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No. : 84555-7

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

ATHLETIC FIELD, INC., a Washington corporation

Petitioner

vs.

TERRY L. WILLIAMS and JANIS E. WILLIAMS, husband and wife,

Respondents

REPLY TO RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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Argument

I. AFI's claims are not moot.

Williams argue, at pages 18 through 20 of their Answer, that AFI's claims are moot because they are barred by statutes of limitations. This Reply only addresses this new issue. RAP 13.4(d).

Williams propose that, even if the Court of Appeals and the trial court were wrong and are reversed, AFI has lost the right to pursue its lien because it did not file an action within 8 months of recording its lien, or by August 6, 2005. This, even though Williams had obtained an order on June 27, 2005 which released the lien and declared it would have no further legal effect and would no longer encumber Williams' real property, CP 135, 137, thus making it impossible to have filed a viable action to foreclose the lien. The authorities cited by Williams do not support this harsh result. *Van Wolvelaere v. Weathervane Window Co.*, 143 Wn. App. 400, 177 P.3d 750 (2008), only stood for the proposition that a subcontractor had to perfect its own action against the landowner within 8 months after filing its lien, even if it had to join a pending lawsuit to do so. It did not require that an action be filed after a lien had been declared invalid. *Geo Exchange Systems, LLC v. Cam*, 115 Wn. App. 625, 65 P.3d 11 (2003) actually supports AFI. It held that the expiration of 8 months after filing a lien did not extinguish the underlying right to recover for the work encompassed by the lien and that "a lien claimant may revive

amounts owed for work under the contract previously included in an expired lien by filing another lien claim no later than 90 days after the claimant completes the work on the project.” *Id* at 633.

The statute of limitations was deemed to have been tolled during the pendency of an appeal in *Elliot v. Peterson*, 92 Wash.2d 586, 599 P.2d 1282 (1979). In a prior decision between the parties, the Supreme Court reversed a lower court’s denial of a voluntary nonsuit but did not expressly grant a new trial. When the plaintiff filed a new action, the defendant argued it was barred by the statute of limitations which had expired while the appeal was pending. The Supreme Court held that, even though it had not ordered a new trial, the right of the plaintiff to further pursue his claim was implicit in the decision and the plaintiff could bring suit within the same period of time as he would have had at the time his motion for nonsuit was erroneously denied. The dissent stated that the plaintiff did not need to establish an exception to the statute of limitations because he could, and should, have simply proceeded with his claim in the original cause of action. *Id* at 594, 595.

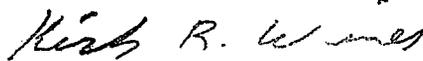
In *Young v. Seattle*, 30 Wash.2d 357, 191 P.2d 273 (1948), the statute of limitations was extended by the period of time during which the plaintiff could not bring suit due to the City of Seattle’s claim filing requirements. AFI has been unable to bring suit since the trial court order was entered releasing its lien.

If the Supreme Court awards the relief sought by AFI and reverses the holding that its lien is invalid, AFI could follow the advise of the dissent in *Elliot*, supra, and file a counterclaim to enforce its lien in the action initiated by Williams. The action to enforce the lien is a compulsory counterclaim as it "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction." CR 13(a). The filing of the Williams' suit tolls or suspends the running of the statute of limitations governing a compulsory counterclaim. *Tallman v. Durussel*, 44 Wn.App. 181, 187, fn3, 721 P.2d 985 (1986). *Steinberg v. Seattle-First Nat. Bank*, 66 Wn.App. 402, 832 P.2d 124 (1992)

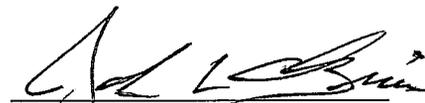
CONCLUSION

AFI's claims will not be barred by statutes of limitations, rendering its requested relief moot. The Supreme Court should accept review.

Respectfully submitted this 21st day of June, 2010



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