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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CLERK

Court of Appeals, Division II No. 33910-2II

CHARLES C. HASELWOOD and JOANNE I. HASELWOOD,

Respondents,

v.

RV ASSOCIATES, INC.,

Petitioner,

and

BREMERTON ICE ARENA, INC., a Washington corporation;
GREGORY S. MEAKIN and DEBORAH A. MEAKIN, husband and
wife; STIRNCO STEEL STRUCTURES, INC., a Washington
corporation; FRONTIER BANK, A Washington bank corporation, and
CITY OF BREMERTON, a municipal corporation.

Defendants.

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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ORIGINAL

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IDENTITY OF RESPONDENT

RV Associates, Inc. is a licensed Washington contractor who performed improvements on property now owned by petitioners.

INTRODUCTION

The City of Bremerton contracted for its real property to be developed privately for an ice arena. Petitioners Haselwood provided financing for the project. Haselwoods have foreclosed on their deed of trust and are now the owners and operators of the ice arena which has a fifty year private concession (lease) term.

Contractor RV Associates has a lien on the concession and its improvements for work it performed. The work performed by RV Associates predates the lender Haselwoods' deed of trust.

The Court of Appeals correctly opined that the contractor's lien attaches to the improvements and concession interest of the private developer, has priority over the lender's mortgage and can be foreclosed.

This decision by the Court of Appeals is consistent with the Washington Contractors Lien Statute, RCW Chapter 60.04 and many decades of Washington case law.

This Court should decline review.

ISSUES PRESENTED FOR REVIEW

The issues presented in this case are whether the contractor's lien attaches to the improvements and concession (leasehold) interest of the private developer and foreclosing lender and has priority over the lender's deed of trust.

STATEMENT OF THE CASE

The trial court determined as a matter of law that the contractor had a valid and enforceable lien on the improvements and concession interest of the private developer and foreclosing lender. Unfortunately, the trial court also ruled that the contractor had no remedy, deciding that the lien lacked priority and the improvements could not be removed.

The following facts are relevant:

- ◆ Bremerton Ice Arena had a fifty year concession agreement with the City of Bremerton requiring it to construct specific improvements which would remain the property of the private developer and subsequent lender for the 50 year term.
- ◆ The concession agreement specifically provided for and referenced lender Haselwoods' deed of trust as an encumbrance on the improvements to the real property and the concession interest.

- ◆ Bremerton required that its real property be improved and rent be paid during the term of the agreement with Bremerton to obtain ownership of the improvements at no cost at the end of the 50 year term.

The Court of Appeals recognized the absurdity of this decision, holding that the plain language of the lien statute gave the contractor priority over the lender's deed of trust.

ARGUMENT – WHY COURT SHOULD NOT ACCEPT REVIEW

RAP 13.4(b)(1), (2) & (4) are relied on by lender Haselwoods as a basis for this Court accepting review. As is this Court is well aware, lender Haselwoods must show that the decision of the Court of Appeals is in conflict with a decision of the Supreme Court or the Court of Appeals. Alternatively, lender must show that this dispute involves an issue of substantial public interest that should be determined by this Court.

(a) The decision of the Court of Appeals is consistent with decisions of this Court holding that mechanic and materialmen's liens attach to the extent of the interest of the person ordering the improvements and have off the record priority from the start of the work.

The Court of Appeals properly opined that the contractor's lien attached to the improvements and leasehold interest of the private developer and subsequent foreclosing lender and in holding that the contractor's lien had priority over the lender's deed of trust.

The central issue in this case as set forth above is whether the contractor's lien has priority over the lender's deed of trust. As the contractor began work before the lender's deed of trust was recorded, the contractor's lien had priority pursuant to RCW 60.04.061.

This statute, often referred to as the "relation back" statute has been a key component of the Washington lien statutes since their initial passage over 100 years ago. Its application in the instant case is obvious and the Court of Appeals properly determined that the contractor's lien had priority over the lender's deed of trust.

Lender continues to argue before this Court that the contractor's lien does not relate back and does not have priority because it cannot attach to public property. This argument is misplaced.

A review of several other statutory provisions found in Chapter RCW 60.04 illustrates the correctness of the decision of the Court of Appeals.

RCW 60.04.051 provides as follows:

Property subject to lien.

The lot, tract, or parcel of land which is improved is subject to a lien **to the extent of the interest of the owner at who instance**, directly or through a common law or construction agent the labor, professional services, equipment, or materials were furnished, as the Court deems appropriate for satisfaction of the lien. If, for any reason, the title or interest in the land from which the improvement is situated cannot be subjected to the lien, the Court in

order to satisfy the lien may order the sale and removal of the improvement from the land which is subject to the lien.

In the case *sub judice*, the improvements subject to the contractor's lien are encumbered to the extent of the interest of the private developer and subsequent foreclosing lender. The contractor can foreclose on the remaining term of the concession agreement along with the improvements constructed by the private developer.

Ironically, lender Haselwoods have engaged in the exact same foreclosure procedure now sought by the contractor. Pursuant to a foreclosure sale, Haselwoods foreclosed their deed of trust against the private developer and now own and operate the Bremerton ice arena pursuant to the concession agreement previously held by the defaulting ice arena developer.

Further, this foreclosure remedy was anticipated by the City of Bremerton and the lender at the time the concession agreement was entered into. In that agreement, Bremerton and the private developer specifically provide for and reference the lender's deed of trust as an encumbrance on the improvements on the real property and on the concession interest. The agreement also requires that the property remain free of liens.

The proposition that a lien attaches to realty through the improvement is not surprising, novel or unique. Many Washington cases have reached the same conclusion. For example in *Cornelius v. Washington Steam Laundry*, 52 Wash 272, 100 P. 727 (1909), the Court held that a lien properly attached and could be foreclosed by a contractor furnishing materials and services for installation of a laundry plant. The court affirmed the determination of the trial court that the lien attached to the improvements that became a part of the leasehold estate and further concluded that the leasehold interest could be foreclosed on in its entirety to satisfy the lien. See also *Masow v. Fife*, 10 Wash 528, 39 P. 140 (1895), *Stetson-Post Mill Co. v. Brown*, 21 Wash 619, 59 P. 502 (1899).

The Legislature also recognizes a leasehold as a real property interest. See for example RCW 6.21.080 granting redemption rights on leasehold real property estates.

(b) Lender Haselwoods argue that a published opinion construing the lien statute is of great public interest and should be addressed.

In 1992, the legislature enacted the current Chapter RCW 60.04. This recodification of the Washington mechanic's lien statute addressed primarily its notice provisions while retaining many of its earlier provisions. For example, former RCW 60.04.050 provided that "any liens created by this chapter are preferred to a mortgage or other encumbrance

recorded after work has commenced.” This previous “relation back” section was recodified as RCW 60.04.061 and now restates the language of current RCW 60.04.011 that the improvement to which the lien attaches has to be to or upon real property.

Lender Haselwoods argue that this recodification shows an intent by the legislature to create two classes of liens, one of which has priority and the other which does not. However, a reading of the entire chapter clearly shows that the intent of the new language is not to create a new class of liens. Instead the statute illustrates that mechanics liens cannot attach to non-real property improvement activity such as work on a boat or an airplane.

This conclusion is reinforced by reference to RCW 60.04.011(5) which defines the improvements subject to a lien as being made either “to” real property or made “upon” real property.

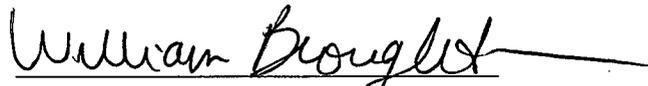
There is no question that the work performed by the contractor in the instant case resulted in improvements both “to” and “upon” the real property. The concession agreement entered into between the original private developer and Bremerton specifically anticipated and required that these improvements be made. The City retained design review and ultimate approval of the developer’s plans and specifications for the

construction. At the end of the concession term, Bremerton will own these improvements free and clear at no cost to Bremerton.

CONCLUSION

For the reasons stated above, this Petition for Review should be denied.

Respectfully submitted this 8th day of August, 2007.


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