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No. 65833-6-I

(King County Superior Court No. 08-2-29583-4 SEA)

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

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LEDCOR INDUSTRIES (USA), INC.,  
A Washington Corporation,

Petitioner,

v.

SQI, INC., Washington Corporation; BORDAK  
BROTHERS, INC., an Oregon Corporation, et.al

Respondents.

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ADMIRAL WAY, LLC's JOINDER OF LEDCOR INDUSTRIES (USA),  
INC.'S REPLY BRIEF

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DIVISION I

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## I. INTRODUCTION

Pursuant to RAP 10.1(g), Admiral Way LLC (hereinafter "Admiral Way") joins the Petitioner Reply by Ledcor Industries (USA), Inc. (hereinafter "Ledcor"). Admiral Way adopts by reference Ledcor's entire Reply and supplements several arguments.

The dispute focuses on the statutory definition of "substantial completion" described as a time when the subject improvement may be "used or occupied for its intended purpose" (i.e. RCW 4.16.310). The problem arises because the "definition" does not state what factors should be considered, who determines those factors and from whose perspective. The statute certainly does not provide that substantial completion occurs when a Certificate of Occupancy is issued or when condo units are offered for sale. It requires a much more "open ended" factual inquiry.

## II. LEGAL ARGUMENT

### A. The Statutory and Prime Contract Definition For Substantial Completion Do Not Conflict

The Briefs submitted by Respondents SQI, Inc. (hereinafter "SQI") and Exterior Metals, Inc. (hereinafter "Exterior Metals"), make an incorrect assumption. Specifically, they claim that Admiral Way and Ledcor argue the court should disregard and replace the statutory definition of substantial completion for the Prime Contract. See SQI Brief, P. 7; See also Exterior Metals Brief, P. 5. So there is absolutely no mistake, the Prime Contract does not minimize, limit, diminish or controvert the statutory definition. Instead, it offers additional guidance to interpret it.

The Prime Contract defines substantial completion as:

...(t)he stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so that the Owner

can occupy or utilize the Work for its intended purpose.

CP 429, 469 at Section 9.8. In their Contract, both Ledcor and Admiral Way agreed that the Project Architect would determine substantial completion. CP 429, 469. Through the flow down provision of each subcontract, such as with Respondent Bordak Brothers, Inc. (hereinafter "Bordak"), all project subcontractors were bound to the Prime Contract. CP 40.

The Statute of Repose defines substantial completion as follows:

...the state of completion reached when an improvement upon real property may be used or occupied for its intended use.

See RCW 4.16.310. It offers no additional assistance to determine exactly when, how or why a project is actually ready for its intended use. For example, what if the project is a multi-unit condominium complex with each unit in varying stages of completion or repair? Or, what if the

condo units are offered for sale but many of them still need substantial work before they close? Or, does the city official who issues Certificates of Occupancy make the decision or someone else? Ultimately, there are a myriad of factors not mentioned by the statute that should be considered to determine "intended use".

In this particular, unique and specific case, the Prime Contract offers additional guidance. CP 429, 469. It provides that the project is ready for its intended use when: 1) it is "sufficiently complete in accordance with the **contract documents**"; and 2) so the **Owner** (i.e. Admiral Way in this case) "can occupy or utilize the Work". (Boldface Added). CP 429, 469. There is no contradiction with the statute.

**B. The Project Architect Would Not Issue a Certificate of Substantial Completion**

To avoid confusion on substantial completion, Admiral Way and Ledcor exercised their contractual right to have the Project

Architect make the determination. CP 429, 469. Thus, their Prime Contract provides that the Project Architect determines that the Project complies with the contract documents and can be utilized by Admiral Way. There is no statutory restriction on appointing the architect. See RCW 4.16.310.

Ultimately, the Project Architect made it absolutely crystal clear that the project was not substantially complete when the Certificate of Occupancy was issued or when the condos were marketed for sale. CP 546 at Par. 6 to 10. The architect did not believe the work at that point fully complied with the contract documents or could be fully utilized by Admiral Way. In fact, by September of 2003, the architect still did not believe the project was substantially complete. CP 546 at Par. 14.

Both Respondents Exterior Metals and SQI emphasize that the Project Architect to this day

has not issued a certificate of substantial completion. See Exterior Metals Brief at P. 7; See also SQI Brief at P. 5. Apparently, they believe the fact diminishes the importance of the architect's role in the entire process. Instead, the fact highlights the contractual nature of the architect's authority. Specifically, the project architect only had authority because it was granted to him by the Prime Contract. CP 429, 469. Thus, when Ledcor and Admiral Way later agreed the project was substantially complete in their February of 2004 Construction Agreement Addendum, the Project Architect lost his authority. CP 526-529.

By ruling that substantial completion occurred when the Certificate of Occupancy was issued and the condo units were offered for sale, the trial court failed to consider valid, material and conflicting evidence. The result of the ruling is that the parties' contract,

intended to assist in providing guidance to the statutory definition, is rendered meaningless. Contrary to this consequence, long established Washington law provides:

...an interpretation of such a writing which gives effect to all of its provision is to be favored over one which renders some of the language meaningless or ineffective.

See Newsome v. Miller, 42 Wn.2d 727 at 731, 258 P.2d 812 (1953). The Prime Contract provisions on substantial completion should be enforced to be effective.

C. **Marketing Condominium Units For Sale Does Not Equate to Substantial Completion**

SQI argues that Admiral Way marketing the condominium units for sale in March of 2003 means that the project was being used for its intended purpose and was thus substantially complete. See SQI Brief, Pgs. 16-17. Exterior Metals goes further by claiming that since units were marketed as "turnkey", they were obviously sold for "immediate occupancy". See Exterior Metals

Brief, P. 5. Thus, the project was surely substantially complete.

In reality, the entire project was not substantially complete when Admiral Way began marketing condominium units. In fact, there is absolutely no evidence that the condominium units were ready for "immediate occupancy" when they were marketed for sale. The record does not support the assertion. On the contrary, while Admiral Way started marketing units as "turnkey" in April of 2003, the only evidence submitted on the topic establishes that they were not substantially complete. CP 1027-1028; 1060-1061.

The Architect testifies that when Admiral Way began to market the units, there remained significant work needing completion, including individual condominium units. Thus, the architect crafted the punch list work to correspond to each condominium unit number. CP 546 at Par. 12. In this way, when a buyer

entered into a contract to purchase a particular unit, Leducor could give priority to complete the work in that unit prior to it being turned over to the buyer. CP 546 at Par. 12. While the particular unit would thus be complete and ready for occupancy, there remained other units awaiting completion until they were "under contract" with a new buyer.

It is noteworthy that the Brief submitted by Respondent Skyline Sheet Metal, Inc. (hereinafter "Skyline"), relies on a Washington Court of Appeals determination of substantially complete to bolster its position See Skyline Brief, P. 13 citing Glacier Springs Property Owner's Association v. Glacier Springs Enterprises, Inc., 41 Wn.App 829 at 832, 706 P.2d 652 (Div. I, 1985). In reality, the Glacier Springs Court found substantial completion only after considering the uncontroverted testimony of two engineer experts who stated their opinion as to

when the project was "being used for its intended purpose". See Glacier Springs at 832. In the present case and similar to the Glacier Springs engineer, the only expert to offer an opinion on substantial completion was the Admiral Way architect. CP 546. Based on Glacier Springs, the Court should consider the Project Architect opinion that the Admiral Way project was not substantially complete as urged by Respondents.

The Glacier Springs case goes on to offer even better guidance. Specifically, in Glacier Springs, the subject project (i.e. a water distribution system) was being used by the owners for one and one-half years but to be fully operational, it needed a water storage tank added at some future point. See Glacier Springs at 831. The Glacier Springs Court determined that even though the water system could be used by the owner, it eventually needed the water storage tank and thus the project was not substantially

complete until it was installed. See Glacier Springs at 832. The Court specifically held:

Substantial completion of construction occurs when the entire improvement, not merely a component part, may be used for its intended purpose.

See Glacier Springs at 832 citing Patraka v. Armco Steel Co., 495 F. Supp 1013 (M.D.Pa. 1980). Similarly, the Admiral Way project was not substantially complete when the individual condo units were offered for sale as they were only a "component part" of the entire project.

As set forth in Admiral Way's opening Brief, the Washington Court of Appeals previously held that a finding of substantial completion demands an analysis of all facts specific to each case. See 1519-1521 Lakeview Blvd. Condominium Assoc. v. Apartment Sales Corp., 101 Wn.App. 923, 6 P.3d 74, affirmed 144 Wn.2d 570, 29 P.3d 1249 (2001). While the Lakeview Court found substantial completion, the factual finding was limited to "in this case" and "the record does not indicate"

otherwise, meaning that other facts will dictate different results. See Lakeview at 79. In other words, all facts including the project architect's opinion, must be considered to determine substantial completion.

### III. CONCLUSION

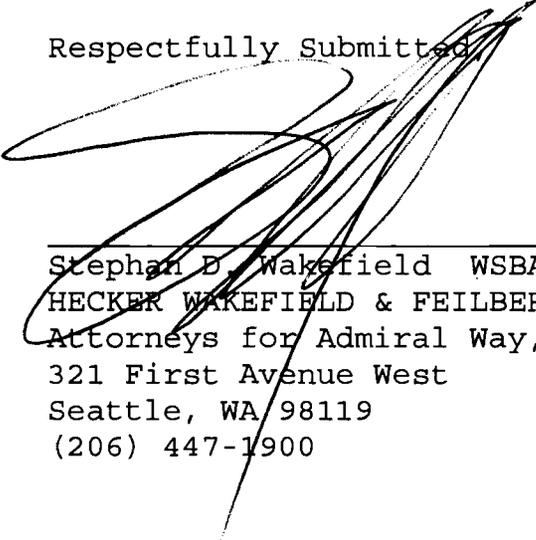
The problem for Respondents is convincing the Court to disregard the Project Architect's crystal clear testimony that the Project was not complete when the Certificate of Occupancy was issued or the condo units were offered for sale. They realize that if the Court gives the testimony any weight, summary judgment was not appropriate. They thus either argue that the Prime Contract is not enforceable or the fact of selling units or issuance of a Certificate of Occupancy automatically "trumps" the architect.

Ultimately, the Prime Contract supplements the statutory definition of substantial completion. Thus, the Admiral Way architect

opinion that the project was not substantially complete must be given at least equal weight to all other factors. Under the circumstances, summary judgment with such conflicting facts is not appropriate.

**DATED** this 21st day of September, 2011.

Respectfully Submitted



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DECLARATION OF  
SERVICE

12 I, Leslie Kay Peppard, hereby certify under  
13 penalty of perjury under the laws of the State of  
14 Washington that on September 21, 2011, I caused to  
15 be filed with the Court, via ABC Legal Messengers  
Incorporated, the originals of the following  
documents:

- 16 1. Admiral Way LLC's Joinder of Ledcor  
17 Industries (USA), Inc.'s Reply Brief; and  
18 2. Declaration of Service.

19 and served copies of the above-named documents  
upon:

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