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NOV 12 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

**NO. 317510
COURT OF APPEALS,
DIVISION III
OF THE STATE OF WASHINGTON**

EXTERRA, LLC, a Washington limited liability company,

Appellant,

v.

CLE ELUM GATEWAY PROPERTY LLC, a Washington limited liability company; and **CORSTONE CONTRACTORS LLC**, a Washington limited liability company,

Respondents.

BRIEF OF APPELLANT

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1. Assignments of Error

1. The trial court erred in entering the Order Granting Motion for Summary Judgment and Award of Attorney's Fees and Costs to Corstone Contractors LLC on April 1, 2013.

2. The trial court erred in entering the Order Denying Reconsideration on April 17, 2013.

Issues Pertaining to Assignments of Error

1. Does a party who has been voluntarily dismissed from a case have standing to bring a motion for summary judgment? (Assignments of Error 1 and 2)

2. The appellant, Exterra, LLC (hereinafter referred to as "Exterra") was a subcontractor on a job involving improvements to real property owned by Cle Elum Gateway Property LLC (hereinafter referred to as "Cle Elum"). The general contractor on the job was Corstone Contractors LLC (hereinafter referred to as "Corstone"). Prior to receiving any payments for work done, the appellant was required to sign a document entitled *Unconditional Waiver and Release of Claims and Lien Upon Progress Payment*. The document, drafted by the respondent, contained the following language:

“The undersigned does hereby waive and release any and all claims, of any type, kind or character, for labor, services, equipment, rented or supplied, and materials furnished, including any mechanic’s or materialmen’s lien, equitable lien, stop notice, equitable adjustment, or bond claim (public or private) that the undersigned has or may ever have in any manner arising out of work, labor, services, equipment, material or supplies furnished by or through the undersigned in connection with the Project or the Contract through the date”

The document also contained the following additional language:

“This is a partial Waiver and Release, the total unpaid balance of the Subcontract Agreement will be paid upon final completion fo [sic] the Project.”

Following completion of the project, respondents did not pay the appellant for work performed. Appellant filed a materialmen’s lien, and brought action to foreclose that lien. The trial court held that there was no ambiguity created by the above language and, therefore, no genuine issue of material fact. The trial court ruled that appellant could pursue its claim against the respondent, but could not pursue a lien claim. Did the above language create a genuine issue of material fact that precluded the grant of summary judgment? (Assignments of Error 1 and 2)

3. Can a trial court award attorney’s fees to an entity who is not a party to the litigation? (Assignments of Error 1 and 2)

4. Can a party argue release when that party has not pled release as an affirmative defense? (Assignments of Error 1 and 2)

II. Statement of the Case

In September 2010, Exterra entered into a contract with the Respondent Corstone to provide certain work on a project in Cle Elum known as the Gateway Center Project. Exterra agreed to do the work in exchange for payment of \$48,704.00. (CP 115, lines 4-7) The work was completed, and Exterra's last day on the job was January 4, 2011. (CP 115, lines 8-9) In addition to performing the work required by the contract, Exterra performed additional work requested by Corstone. The value of the additional work was \$6,519.00. (CP 115, lines 9-11)

During the course of the project, Corstone made three (3) payments to Exterra. They were as follows:

November 29, 2010	\$12,230.55
January 18, 2011	\$ 1,820.66
January 18, 2011	\$ 246.06

(CP 115, line 22 through CP 116, line 3) At the time of payments, Exterra was required to execute a document entitled *Unconditional Waiver and Release of Claims and Lien Upon Progress Payment*,

which Exterra executed on November 24, 2010, January 14, 2011, and February 3, 2011. (CP 133, 134, 135, 136, 101) The documents were prepared by Corstone. (CP 115, line 14) At the time the documents were executed, no additional payments were made to Exterra. (CP 116, lines 3-5) The documents contained the following language:

“This is a partial Waiver and Release, the total unpaid balance of the Subcontract Agreement will be paid upon final completion fo [sic] the Project.”

The project was completed by the spring of 2011. (CP 115, lines 18-23)

It was Exterra's understanding that by signing the documents, Exterra was waiving its right to claim a lien as to monies it had been paid. (CP 115, lines 14-19) It was Exterra's understanding that it would be paid when the project was finished. (CP 115, lines 21-23) According to Corstone, all of the work performed by Exterra was performed prior to December 31, 2010. (CP 52, lines 17-20)

On May 12, 2011 Exterra commenced this action against the owner of the real property, Cle Elum, and the general contractor, Corstone, as well as the general contractor's bonding company.

The action was for foreclosure of a materialmen's lien and for breach of contract. (CP 1-13) Prior to any answer or counterclaim, Exterra, on July 14, 2011, filed *Plaintiff's Motion for Voluntary Dismissal of Defendants Corstone Contractors LLC and Travelers Casualty & Surety Company of America Pursuant to CR 41(a)(1)(b)*. (CP 14-15) On July 28, 2011 the trial court entered an order dismissing Corstone and the bonding company. The order was approved by Corstone. (CP 20-21) In between the time the motion for dismissal was filed, and the order of dismissal was entered, the respondent Cle Elum filed its answer. In that answer, this respondent acknowledged that Corstone and the bonding company were to be dismissed from the lawsuit. (CP 16-19) Prior to July 28, 2011, Corstone filed no pleading.

Corstone filed a motion for summary judgment on January 4, 2013 and, on April 1, 2013, the trial court granted the motion. (CP 219-224, CP 158-163) Exterra timely sought reconsideration (CP 225-227), and that motion was denied without argument on April 17, 2013 (CP 228). On June 7, 2013 a *Final Judgment Pursuant to CR 54 Regarding Plaintiff's Claim of Lien Foreclosure Action* was entered by the trial court. (CP 229-234). Notice of appeal to this Court was filed on June 20, 2013 (CP 235-249).

At issue in this appeal are five (5) documents prepared by Corstone and executed by Exterra. Three (3) of the documents are entitled *Unconditional Waiver and Release of Claims and Lien Upon Progress Payment* (CP 133, 134, CP 90), and two (2) of the documents are entitled *Conditional Waiver and Release of Claims and Lien* (CP 135, 136), although the language of all of the documents is substantially the same. The document referenced by the trial court in its memorandum decision (CP 90) was executed on February 3, 2011 (although there were two (2) releases executed on that date – one showing payment of \$264.06 (CP 136), and one showing payment of \$14,315.27 (CP 90)) The document showing payment of \$264.06 is “conditional” and the one showing payment of \$14,315.27 is “unconditional”.

In any event, CP 90 contains the following language:

“The undersigned does hereby waive and release any and all claims, of any type, kind or character, for labor, services, equipment, rented or supplied, and materials furnished, including any mechanic’s or materialmen’s lien, equitable lien, stop notice, equitable adjustment, or bond claim (public or private) that the undersigned has or may ever have in any manner arising out of work, labor, services, equipment, material or supplies furnished by or through the undersigned in connection with the Project or the Contract through the date 12/31/2010”

Further, the document contains the following language:

“This is a partial Waiver and Release, the total unpaid balance of the Subcontract Agreement will be paid upon final completion fo [sic] the Project.”

III. Argument

Effect of CR 41 Dismissal

Appellant moved to voluntarily dismiss Corstone and its bonding company pursuant to CR 41(a)(1)(B). This occurred prior to any claims of any kind being asserted by either Corstone or Cle Elum.

“. . . the right to a voluntary nonsuit is fixed at the moment it is claimed. A defendant is not thereafter entitled to claim a setoff or seek affirmative relief so as to prevent the granting of the nonsuit.”

Krause v. Borjessan, 55 Wash.2d 284, 285, 347 P.2d 893 (1959), citing, *McKay v. McKay*, 47 Wash.2d 301, 304, 287 P.2d 330 (1955). In *Krause*, the plaintiff moved for voluntary dismissal on April 1, and the defendants answered seeking set off and cross claim on April 9.

Once a motion for voluntary dismissal is filed, the court is left with no discretion. The plaintiff has an absolute right to the dismissal. *In re Archer's Estate*, 36 Wash.2d 505, 507-08, 219

P.2d 112 (1950). A motion for voluntary dismissal is proper when dismissing one of multiple defendants. *Seattle-First National Bank v. Westwood Lumber, Inc.*, 59 Wash.App. 344, 796 P.2d 790 (1990), *review denied*, 116 Wash.2d 1003, 803 P.2d 1310 (1990). Once an order of dismissal is entered, the court loses jurisdiction. *Cork Insulation Sales Co., Inc. v. Torgeson*, 54 Wash. App. 702, 705, 775 P.2d 770 (1989). *See, also, Calvert v. Berg*, Wash.App. (Nov. 4, 2013).

At the time Exterra filed its motion for voluntary nonsuit against Corstone and the bonding company, neither party had answered or otherwise sought affirmative relief. The right to an order of dismissal was fixed at the time it was filed. The fact that Cle Elum filed an answer after the motion was filed, but before the order was entered did nothing to somehow keep Corstone in the case. In fact, Cle Elum alleged that Corstone was to be dismissed from the case. In its Memorandum Decision, the trial court stated:

“Although Exterra did move to dismiss Corstone and an order dismissing Corstone was entered 14 days later, in the interim between the filing of the motion and the order of dismissal, Gateway filed a cross-claim against Corstone. Gateway asserted that Corstone would be required to indemnify and hold Gateway harmless of any of the plaintiff Exterra’s claims. Given that the order of dismissal had not been entered, Gateway appropriately initiated its claim against co-party Corstone as a CR 13(g) cross-claim.

The question then becomes what happens to the status of Gateway's cross-claim against Corstone after Exterra's order of dismissal was entered dismissing Corstone as a party. Although Corstone was dismissed by Exterra, it is neither practical nor feasible to think Corstone is then dismissed for all purposes. Since a cross-claim was filed against Corstone prior to the dismissal, Corstone remained as a party who was required to respond to Gateway's cross-claim. Corstone did in fact respond to Gateway's cross-claim on September 13, 2011 and at the same time filed a cross-claim against Exterra."

(CP 160)

With all due respect, the trial court was in error. Once Exterra moved to voluntarily dismiss Corstone from the litigation, no claims could be asserted that would prevent the dismissal. When the order was signed dismissing Corstone from the litigation, Corstone was no longer a party.

Failure to Plead Release

CR 8(c) states, in pertinent part:

"In pleading to a preceding pleading, a party shall set forth affirmatively . . . release . . ."

If such defenses are not raised, they are waived. *Farmers Ins. Co. v. Miller*, 87 Wash.2d 70, 75, 549 P.2d 9 (1976). Some affirmative defenses can also be raised by motion. CR 12(b) Here, Corstone, a party that had been dismissed, filed its answer, but alleged no affirmative defenses against Exterra. (CP 22-29) Interestingly,

even though Corstone argues that it was not dismissed, it did not answer Exterra's complaint.

Exterra objected to Corstone's release argument. (CP 112) The trial court never addressed this issue. Neither did Corstone. Both the trial court and Corstone simply ignored the issue as if it had not been raised.

Ambiguity of Releases

Exterra asserts that the "unconditional" and "conditional" releases that it signed were ambiguous. In fact, Charles Tudor, the managing member of Exterra testified:

"In support of its motion for summary judgment, Corstone produces a copy of the *Unconditional Waiver and Release of Claims and Lien Upon Progress Payment* that I signed on February 3, 2011. That document was prepared by Corstone. My understanding of that document was that Exterra was waiving its right to claim a lien as to the monies that it had been paid on the project. However, Exterra was not waiving any such rights as to monies it had not been paid, but were due. That is evidenced by the statement

"This is a partial Waiver and Release, the total unpaid balance of the Subcontract Agreement will be paid upon final completion fo [sic] the Project."

(CP 115) Corstone offered no evidence to controvert Mr. Tudor's testimony.

The term "partial" is defined as "being such in part only; incomplete" *Webster's College Dictionary*, (Random House 1996). On the one hand, the releases appear to be absolute. On the other, they are "partial". The trial court found no ambiguity.

"An ambiguity is generally defined as language susceptible to two different reasonable interpretations."

Weyerhaeuser Co. v. Commercial Union Ins. Co., 142 Wash.2d 654, 703, 15 P.3d 115 (2000).

A contract that is ambiguous is to be interpreted against the party who drafted the contract. *Universal/Land Constr. Co. v. City of Spokane*, 49 Wash.App. 634, 638, 745 P.2d 53 (1987); *Washington Greensview Apartment Associates v. Travelers Property Casualty Co. of America*, 173 Wash.App. 663, 678, 295 P.3d 284 (2013).

Interestingly, the trial court found no ambiguity. However, it simply dismissed the "partial waiver and release" language, and stated, "Nowhere does it indicate that Exterra was only waiving claims as to payments already made." (CP 162) Yet, the trial court gave no significance whatsoever to the "partial waiver and release" language. The total contract price was \$48,704.00. According to Corstone, all of the work by Exterra had been completed by December 31, 2010.

However, Exterra had only been paid \$14,315.27. Thus, under the original contract (excluding extras) Exterra was still owed \$34,388.73.

In order to give effect to the language of the releases, it is reasonable to read the language as follows:

“The undersigned does hereby *partially* waive and *partially* release”

Does not this reading give meaning to all parts of the release? To read the releases as the trial court did, treats them as if the “partial waiver and release” language did not exist.

“In construing a contract, a court must interpret it according to the intent of the parties as manifested by the words used. See *Patterson v. Bixby*, 58 Wash.2d 454, 458, 364 P.2d 10 (1961). Courts can neither disregard contract language which the parties have employed nor revise the contract under a theory of construing it. Cf. *Farmers Ins. Co. v. Miller*, 87 Wash.2d 70, 73, 549 P.2d 9 (1976). An interpretation of a writing which gives effect to all of its provisions is favored over one which renders some of the language meaningless or ineffectual. *Newsom v. Miller*, 42 Wash.2d 727, 731, 258 P.2d 812 (1953). . . .”

Wagner v. Wagner, 95 Wash.2d 94, 101, 621 P.2d 1279 (1980). The interpretation of the releases in this case by the trial court rendered the “partial waiver and release” language “meaningless or ineffectual”.

The releases were drafted by Corstone. They are to be interpreted against Corstone. *Sprague v. Safeco Ins. Co. of America*, 174 Wash.2d 524, 528, 276 P.3d 1270 (2012); *Pierce County v. State*, 144 Wash.App.

783, 813, 185 P.3d 594 (2008). The releases are, at best, ambiguous. Generally, an ambiguity in a contract precludes summary judgment. *National General Ins. Co. v. Sherouse*, 76 Wash.App. 159, 162, 882 P.2d 1207 (1994).

It was error for the trial court to treat the “partial waiver and release” language as if it did not exist. It was error for the trial court to construe the releases without giving effect to the “partial waiver and release” language.

Attorney's Fees

The trial court awarded Corstone attorney's fees as if it were a party to the action. It was not. Exterra asserted no claims against Corstone. While Corstone attempted to assert claims against Exterra, it attempted to do so after Corstone had been dismissed as a party to the litigation. Corstone's Motion for Summary Judgment as to Exterra dealt with the lien foreclosure action Exterra was pursuing against Cle Elum. Corstone was not a party to that action.

Additionally, Exterra objected to Corstone's right to bring the summary judgment. Exterra cited CR 56(a) and (b). That rule clearly states that “a party” may move for summary judgment. Corstone was

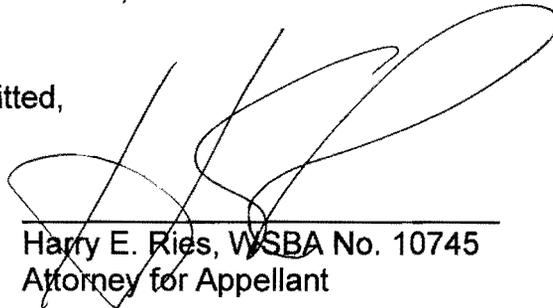
not a party. It had no standing to move for summary judgment, nor did it have any right to recover attorney's fees.

IV. Conclusion

For the reasons stated above, the Appellant, Exterra, respectfully asks this Court to reverse the *Order Granting Motion for Summary Judgment and Award of Attorney's Fees and Costs to Corstone Contractors LLC* entered on April 1, 2013.

DATED this 11th day of November, 2013.

Respectfully submitted,



Harry E. Ries, WSBA No. 10745
Attorney for Appellant

FILED

NOV 12 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

**COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON**

EXTERRA, LLC , a Washington limited liability company,)	NO. 317510
)	
)	
Appellant,)	(Kittitas Co. Cause 11-2-00187-6)
)	
and)	<i>PROOF OF SERVICE</i>
)	
CLE ELUM GATEWAY PROPERTY, LLC , a Washington limited liability company; and CORSTONE CONTRACTORS LLC , a Washington limited liability company;)	
)	
)	
Respondents.)	

THE UNDERSIGNED, hereby declares and states as follows: I am a citizen of the State of Washington; I am over the age of eighteen years, not a party to the above-entitled cause, and competent to be a witness therein. On November 11, 2013, I sent via electronic email a copy of the Brief of Appellant to Christina Gerrish Nelson at cnelson@cgn-law.com and I sent via electronic email a copy of the Brief of Appellant to Richard M. Holt at mustangholt@holtlawwa.com and at mustangholt@yahoo.com. On November 12, 2013, I deposited in the United States mail properly stamped and addressed envelopes by regular U.S. Mail directed to:

Richard M. Holt
R.M. Holt, Inc. P.S.
PO Box 1317
Issaquah, WA 98027-0052

Christina Gerrish Nelson
CGN PLLC - Law Office
1455 NW Leary Way, Suite 400
Seattle, WA 98107

Said envelopes contained copies of:

1. BRIEF OF APPELLANT

I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

DATED November 12, 2013 at Moses Lake, Washington.


Rhiannon C. Fronsman