FILED
COURT OF APPEALS
DIVISION II

06 JUL 28 PM 12: 02

STATE OF WASHINGTON
BY _____
DEPUTY

80411-7

No.33910-2-II

COURT OF APPEALS - DIVISION II
OF THE STATE OF WASHINGTON

Charles C. Haselwood, et ux., *Respondent*
v.

RV Associates, Inc., *Petitioner*

and

City Of Bremerton, *Respondent*

Kitsap County Superior Court
Cause No. 03-2-02825-0

REPLY BRIEF OF PETITIONER

William H. Broughton
WSBA# 8858
Broughton & Singleton, Inc. P.S.
9057 Washington Avenue NW
Silverdale, WA 98383
(360) 692-4888
Attorney for RV Associates, Inc.

PM 7-27-06

TABLE OF CONTENTS

Page

INTRODUCTION.....1

RESTATEMENT OF ISSUES.....2

1. *May the contractor RV lien the indisputably private improvements constructed on public property where the ownership of those private improvements will remain for the use and benefit of the lenders for a total term of 50 years?*.....2, 7

2. *Is the lenders' deed of trust and UCC-1 filings superior to RV's lien despite the fact that RCW 60.04.061 allows a contractor's lien to relate back to when it first began work prior to the recording of the lenders' deed of trust and UCC-1 filing?*.....2, 9

3. *Once the trial court ruled the contractor could not foreclose on its valid lien, did it err in prohibiting removal by the contractor of its improvements?*.....2, 12

4. *Where the trial court determined that the motion to amend by RV Associates would not prejudice the lenders as the case had not been noted or set for trial, did the trial court err in determining that the amendments on their face were futile?*.....2, 14

5. *Should the Court award attorney's fees although the trial court determined in its discretion that fees should not be awarded*.....2, 16

RESPONSE TO LENDERS' RESTATEMENT OF THE CASE.....3

A. *The City of Bremerton and the owner entered into a concession agreement which provided to the initial owner and now the lender, complete ownership and use of improvements constructed on City of Bremerton property for a 50 year term*.....3

B. *Procedural History*.....5

SUMMARY OF ARGUMENT.....6

ARGUMENT.....7

CONCLUSION.....17

TABLE OF AUTHORITIES

Table of Cases

Page

Colby & Dickinson v. Baker
145 Wash 584, 261 P.101 (1927).....8

Condon Brothers, Inc. v. Simpson Timber Co.
92 Wn. App 275, 966 P.2d 355 (1998).....12

Courtright Cattle Co. v. Dolsen Co.
94 Wn.2d 645, 657, 619 P.2d 344 (1980).....10

Forman v. Columbia Theater Co.
20 Wn.2d 685, 695, 148 P.2d 951 (1944).....11

Geo Exchange Systems, LLC v. Cam
115 Wn. App 625, 625 P.3d 11 (2003).....15

Hewson Constr., Inc. v. Reintree Corp.
101 Wn.2d 819, 685 P.2d 1062 (1984).....12, 13

Honey v. Davis
131 Wn.2d 212, 930 P.2d 908 (1997).....10

Lipsett Steel Products, Inc. v. King County
627 Wn.2d 650, 409 P2nd 475 (1965).....11

Washington Public Trust Advocates v. City of Spokane
117 Wn.App 178, 69 P.3d 351 (2003).....15

Table of Statutes

RCW 60.04.....*passim*

RCW 64.04.051.....5, 7, 11, 13

RCW 60.04.061.....2, 5, 10, 12

RCW 60.04.181.....16

RCW 60.28.010.....16

Other Authorities

Superior Court Civil Rule 12.....14

Superior Court Civil Rule 15.....16

INTRODUCTION

Appellant RV Associates contracted to construct a privately owned and operated ice arena located on real property owned by the City of Bremerton. After constructing those improvements and not being paid for its work by the owner, RV Associates sought to foreclose its lien on those private improvements. Failing that, RV Associates sought to have its improvements removed from the property.

The private lenders on the project, Respondents Haselwood, convinced the trial court to commit error through a series of internally inconsistent arguments. While lenders Haselwood received a judgment in foreclosure from the trial court on its Deed of Trust, they argued that RV Associates could not lien the private improvements on which Haselwood has foreclosed. Haselwoods further argued that the relation back provisions in the lien statute do not give RV Associates lien priority. Finally, lenders argued that RV Associates could not remove its improvements.

All of these arguments are erroneous and the summary judgments granted by the trial court in favor of the lenders and against the contractor should be reversed.

The trial court further erred in denying the motion of the contractor to amend its counterclaim to add additional claims against the lenders and the City of Bremerton. This court should reverse.

RESTATEMENT OF ISSUES

1. May the contractor RV lien the indisputably private improvements constructed on public property where the ownership of those private improvements will remain for the use and benefit of the lenders for a total term of 50 years?

2. Are lenders' deed of trust and UCC-1 filings superior to RV's lien despite the fact that RCW 60.04.061 allows a contractor's lien to relate back to when it first began work, prior to the recording of the lenders' deed of trust and UCC-l filing?

3. Once the trial court ruled the contractor could not foreclose on its valid lien, did it err in prohibiting removal by the contractor of its improvements?

4. Where the trial court determined that the motion to amend by RV Associates would not prejudice the lenders as the case had not been noted or set for trial, did the trial court err in determining that the amendments on their face were futile?

5. Should the Court award attorney's fees although the trial court determined in its discretion that fees should not be awarded?

RESPONSE TO LENDERS' RESTATEMENT OF THE CASE

A. The City of Bremerton and the owner entered into a concession agreement which provided to the initial owner and now the lender, complete ownership and use of improvements constructed on City of Bremerton property for a 50 year term.

The City and the owner entered into a concession agreement which provided to the initial owner and now the lender, complete ownership and use of improvements privately constructed on City of Bremerton property for a 50 year term.

The City of Bremerton and Bremerton Ice Arena, Inc. ("BIA") entered into a "Concession Agreement" to permit BIA to develop, construct and operate an ice arena on public property. *CP 618*; Brief of Respondents (RB 3). Under the Concession Agreement, the owner was granted the right to develop, construct, maintain and operate for profit an indoor ice arena facility on City of Bremerton real property. *CP 263-64, ¶ 1.1.* The owner of the improvements was granted exclusive possession of the property for five 10 year terms amounting to a total of a 50 year term. *CP 263-265; ¶ 1.2, 2.2.* Further, BIA agreed to maintain and repair its improvements at its sole cost and expense. *CP 269; ¶ 4.5*

The agreement further provides that the development and construction of the improvements on the property is a private development project with BIA operating in the role of a developer. The agreement

clearly states that the City is not an owner, partner, joint venturer or that the City maintains any business relationship with BIA. *CP 276; ¶5.8* In a subsequent paragraph, the agreement provides that any liens on the property shall attach only to the rights and interests of BIA and will not be binding upon any interest of the City. *CP 276; ¶5.9*

In the same Agreement, the City further consents to encumbrance of the improvements made by BIA of all the improvements constructed on city property and specifically represents in the Concession Agreement that the City has authority to grant to BIA a 50 year concession agreement and grants to the lenders the right to encumber the improvements. *CP 277; ¶6.2, 6.3* The City provides numerous guarantees to the lenders that the lenders' interest in the collateral would be protected in the event of default or bankruptcy. *CP 278-280; ¶6.5-6.12*

Based upon these contractual assurances by the City, the lenders advanced the funds necessary to construct the improvements on the property and secured their loan with a deed of trust on the improvements to the real property as well as a UCC-1 filing on the personal property and improvements. *CP 302-307*

Finally, the agreement provides that at the expiration of the 50 year term, all improvements will become the unencumbered property of the City. *CP 263-264; ¶1.1*

B. Procedural History

When the contractor sought to foreclose its lien on the improvements, the trial court held that while the lenders deed of trust could be foreclosed, RV Associates could not foreclose on its lien. Initially, the trial court determined that because the improvements were situated on underlying real property owned by a municipal entity, the improvements could not be subjected to the contractor's lien. *CP 609*

Following this ruling, the contractor sought an order allowing it to remove its improvements under RCW 60.04.051. *CP 348-356* The lenders filed their own motion for summary judgment arguing that because the improvements liened by the contractor did not attach to the underlying real property the lien of the contractor did not have priority under the "relation back" provisions of RCW 60.04.061.

The trial court agreed, determining that the lien of the contractor did not relate back to the time that it first began performing work on the property. The court further held that the contractor's right to remove its improvements under RCW 60.04.051 was unavailable as the contractor's lien did not have priority over the lien of the lenders. *CP 764-765*, *CP 773-774*

The lenders, who are the plaintiffs in this litigation, for reasons unknown to the contractor have never noted the matter on the trial setting

calendar in Kitsap County Superior Court. As a result, two years into the litigation, the trial court had yet to establish a trial date. *CP 784-787* RV Associates moved to amend its Answer and Counterclaim to add additional claims against the lenders and City. The trial court determined that there would be no prejudice to any party as a result of the amendment based on timeliness but determined that the proposed amendments were futile and denied RV's motion. *CP 820*

The trial court later denied the lenders request for fees. *CP 821*

SUMMARY OF ARGUMENT

Contractor RV believes that because the public property upon which the improvements are situated is being held by the City of Bremerton in a proprietary capacity, RV's lien should attach to the real property. This is an issue of first impression in Washington. This issue and the authority to support of this argument are found in Appellant's opening brief and will not be repeated here.

However, the Legislature and Washington Courts have long recognized that mechanics and materialmens lien can and do attach to improvements constructed on real property under RCW 60.04.

In addition, the Legislature specifically granted a right of removal to contractors in situations where a lien did not attach to the real property

or the improvements. RCW 60.04.051 This right of removal is obviously not subject to a priority analysis such as that engaged in by the trial court as removal is only available where a lien does not attach and there is no foreclosure or priority. RCW 60.04.051 Lenders Haselwood offer no reason for this Court to depart from the clearly established and consistent Washington precedent allowing for foreclosure of improvements pursuant to the mechanic and material lien statute. Further, lenders Haselwood provide the court with no reason to depart from the clear language of that statute which specifically allows for liens and foreclosure of improvements. RCW Chapter 60.04

Finally, the trial court abused its discretion in denying RV's motion to amend as futile where the averments of the proposed amended counterclaim are treated as true and where some of the same issues are to be tried by another contractor against lenders. A summary judgment motion or trial would have been the appropriate procedural mechanism to determine the validity of the proposed amended claims of the contractor.

The court should reverse.

ARGUMENT

Restatement of Issues No. 1 ***May the contractor RV lien and foreclose upon the indisputably private improvements constructed on public property where the ownership of those private improvements will remain for the use and benefit of the lenders for a total term of 50 years?***

It is clear from the plain language of the Concession Agreement between the City of Bremerton and BIA that the ice arena and related improvements constructed by BIA would remain the property of BIA for the fifty year term of the Concession Agreement. It is also clear from the agreement that both parties intended those improvements to be subject to a deed of trust from the lenders secured against the improvements. Finally, the parties clearly recognized and contractually intended that those improvements could be subject to liens. *CP 276, ¶5.9*

It is long been the rule in Washington that leasehold improvements can be liened. Witness the following language in *Colby & Dickinson v. Baker,* 145 Wash 584, 261 P.101 (1927):

> The plain intention of the parties, to be gathered from the lease, is that the tenants might erect such buildings as they pleased, at their own expense, use them during the term for their own convenience or profit, without added rental, but with no right, after once having erected a building, to remove it at any time. Since the building was not to be removed, the only logical conclusion is that as and when erected it became part of the real estate, which was the subject of the tenancy, and the tenants' only rights were those of occupancy given by the lease. No doubt a lien could be enforced against the terms; but when the term is ended by forfeiture or by lapse of time, there remains nothing belonging to the tenant upon which the lien can operate, and in which case as this we see no way of enforcing the lien against the landlord's property, with or without notice to him. *Id* at 585.

In the instant case, the contractor seeks to enforce its lien as to the improvements constructed by BIA along with BIA's de facto 50 year ownership interest granted under the Concession Agreement. The rights it seeks are no different than those granted by the trial court to the lenders when allowing them to foreclose their deed of trust on the improvements. These rights to encumber the improvements were clearly anticipated and contracted for by the City of Bremerton and BIA in the Concession Agreement. *CP 263.*

To hold otherwise would result in a windfall to the lenders. The contractor contributed over $150,000 of value to the lenders for which lenders have not paid. To allow the lenders to keep these improvements without compensating the contractor would result in unjust enrichment of the lender. It is this injustice that the Legislature clearly intended to prohibit by enactment of the mechanics lien statutes.

It is also clear that the Legislature intended that mechanics liens have priority over other encumbrances recorded after work on the improvements is commenced by the contractor. This priority provision has long been found in several different versions of the Washington lien statute. Similar provisions are found in other jurisdictions.

<u>Restatement of the Issues No. 2:</u> Is the lenders' deed of trust and UCC-1 filings superior to RV's lien despite the fact that RCW 60.04.061 allows

a contractor's lien to relate back to when it first began work, prior to the recording of the lenders' deed of trust and UCC-l filing?

Unfortunately, the trial court adopted an extremely narrow interpretation of the "relation-back" provisions of RCW 60.04.061. This statutory section allows a contractor's lien to relate back to its commencement of its work rather than the recording date of the lien. The trial court held that the RV's lien on the improvements was not a lien upon "land" as identified in RCW 60.04.061 as the lien could not attach to public property. [1]

Washington law is well settled that improvements made to realty become part of the realty in situations such as the case at bar. *Courtright Cattle Co. v. Dolsen* Co., 94 Wn.2d 645, 657, 619 P.2d 344 (1980)

Therefore, as the improvements become part of the lessee's interest in the land, the lien of the contractor as well as the lender's deed of trust attached to both the improvements and the owner's 50 year concession. This is because the concession agreement subordinated the public's interest to the rights of the developer and lenders. The only public interest in the property currently is a reversion at conclusion of the 50 year term. *Honey v. Davis*, 131 Wn.2d 212, 930 P.2d 908 (1997).

---

[1] As noted earlier, the trial court also ruled that the lenders could foreclose its deed of trust on the "land".

Similarly, the fact that the improvements attached to the land provided the contractor with the benefit of the relation-back provisions of RCW 60.04.051.

In ascertaining whether improvements to buildings or land have become, in legal contemplation, a part of the realty to which they are annexed, the intention of the parties is one of the dominant factors or determinants. *Lipsett Steel Products, Inc. v. King County*, 627 Wn.2d 650, 409 P2nd 475 (1965). The rules explained in *Forman v. Columbia Theater Co.* 20 Wn.2d 685, 695, 148 P.2d 951 (1944) as follows:

> The true criterion of a fixture is the united application of these three requisites: (1) Actual annexation to the realty, or something appurtenant thereto; (2) Application to the use or purpose to which that part of the realty with which it is connected is appropriated; and (3) the intention of the party making the annexation to make a permanent accession to the freehold. *Id.* at 695.

The record in this case clearly indicates that the City of Bremerton's interest in the land was encumbered by the Concession Agreement. That Agreement unequivocally provides that the improvements remain the property of the owner until the end of the concession term, when title in the improvements passes to the City.

It is for this reason that the UCC-1 filing by the lenders in this case did not operate to encumber the ice arena improvements liened by the contractor as part of the realty. A structure affixed to land is not within

the coverage of Article 2 of the Uniform Commercial Code. *Condon Brothers, Inc. v. Simpson Timber Co.*, 92 Wn. App 275, 966 P.2d 355 (1998).

In summary, the improvements constructed by BIA became part of the land. Consequently, the lien of RV Associates related back to the time it commenced work, giving the contractor priority over the lender's deed of trust.

Finally, the UCC filing did not cover those portions of the improvements which attach to the land. Accordingly, the trial court erred in holding the relation back provisions of RCW 60.04.061 were inapplicable and denying the summary judgment motion of RV Associates to foreclose on its lien.

Restatement of the Issues No. 3: ***Once the trial court ruled the contractor could not foreclose on its valid lien, did it err in prohibiting removal by the contractor of its improvements?***

The substitute remedy of removal is applicable and the trial court erred in utilizing a lien priority analysis in denying RV Associates motion to remove it improvements.

The seminal case on removal is *Hewson Constr., Inc. v. Reintree Corp.*, 101 Wn.2d 819, 685 P.2d 1062 (1984). Under the facts of that case, the contractor had installed sidewalks on public property which were to be conveyed to King County when the sidewalk construction was

completed. As the sidewalks were on public property and were to become publicly owned upon their completion, Hewson sought to remove the improvements pursuant to RCW 60.04.051. In upholding the right of the contractor to remove the improvements, the Court noted that the sidewalks had not been conveyed to the City and were therefore subject to a lien and could be removed. *Id* at 828, 829.

Similarly, in the case *sub judice*, the ice arena improvements are not public property and may be subject to a lien. Should the contractor not be allowed to foreclose on its lien, the contractor has the option of removing its improvements in accordance with RCW 60.04.051. The Court in *Hewson Constr. v. Reintree Corp, supra* further affirmed in its decision that private improvements constructed on public property may be subjected to a lien.

The trial court denied the contractor's motion to remove here apparently based upon its belief that the right to remove is dependent upon lien priority. However, as the legislature made clear in its statutory scheme, removal provides an alternative to foreclosure for a lien claimant which was wrongfully denied to RV in the instant case. Priority is irrelevant.

<u>Restatement of the Issues No. 4:</u> The Trial Court Abused Its Discretion in Denying RV's Motion to Amend

RV moved to amend its Answer to add counterclaims against the lender and City. In its proposed amended pleading, RV alleges that it relied on a letter from the lenders which was provided to numerous contractors on the job providing a guarantee of payment. In fact, another contractor in this dispute has made similar claims which will be the subject of a trial (should plaintiffs ever note this matter for trial).

Despite allowance of these claims by another contractor who worked on the project, the trial court denied the motion by RV Associates to amend its Answer to allege similar claims against the lenders. The trial court reasoned that because RV Associates had already commenced construction when it received the letter, it could not have relied on the letter to guarantee payment.

Unfortunately, this determination by the trial court is a factual finding which needs to be made at the time of trial. Further, the court in denying the motion to amend in effect determined that the proposed Amended Answer and Counterclaims failed to state a claim under CR 12. As CR 12 and numerous Washington case point out, allegations of a complaint are presumed true for the purpose of a motion to dismiss for failure to state a claim upon which relief can be granted. CR 12(b)(6);

Washington Public Trust Advocates v. City of Spokane, 117 Wn.App 178, 69 P.3d 351 (2003).

Contrary to suggestions made in the lenders' briefing, the court specifically determined there was no prejudice to the lenders in permitting the amendment as the lenders had yet to note this matter for trial. The Respondents' argument to this Court totally ignores this specific determination by the trial court that there was no prejudice to the lenders.

Rather, the trial court determined that the amendments would be futile and in essence made a determination of futility under CR 12(b)(6).

The second amendment sought to include an allegation that the City should have required BIA to post performance and payment bonds and withhold retainage for the construction of the improvements on public property if contractors lacked the ability to enforce their lien rights.

This proposed cause of action is based upon a long line of Washington cases recognizing that the legislature intended and required public entities to set up a reserve fund as well as require payment and performance bonds to give contractors who do not have lien remedies against public property the ability to be paid. RCW 60.28.010; *Geo Exchange Systems, LLC v. Cam*, 115 Wn. App 625, 625 P.3d 11 (2003).

The erroneous determinations of the trial court that RV could not foreclose on its own lien and could not remove its improvements created

the exact situation the legislature sought to address in enacting RCW 60.28.010. While RV believes that the trial court rulings in this case are incorrect, the result of those rulings is that the City should have required BIA to have posted retainage and bonding on the project to ensure contractors were paid.

The trial court's determination that the proposed amendments were futile was made without the benefit of any briefing on the merits of the contractor's allegations. The trial court simply concluded that the project was not a public work and that no such protections were required on the project.

CR 15(a) provides that leave to amend shall be freely given. This did not occur in the instant case and the decision of the trial court denying the motion to amend should be reversed.

Restatement of the Issues No. 5: **Should the Court award attorney's fees although the trial court determined in its discretion that fees should not be awarded?**

The trial court denied lenders' motion for attorney's fees. This determination of the trial court was not appealed by the lenders. Nevertheless, the lenders argue they are entitled to attorney's fees under RCW 60.04.181(3). However, the lenders ignore the fact that the trial court determined that RV Associates had a valid lien claim but no remedy.

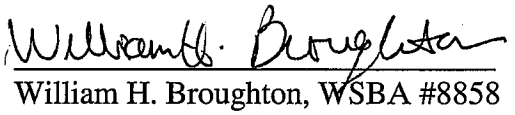
If anyone is entitled to fees under RCW 60.04.181, it is the contractor and not the lenders.

In essence, the court determined that despite the fact that RV had a valid lien; it had no remedy as its lien was inferior to that of the lenders and that the contractor could not remove its improvements. The lenders' request for attorney's fees should be denied.

CONCLUSION

For the reasons above stated, the contractor asks this Court to reverse the trial court and remand with instructions consistent with its opinion.

Respectfully submitted this 27th day of July, 2006.



William H. Broughton, WSBA #8858
Attorney for Appellant
9057 Washington Ave. NW
Silverdale, WA 98383
(360) 692-4888

COURT OF APPEALS - DIVISION II
OF THE STATE OF WASHINGTON

Charles C. Haselwood, et ux.,	)	
	)	No. 33910-2-II
Respondent,	)	
	)	DECLARATION OF
	)	MAILING
	)	
RV Associates, Inc.,	)	
	)	
Petitioner,	)	
	)	
and	)	
	)	
and City of Bremerton,	)	
	)	
Respondents.	)	
	)	

FILED
COURT OF APPEALS
DIVISION II
06 JUL 28 PM 12: 02
STATE OF WASHINGTON
BY
DEPUTY

Maureen E. Ahern, under penalty of perjury under the laws of the State of Washington, hereby declares as follows:

i) That I am over the age of eighteen (18) years, not a party to this action, and am competent to make this declaration;

ii) That on July 27, 2006 I caused the following document: **Reply Brief of Petitioner**, along with this Declaration of Service to be sent via first class mail to the following:

David R. Riley,
Weinstein & Riley, P.S.
2101 4th Avenue Suite 900
Seattle, Washington 98121-2339
Attorneys for Frontier Bank

Jeffrey L. Tolman
P.O. Box 851
Poulsbo, WA 98370
Attorney for Receiver

Kenneth Kambich,
Shiers Chrey Cox Digiovanni Zak & Kambich LLP
600 Kitsap Street Ste 202
Port Orchard WA 98366
Co-counsel for Plaintiffs

Charles M. Granoski Jr,
2626 N Pearl
Tacoma WA 98407
Attorney for Defendant Stirnco

Kenneth W. Masters
241 Madison Ave. North
Bainbridge Island, WA 98110
Co-counsel for Plaintiffs

David Horton
3212 NW Byron St.
Silverdale, WA 98383
Attorney for Defendant Intervenor /City of Bremerton

DATED this 27th day of July, 2006

Maureen E. Ahern

Maureen E. Ahern