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DIVISION II

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STATE OF WASHINGTON

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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

TERRY L. WILLIAMS and JANIS E.)	
WILLIAMS, husband and wife,)	No. 33607-3-II
)	
Respondent,)	REPLY BRIEF OF
vs.)	APPELLANT
)	
ATHLETIC FIELD, INC., a)	
Washington corporation,)	
)	
Appellant.)	
_____)	

Kirk R. Wines WSBA #4183

Attorney for Appellant, Athletic Field, Inc.

O'Brien Barton Wieck & Joe, PLLP
Attorneys at Law
175 NE Gilman Blvd., Suite 100
Issaquah, WA 98027
Telephone (425) 391-7427
Facsimile (425) 391-7489

ORIGINAL

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ARGUMENT

1. AFI's lien is not invalid because it was signed by an agent for the corporation.

Appellant agrees with respondents that this issue involves review of the trial court's interpretation of RCW 60.04.091(2) and is a question of law to be reviewed de novo. Brief of respondent at page 5.

Appellant also agrees with respondents that RCW 60.04.091(2) is not ambiguous. Brief of respondents page 10. The statute unambiguously states that the Notice of Claim of Lien shall be signed by the claimant "or some person authorized to act on his or her behalf..." This language is not ambiguous and it clearly authorized signature by Rebecca Southern, the employee of LienData USA, Inc. who was authorized to file the lien on behalf of AFI.

Williams' attempt to render the above language ambiguous when they argue that some person authorized to act on the claimant's behalf can only mean the claimant's attorney.

The statute is not ambiguous and requires no interpretation unless weight is given to the respondent's contention that the language contained

in the verification clause of the suggested Notice of Claim of Lien contradicts the language quoted above by only allowing the claim to be verified by the claimant or the claimant's attorney. This would be a strained reading of this statute in view of the clarity of the language allowing a person authorized to act on behalf of the claimant to sign and verify this notice. The form containing the language relied upon by respondent is not required. The statute only states that a claim which is substantially in that form will be sufficient.

The cases relied upon by Williams did not support their argument. In arguing that the claim was invalid, Williams' rely upon Flag Const. Co, Inc. v. Olympic Blvd. Partners, 109 Wn.App. 286, 34 P.3d 1250 (2001) and Lumberman's of Washington, Inc. v. Barnhardt, 89 Wn.App. 283, 949 P.2d 382 (1987).

Both of these cases hold only that failure to sign a verification invalidated a Notice of Lien, they do not address the issue in the case before the court. In both of these cases, no one signed a verification. The Notice of Lien in this case was properly verified. The only issue is whether signature of the verification by an agent is allowed by the clear language of the statute.

Strandell v. Moran, 49 Wash. 533, 95 Pac. 1106 (1908) can not be distinguished because the statute was amended after it was decided. The issue in Strandell was whether an agent could sign a notice on behalf of the claimant. The court's approval of the notice was not based on any language in the statute that differs from the language of the current lien statute. The statutory language relied on by the court said the notice "shall be signed by the person or corporation making the claim or giving the notice." Id. at 535. The only significant difference is that the current lien statute specifically allows signature of a claim by an authorized person.

Fircrest Supply, Inc. v. Plummer, 30 Wn.App. 384, 634 P.2d 891 (1981) remains good law despite subsequent amendments to the lien statutes. Execution by a registered agent of a corporation was approved under language which is virtually identical to the language of the current statute. Brief of appellant at 13.

2. AFI's lien was not frivolous.

The revised Findings of Fact and Conclusions of Law contained in the trial court's Order on Defendant's Motion for Revision (CP 406) do not aid the Court of Appeals in determining whether the lien was frivolous. The trial court merely entered Finding #5 that the lien "is

invalid, frivolous, and made without reasonable cause.” No Finding provided any basis for holding the lien was frivolous with the possible exception of Finding #2 which found the lien was not signed by the claimant or its attorney. This issue is discussed in the preceding section.

Respondents only argument in support of their assertion that the lien was frivolous is based upon Mr. Hubbard’s assertion that AFI was paid in full or overpaid for the work it completed. In the portions of the declaration set forth in Respondent’s brief, Mr. Hubbard calculated that AFI should have been paid “about \$120,000(?)” as opposed to the lien claim of \$276,825.00.

Respondents do not argue that AFI did not perform lienable work and improve the property they owned. They do not argue that the lien was not properly filed. Their argument is that because Mr. Hubbard believes the work was worth \$120,000.00 rather than \$276,000.00, the lien is frivolous.

The summary proceeding allowed under the frivolous lien statute is not the venue for determining the amount owing to a lien claimant. See Pacific Industries, Inc. v. Singh, 120 Wn.App. 1, 86 P.3d 778 (2003), where the trial court’s finding that a lien was not invalid was affirmed and

attorney's fees were awarded to the lien claimant for having to defend against a claim it was frivolous, even though the ultimate determination was that the lien claimant was not entitled to any payment. Only liens which were improperly filed, beyond legitimate dispute, are subject to the frivolous lien statute. Pacific Industries, supra at 5.

This is not a case like Intermountain Elec. v. G-A-T Bros., 115 Wn.App. 384, 62 P.3d 548 (2003) where a second lien claim was filed after the trial court had already ruled that a prior lien claim was untimely. Even in that case, the Court of Appeals held the first claim was only invalid, not frivolous. In the case at bar, the only dispute is over the amount owing. This does not render the lien frivolous.

Respondents' failure to distinguish between the right to file a lien and the ultimate outcome of an action on the lien is demonstrated by their citation of Pacific Gamble Robinson Co v. Chef-Reddy Foods Corp., 42 Wn.App. 195, 710 P.2d 804 (1985). Pacific Gamble involved an action on a crop lien which was dismissed because the claimant waited more than the statutorily allowed time before filing an action to enforce the lien. That is far different than dismissing the lien because another individual who performed work on the same project claims that he performed most of the work (and should receive most of the payment for the work.)

3. AFI's claim of lien was not excessive.

Neither the Court Commissioner (CP 135), nor the Trial Court (CP 406) found that the lien was excessive.

In support of their argument that the lien was excessive, Williams cite only language from CHG Int'l v. Platt Electric, 23 Wn.App. 425, 597 P.2d 412 (1979). In CHG Int'l, the court held a \$77,000.00 lien claim was not excessive even though only \$25,510.26 was actually lienable.

The amount of the lien itself does not render it clearly excessive. In Pacific Industries, Inc. v. Singh, *supra*, a lien claim of \$250,000.00 was not subject to dismissal for being excessive even though the claimant conceded he was entitled to nothing as there had been no profit on the project.

Williams based their claim that the lien was excessive on the Declaration of Norman Hubbard. At the time AFI contracted with Williams, Norm Hubbard was a full-time AFI employee starting at \$6,000.00 per month which increased to \$7,000.00 per month. Declaration of Craig Starren (CP 52-53). After AFI left the job, Mr. Hubbard went on to complete the project as general contractor for Williams, giving him more than enough incentive to downplay the amount

of work performed by AFI, thereby increasing the amount of work he could claim compensation for. Allowing a lien claim to be dismissed based upon contested evidence from interested parties would greatly expand the role of the frivolous lien statute. It would sanction use of the statute to bring a summary end to liens based upon weighing affidavits when its intent is to provide relief only against claims which have no merits.

4. AFI was prejudiced by the trial court's consideration of the late declarations filed by Williams.

Williams seek to justify the filing of reply declarations by Pierce County Local Rule 7(a)(6). PCLR 7 deals with motions. It does not set forth procedures for trial by affidavit. The Rule relied upon also requires reply papers to be filed and served no later than 12:00 pm noon the day before the hearing. The hearing was scheduled for the morning of June 27, 2005, a Monday. Any reply papers which were allowed needed to be filed before noon on Friday, June 24, 2005.

Although Williams argue in footnote 1 at page 29 of their brief that the reply declarations were served on AFI by email on June 25, 2005, two

days before the hearing, June 25, 2005 was a Saturday. Service on a Saturday or Sunday is not effective.

Williams argue in footnote 2 on page 29 of their brief that the reply memorandum and declarations were “E-filed” on June 24, 2005. If so, the E-filing must have occurred after the clerk’s office was closed as the index to the clerk’s papers shows the declarations and memorandum were filed on June 27, 2005.

Williams also claim to have followed the statutory procedure set forth in RCW 60.04.081. This procedure calls for the party contesting the claim of lien to apply for an order to show cause putting forth the grounds upon which relief is asked and supporting these grounds by the affidavit of the applicant or his attorney. The statute never mentions filing of reply declarations. It does not allow the contesting party to hold back the bulk of its evidence for a last minute submittal immediately before the hearing.

Williams criticize AFI for only submitting the Declaration of Craig Starren in opposition to their Order to Show Cause. This affidavit fully answered all of the factual contentions submitted in support of the Order to Show Cause. AFI was not required to produce all of the evidence necessary to prove its lien claim. This would have required an evidentiary

hearing of equal scope to the trial. It certainly could not have been required to anticipate and respond to the seven declarations that were submitted at the time of the hearing.

5. Attorney's Fees

Both parties appear to agree that the prevailing party should be awarded attorney's fees.

CONCLUSION

AFI was clearly entitled to file a lien to secure monies owing for the work which was admittedly performed. Arguments over who performed the most work and the amount owing for the work do not address the right to file the lien. The lien is not frivolous. AFI should be allowed to proceed to trial where both sides will be allowed to present evidence on the amount owing to AFI.

RESPECTFULLY submitted this 2nd day of March, 2006.



KIRK R. WINES, WSBA No. 4183
Attorney for Appellant

