

FILED

AUG 16 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 291049

IN THE COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

NEW CARE CONSTRUCTION, LLC,
a Washington limited liability company,

Plaintiff/Respondent,

v.

MIKE HARVEY'S PLUMBING SERVICES, INC.,
a Washington corporation,

Defendant/Appellant.

BRIEF OF RESPONDENT

Jason M. Whalen, WSBA # 22195
Darren R. Krattli, WSBA # 39128
Attorneys for Respondent

EISENHOWER & CARLSON, PLLC
1201 Pacific Ave., Ste. 1200
Tacoma, WA 98402
Phone: (206) 572-4500

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Tacoma, WA 98402
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I. INTRODUCTION

This appeal concerns whether the trial court properly found that the Appellant's claim of lien under RCW 60.04 filed on January 29, 2010 was untimely and frivolous where (i) the last work performed at the request of the Respondent was on April 23, 2008, (ii) the last payment on the contract occurred on June 11, 2008, (iii) the Appellant's only contact with the property owner within ninety days of recording the claim of lien was initiated by the Appellant itself to verify that "as built" drawings were previously provided to the property owner in April 2008, and (iv) the only post-recording work performed by the Appellant for the property owner was not performed pursuant to any identified contractual obligation.

II. STATEMENT OF THE ISSUES

1. Where the trial court made specific findings regarding factual disputes in a proceeding under RCW 60.04.081, are those findings subject to review only as to whether they are supported by substantial evidence?
2. Was the trial court correct in finding Appellant's Claim of Lien was untimely?
3. Was the trial court correct in finding that the Claim of Lien was frivolous under RCW 61.24.081, and thus properly awarded Respondent its attorney's fees and costs?
4. Should the Respondent be awarded its attorney's fees and costs related to this appeal, pursuant to RAP 18.1 and/or the subject contract?

III. STATEMENT OF THE CASE

The Respondent, New Care Construction, LLC ("**New Care**"), was a general contractor for a construction project in Walla Walla County,

Washington, known as the Park Manor Rehabilitation Center (“**Park Manor**”). CP: 5. On or around July 13, 2007 New Care entered into a Subcontract Agreement with Appellant, Mike Harvey’s Plumbing Services, Inc. (“**MHP**”) whereby MHP agreed to provide certain plumbing services in exchange for payment of \$83,035.00. CP: 5; 11-28. MHP failed to complete the work pursuant to the contract, and New Care was forced to obtain another subcontractor to complete the project. CP: 5.

New Care notified MHP of the deficiencies in its performance on several occasions, culminating in a formal letter dated September 30, 2009 disputing the amount due, and alleging numerous breaches of the Subcontract Agreement by MHP. CP: 60-64. It also referenced that the last payment made by New Care to MHP occurred on June 11, 2008. CP: 60.

MHP’s final work on the project occurred on April 23, 2008. CP: 30. MHP did not provide any additional labor or materials to the project after April 23, 2008. CP: 6; 30. New Care did not request nor expect any further services to be performed by MHP following the breach and completion of the project by the substitute subcontractor. CP 51-52; 60-64.

More than *twenty-one months* after leaving the project and *nineteen months* after it was last paid under the contract, MHP recorded a Claim of Lien pursuant to RCW 60.04 with the Walla Walla County Auditor in the amount of \$29,880.74 on January 29, 2010. CP: 32-34.

In asserting that the Claim of Lien was recorded within ninety days of its performance under the Subcontract Agreement, MHP solely relies on two interactions with Les Wright, the maintenance manager for Park Manor, which owns the subject real property. CP: 50-52. On the first

occasion, MHP contacted Mr. Wright on or about November 25, 2009 to inquire as to whether Mr. Wright received “as built” drawings, which were required under the subject contract. CP 50-51; 72; 76-77. Mr. Wright informed MHP that Park Manor did, in fact, have copies of the “as built” drawings, which were provided to Park Manor in April 2008. CP: 50-51; 72; 76-77.

The second contact with Mr. Wight occurred in late February, 2010, nearly a month *after* the Claim of Lien was recorded, and just days before this action commenced. CP: 1-4; 51; 72. Mr. Wright contacted MHP regarding a problem with the water temperature at the Park Manor facility. *Id.* MHP visited the property on or about February 25 or 26, 2010, and fixed a circulating pump. CP 51. He informed Mr. Wright that there would be “no charge” for the repair, as he considered it fulfillment of the original subcontract. CP 51; 72. However, the express warranty included in the Subcontract Agreement is limited to one year from the date of final acceptance of the project. CP 15 at ¶ 26. The project was closed out in April 2008, approximately twenty-two months *prior* to the repair of the circulating pump. CP: 72.

On March 2, 2010, New Care filed this action seeking release of the Claim of Lien as frivolous and an award of its attorney’s fees and costs pursuant to RCW 60.04.081(4). CP: 4. Following oral argument, the court issued its letter opinion dated April 6, 2010, in which the trial court found that (i) MHP’s “active role on the project ended April 23, 2008”, (ii) the inquiry by MHP regarding “as built” drawings did not constitute a request by the property owner or New Care for additional work, and (iii) there was no contractual requirement for MHP to provide the repairs to the circulating pump. CP: 79-80. As such, the trial court ruled that the Claim

of Lien was untimely *and* frivolous, and awarded attorney fees to New Care pursuant to RCW 60.04.081(4).¹ CP: 80.

MHP now seeks a decision of this Court reversing the trial court as to the release of the Judgment lien and/or the award of attorney's fees and costs to New Care.

IV. ARGUMENT

- A. AS THE TRIAL COURT MADE SPECIFIC FACTUAL FINDINGS BASED ON THE EVIDENCE PRESENTED, THE APPLICABLE STANDARD OF REVIEW FOR THOSE FINDINGS IS WHETHER THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT THE FINDINGS.

Although Respondent agrees that questions of law are appropriately reviewed de novo upon appeal, factual findings by a trial court, even in a summary proceeding under RCW 61.04.081, are reviewed as to whether they are supported by substantial evidence. Intermountain Electric v. G-A-T Bros., 115 Wn.App. 384, 391-92, 62 P.3d 548, 551 (Div. 3, 2003); W.R.P. Lake Union v. Exterior., 85 Wn.App. 744, 749, 934 P.2d 722, 726 (Div. 1, 1997).

Appellant's Brief asserts that that the trial court's order made "no findings of fact or conclusions of law," and thus the applicable standard of review for this appeal is de novo. Brief of Appellant, 5, 10. That is simply incorrect. The trial court issued a lengthy opinion letter outlining its findings on numerous facts, to include the last date of MHP's active role in the subject project, that the November 25, 2009 site visit was initiated by MHP for its own purposes, and that the work performed in

¹ Appellant did not request, pursuant to RAP 8.1, a stay of the money judgment issued by the trial court in the amount of \$5,557.59. Respondent applied for and received a writ of garnishment, and subsequently received payment of the judgment in full, to include all post-judgment interest and garnishment fees.

February 2010 was not conducted pursuant to any specific contractual requirement. CP: 79-80. Those findings were then incorporated into the trial court's Order and Judgment. CP: 93. Any such findings should thus be reviewed as to whether they are supported by substantial evidence, rather than de novo.

B. THE TRIAL COURT CORRECTLY RULED THAT THE CLAIM OF LIEN WAS UNTIMELY FILED.

There is no dispute that the last work performed under the Subcontractor Agreement at the request of New Care occurred on or about April 23, 2008, twenty-one months before MHP recorded its claim of lien. CP: 30, 79. The original period to file a lien under RCW 60.04.091 expired on or about July 22, 2008. Instead, MHP relies on two interactions with an agent of the property owner, Les Wright, to assert that the lien was revived. CP 50-52. As found by the trial court, there simply was no contractual obligation justifying those two meetings with Mr. Wright, so they cannot provide a basis for reviving a lien under RCW 60.04.021.

RCW 60.04.021 provides persons furnishing labor, professional services, materials, or equipment for the improvement of real property a lien upon the real property improved for the contract price of the labor, professional services, materials, or equipment furnished. However, the claim of lien must be recorded within ninety days of when the person ceased furnishing labor, professional services, materials, or equipment or the last date on which employee benefit contributions were due. RCW 60.04.091. Later performed work or materials delivered under a contract can extend the time for filing a lien, so long as it was in furtherance of the *original* contract. Friis v. Brown, 37 Wash.2d 457, 460, 224 P.2d 330,

332 (1950); Hopkins v. Smith, 45 Wash.2d 548, 552, 276 P.2d 732, 734 (1954). However, subsequently performed work or materials delivered cannot extend the time to file a lien where the work was performed (i) under a new and independent contract, (ii) for the purpose of prolonging the time for filing a lien, or (iii) renewing a right to file a lien which had been lost by time. Friis v. Brown, 37 Wash.2d at 460, 224 P.2d at 332. This is true even where the subsequent work was performed at the request of the property owner. Swenson v. Carlton, 17 Wash.2d 396, 405, 135 P.2d 450, 454 (1943).

Based on the agreed date of work performed under the Subcontract Agreement, MHP should have filed its Claim of Lien no later than July 22, 2008. RCW 60.04.091. The last payment received by MHP was approximately June 11, 2008, *nineteen months* prior to the recorded Claim of Lien, and more than *seventeen months* before MHP's visit with Mr. Wright. CP: 60. There is no evidence presented by MHP asserting that any work was performed or materials furnished to New Care or Park Manor between April 23, 2008 and November 25, 2009. CP: 49-52. MHP basis its entire argument on the site visit on November 25, 2009.

The visit with Mr. Wright was not in furtherance of the original contract. Instead, as found by the trial court, it was an information gathering session designed to respond to the breach of contract allegations made by New Care. CP: 60-62, 80. MHP initiated the meeting, without the involvement of New Care, merely to obtain evidence that it had previously provided the "as built" drawings to Park Manor. CP: 50. In furtherance of this goal, MHP had Mr. Wright sign a document testifying that such documents were provided. CP: 76-77. There was no new work performed. Park Manor, the owner of the improved real property, was not

even the party requesting the “as built” drawings. Mr. Wright’s declaration establishes that those drawings were in the possession of Park Manor since project completion in April 2008. CP: 72. It was New Care that claimed it had not been provided the “as built” drawings, although the time for performance of that contract term was already more than ninety-days past due. CP: 69. Nothing related to MHP contacting Mr. Wright in November 2009 constituted performance under the original contract, and thus does not constitute the date performance ceased for the purposes of RCW 60.04.091.

Seemingly recognizing the weakness of the “work” performed during the November 25, 2009 meeting, Appellant attempts to bolster its Claim of Lien by attempting to retroactively justify its Claim of Lien through work performed at the request of Park Manor after the Claim of Lien was recorded. Brief of Appellant, 10. MHP claims that work performed at the request of Mr. Wright on behalf of Park Manor, and without the involvement of New Care as the general contractor, renders the previously filed claim timely.

First, the work performed for Mr. Wright was in no way related to the original contract. Mr. Wright contacted MHP regarding a *new* plumbing problem. CP: 51, 72. This request occurred approximately *twenty-two months* after the New Care project was completed. CP: 72. The Subcontract Agreement provided for a warranty period of only one year after project completion. CP: 15 at ¶ 16. There is no evidence that New Care, Park Manor, or Mr. Wright claimed that this repair was covered by any warranty or other guaranty. CP: 51, 72. That self-serving determination was made solely by MHP, less than a month after it recorded its extremely tardy Claim of Lien.

More importantly, there is no case law to support the position that post-recording performance can validate a previously untimely and invalid Claim of Lien under RCW 60.04. Even assuming that the work performed in February 2010 was in furtherance of the original contract, it cannot retroactively render an untimely claim as valid.

MHP should have filed its Claim of Lien no later than July 22, 2008. Instead, it filed its Claim of Lien *eighteen months* later, *nineteen months* after the last payment from New Care, and *twenty-one months* after the Park Manor project concluded. The contact initiated by MHP with Mr. Wright in November 2009 and the “warranty” work completed in February 2010 in no way further the original contract, which was materially breached nearly two years earlier. There is no indication whatsoever to indicate that New Care perceived it had an ongoing contractual relationship with MHP during this period, or that it was awaiting performance of additional work by MHP. These activities were obvious attempts by MHP to revive a long expired lien.

C. THE TRIAL COURT CORRECTLY RULED THAT THE CLAIM OF LIEN WAS FRIVOLOUS AND NEW CARE WAS ENTITLED TO AN AWARD OF ITS ATTORNEY’S FEES AND COSTS ON APPEAL.

Appellant appears to suggest that the trial court used the term “frivolous” gratuitously and without any significant consideration of its legal meaning under RCW 60.04.081 and applicable case law. Brief of Appellant, 10. It further argues that the Court made no applicable findings justifying ruling that MHP’s Claim of Lien was frivolous.

It is obvious from the statute and applicable case law that not all invalid lien claims under RCW 60.04 are inherently frivolous. RCW 60.04.081 specific refers to frivolous liens as those made without

reasonable cause. Case law expands that definition by explaining that frivolous liens are those that present no debatable issues and are so devoid of merit that they have no possibility of succeeding. Intermountain Electric, 115 Wn. App. at 394, 62 P.3d at 553; W.R.P. Lake Union, 85 Wn. App. at 752, 934 P.2d at 726. That the lien was improperly filed must be clear and beyond a legitimate doubt. W.R.P. Lake Union, 85 Wn. App. at 750, 934 P.2d at 726. RCW 60.04 contains no requirement for entry of findings of fact and conclusions of law regarding the basis for a determination that a claim is frivolous, but the absence of such findings warrants de novo review upon appeal rather than a mere determination of substantial evidence. W.R.P. Lake Union, 85 Wn. App. at 750, 934 P.2d at 726.

In the present case the trial court made significant findings of fact warranting a determination that MHP's Claim of Lien was frivolous. CP: 78-80. It issued a three page letter opinion clearly explaining its position, and addressed each of the Appellant's assertions individually. It determined that (i) MHP's active role on the project ended on April 23, 2008, (ii) MHP went to Mr. Wright on its own initiative and for its own purposes, and (iii) there was no legal requirement under the Subcontract Agreement for MHP to perform warranty work twenty-two months after completion of the project. Id. Based on that detailed analysis, the court then expressly found that the lien was both untimely and frivolous. CP: 80. Once it determined that the Claim of Lien was untimely, and the recent activity of MHP was self-serving for the purposes of attempting to revive the lien, it is a reasonable position to state that the Claim of Lien, filed twenty-one months after the project was completed and nineteen months after the last payment by New Care, was frivolous.

The facts in this matter are entirely different from the analysis conducted by this Court in Intermountain Electric with respect to Intermountain Electric's first claim of lien. In that case the first claim of lien was filed a mere four days late, and the claimant asserted several reasonable arguments as to why the lien was valid, to include a dispute as to the interpretation of the statute and the claimant's continued presence on the property. 115 Wn. App. at 394, 62 P.3d at 553.

In the present case the right to record a claim of lien had indisputably expired. MHP ceased working on the project on April 23, 2008, and should have filed its Claim of Lien no later than July 22, 2008. In fact, so much time had passed that, even if the lien had been timely and properly recorded, it would have easily expired by its own terms pursuant to the eight month limitation of RCW 60.04.141. Rather than disputing the date triggering the ninety-day filing requirement, MHP instead attempts to revive the lien through unrelated "work" performed nearly two years later. Prior to finding that the Claim of Lien was frivolous, the trial court stated in exhaustive detail the self-serving and gratuitous nature of the "work" performed by MHP. Although the phrase "without reasonable cause" is not expressly stated in the opinion letter, it is easily implied by the trial court's analysis, to include the repeated references to the conclusion of work in April 2008 and the self-aware nature of MHP's conduct in performing additional "work" under the original contract. There is no reason to assume that the court ignorantly used the term "frivolous" in its opinion, and there is substantial evidence to support a finding that the untimely Claim of Lien was frivolous.

Upon a finding that a Claim of Lien is frivolous, RCW 60.04.081(4) mandates an award of attorney's fees and costs. As the trial

court properly found that MHP's Claim of Lien was frivolous, it properly awarded New Care its attorney's fees and costs incurred in the action.

D PURSUANT TO RAP 18.1, NEW CARE SHOULD BE
 AWARDED ITS ATTORNEY'S FEES AND COSTS.

Attorney's fees on appeal can be awarded if applicable law permits an award of fees. RAP 18.1(a). As referenced above, upon a finding that a claim of lien is frivolous, RCW 60.04.081 mandates an award of attorney's fees and costs. Should New Care prevail in this appeal, it respectfully requests this Court award New Care its reasonable attorney's fees and costs pursuant to RCW 60.04.081.

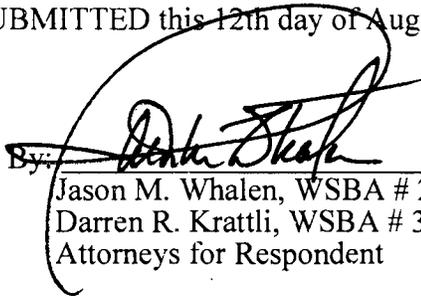
In addition, New Care is entitled to an award of its reasonable attorney's fees pursuant to the contract at issue. CP: 15 at ¶ 21a. Although this issue was not addressed by the trial court, it was raised in the supplied declarations. *Id.* Appellate court can affirm lower court decisions on any grounds established by the pleadings and supported by the record. Truck Ins. Exchange v. Vanport Homes, Inc., 147 Wash.2d 751, 766, 58 P.3d 276, 784 (2002). This includes granting an award of attorney's fees on a different basis than the one relied upon by the lower court. See In re Marriage of Rideout, 150 Wash.2d 337, 358, 77 P.3d 1174, 1184 (2003).

V. CONCLUSION

The trial court correctly found that MHP's Claim of Lien both was untimely and frivolous. Although Appellant asserts that there were no findings made by the trial court, they are clearly present in the trial court's opinion letter, which was integrated into its final order releasing the lien and awarding New Care its attorney's fees and costs. Those extensive, written findings are supported by substantial evidence in the record. All

the available evidence reflects that any potential lien for MHP expired in July 2008. By filing a Claim of Lien *eighteen months* too late and justified on obviously questionable grounds, it was appropriate for the trial court to further find that the lien was also frivolous as that term is used in RCW 60.04.081, and that New Care was entitled to an award of its attorney's fees. New Care respectfully requests that this Court dismiss MHP's appeal and award New Care its reasonable attorney's fees and costs incurred in defense of this action on appeal pursuant to RAP 18.1 and/or the subject contract.

RESPECTFULLY SUBMITTED this 12th day of August, 2010.

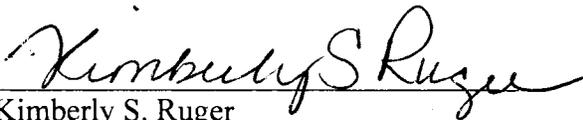
By: 
Jason M. Whalen, WSBA # 22195
Darren R. Krattli, WSBA # 39128
Attorneys for Respondent

I, Kimberly S. Ruger, am a legal assistant with the firm of Eisenhower & Carlson, PLLC, and am competent to be a witness herein. On August 13, 2010, at Tacoma, Washington, I caused a true and correct copy of Respondent's Brief to be served upon the following in the manner indicated below:

Michael E. de Grasse Attorney at Law 59 South Palouse Street P. O. Box 494 Walla Walla, WA 99362 Fax: (509) 529-1226	<input checked="" type="checkbox"/> by Facsimile and <input type="checkbox"/> e-mail in .PDF format <input type="checkbox"/> by Legal Messenger <input checked="" type="checkbox"/> by regular mail
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 13th day of August, 2010, at Tacoma, Washington.


Kimberly S. Ruger

APPENDIX “A”

**SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF WALLA WALLA**

P.O. Box 836

JUDGE JOHN W. LOHRMANN
DEPARTMENT NO. 1

WALLA WALLA, WASHINGTON 99362

TELEPHONE (509) 524-2790
FAX (509) 524-2777

April 6, 2010

Mr. Michael deGrasse
Attorney at Law
P.O. Box 494
Walla Walla, WA 99362

Mr. Jason Whalen
Eisenhower & Carlson
1200 Wells Fargo Plaza
1201 Pacific Avenue
Tacoma, WA 98402

Re: New Care Construction, LLC vs. Mike Harvey's
Plumbing Services, Inc.
Walla Walla County Cause No. 10-2-00181-7

Dear Counsel:

A general contractor, New Care Construction, LLC (NCC), commenced this proceeding under RCW 60.04.081, and obtained an order requiring Mike Harvey's Plumbing Services, Inc. (MHP), to appear and show cause why its lien filed against property owned by Manor Park Healthcare, LLC, d/b/a Park Manor Rehabilitation Center, on January 29, 2010, should not be declared frivolous.

Case law clarifies the scope of these summary proceedings. Andries v. Covey, 128 Wn. App. 546, 113 P.3d 483 (2005), instructs that the issues in a proceeding brought under RCW 60.04.081 are determined as a matter of law, the

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proceedings being in the nature of a trial by affidavit.
Id. at 550-53.

Washington's lien statute states:

. . . [A]ny person furnishing labor, professional services, materials, or equipment for the improvement of real property shall have a lien upon the improvement for the contract price of labor, professional services, materials, or equipment furnished at the instance of the owner, or the agent or construction agent of the owner.

RCW 60.04.021. In turn, RCW 60.04.091 sets forth the requirement that the claim of lien must be recorded not later than 90 days after the furnishing of labor, professional services, materials, or equipment.

The declarations filed by NCC indicate that MHP's active role on the project ended April 23, 2008. This is not really contested by MHP; instead, it contends that Mr. Harvey's work at the property on November 25, 2009--when he reviewed the "as-built" diagrams left at the facility to assure their completeness--involved his professional services in furtherance of the contract and should serve as the date from which the 90-day period for filing liens may be calculated. Additionally, MHP argues that it returned one more time in February, 2010, at the request of Les Wright, Park Manor's maintenance manager, "to resolve a problem with a circulating pump" which was producing tepid water instead of hot. Mr. Harvey--who was of course aware of the legal issues pending between his company and NCC--indicated to Mr. Wright that there would be no charge because he regarded the work as within the construction/installation warranty.

Some guidance on the timeliness issue has been provided by our appellate courts. First, separate contracts may not be tacked together for purposes of extending time. Anderson v. Taylor, 55 Wn.2d 215, 347

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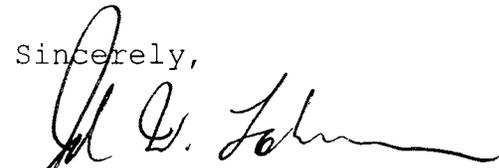
P.2d 536 (1959); King Equipment Co. v. R. N. & L. Corp., 1 Wn. App. 487, 462 P.2d 973 (1969).

Second, the later work must in fact be done as part of the project and not be done gratuitously or as a mere pretext to justify an otherwise late lien filing. Hopkins v. Smith, 45 Wn.2d 548, 276 P.2d 732 (1954).

As in Hopkins, the owner here did not ask MHP to come and provide any services on November 25, 2009. Mr. Harvey did this on his own initiative, perhaps as part of efforts to resolve a pending legal or factual dispute between the parties. And while after the lien filing the facility's maintenance manager called MHP to do some repair work in February, 2010, the fact that Mr. Harvey graciously regarded his repair work as within the warranty period does not make it so from a legal standpoint. As NCC points out, the one-year warranty had long since expired. The February work described by Mr. Harvey consisted of repairs to a circulating pump. There is no indication that the pump presented an ongoing problem or that it was improperly installed; it had apparently worked during the 22 or more months since MHP completed its work (April 23, 2008).

Based upon the facts and the above statutory and case law, the Court finds that neither of these dates qualifies for purposes of the 90-day calculation. The lien is therefore frivolous, being untimely, and should be immediately released. Attorney fees will be awarded to New Care pursuant to RCW 60.04.081(4).

Sincerely,



JOHN W. LOHRMANN
SUPERIOR COURT JUDGE

JWL/11

