65732-1

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No. 65732-1-I

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

COASTAL COMMUNITY BANK,

Third-Party Defendants/Appellants,

vs.

MADI GROUP, INC.,

Third-Party Plaintiff/Respondent.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

APPENDICES

I. INTRODUCTION

This case involves a dispute between the lender, Coastal Community Bank ("Coastal") and the architect Madi Group, Inc. ("Madi") regarding priority of Coastal's deed of trust and the materialman's lien for professional services.

Coastal loaned money to Pacific Ventures Redmond Ridge, LLC ("Pacific Ventures") for the purpose of purchasing real property and development of that property. Pacific Ventures hired Madi to provide design and engineering services. After developing plans and engineering for the project Pacific Ventures failed to pay Madi and therefore Madi filed its lien for professional services under RCW 60.04. A few months later, Madi negotiated with Pacific Ventures to provide additional time for payment and accepted additional security in the form of a promissory note and deed of trust from Pacific Ventures.

Pacific Ventures never paid. Madi filed suit for foreclosure of its lien. Coastal claims that Madi effectively waived its lien rights by accepting additional security in the form of a promissory note and deed of trust.

Coastal admits that it knew Madi was providing professional services prior to Coastal recording its deed of trust. Coastal claims that

despite this fact, RCW 60.04.031(5) gives Coastal priority because Madi did not record a notice of rendering professional services. Madi maintains that because Coastal had actual notice of Madi's services, RCW 60.04.031(5) gives Madi priority because no notice of professional services was required.

The trial court approved Madi's positions on these two issues and granted Madi summary judgment. This appeal followed.

II. RESPONSE TO ASSIGNMENTS OF ERROR

A. Implied Waiver. The trial court properly determined that there was no implied waiver.

B. Notice Under RCW 60.04.031(5). The trial court properly determined that because Coastal had actual notice of Madi's services, Madi's lien related back and gave Madi priority under RCW 60.04.021 and RCW 60.04.061.

C. Attachment Of Madi's Lien. The trial court properly struck the trial date because the cross motions for summary judgment addressed all remaining issues between the parties and Coastal did not present any issues to the trial court other than waiver and notice.

III. RESTATEMENT OF ISSUES

1. **Waiver. Where there has been no express waiver of lien rights and no unequivocal acts by Madi clearly showing an intent to waive lien rights, does accepting a promissory note and deed of trust waive Madi's lien rights as a matter of law? Answer: No.**

2. **Actual Notice Of Professional Services. Where Coastal had actual notice of Madi's services prior to Coastal recording its deed of trust, is Coastal's deed of trust subordinate to Madi's lien under RCW 60.04.031(5) and RCW 60.04.061? Answer: Yes.**

3. **Lien Requirements Were Not Included In Summary Judgment Pleadings or Arguments: Failure To Raise Issues Regarding The Amount And Nature Of Madi's Services. Where Coastal only presented and argued the issues of waiver and actual notice to the trial court should Coastal be prohibited from raising new issues on appeal? Answer: Yes.**

IV. STATEMENT OF THE CASE

Madi is an architectural firm licensed in the State of California. In 2007 Madi agreed to perform services for the development of property located in the Redmond Ridge development located in Redmond, Washington. For this purpose Madi retained consultants licensed in the State of Washington as is allowed for architects and engineers. The project consisted of developing plans and drawings for an office condominium complex to be owned by Madi's client, Pacific

Ventures. Madi's contact at Pacific Ventures was Bill Hegger.[1] Mr. Hegger informed Madi about the project in January 2007 and Madi took steps to begin developing designs and plans.[2] Some of Madi's personnel visited the project site and plans were developed for the project.[3]

According to title records, Coastal recorded its Deed of Trust on May 7, 2007.[4] By the time Coastal recorded its Deed of Trust, Madi had already been providing professional services for months.

Through the remainder of 2008 and until March of 2009 Madi provided additional services for the project in conjunction with its local architectural consultants and engineers. Ultimately, permits for the project were applied for using Madi's designs and work product.[5] Small progress payments were made by Pacific Ventures, but by March 1, 2009 the bill had grown to $186,795.00 with accrued interest of $28,466.10.[6] Mr. Hegger repeatedly promised payment to Madi but no subsequent payments were received.

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[1] These factual statements and references are verified by the Declaration of Vijay Jayachandran, President of Madi Group, Inc. hereinafter referred to as "Jayachandran Decl." CP 92-98.

[2] Leroux Email, Jan. 23, 2007, CP 115.

[3] Id.

[4] Coastal Deed of Trust, May 7, 2007, CP 117-128.

[5] Hegger Emails, October 10, 2008, CP 129-133.

[6] Madi Invoice, CP 135.

At that point in March of 2009, Madi needed to protect its lien rights and filed its lien on March 6, 2009.[7] At about the same time Madi recorded its notice of supplying professional services.[8] The lien was filed in part as a precaution due to the running of the 90 day limitations period running from Madi's last day of working on the project, which was December 11, 2008. A copy of the lien was mailed by counsel for Madi to Mr. Hegger and Pacific Ventures by certified mail.[9] Shortly thereafter, Mr. Hegger acknowledged receiving the Lien Letter.[10]

Mr. Jayachandran had a conference with Mr. Hegger on March 18, 2009 regarding his outstanding bill and the fact that Hegger still needed Madi's assistance with the project. Mr. Jayachandran asked him for financial information and a list of all liens against the project. Mr. Hegger offered to execute a deed of trust and promissory note if Madi would simply assist Hegger in attempting to get the project built.[11]

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[7] Lien, March 6, 2009, CP 137-138.
[8] Notice Of Professional Services, CP 139.
[9] Lien Letter, March 6, 2009, CP 142-145.
[10] Hegger Email, March 16, 2009, CP 147.
[11] Jayachandran Decl., ¶6, CP 94.

In June of 2009, Mr. Hegger executed the Promissory Note and Deed of Trust.[12] At no time prior to executing the Promissory Note and Deed of Trust did Mr. Hegger indicate that he expected Madi's lien rights to be waived or the existing lien to be released.[13] There are no emails, letters, or other documents expressing that intent and at no time did Madi promise or intend to release any of Madi's lien rights.[14] This is why the Promissory Note specifically states that only upon receiving payment of all amounts due under the Promissory Note would litigation be dismissed and liens released.[15] It was specifically contemplated that Madi might have to file suit on its lien prior to the due date of the Note, but Madi agreed not to take a judgment in order to accord Mr. Hegger and his company additional time to put the project and his financing together.[16] Madi wanted to preserve and protect its lien rights but also wanted to provide additional security in case any problem developed with its lien.[17] Madi had not filed its notice of professional services at the beginning of the project. Madi also did not have information in July of

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[12] Promissory Note, CP 154-155, and Deed of Trust, CP 156-161.
[13] Jayachandran Decl., ¶7, CP 94.
[14] Id.
[15] Id.
[16] Id.

2009 about whether Mr. Hegger's lender had actual notice of Madi's services.[18] Without such notice Madi's lien rights could have been in jeopardy and the property could be sold or "flipped" to a third party without paying the outstanding bill. The Deed of Trust accorded additional security for the debt and also liquidated the amount of the debt that was due. The disadvantage of the Deed of Trust as opposed to Madi's lien rights was the Deed of Trust was recorded after the Coastal Deed of Trust and therefore subordinate. Thus Madi did not want to waive its lien rights in accepting and recording the Deed of Trust.[19]

At the same time Mr. Hegger was executing the Promissory Note and Deed of Trust, Madi was still discussing the project with Mr. Hegger.[20] After recording the fully executed Deed of Trust, Madi sent Mr. Hegger plans and specifications for his use in developing the project.[21] Mr. Hegger used the plans in his attempts to secure additional financing through the fall of 2009.[22]

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[17] Id. at CP 95.
[18] Id.
[19] Id.
[20] Hegger Email, June 30, 2009, CP 147.
[21] Madi Email, July 9, 2009, CP 168-169.
[22] Hegger Email, August 19, 2009, CP 173-175.

No payments were ever received on the Promissory Note or on the amounts due Madi.

Madi sued Pacific Ventures and Coastal to foreclose its lien. Coastal claimed in its Answer that by accepting additional security in the form of the Promissory Note and Deed of Trust Madi waived its lien.[23] This is the sole affirmative defense claimed by Coastal. In response to Madi's summary judgment motion Coastal claimed that taking the Promissory Note and Deed of Trust constituted waiver as a matter of law.[24] At no time in its answer, or on summary judgment did Coastal claim that there was a question of material fact that necessitated a trial nor could it. Coastal did not submit any declarations or other documents calling the amount or nature of Madi's lien into question. Coastal also did not contest any of the statements in Mr. Jayachandran's Declaration. On summary judgment, Coastal presented only two issues to the trial court: 1) Implied Waiver, and 2) Compliance with RCW 60.04.031(5).

Coastal now argues for the first time on appeal that there is some question of material fact as to when the contract between the parties was

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[23] Answer, CP 12.
[24] CP 25.

executed and the date of the contract.[25] But besides the general prohibition of making arguments for the first time on appeal, the question of the precise date when Madi started providing professional services or the date of the contract is irrelevant. Coastal's counsel admitted at oral argument that Coastal knew Madi was providing professional services and started providing professional services prior to Coastal recording its deed of trust: "We know based on the documents that we've obtained and provided to the Court that the date of January 23 is not accurate, but we do know that they did begin work prior to recording of Coastal's deed of trust."[26] Thus Coastal has already admitted that the key question concerning priority of Madi's lien has been answered - under RCW 60.04.061 Madi's lien relates back to before Coastal recorded its deed of trust.

Coastal also argues for the first time on appeal that there is some question about the nature of Madi's services and whether they were for improvements to the property and whether Madi's lien attached to improvements or to the real property itself.[27] Coastal further argues for

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[25] Appellant's Brief, p.3.
[26] RP p.4.
[27] Appellant's Brief, pp. 29-34.

the first time on appeal that somehow RCW 60.04.021 limits the lien to improvements only and not the real property.[28] These arguments were never submitted to the trial court either in argument or in the summary judgment pleadings.

Madi and Coastal filed cross-motions for summary judgment. The trial court found that there was no clear evidence of waiver and denied that argument.[29] The trial court also found that under RCW 60.04.031(5) Coastal had actual notice of Madi's services and therefore did not have priority over Madi's lien.[30] As admitted by Mr. Adams at oral argument, these were the only issues submitted to the trial court on summary judgment: "Court: Are there other issues left to be decided today? . . . Mr. Adams: We only raised the two on our motion, which were waiver and ***McAndrews,*** so Court has dealt with those."[31]

The trial court entered judgment foreclosing Madi's lien.[32] Coastal then filed this Appeal.

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[28] Appellant's Brief, pp. 31-32 and 42-45.
[29] RP, 31, ll.22-25.
[30] Id.
[31] RP 32, ll. 19-23.
[32] Judgment Summary, CP 320-323.

V. LEGAL ARGUMENT

A. Standard On Summary Judgment.

Summary judgment is proper "if the pleadings, affidavits, and depositions establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law."[33] The non-moving party is required to provide affidavits containing facts that raise material questions of fact for trial. "Mere unsupported conclusory allegations and argumentative assertions will not defeat summary judgment."[34]

Coastal failed to provide the trial court with any facts in support of its waiver or notice defenses. Coastal also failed to file any affidavits or other credible evidence contradicting Mr. Jayachandran's Declaration. Thus Madi was entitled to judgment as a matter of law.

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[33] ***Jones v. Allstate Ins. Co.***, 146 Wn.2d 291, 300-301, 45 P.3d 1068 (2002).

[34] ***Absher Constr. Co. v. Kent Sch. Dist. No. 415***, 77 Wn. App. 137, 141-142 (1995) ***citing***, ***Vacova Co. v. Farrell***, 62 Wn. App. 386, 395 814 P.2d 255 (1991).

B. Waiver: Washington Law Requires Clear Proof Of Waiver And Implied Waiver Requires Unequivocal Conduct – Taking Additional Security Is Not Unequivocal Conduct.

The sole defense asserted by Coastal in its answer was waiver.[35] In its motion for summary judgment, Coastal only raised two claims: 1) Waiver, and 2) Notice under RCW 60.04.031(5).

Coastal claimed that Madi waived its lien for professional services by taking additional security in the form of a promissory note and deed of trust. "The potential lien claimant, Madi, waived any mechanic's lien it has as a matter of law by taking multiple deeds of trust and a promissory note on the same property subject to the claimed lien."[36]

The proof submitted by Coastal on summary judgment clearly indicated its legal theory was based strictly on implied waiver rather than express waiver. There is no evidence of express waiver in this case.

For instance, in its responses to Madi's Request for Admissions, Coastal admitted it had no documents showing an "express waiver" of

[35] Answer, CP 12.

[36] Coastal Mot. For Summary Judgment, CP 22.

Madi's lien claims.[37] Therefore Coastal's claims depend entirely upon implied waiver as a matter of law.

It has been well established by our Supreme Court that implied waiver requires unequivocal acts showing intent to waive:

> The Court of Appeals misapplied the law. While in some cases equivocal conduct does create an issue of material fact, in which case it would be improper to grant summary judgment, such ambiguity here means that the conduct by definition was not unequivocal, as is required for waiver: "**[W]aiver by conduct 'requires unequivocal acts of conduct evidencing an intent to waive**.'" ***Mike M. Johnson***, 150 Wn.2d at 391 (emphasis added) (***quoting Absher***, 77 Wn. App. at 143). At most, the fact that the City agreed to consider negotiations—and we point out that the City never did enter into negotiations, for it never received the information it required as a prerequisite to doing so—constitutes equivocal conduct. **Equivocal conduct by definition cannot be unequivocal**, and the Court of Appeals thus erred when it found that "the equivocal nature of the City's conduct" warranted a trial on the merits. ***Am. Safety***, 133 Wn. App. at 661 (emphasis added). Given that the City three times expressly asserted that it was not waiving its defenses, a reasonable juror could not find that the City unequivocally did exactly the opposite. Amicus Washington State School Construction Alliance points out that "[t]he 'unequivocal acts' standard is demanding for good reason. Waiver permanently surrenders an established contractual right." Br. of Amicus Curiae Wash. State Sch. Constr. Alliance at 11 (emphasis added).

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[37] Admissions, CP 209.

> ***Am. Safety Cas. Ins. Co. v. City of Olympia***, 162 Wn.2d 762, 771 (2007).

Here, the most that can be said is that taking the Promissory Note and Deed of Trust were equivocal acts. But without more indication of actual intent to waive, Coastal's implied waiver defense must fail.

Similar arguments involving waiver of liens through subordination agreements have been strictly construed. "We think that the better rule is that subordination agreements of this kind are to be strictly construed."[38] Moreover, the law in Washington is that waiver of lien rights must be proved by "clear, certain and unequivocal" evidence:

> A lien right is a valuable right and **its waiver is not to be presumed**, and any waiver must be established by evidence that is "clear, certain and unequivocal." ***Emrich v. Gardner & Hitchings, Inc.***, 51 Wn.2d 528, 320 P.2d 288 (1958); ***Pacific Lumber & Timber Co. v. Dailey***, 60 Wash. 566, 111 Pac. 869 (1910).
>
> ***Boise Cascade Corp. v. Distinctive Homes***, 67 Wn.2d 289, 290 (1965)

In ***Boise Cascade*** the court determined that there was no express waiver of lien rights and that acceptance of a promissory note was not proof of waiver based in significant part upon the provisions of former

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[38] ***Ban-Co Inv. Co. v. Loveless***, 22 Wn. App. 122, 134 (1978).

RCW 60.04.140, now re-codified as RCW 60.04.191. That statute provides that any waiver must be expressly included in the terms of a promissory note taken "as payment" for the amounts due under the lien:

> The taking of a promissory note or other evidence of indebtedness for any labor, professional services, material, or equipment furnished for which a lien is created by this chapter **does not discharge the lien therefor, unless expressly received as payment and so specified therein**.
>
> Nothing in this chapter shall be construed to impair or affect the right of any person to whom any debt may be due for the furnishing of labor, professional services, material, or equipment to maintain a personal action to recover the debt against any person liable therefore.
>
> Rev. Code Wash. (ARCW) § 60.04.191 (emphasis added.)

The ***Boise Cascade*** court reversed the trial court because the claimed waiver did not meet these conditions. Thus as commented upon by the court in ***Boise Cascade***, there is a strong public policy that waiver of lien rights is not to be presumed and any such waiver must be expressed in the underlying promissory note.[39]

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[39] ***Boise Cascade***, 67 Wn.2d at 292.

Here, there was no waiver of lien rights contained in the Promissory Note or Deed of Trust.[40] It is also clear that under the terms of the Promissory Note any release of lien rights will only occur "after" payment in full.[41] Thus by the express terms contained in the Promissory Note, Madi preserved its lien rights until payment was received in full:

> "This note is an accommodation of outstanding charges under the contract between the parties to allow the Maker to pay its outstanding balance over the time periods described herein. This is not a commercial or consumer loan but is an agreement to make payments on an outstanding debt due Holder. Holder agrees to forebear other means of collection, including delaying judgment on any ongoing litigation, provided all payments are made as provided herein. Upon completion of payments (and only then) of all amounts required under this Note and the Deed of Trust securing this Note, Holder agrees to return the original of this Promissory Note to Maker, reconvey any and all security conveyed as security for this Note, dismiss any pending liens and lawsuits, and take any other actions reasonably necessary to relieve Maker and its pledged property from the debts represented by this promissory note and the related Deed of Trust. The amounts due under this Promissory Note may be paid in whole or in part at any time prior to maturity."
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> [Promissory Note, CP 154 (emphasis ours.)]

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[40] Promissory Note, CP 154.

[41] Id..

Thus the document by its express terms recognizes the existence of lien rights by Madi and the fact that litigation may be commenced and maintained prior to maturity. The only commitment by Madi was to forebear obtaining judgment. There was no commitment to release its existing lien or to refrain from perfecting its lien by filing suit. In fact, the statements in the Promissory Note specifically contemplate the existence of litigation and a lien at the time final payment is made.

The Promissory Note also conclusively established the "contract price" due Madi. Under RCW 60.04.151 a lien claimant is entitled to recover its "contract price" as a lien upon the real property:

> The lien claimant shall be entitled to recover upon the claim recorded the contract price after deducting all claims of other lien claimants to whom the claimant is liable, for furnishing labor, professional services, materials, or equipment; and in all cases where a claim of lien shall be recorded under this chapter for labor, **professional services**, materials, or equipment supplied to any lien claimant, he or she shall defend any action brought thereupon at his or her own expense.
>
> RCW 60.04.151 (emphasis added.)

In its summary judgment motion Madi specifically stated that "There is no evidence that all of the requirements for an enforceable lien

have not been met."[42] Coastal did not contest this statement other than making passing mention of an inaccuracy regarding the start date of Madi's services. Coastal did not contest any of the other underlying requirements for an effective lien.[43]

Coastal would have this Court ignore the public policy behind RCW 60.04.191 and hold that the taking of a deed of trust automatically invalidates a materialman's lien on the same property. But this theory runs counter to modern concepts of additional and alternate security.

It also reads out of the statute the language "or other evidence of indebtedness" which would clearly include a deed of trust.

No case in Washington has ever held that a lien claimant that accepts additional security in the form of a promissory note and a deed of trust constitutes waiver of its lien "as a matter of law." The Promissory Note and Deed of Trust executed by Pacific Ventures was simply an additional form of security and is "evidence of indebtedness" within the meaning of RCW 60.04.191. The Promissory Note clearly

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[42] Madi Motion For Summary Judgment, CP 106, ll.4-5.

[43] RP, 32.

falls within the statute and cannot be deemed to waive the lien unless it expressly includes language so specifying.

Coastal misperceives the nature of a deed of trust as another form of lien rather than conveying title. A deed of trust has little meaning apart from the underlying note.[44] As previously held by this Court, Washington is a lien theory state and a deed of trust conveys only a lien, not title to real property:

> The original version of this statute was passed in 1869. Before that time, a mortgage vested fee title to the property in the mortgagee and he or she was entitled to possession after default. In 1869, the original version of RCW 7.28.230 **changed the nature of a common-law mortgage from a conveyance to a security instrument and it expressed the new public policy that the mortgagor was to retain possession until the foreclosure sale**. n4 Through this statute, Washington became a lien theory state.
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> ***Kezner v. Landover Corp.***, 87 Wn. App. 458, 463 (1997) (Emphasis Added.)

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[44] A deed of trust is a species of mortgage and mortgages do not exist but to secure the underlying debt. See, Washington Real Property Deskbook, §46.4(2) & §47.2 (3rd Ed, 1996); *Walcker v. Benson and McLaughlin, P.S.*, 79 Wn. App. 739, (1995) ("because the statute of limitations has expired on enforcement of the underlying promissory note [the note holder] should not be permitted to proceed with its nonjudicial foreclosure of a deed of trust"); *Parker v. Dacres*, 2 Wash. Terr. 439, 446 (1885) ("the debt is the principal fact, and the mortgage is wholly incidental or collateral thereto, and intended to secure its payment").

Coastal cites Black's Law Dictionary as authority and simply states an incorrect rule of law: "A deed of trust **is a conveyance of title** that serves as collateral to secure a loan as a mortgage substitute."[45] As shown above, this has not been the law in Washington for over 140 years regardless of what Black's Law Dictionary might say.

Additionally, the fact that the Promissory Note bears a maturity date later than the expiration of the mechanic's lien is not fatal to the coexistence of the two liens. The lien statute specifically contemplates the extension of credit extending the eight (8) month lien duration.[46] RCW 60.04.191 specifically requires any lien waiver to be included in the terms of the promissory note or other evidence of indebtedness. The mere fact that Madi recorded additional security is not determinative and it was Coastal's burden to provide the trial court with evidence of a clear waiver which it failed to do.

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[45] Coastal cites ***Black's Law Dictionary*** 445 (8th dx. Ed. 2004) and ***Nelson & Whitman***, Real Estate Finance Law, §7.19 (Fifth Ed. 2007) for these propositions but did not attach these authorities or any of the other non-Washington authorities to its brief as required by the RAP.

[46] ***See***, RCW 60.04.141 "if credit is given and the terms thereof are stated in the claim of lien, then eight calendar months after the expiration of such credit..."

The ***Boise Cascade*** court cited strong public policy in favor of protecting lien claimants from implied waiver and specifically addressed the provisions of RCW 60.04.140 (now RCW 60.04.191):

> "But even more important than exhibit No. 4 is **public policy** expressed in a state statute (RCW 60.04.140), which indicates that **a claim that a lien has been waived by the taking of a promissory note must rest on something more tangible than the assertion that such lien was waived by the acceptance of a note or notes**."
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> ***Boise Cascade Corp. v. Distinctive Homes***, 67 Wn.2d 289, 292 (1965) (Emphasis Added.)

It should also be noted that Washington precedent consistently requires clear proof of implied waiver by the party asserting waiver as a defense:

> "A waiver is the intentional and voluntary relinquishment of a known right. ...To constitute implied waiver, there must exist **unequivocal acts or conduct evidencing an intent to waive**; waiver will not be inferred from doubtful or ambiguous factors....The intention to relinquish the right or advantage must be proved, and **the burden is on the party claiming waiver**. Rhodes v. Gould, 19 Wn. App. 437, 441, 576 P.2d 914, review denied, 90 Wn.2d 1026 (1978)."
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> ***Jones v. Best***, 134 Wn.2d 232, 241-242 (1998) (emphasis added.)

Coastal attempts to shift this burden by claiming that the burden is upon Madi to prove its lien. But Coastal never challenged the underpinnings of Madi's lien. The only question here is whether Madi's otherwise valid lien was waived by taking additional security in the form of a promissory note and deed of trust. That is the sole issue before this Court. Once the right to a lien has been established, the remedies of RCW 60.04 are to be liberally construed in favor of lien claimants:

> "Mechanic's and materialmen's liens are creatures of statute, in derogation of common law, and therefore must be strictly construed to determine whether a lien attaches. ***Dean v. McFarland***, 81 Wn.2d 215, 219-20, 500 P.2d 1244 (1972). But if it is determined a party's lien is covered by chapter 60.04 RCW, **the statute is to be liberally construed to provide security for all parties intended to be protected by its provisions. RCW 60.04.900**; see Lumberman's of Wash., Inc. v. Barnhardt, 89 Wn. App. 283, 286, 949 P.2d 382 (1997)."
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> ***Estate of Haselwood v. Bremerton Ice Arena, Inc.***, 166 Wn.2d 489, 498 (2009) (Emphasis Added.)

The only question raised by Coastal before the trial court on summary judgment was whether the lien was subsequently waived. The burden was upon Coastal to support its waiver defense – not the other way around.

Coastal's legal arguments are based upon old law that predates the current statutory framework in Washington. In ***Gorman v. Sagner***,

the Missouri Supreme Court determined that taking of a promissory note and deed of trust released the claimant's materialman's lien as a matter of law because "Why this should be done but for the purpose of discharging the lien and substituting another mode of satisfaction in its stead, it is difficult to imagine."[47] What is clear from ***Gorman*** is that there is (or was) no similar statute to RCW 60.04.191 in Missouri in 1855. Washington statute specifically allows taking of a "promissory note or other evidence of indebtedness" in addition to lien rights without waiver. In the instant case it made perfect sense to take additional security in the form of a promissory note and deed of trust under these circumstances.

At the time the promissory note and deed of trust were taken from Pacific Ventures in June of 2009, it was unknown whether Coastal in fact had received actual notice of Madi's services.[48] Thus the viability of Madi's lien rights were in question because a notice of professional services had not been filed. In order to protect Madi's rights in case some attempt were made to convey the real property or further encumber the real property and in case Madi's lien rights were somehow defective,

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[47] ***Gorman v. Sagner***, 22 Mo. 137 (Mo. 1855).

Madi accepted the promissory note and deed of trust.[49] This concept of "covering bets" and liquidating claims gives additional security even though it is on the same property. It is also specifically contemplated by RCW 60.04.191.

The two Wisconsin cases cited by Coastal actually support Madi's claims. In ***Phoenix Mfg. Co. v. McCormick Harvesting Mach. Co.***, the Wisconsin Supreme Court held that the taking of a promissory note and deed of trust did not waive a materialman's lien as a matter of law but could be considered as possible evidence of waiver:

> "The ultimate question is one of intent. If the parties, by their transaction, intended a waiver of the lien, no doubt such result is accomplished. If they intended that the lien should not be waived, **but that the security should be taken merely as additional thereto, such intent will be given full effect by the courts. The significance, therefore, of such acts is evidentiary only**. They may serve to warrant the inference of an intent to waive in the absence of other satisfactory evidence on the subject."
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> ***Phoenix Mfg. Co. v. McCormick Harvesting Mach. Co.***, 111 Wis. 570, 573-574 (1901) (emphasis added, trial court's dismissal of lien reversed.)

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[48] See, Declaration of Vijay Jayachandran p.3, ¶ 7.
[49] Id.

How ***Phoenix Mfg.*** helps Coastal's argument is difficult to see. The holding is parallel to that of ***Boise Cascade*** in that common law waiver is a question of intent that must be proved by clear evidence.

The second Wisconsin case cited by Coastal is distinguishable on its facts but actually supports Madi. In ***Roseliep v. Herro***, the trial court prohibited the plaintiff from maintaining a second lien foreclosure action after it had obtained a personal judgment against the same defendant based upon a promissory note. The reasoning of the trial court was that the right to foreclose the lien merged into the personal judgment. The appellate court reversed holding that the two actions were not mutually exclusive.[50] ***Roseliep*** held that even though the plaintiff obtained a judgment on the promissory note, it could still pursue its lien foreclosure. Moreover, the fact that the plaintiff also had a chattel lien did not waive the materialman's lien. Again, the court enforced the same rule that is now included in RCW 60.04.191 – i.e. acceptance of alternate or additional security in the form of a promissory note does not waive existing liens. It is a question of intent that in Washington must be shown by clear evidence.

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[50] Coastal uses the term "repugnant" several times in its brief but not a single case cited by Coastal uses this term.

Coastal compounds its misstatements of its supporting case law by failing to disclose contrary authority in the same jurisdiction that holds taking of security must be read in light of the agreement between the parties and the party seeking to avoid the liens must have performed:

> There has been great conflict in the decisions on the subject of waiver of mechanics' liens by taking security or by acts and agreements showing an intention inconsistent with the right to file liens. But the authorities seem quite uniform on the proposition that where a party relies on a special agreement or promise to give security as a waiver of lien rights, he should show compliance on his own part with his agreement. The right given by statute to laborers and materialmen for their protection is highly favored by legislation and the courts, and ought not to be impaired by one who pleads an agreement with which he himself has failed or refused to comply...."
>
> ***Carl Miller Lumber Co. v. Meyer***, 183 Wis. 360, 367 (Wis. 1924) (Copy Attached.)

Thus this decision by Wisconsin's highest court of a statute that is similar to that of RCW 60.04.191 requires the party claiming waiver to have performed its contract. Of course neither Coastal nor Pacific Ventures can meet this burden. Pacific Ventures never paid what was owed under the Promissory Note and therefore is not entitled to a release of Madi's lien. The Promissory Note specifically required payment in

full in order for Madi's lien to be released. This is a far cry from any evidence of intent to waive Madi's liens.

It must also be noted that the cases cited by Coastal are based almost exclusively upon the common law at that time. The statutory law concerning liens and other commercial statutes was only starting to be developed in the middle of the 19th century. The Missouri case and Wisconsin cases cited by Coastal date prior to the American civil war and reflect the old common law hostility toward statutory liens. This is not to say that these dated cases do not hold some value, far from it. But in the ensuing century, significant changes in lien and security law have developed as illustrated by Washington's statutory lien law modifications.

In this case, Madi wanted to ensure a lien upon the property would be effective on June 30, 2009, the date it released its work product and plans to Pacific Ventures. At that time, it was unknown whether the lien could or would relate back to the start of work because there was no communication directly between Coastal and Madi. Thus it was unknown whether Coastal had actual notice of the services by Madi. Once the lien foreclosure action was started five months later and

discovery had been obtained it became clear that Coastal had actual notice of Madi's services from the very beginning. But as of June 30, 2009, when Madi took the Pacific Ventures promissory note and deed of trust, this was unknown.

There is no proof (oral or written) of intent to waive Madi's lien. RCW 60.04.191 allows a lien claimant to accept a promissory note and other evidence of indebtedness in addition to its lien. Madi's lien was not waived and the trial court should be affirmed.

C. Coastal Had Actual Notice Of Madi's Services – Therefore Coastal Has No Priority Under RCW 60.04.031(5).

The language of RCW 60.04.031(5) is clear – a lender's deed of trust is subordinate to a professional's lien unless the lender recorded its security in good faith and without actual notice that the lien claimant was providing services:

> (5) Every potential lien claimant providing professional services where no improvement as defined in RCW 60.04.011(5) (a) or (b) has been commenced, and the professional services provided are not visible from an inspection of the real property **may record** in the real property records of the county where the property is located a notice which shall contain the professional service provider's name, address, telephone number, legal description of the property, the owner or reputed owner's name, and the general nature of the professional services provided. **If such notice is not recorded, the lien claimed shall be subordinate to the interest of any**

> **subsequent mortgagee and invalid as to the interest of any subsequent purchaser if the mortgagee or purchaser acts in good faith and for a valuable consideration acquires an interest in the property prior to the commencement of an improvement as defined in RCW 60.04.011(5) (a) or (b) without notice of the professional services being provided**.
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> RCW 60.04.131(5) (emphasis added.)

Coastal's responses to Madi's Requests For Admission specifically and unequivocally admit that Coastal had actual notice and knowledge that Madi was providing professional services to Pacific Ventures prior to Coastal recording:[51]

> **REQUEST FOR ADMISSION NO. 11:** Admit that Madi Group, Inc.'s lien [Attached as Exhibit A to these Requests for Admissions] correctly describes the real property upon which Coastal Community Bank claims an interest under its Deed of Trust [A copy of which is attached to these Requests of Admissions as Exhibit B.]
>
> **RESPONSE:** [X] Admit [ ] Deny

> **REQUEST FOR ADMISSION NO. 12:** Admit that prior to Coastal Community Bank recording its Deed of Trust [A copy of which is attached to the Requests For Admissions as Exhibit B] Coastal Community Bank was aware that Madi Group, Inc. was providing professional services for the improvement of the real property at issue in this dispute [Legally described in both Exhibits A and B attached.]
>
> **RESPONSE:** [X] Admit [ ] Deny

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[51] Admissions, CP 209.

REQUEST FOR ADMISSION NO. 13: Admit that prior to Coastal Community Bank recording its Deed of Trust [A copy of which is attached to the Requests For Admissions as Exhibit B] Coastal Community Bank had in its possession design plans created by Madi Group, Inc. related to the real property at issue in this dispute [Legally described in both Exhibits A and B attached.]

RESPONSE: [X] Admit [ ] Deny

REQUEST FOR ADMISSION NO. 14: Admit that you cannot identify any documents that contain an express waiver by Madi Group, Inc. of its lien rights in exchange for a promissory note or deed of trust from Pacific Ventures.

RESPONSE: [X] Admit [ ] Deny

The Admissions couldn't be clearer. Coastal had plans in its possession and it had actual notice. Coastal had every opportunity to contact Madi about subordinating its lien rights or obtaining lien releases but it did not do so. And, Coastal did not provide the trial court with any documents indicating any waiver of Madi's lien rights.

Moreover, Coastal's own exhibits confirm that Coastal had actual notice of Madi's professional services and the nature of those services. Coastal's "Credit Authorization" attached to its motion for summary judgment as Exhibit 1 specifically states that Pacific Ventures and its owners, "Glen and Bill" were using Madi Architects to design the project and obtain permits:

> "Glen and Bill are in the final stages of permit application. They are working with MATI Archtects out of San Francisco, who designed a similar business condo project in Snoqualmie known as "Venture Commerce Center." They are finalizing a budget, site plan, and marketing plan to sell the completed business condos. This loan will enable them to acquire the land, and CCB will consider the proposed development and construction loan when permits are obtained."
>
> [Credit Authorization, CP 75.]

Thus not only did Coastal have notice of Madi providing services, they also knew that it was for purposes of providing a site plan and obtaining permits. Additionally, Coastal planned on using the services and design developed by Madi for approval of the "development and construction loan" once permits were obtained.

RCW 60.04.031(5) has been addressed by the Washington Court of Appeals in one and only one case - ***McAndrews v. Ehmke***.[52] In ***McAndrews*** a surveyor failed to file a notice of professional services and claimed a lien superior to that of a competing lender. The start of the surveyor's services predated the lender's deed of trust. The appeals court did not reach the issue of whether the lender took its interest in good faith and without notice commenting that:

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[52] ***McAndrews Group Ltd. v. Ehmke***, 121 Wn. App. 759, 90 P.3d 1123 (2004).

> McAndrews asserts that "five primary conditions" must be satisfied in order to subordinate a professional services lien under RCW 60.04.031(5), namely that (1) the lien claimant has not recorded a formal "Notice of Furnishing Professional Services"; (2) physical property construction has not commenced; (3) a property inspection reveals no visible signs of professional services; (4) the lender acts in good faith; and (5) **the lender does not have notice of the professional services**. Only three RCW 60.04.031(5) provisions apply here: whether surveying is a professional service, whether no improvements were commenced, and whether surveying stakes are visible professional services. **Whether the lender acts in good faith without notice of the professional services is relevant only if McAndrews was required but failed to record its professional services lien**.
>
> ***McAndrews Group, Ltd. v. Ehmke***, 121 Wn. App. 759, 764 (2004) (fn.4) (Emphasis Added.)

The Court of Appeals in ***McAndrews*** only considered the first three requirements because there was a question of fact whether certain survey stakes would have revealed the surveying activity if a property inspection had occurred. The Court specifically ruled that if RCW 60.04.031(5) does not apply, then the surveyor's lien would have priority over the lender under RCW 60.04.021 (relation back) and RCW 60.04.061.[53]

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[53] RCW 60.04.061 provides: "The claim of lien created by this chapter upon any lot or parcel of land shall be prior to any lien, mortgage, deed of trust, or other encumbrance which attached to the land after or was unrecorded at the

It should also be noted that the ***McAndrews*** court obviously regarded the "notice" to the lender to be actual notice, not the notice of professional services. This makes ultimate sense given that the clause of the statute dealing with good faith of the lender starts with the term "If such notice is not recorded. . ." So where no improvement has been started and there is no proof that an inspection of the property would reveal the professional services, and no statutory notice of professional services has been filed, the lender only has priority "If the mortgagee or purchaser acts in good faith and **without actual notice** of the professional services being provided."[54] The trial court applied all five tests and found that Coastal had notice of Madi's services and therefore Madi had priority.[55]

Coastal attempts to skirt the five requirements of RCW 60.04.031(5) by setting up a misstatement of the court's holding in ***McAndrews***. Coastal claims that there are only three requirements under the statute and ignores the forth and fifth requirements of "good faith and . . . without notice of the professional services being provided." Coastal

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time of commencement of labor or professional services or first delivery of materials or equipment by the lien claimant."

[54] RCW 60.04.031(5).

[55] RP 31, ll. 22-25.

misstates the requirements of RCW 60.04.031(5) and the holding in ***McAndrews*** when it misstates the rule of law as follows: "an architect that fails to record notice of their professional services that are not manifest on the real property until after a purchase money lender records their deed of trust may not claim the priority of a mechanic's lien on the property unless their professional services were visible on the property."[56]

McAndrews says no such thing. The statute says no such thing. ***McAndrews*** only addressed the first three (of five) requirements of RCW 60.04.031(5) because there was a question of fact as to the third requirement -- whether the surveyor's stakes would have been revealed by an inspection of the property. The ***McAndrews*** court specifically stated that only three of the five conditions were applicable to that case and said it did not need to reach the fourth and fifth requirements concerning good faith and notice.[57]

The legislative history of RCW 60.04.031(5) shows that the filing of a notice of professional service is permissive, not mandatory. The 1992 amendments to RCW 60.04.031(5) changed the key terms of the

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[56] Appellant's Brief, p.40.

statute from "shall record" the notice of professional services to "may record."[58] It also added the conditional language "**if** the mortgagee or purchaser" as a predicate to "acts in good faith and . . . without notice of the professional services being provided" thereby making the lender's priority specifically conditional upon "acting in good faith and without notice of the professional services being provided."[59]

What this amendment shows is that the legislative intent was to give priority to a lien for professional services regardless of whether a notice had been filed if the competing lender had prior actual notice, i.e. knew of, the professional's services. This provision obviously has its roots in the legal concept of a "bona fide" purchaser without notice.

Madi does not contest that the first four elements of RCW 60.04.031(5) described in ***McAndrews*** have been met. First, at the time Coastal recorded its deed of trust there were no improvements started. Second, Madi did not record a notice of professional services prior to the time Coastal recorded its deed of trust. Third, inspection of the property would not have revealed that Madi was providing services. Fourth,

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[57] ***McAndrews Group, Ltd. v. Ehmke***, 121 Wn. App. 759, 764 (2004)
[58] 1992 WA laws 126, SB 6441, CP, 236.
[59] Id.

Madi has not claimed that Coastal did not exercise good faith in recording its deed of trust.

The only remaining issue under RCW 60.04.031(5) is whether Coastal had actual notice of Madi's services. It is uncontested that Coastal had notice. As a result, in accord with ***McAndrews***, RCW 60.04.031(5) does not apply to give Coastal priority. Madi's lien relates back to before Coastal's deed of trust under RCW 60.04.021 and RCW 60.04.061, and Madi's lien is superior to that of Coastal's deed of trust. This was precisely the holding in ***McAndrews***.[60]

D. Issues Argued By Coastal For The First Time On Appeal Should Be Disregarded.

Coastal attempts to advance two arguments for the first time on appeal. First, Coastal claims that there are material questions of fact whether Madi met all of the requirements for an enforceable lien.[61] This was never presented to the trial court on summary judgment and should be disregarded by this court because no record has been developed on this issue and there was no opportunity for Madi to respond.

> "It is the responsibility of the moving party to raise in its summary judgment motion all of the issues on which it believes it is entitled to summary judgment." White v.

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[60] See, ***McAndrews***, 121 Wn. App. at 764.

[61] Appellant's Brief, pp. 42-45.

> Kent Med. Ctr. Inc., 61 Wn. App. 163, 168, 810 P.2d 4 (1991). Further, "[a]llowing the moving party to raise new issues in its rebuttal materials is improper because the nonmoving party has no opportunity to respond." Id.
>
> ***Cox v. Oasis Physical Therapy***, PLLC, 153 Wn. App. 176, 194 (2009)

Second, Coastal asserts a novel theory about two different liens under RCW 60.04, one that attaches only to improvements and one that attaches to the real property.[62] This argument was not included in any of the summary judgment pleadings or arguments to the trial court. This argument should also be disregarded by this Court for the same reasons.

1. Defective Lien Allegation Is A New Argument.

Coastal's Response To Madi's Motion For Summary Judgment included a short argument that Madi's lien had the wrong start date of Madi's work and therefore was defective.[63] This is the only mention of any question concerning Madi's lien in the summary judgment proceedings. At oral argument counsel for Coastal admitted that the question concerning the work start date was irrelevant because Coastal conceded that whatever the date may have been, Madi's start date was before Coastal recorded its deed of trust. "We know based on the

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[62] Appellant's Brief, pp.29-32.

documents that we've obtained and provided to the Court that the date of January 23 is not accurate, but we do know that they did begin work prior to recording of Coastal's deed of trust."[64] That was the only mention of any alleged defect in Madi's lien.

Moreover, when Coastal's counsel had been informed of the trial court's ruling that no waiver had occurred and Madi had lien priority, counsel for Coastal did not raise any additional issues for consideration by Judge Gonzalez: "Court: Are there other issues left to be decided today? . . . Mr. Adams: **We only raised the two on our motion**, which were waiver and ***McAndrews***, so Court has dealt with those."[65] Thus it is clear that Coastal waived these other arguments about whether Madi's services were for "improvements" and whether the amount billed was correct.

2. The Contract Amounts Due Madi Were Liquidated And Agreed By The Owner.

But even if this Court considers Coastal's arguments about the validity of Madi's lien, they are not supportable for several reasons.

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[63] Coastal Response To Madi's Motion For Summary Judgment, CP 254-255.
[64] RP 4.
[65] RP 32, ll. 19-23.

First, the Promissory Note specifically provides that the amounts admitted to be due from Pacific Ventures (the owner) are for the "contract amounts due."[66] RCW 60.04.021 provides that those rendering professional services shall have a lien for the "contract price of labor, professional services, materials or equipment furnished at the instance of the owner, or the agent or construction agent of the owner."[67] RCW 60.04.011(2) defines "contract price" as "the amount agreed upon by the contracting parties, or if no amount is agreed upon, then the customary and reasonable charge therefor."[68] RCW 60.04.151 provides that "The lien claimant shall be entitled to recover upon the claim recorded the contract price . . ." Thus the amounts due Madi under its contract for professional services were liquidated and determined by agreement as shown by the Promissory Note.

All of the case law cited by Coastal deals with non-professional services. Licensed professionals are given greater deference than other lien claimants under RCW 60.04 as to what is a lienable cost: "(13) "Professional services" means surveying, establishing or marking the

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[66] Promissory Note, CP 154.
[67] RCW 60.04.021
[68] RCW 60.04.011(2).

boundaries of, prepare maps, plans, or specifications for, or inspecting, testing, or otherwise performing any other architectural or engineering services for the improvement of real property."[69] Clearly this is a very broad definition.

Once again, Coastal misstates the holdings of various cases to support its unsupportable arguments. Coastal claims that under the ***Wenatchee Federal Savings*** case "Land use planning and development services are not lienable because they do not improve real property."[70] This is patently false. The actual holding was that a lien claimant for engineering services related to land use planning and development must use the proper form of lien notice under RCW 60.48 (the former lien statute for engineering services, now combined with RCW 60.04.) "One attempting to assert a lien for a specialized type of service under chapter 60.48 must assert the nature of that service as specified therein. A claim of lien for engineering services filed in the general nonspecific form authorized by RCW 60.04.060 is insufficient."[71] The materialman's lien statute (RCW 60.04) did not contain a provision for liens by

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[69] RCW 60.04.011(13).

[70] Appellant's Brief, p.45.

[71] ***Wenatchee Fed. Sav. & Loan Assn. v. Mission Ridge Estates***, 80 Wn.2d 749, 754 (1972)

professionals in 1972. Thus Coastal's misleading statement of law should be disregarded by this court.

The other cases cited by Coastal are of little value given that they pre-date the modern lien laws and specifically the major revisions consolidating all private construction liens in RCW 60.04. The facts remain that Madi negotiated and agreed with the owner as to the amounts outstanding for its contract for professional services and Coastal failed to object to the amounts agreed by the owner. Coastal did not brief or argue these newly minted arguments to the trial court. This court should refuse to consider these arguments, but if for some reason this court considers them it should hold that the amounts due Madi under its contract were liquidated under the terms of the Promissory Note. As a result, Madi has a lien for the established contract price.

3. Madi's Lien Attached To The Real Property, Not Just Improvements.

Coastal has asserted a novel argument that Madi's lien only attached to improvements not the real property improved by its professional services.[72] This argument was never presented to the trial

[72] Appellant's Brief, pp. 28-32.

court in either the summary judgment pleadings or on oral argument. It is baseless in both law and fact.

Coastal claims that the provisions of RCW 60.04.021 apply to only create a lien for professional services upon the "improvement" and not the real property when no building or structure has been constructed. This is an absurd argument because it leads to an absurd result, i.e. the professional only has a lien upon a non-existent structure. It also conflicts with all of the sections of RCW 60.04 that provide for a lien upon the real property for professional services:

> "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 whose instance, directly or through a common law or construction agent of the labor, **professional services**, equipment, or materiasl were funished, as the court deems appropriate for satisfaction of the lien. If for any reason, the title or interest in the land upon which the improviement is situated cannot be subject to the lien, the court in order to satify the lien **may order the sale and removal of the improvement** from the land which is subject to the lien." [RCW 60.04.051.]

RCW 60.04.011 includes rendering professional services on unimproved property within the definition of "improvement": "(5) "Improvement" means: . . .(c) providing professional services upon real property or **in preparation for or in conjunction with the intended**

acivities in (a) or (b) of this subsection."[73] Thus regardless of whether there was an improvement constructed or not, a lien claimant providing professional services has a lien under RCW 60.04.051 against the "lot, tract, or parcel of land . . ."

Coastal resorts to another misstatement of law by claiming that "For the RCW 60.04.021 lien to attach to the real property and become an RCW 60.04.061 lien, the professional services must "improve" the real property, i.e. be "situated" upon the land. RCW 60.04.051." That statement of law has no support in the statutes or the case law. RCW 60.04.051 specifically provides for a lien against the "lot, tract, or parcel of land." RCW 60.04.051. The statute does not use any words resembling "situated" as claimed by Coastal.

Moreover Coastal bases its argument upon a theory that was specifically rejected by our Supreme Court. The dissent written by Justice Alexander in ***Haselwood v. Bremerton Ice Arena, Inc.*** advanced the notion that there were really two liens under RCW 60.04.

In that case, our Supreme Court upheld the Court of Appeals Div. II in soundly rejecting this argument. The Court of Appeals had

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[73] RCW 60.04.011(5).

reversed the trial court holding that RCW 60.04 only has one kind of lien and that the lien attaches to the underlying realty in accord with the provisions of RCW 60.04.051:

> The Haselwoods' interpretation overlooks the very reason for establishing mechanics' liens, namely, "the equitable principles of paying for work done or materials delivered, prevention of unjust enrichment, and estoppel to deny a benefit," as well as preventing detriment to laborers and material suppliers who expend their resources on others' property. 53 Am. Jur. 2d Mechanic's Liens §2 (1996); see also Barber v. Honorof, 116 Idaho 767, 780 P.2d 89, 90-91 (1989); Sun Solutions, Inc. v. Brandt, 300 Ore. 317, 709 P.2d 1079, 1081 (1985). Relation-back statutes are necessary to protect builders' interests because a builder or supplier cannot record a lien to protect its interests until the bill goes unpaid. See RCW 60.04.031(4) (notifying owner that lien may be filed if owner or contractor fails to pay). If priority can be established only on the date of recording, supplies and labor furnished on credit would always be vulnerable to intervening recorded claims. **By enacting the relation-back statute, the legislature intended to safeguard the interests of suppliers and laborers, regardless of whether their improvements constitute part of the realty**. See, e.g., RCW 60.04.051.
>
> Thus, **the trial court erred in interpreting RCW 60.04.061 to relate back only when the lien attaches to real property**. Courts need not read statutes so literally that potentially absurd consequences result. See Fraternal Order of Eagles, 148 Wn.2d at 239. The Haselwoods' overly literal reading of the priority statute creates possible absurd and inequitable results that the legislature did not intend. RV Associates is entitled to establish its

> priority under RCW 60.04.061 as of the date it delivered equipment to the construction site.
>
> **Haselwood v. Bremerton Ice Arena**, 137 Wn. App. 872, 888 (2007)

Coastal asks this court to disregard Supreme Court precedent and hold that there really are two species of liens under RCW 60.04. As stated by the Court of Appeals this would lead to absurd results. The clear ruling of ***Haselwood*** actually supports Madi's claims. Thus this Court should hold that the trial court properly ordered the real property in this dispute to be foreclosed upon and sold to satisfy Madi's lien.

E. Request For Award Of Attorney Fees On Appeal.

In accord with RAP 18.1 Madi requests award of attorney fees and costs on appeal based upon the provisions of RCW 60.04.181 that provides for award of attorney fees and costs on appeal to the prevailing party.[74] In addition, the Promissory Note executed by Pacific Ventures provides for award of attorney fees and costs.[75]

VI. CONCLUSION

The trial court properly denied Coastal's waiver defense. Implied waiver or waiver by estoppel is not to be presumed and the fact that

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[74] RCW 60.04.181(3).
[75] CP 258.

Madi took additional security in the form of a promissory note and deed of trust is not clear evidence of intent to waive. Coastal was obligated to contest summary judgment with facts indicating a material question of fact for trial and it failed to do so.

Coastal had actual notice of Madi providing professional services prior to Coastal recording its deed of trust. The statute and the ***McAndrews*** case are clear – a lender with notice cannot claim priority over a provider of professional services under RCW 60.04.031(5).

Coastal's newly minted arguments concerning the requirements for a valid lien and the two lien theory under RCW 60.04 should not be considered by this Court. They were never argued to the trial court and do not qualify for any exceptions under RAP 2.5.

Madi is also entitled to its attorney fees and costs on appeal as the prevailing party under RCW 60.04.181 and under the terms of the Promissory Note.

DATED this 10th of November, 2010.

INSLEE, BEST, DOEZIE & RYDER, P.S.

By _____
William A. Linton, WSBA #19975
Attorneys for Respondent

APPENDIX A

CARL MILLER LUMBER COMPANY, Respondent, v. MEYER and others, Appellants.

[NO NUMBER IN ORIGINAL]

SUPREME COURT OF WISCONSIN

183 Wis. 360*; *196 N.W. 840*; *1924 Wisc. LEXIS 113

November 17, 1923, Argued
April 8, 1924, Decided

PRIOR HISTORY: [***1] APPEAL from a judgment of the circuit court for Milwaukee county: C. M. DAVISON, Judge. Modified and affirmed.

The Carl Miller Lumber Company is a corporation engaged in the wholesale and retail lumber business. Charles Miller was its president. He owned two thirds of its stock, and his wife one third less one qualifying share held by another party. Mr. Miller had practically the charge and direction of the business.

From the year 1915 to December 9, 1920, the Fehrer & Meyer Company was a copartnership. Mr. Fehrer died on the latter date devising all his property to his widow. The company was engaged in buying and selling real estate, dealing in mortgages, and in building operations.

In 1916 the partnership purchased from the Mariners on a land contract with deferred payments a tract of land including the lot in question. The land contract later became the property of the Mariner Realty Company, and on November 5, 1920, this company deeded this lot to Fehrer & Meyer Company. On August 13, 1920, the following contract was made:

"Milwaukee, Wis., Aug. 13, 1920.

"Messrs. Joseph Fehrer and Frank Meyer,

"c/o Fehrer & Meyer Co., Milwaukee, Wis.

"Gentlemen: [***2] I hereby propose to finance for you the erection of ten (10) flats and ten (10) bungalows on Cramer street within the next few months in the following manner:

"You are to purchase from the Carl Miller Lumber Company, at present market prices, the material for these houses; you are to pay cash for the lots when the houses are ready to be mortgaged to the amount of about sixty per cent. (60 %) of the cost of the property; you are to sell these properties under land contracts and secure a payment down of at least twenty per cent. (20 %) of the value thereof, and turn over to me the land contract with a personal guarantee by you to the payment of the instalments of said land contracts and interest. You are to turn over with the land contract a warranty deed of said properties, with the understanding that when the land contract is paid I will convey back the property to you. The unpaid portions of the land contracts to run at six per cent. (6 %) interest until paid. You are to take care of the insurance, taxes, and the administration of the property until the land contracts are fully paid up.

"This proposition is based on the plan to use the proceeds of the mortgage $ 7,500 and [***3] the first payment of $ 2,500 for the liquidation of claims for the cost of the building and lot, and turn over the equities to me for the settlement of material furnished by the Carl Miller Lumber Company.

"It is understood that you are not to receive any payments for profits upon any of these properties until the Carl Miller Lumber Company is paid up in full, and that six per cent. interest is allowed for deferred payments for lumber, beginning sixty days after delivery of hardwood flooring, until final payment thereof.

"Yours very truly, C. A. MILLER.

"Accepted by Fehrer & Meyer Co.

"Per Joseph Fehrer, Jr."

At this time the Fehrer & Meyer Company, with knowledge of plaintiff, contemplated building twenty houses. For several years before the date of the above

agreement the plaintiff had been selling to the partnership considerable amounts of lumber and had taken their notes which were renewed from time to time until paid, and at this time the plaintiff held such notes to the amount of about $ 25,000. These notes had been secured by land contracts and second and third mortgages.

Before the execution of this contract Charles Miller told F. J. Fehrer [***4] that notes would no longer be acceptable, but that arrangements would have to be made in advance as to payment for the material. All the lumber furnished by plaintiff for the building in question was furnished under the written contract. After the death of Joseph Fehrer, Jr., demand was made upon the plaintiff and Charles Miller to finance the completion of the houses according to the agreement. The demand was refused on the ground that the partnership had not complied with the agreement.

The copartnership proved unable to obtain funds to complete the construction of the house in question and others, and the plaintiff filed its claim for lien on July 31, 1921, and its affidavit for extension on January 31, 1922. The claim and the complaint were not based on the written agreement but upon quantum meruit.

Frank J. Meyer, individually and as surviving member of the partnership, in the answer relied upon the written agreement, claiming that lien rights had been waived thereby and that the plaintiff had failed to finance the partnership as agreed. Other defendants pleaded the same defense, and the Mariner Realty Company claimed priority, if any lien existed, by virtue of a mortgage.

[***5] Other facts will be stated in the opinion.

DISPOSITION: Judgment modified and affirmed.

HEADNOTES

Mechanics' liens: Waiver by agreement: Construction: Corporations: Contract executed in name of president: Purchase-money mortgage: Priority as against liens: Evidence.

1. Where the president of a lumber company owning two thirds of its stock entered into an agreement in his own name to finance the construction of houses for the defendant partnership, and the material was all furnished by the company and not by its president, the company by its acceptance of the agreement, acting on it, and bringing suit for the value of materials, adopted the agreement as its own and was bound thereby. p. 364.

2. A materialman may waive the right to file a mechanic's lien by express agreement; but when an agreement relied on as a waiver is ambiguous, the doubt should be resolved against the waiver. p. 365.

3. Such waiver may be implied from facts and the conduct or agreement of the parties which are inconsistent with the right to file a lien and which manifest an intention to waive the right. p. 365.

4. The contract between the company and the partnership, which contained mutual covenants whereby the partners were bound to turn over deeds and land contracts for the benefit of the company, which supplied the lumber, such land contracts to be subject to a sixty per cent. mortgage on the property on which there should have been paid at least twenty per cent. of the purchase price, does not operate as a waiver of the right to file a mechanic's lien for materials furnished in case of nonperformance by the partnership, since one who relies on a special agreement or promise to give security as a waiver of lien rights should show compliance on his own part with his agreement. p. 367.

5. As against a mechanic's lien claimant who furnished materials for a building between September 9, 1920, and January 31, 1921, a mortgage dated May 6, 1921, will not, in the absence of proof and an appropriate recital in the mortgage, be presumed to have been given for the purchase price of the lot upon which the building was erected, where the deed to the lot was given in November, 1920, pursuant to a land contract executed in 1916. p. 368.

COUNSEL: For the appellants there was a brief by Lines, Spooner & Quarles, attorneys, and Lawrence A. Olwell, of counsel, for the Cramer Realty Company and Mariner Realty Company, and Lawrence A. Olwell and Karbys & Kenney, attorneys, and George A. Gessner, of counsel, for Frank J. Meyer individually and as sole surviving member of the copartnership of Fehrer & Meyer Company, all of Milwaukee; and the cause was argued orally by Mr. Olwell.

For the respondent there was a brief by Connell & Weidner of Milwaukee, and oral argument by Adolph J. Weidner.

JUDGES: BURR W. JONES, J.

OPINION BY: JONES

OPINION

[*364] [**841] The following opinion was filed January 15, 1924:

JONES, J. It is argued by plaintiff's counsel that the terms of the agreement did not bind the plaintiff since it was made and signed in the name of Charles Miller. The material was all furnished by the plaintiff and not by Charles Miller, its president. We do not regard the form

of the contract as conclusive. The plaintiff by its acceptance of the agreement, acting on it, and bringing the suit for the value of the materials, adopted the agreement [***6] as its own. We are convinced by the testimony that the president was acting as the agent of the company.

It is also contended by plaintiff's counsel that the contract was ambiguous, and that by the acts of the parties and their conduct it should be construed as merely a continuance [**842] of their former modes of dealing. In view of the conclusion we have reached it seems unnecessary to discuss this question.

It is one of the contentions of defendants' counsel that the contract was to finance the partnership in its building operations; that it was an agreement whereby funds were to be provided for the erection of the houses and a way of meeting the obligations to be incurred. We do not construe the agreement as one to finance the partnership except in the manner specifically provided therein, and it is unnecessary to repeat the manner in which the financing was to be effected.

It is the main contention of defendants' counsel that the contract operated as a present waiver on the part of the plaintiff of the right to file mechanics' liens; that there was a waiver by reason of the agreement to accept land contracts [*365] and deeds of the property for which the materials were [***7] to be furnished; that it was an unrecorded agreement and made no provision that property sold to innocent purchasers should be liable for liens; that it could not be ascertained when the claim of plaintiff would become due, since the payments were to be deferred until the property was completed, mortgaged, and sold on land contract; that the material was not sold on the credit of the buildings but on the credit of a financing agreement and the money to be derived from the sale of the houses; that the plaintiff was to be paid only out of the net proceeds to be derived from the sale of the property to be improved.

On all these grounds it is insisted that the agreement is wholly inconsistent with any intention to rely on any mechanic's lien as a basis of credit.

There is no doubt that the plaintiff could have waived the right to file a lien by express agreement, although when an agreement relied on as a waiver is ambiguous the doubt should be resolved against the waiver. *Davis v. La Crosse H. Asso. 121 Wis. 579, 99 N.W. 351.*

It is also true that a waiver may be implied from facts and conduct or agreement of the parties which are inconsistent with the right to file [***8] a lien and which manifest an intention to waive the right. For example, this court has held that by accepting a mortgage and promissory note extending the time for payment of an indebtedness for the amount claimed as lien to a period beyond that which the statute prescribes for the commencement of an action to foreclose the lien and by including other indebtedness, the right to assert a lien under the statute is waived. *Miller-Piehl Co. v. McCormick, 170 Wis. 378, 174 N.W. 542.* This is based on the theory, not that the note is taken as payment, but on the ground that the note suspends the time of payment and the payee is estopped from asserting the lien in violation of his contract to extend the time of payment until the note matures.

[*366] But many of the decisions hold that the lien is not waived by merely taking a note and mortgage which are payable before the time fixed by statute for enforcing the lien. *Phoenix M. Co. v. McCormick H. M. Co. 111 Wis. 570, 87 N.W. 458.* See note, Ann. Cas. 1916D, p. 179.

By the Wisconsin statute it is provided that "the taking of a promissory note or other evidence of indebtedness for any such work, labor [***9] or materials done or furnished shall not discharge the lien therefor hereby given unless expressly received as payment therefor and so specified therein." Sec. 3317, Stats.

There is general agreement in the view that the question of waiver is one of intention of the parties, and that if it was the intention, to be gathered from all the facts, that the security is intended as merely additional, the lien is not waived.

The agreement here relied on as a waiver is so unusual that no authorities have been cited or found which seem directly in point on the question whether it was a waiver by operation of law. The proposition has been very ably argued by counsel for appellants, and there is so much force in the contention that if the agreement had been complied with by defendants we should be disposed to accept that view.

But it was a contract containing mutual covenants binding on both the parties. According to its terms defendants were bound to turn over deeds and land contracts for the benefit of the plaintiff; the land contracts were to be subject to a sixty per cent. mortgage on the property on which there should have been paid at least twenty per cent. of the purchase price.

By [***10] the undisputed testimony the two contracts tendered the plaintiff were not in compliance with either of these requisites. Moreover, there were outstanding liens held by other parties.

[*367] There has been great conflict in the decisions on the subject of waiver of mechanics' liens by taking security or by acts and agreements showing an intention inconsistent with the right to file liens. But the authorities seem quite uniform on the proposition that

where a party relies on a special agreement or promise to give security as a waiver of lien rights, he should show compliance on his own part with his agreement. The right given by statute to laborers and materialmen for their protection is highly favored by legislation and the courts, and ought not to be impaired by one who pleads an agreement with which he himself has [**843] failed or refused to comply. *McMurray v. Brown, 91 U.S. 257, 23 L. Ed. 321*; *Van Stone v. Stillwell & B. Mfg. Co. 142 U.S. 128, 12 S. Ct. 181, 35 L. Ed. 961*; *Baumhoff v. St. L. & K. R. Co. 171 Mo. 120, 71 S.W. 156*; *Reynolds v. Manhattan T. Co. 83 F. 593, 601*; *Central T. Co. v. R., N., I. & B. R. Co. 68 F. 90*; [***11] *Gardner v. Hall, 29 Ill. 277*; Phillips, Mechanics' Liens (2d ed.) § 285; 2 Jones, Liens (2d ed.) §§ 1524, 1525; 18 Ruling Case Law 971.

It is claimed by appellants' counsel that a certain mortgage owned by the *Mariner Company* was superior to any lien which the plaintiff might have. In November, 1920, this company conveyed the lot in question to the partnership pursuant to a land contract executed in 1916. On May 6, 1921, the partnership by its agent executed a mortgage for $ 1,120 covering this lot to the *Mariner Company,* which was recorded July 12, 1921. The material was furnished for the building between September 9, 1920, and January 31, 1921.

It is claimed that this was a purchase-money mortgage and a prior lien to any claim of plaintiff. The *Mariner Company* introduced no proof to maintain this claim, and we are asked to presume that the mortgage was given for the purchase of the lot in question. In the absence of any such recital in the mortgage, and in view of the considerable [*368] lapse of time between the execution of the deed and the mortgage, the trial court could hardly indulge in any such presumption. The court found that this lien [***12] was subsequent to that of plaintiff and we concur in that decision. On this question sec. 3314, Stats., is pertinent.

At the oral argument counsel for both parties agreed that the judgment ought to be so modified as to provide for judgment for deficiency, if any, against the defendant *Frank J. Meyer* individually and as surviving member of the partnership. Respondent's counsel asked for this modification by filing exceptions and giving notice for review pursuant to sec. 3326, Stats. On the pleadings and the findings of fact it seems clear that this modification should be made.

There was much testimony as to the rights of the respective lien claimants, and the findings of the court establishing such rights were very elaborate, but no questions are before us except those which have been discussed, since the numerous other defendants have not appealed except the *Cramer Realty Company,* which became a subsequent vendee and subject to the rights of the plaintiff.

By the Court.--Judgment modified as indicated in the opinion, and, as so modified, affirmed.

A motion for a rehearing was denied, with $ 25 costs, on April 8, 1924.

LEXSEE

Positive
As of: Oct 25, 2010

ROSELIEP, Plaintiff, v. HERRO and wife, imp., Defendants and Respondents, and HEATING AND PLUMBING FINANCE CORPORATION, Defendant and Appellant.

[NO NUMBER IN ORIGINAL]

SUPREME COURT OF WISCONSIN

206 Wis. 256; 239 N.W. 413; 1931 Wisc. LEXIS 159

November 12, 1931, Argued
December 8, 1931, Decided

PRIOR HISTORY: [***1] APPEAL from a judgment of the circuit court for Milwaukee county, entered on the 7th day of March, 1931, dismissing the cross-complaint of the defendant Heating and Plumbing Finance Corporation: JOHN J. GREGORY, Circuit Judge. Reversed.

This action was commenced by the plaintiff to foreclose a certain mortgage theretofore given to him by the defendants Charles H. Herro and Nellie Herro. Several of the other defendants were owners of mechanics' liens duly filed at the time of the commencement of this action. These defendants cross-complained against the defendants Herro and asked for the foreclosure of their respective liens. One A. F. Leitgabel was a heating contractor who, pursuant to a written contract, had furnished materials and performed labor for installing a heating system in the building owned by the defendants Herro. The work was performed on and between the 17th day of September and the 13th day of November, 1928. On or about the 8th day of November, 1928, the Herros made and delivered to Leitgabel their promissory note in the amount of $ 3,836, payable in thirty-six equal monthly instalments. The note included the amount due on the heating contract and also certain financing [***2] charges. The note contained a provision accelerating its due date in case of default in making any instalment payment, and also provided for fifteen per cent. attorney's fees, if allowed by law, in case it was placed in the hands of an attorney at law for collection. Thereafter a claim for lien was duly filed by Leitgabel. Both the note and the claim for lien were subsequently assigned to the Finance Corporation. Several instalment payments were made before the Herros defaulted. Thereafter action was commenced by the Finance Corporation against the Herros on the promissory note, and judgment by default was duly entered thereon in the circuit court for Milwaukee county on the 10th day of October, 1930, for $ 3,593.28, the amount then due on said note, and for the further sum of $ 547.84 costs, disbursements, and attorney's fees. The Finance Corporation was not a party originally, but upon its petition it was made a party defendant. It thereupon answered by way of cross-complaint asking foreclosure of the Leitgabel claim for lien which had theretofore been assigned to it. Although the cross-complaint of the Finance Corporation asked for foreclosure of its lien, it did not demand a deficiency [***3] judgment against the Herros, who were legally liable for the amount of the lien claim. The Herros made no answer to the cross-complaint of the Finance Corporation. Upon the trial of this action, the fact that the Finance Corporation had theretofore taken judgment against the Herros on its note as hereinbefore stated was informally called to the attention of the trial court by exhibiting to it the original judgment roll in that action. Upon having the matter of the former judgment called to its attention, the court evidently felt that the Herros were being unduly burdened by the Finance Corporation in seeking to have its lien foreclosed when it had already taken judgment on its note including fifteen per cent. attorney's fees. The court evidently reached a somewhat hastily considered conclusion which led it to refuse to entertain a brief on the subject. It informed the Finance Corporation that it could not have two judgments. Thereafter the court made its findings which recited the facts

substantially as hereinbefore stated and specifically found as follows:

"48. That said defendant Heating and Plumbing Finance Corporation did, by commencing its action upon said note and recovering [***4] judgment in such action against said defendants Charles H. Herro and Nelley Herro, his wife, elect to waive, and did waive, its mechanic's lien upon said premises above described, and that it would be inequitable and unconscionable for said defendant Heating and Plumbing Finance Corporation to recover judgment herein against said defendants Charles H. Herro and Nelley Herro, his wife, for the amount unpaid upon said claim, for which said amount judgment has heretofore been recovered in this court by said defendant in the action hereinbefore mentioned. That said defendant Heating and Plumbing Finance Corporation should not recover judgment herein against said defendants Charles H. Herro and Nelley Herro, his wife."

As a conclusion of law the court found:

"7. That there is no sum due said defendant Heating and Plumbing Finance Corporation from said defendants Charles H. Herro and Nelley Herro, his wife, in this action, and that the cross-complaint herein of said defendant Heating and Plumbing Finance Corporation be dismissed."

Judgment was thereafter entered in which it was adjudged that the Finance Corporation, by commencing an action upon its promissory note and by recovering [***5] judgment in that action against the defendants Herro, waived its claim for a mechanic's lien, and that it would be inequitable and unconscionable to permit the Finance Corporation to recover judgment of foreclosure of its lien against the defendants Herro, and that the cross-complaint of the Finance Corporation be dismissed. From such judgment the Finance Corporation appealed.

DISPOSITION: Judgment reversed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant finance company sought review of a decision by the Circuit Court for Milwaukee County (Wisconsin) dismissing the company's cross-complaint against appellee borrowers to foreclose on a mechanics' lien, which had been assigned to the company along with a promissory note. The lien and note arose from the assignor's installation of a heating system in the borrowers' building.

OVERVIEW: The borrowers executed a promissory note in favor of the finance company's assignor for the installation of a heating system in the borrowers' building, the assignor assigned to the company the note and his mechanics' lien for the installation, and the company took a default judgment on the note and subsequently sought to foreclose on the lien. The court reversed the circuit court's ruling dismissing the company's action to foreclose on the mechanics' lien, based on the determination that the company had waived its right to foreclose by taking the judgment on the note, and found that entry of the judgment on either the original indebtedness secured by the mechanic's lien or on a note given therefor without intention to waive the lien was not a bar to foreclosure of the lien. In addition, the default judgment on the note did not constitute an election to pursue an inconsistent remedy, which would prevent the company from foreclosing its lien. The court rejected the borrowers' argument that the default judgment on the note discharged the mechanics' lien as a matter of law because the note was for an amount considerably greater than the amount due for the installation contract.

OUTCOME: The judgment was reversed.

CORE TERMS: entry of judgment, foreclosure, mortgage, general rule, lien claimant, waive, indebtedness secured, financing, waived, acre, evidence of indebtedness, concurrently, cumulative, election, questions of law, matter of law, common law, liberally construed, purpose of aiding, right to file, personal action, timely manner, promissory note, mechanics' lien, indebtedness, materialmen, foreclosing, conditional, foreclose, manifest

LexisNexis(R) Headnotes

Civil Procedure > Judgments > Entry of Judgments > Enforcement & Execution > General Overview
Real Property Law > Nonmortgage Liens > General Overview
[HN1]The rights of a lien claimant to proceed concurrently at common law on a claim, or on a note given to evidence it, and to proceed by foreclosure of his lien, are concurrent, cumulative remedies, which may be pursued concurrently.

Civil Procedure > Judgments > Entry of Judgments > General Overview
Contracts Law > Secured Transactions > Perfection & Priority > Priority > General Overview
Real Property Law > Financing > Secondary Financing > Lien Priorities
[HN2]A chattel mortgage may be foreclosed after entry of judgment on an indebtedness secured thereby, and,

prior to the adoption of the Wisconsin Uniform Conditional Sales Act, that judgment could be entered on an indebtedness secured by a conditional sales contract and the security reserved could thereafter be pursued. The entry of judgment on an indebtedness secured by a real-estate mortgage does not prevent subsequent foreclosure of the mortgage. The only exception to both proceeding at common law on the note and also foreclosing the mortgage is that, after a judgment of foreclosure that provides for a deficiency judgment has been entered, no action on the note may thereafter be brought. The Supreme Court of Wisconsin adopts the position that it is permissible to foreclose on a mechanic's lien after judgment has been entered on the associated account or note.

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview
Civil Procedure > Trials > Jury Trials > Province of Court & Jury
[HN3]The intention of the parties as to waiver is a question of fact to be determined by the trial court.

Civil Procedure > Appeals > Reviewability > Preservation for Review
[HN4]Where a question raised for the first time on appeal involves factual elements not raised by the pleadings or not brought to the attention of the lower court, the court on appeal generally will not decide such questions.

HEADNOTES

Mechanics' liens: Statutes: Construction: Waiver: Election of remedies: Appeal: Fact question first raised in supreme court.

1. Lien statutes are to be liberally construed for the purpose of aiding materialmen and laborers to obtain compensation for materials and services. p. 259.

2. Under the mechanics' lien statute, sec. 289.05, the mere taking of a note or other evidence of indebtedness does not in itself amount to waiver of the lien; the question of waiver is to be determined by the intention of the parties, and is one of fact for the trial court. pp. 260, 263.

3. To constitute waiver, conduct of parties inconsistent with the right to file a lien must manifest an intention to waive the right p. 260.

4. Under the general rule, now adopted for this state, that a lien claimant may bring a personal action against the owner of the premises for the debt as a cumulative remedy without waiving the right to a lien, entry of judgment on a note given for materials and labor was not a release of the lien duly filed under the statute, nor an election to pursue an inconsistent remedy so as to prevent foreclosure. pp. 261, 262.

5. The supreme court generally refuses to consider and dispose of questions on appeal not properly or in timely manner presented for determination by the trial court; the exceptions to the general rule involve questions of law. pp. 263, 264.

6. Since this court will not decide a question involving factual elements not raised by the pleadings nor brought to the attention of the court below, the question concerning the intention of parties to waive the right to the lien not raised in the lower court will not be determined on appeal. p. 264.

COUNSEL: The cause was submitted for the appellant on the brief of Kaumheimer & Kaumheimer, attorneys, and Gifford Alt of counsel, all of Milwaukee, and for the respondents Herro on that of Zebulon Pheatt of Milwaukee.

JUDGES: GEORGE B. NELSON, J.

OPINION BY: NELSON

OPINION

[*259] [**415] NELSON, J. The facts in this controversy are not in dispute. The question for decision is whether the court erred in holding that the Finance Corporation, by taking judgment on its note, waived the right to foreclose its lien. The court held that the entry of judgment on the note by the Finance Corporation operated as a waiver of its lien as a matter of law, although there is language in the decision of the court which indicates that the court may also have thought that the Finance Corporation, having elected its [***6] remedy by bringing action on the note, could not thereafter take the inconsistent position of asking for the foreclosure of its lien.

It has been consistently held by this court that the lien statutes of this state provide new or additional remedies supplementary to the common-law remedies and that such laws should be liberally construed for the purpose of aiding materialmen and laborers to obtain compensation for materials [*260] used and services bestowed upon the property of another enhancing its value. *Vilas v. McDonough Mfg. Co.* 91 Wis. 607, 65 N.W. 488; *Wiedenbeck-Dobelin Co. v. Mahoney*, 160 Wis. 641, 152 N.W. 479.

Sec. 289.05, Stats., provides that the "taking of a promissory note or other evidence of indebtedness for any such work, labor or materials done or furnished shall not discharge the lien therefor hereby given unless expressly received as payment therefor and so specified

therein." Under this statute it is clear, from the well considered decisions of this court construing it, that the mere taking of a note or other evidence of indebtedness does not in and of itself amount to a waiver. The question of waiver is to be determined [***7] by the intention of the parties. *Phoenix Mfg. Co. v. McCormick H. M. Co.* 111 Wis. 570, 573, 87 N.W. 458; *Carl Miller L. Co. v. Meyer*, 183 Wis. 360, 365, 196 N.W. 840.

In this action no claim was made by the Herros to the effect that the giving of the note in this case was intended by the parties as a waiver of the lien. No testimony to that effect was offered or received. It is quite apparent that the giving of the note for an amount exceeding the amount due under Leitgabel's contract, which covered financing charges, so as to permit the Herros to pay it in thirty-six equal instalments, rather strongly suggests that the lien was to be preserved rather than waived. The note must have been given with the financing charges definitely in mind. With the lien waived the note of the Herros would be wholly unsecured.

While it is no doubt true that a waiver may be implied from facts and conduct of the parties inconsistent with the right to file a lien, such facts, however, must manifest an intention to waive such right. *Carl Miller L. Co. v. Meyer, supra; Davis v. La Crosse H. Asso.* 121 Wis. 579, 99 N.W. 351.

[*261] Whether [***8] the giving of a promissory note by an owner to a lien claimant, upon which judgment is thereafter entered, prevents the lien claimant from thereafter proceeding to foreclose his claim for lien, has not been decided by this court. Looking to the decisions of other courts, we find the general rule to be that a lien claimant may bring a personal action against the owner for the amount of the debt for which a lien is claimed as a cumulative remedy without waiving the right to the lien, although there are at least two states which seem to hold otherwise. An extended note upon this subject is found in 65 A.L.R. at page 313, in which a considerable number of the cases are digested. The following cases support the general rule: *West v. Flemming*, 18 Ill. 248; *Southern Surety Co. v. New York Tire Service*, 209 Iowa 104, 227 N.W. 606; *Kirkwood v. Hoxie*, 95 Mich. 62, 54 N.W. 720; *F. M. Sibley L. Co. v. Murphy*, 243 Mich. 483, 220 N.W. 746; *Kinzel v. Joslyn*, 158 Minn. 194, 197 N.W. 217; *Erickson v. Russ*, 21 N.D. 208, 129 N.W. 1025, 32 L.R.A. N.S. 1072. See, also, 18 Ruling Case Law, [***9] p. 980, and 40 Corp. Jur. p. 367.

Decisions to the contrary appear to be confined to the states of Missouri and Texas. *Matthews v. Stephenson*, 172 Mo. App. 220, 157 S.W. 887; *Wycoff v. Epworth Hotel*, 146 Mo. App. 554, 125 S.W. 550; *Foster v. Spearman Equity Exchange* (Tex. Civ. App.) 266 S.W. 583. The underlying theory of the Missouri decisions is that the account on which the lien must be based merges into a judgment obtained thereon. It seems clear to us that the majority rule is the better rule, considering the remedial purposes of our lien law, and that entry of judgment on either the original indebtedness secured by a mechanic's lien or on a note given therefor without intention to waive the lien should not bar foreclosure of the lien. We conclude that no waiver or release of the lien herein resulted by virtue of the entry of judgment under the circumstances of this case.

Nor do we think that the entry of judgment on the note was an election to pursue an inconsistent remedy which prevented the Finance Corporation from foreclosing its lien. The courts generally hold, as will appear from a reading of the authorities hereinbefore [***10] [**416] cited, that [HN1]the rights of a lien claimant to proceed concurrently at common law on a claim, or on a note given to evidence it, and to proceed by foreclosure of his lien, are concurrent, cumulative remedies which may be pursued concurrently. Although a party may generally have two recoveries he of course is entitled to but one satisfaction.

This court has, in matters somewhat analogous, permitted the bringing of two actions concurrently for the recovery of the same indebtedness. It has been held that [HN2]a chattel mortgage may be foreclosed after entry of judgment on an indebtedness secured thereby (*J. I. Case T. M. Co. v. Johnson*, 152 Wis. 8, 139 N.W. 445; *Ex parte Logan*, 185 Ala. 525, 64 So. 570, 51 L.R.A. N.S. 1069; *Graham v. Perry*, 200 Wis. 211, 228 N.W. 135); and, prior to the adoption of the Uniform Conditional Sales Act, that judgment could be entered on an indebtedness secured by a conditional sales contract and that the security reserved could thereafter be relied on (*Hyland v. Bohn Mfg. Co.* 91 Wis. 574, 65 N.W. 369; *Wiedenbeck-Dobelin Co. v. Anderson*, 168 Wis. 212, 169 N.W. 615); [***11] and that entry of judgment on an indebtedness secured by a real-estate mortgage does not prevent subsequent foreclosure of the mortgage (*Bliss v. Weil*, 14 Wis. 35; *Witter v. Neeves*, 78 Wis. 547, 47 N.W. 938; *Duecker v. Goeres*, 104 Wis. 29, 80 N.W. 91). The only exception to both proceeding at common law on the note and also foreclosing the mortgage is that found in *Witter v. Neeves, supra*, wherein it was held that after judgment of foreclosure has been entered which provides for a deficiency judgment, no action on the note may thereafter be brought. We therefore think it clear, both on principle and on authority, that [*263] the general rule established by the decisions of the courts of other jurisdictions permitting the foreclosure of a mechanic's lien after judgment has been entered on the account or on a note, should be followed in this state.

The respondents contend in this court, apparently for the first time, that since the note given by the Herros to Leitgabel was for an amount considerably in excess of the actual amount due Leitgabel on his contract, made up of certain financing charges, and also including [***12] an obligation on the part of the makers to pay fifteen per cent. attorney's fees if allowed by law, in case of default, the taking of the note itself, under such circumstances, should be held as a matter of law to have discharged the lien. The respondents rely on *Miller-Piehl Co. v. Mullen*, 170 Wis. 378, 174 N.W. 542. In that case a lien was filed against one acre of ground. Thereafter a note was given for the amount of the lien and also to cover some additional indebtedness owing to the lien claimant. A mortgage which covered four acres instead of the one acre theretofore covered by the lien was given to secure the note. In that case it was apparently held that the lien had been waived although that point was not necessary to the decision of the case, which involved the validity of the mortgage as a lien on the four acres. This case seems to be somewhat out of harmony with *Phoenix Mfg. Co. v. McCormick H. M. Co., supra*, and *Carl Miller L. Co. v. Meyer, supra*, both of which cases were carefully considered and in which it was declared that the intention of the parties is the crucial matter for consideration.

However, this issue which [***13] the respondents now seek to have this court decide was not in any manner raised in the court below. Under the decisions just hereinbefore cited, we think it clear that [HN3]the intention of the parties as to waiver is a question of fact to be determined by the trial court.

It is well settled that this court generally refuses to consider and dispose of questions on appeal which have not [*264] properly or in a timely manner been presented for determination by the trial court. There are, however, exceptions to such rule. *Cappon v. O'Day*, 165 Wis. 486, 162 N.W. 655; *Braasch v. Bonde*, 191 Wis. 414, 211 N.W. 281. These exceptions to the general rule, however, involve questions of law which, though not raised below, may nevertheless be raised and decided by this court on appeal. The rule seems to be equally well established that [HN4]where the question raised for the first time on appeal involves factual elements not raised by the pleadings or not brought to the attention of the lower court, this court on appeal will not generally decide such questions. *Youngs v. Wegner*, 157 Wis. 489, 497, 146 N.W. 803; *Harrington v. Downing*, 166 Wis. 582, 166 N.W. 318; [***14] *In re Assignment of Milwaukee S. & W. Co.* 186 Wis. 320, 202 N.W. 693.

In this case it is very clear that the question of the intention of the parties at the time the note was given was a question of fact to be determined by the trial court. Since the question of intention of the parties was not raised in any manner in the court below or even called to the court's attention, we do not think that such question is here for determination or that, in this state of the record, we could with propriety determine such question.

Since it does appear that the note providing for instalment payments was given for the purpose of financing the Herros as to this particular claim, and since an intention to waive the lien under such circumstances [**417] could not, in all probability, reasonably be found, we do not think under the circumstances that justice requires that we send this case back for a determination of that particular issue.

By the Court.--Judgment reversed, with directions to enter judgment in favor of the Heating and Plumbing Finance Corporation on its claim for lien.

Analysis
As of: Oct 25, 2010

BAILEY and another v. HULL.

[NO NUMBER IN ORIGINAL]

SUPREME COURT OF WISCONSIN

11 Wis. 289; 1860 Wisc. LEXIS 106

January, 1860, Decided

PRIOR HISTORY: [**1] APPEAL from Milwaukee Circuit Court.

This was an action brought by the plaintiffs, to enforce a mechanic's lien, claimed by them upon certain real estate of the defendant. The petition for the lien and the complaint alleged that the plaintiffs performed labor and furnished materials in the erection of an iron fence on certain lots of the defendant, in the city of Milwaukee, on which the defendant's dwelling house was situated, pursuant to a contract made with him, the same being finished October 3, 1857; that there was a balance of $ 305 unpaid at that date, for the work and materials, on which the defendant promised to pay interest at ten per cent. until paid; that on the 5th of that month the defendant, in acknowledgment of the indebtedness to the plaintiffs, and to secure the same, gave them his two promissory notes, one at sixty days from that date, the other being taken up and a new note given in lieu of it by the defendant, January 25, 1858; that both notes are unpaid and unsecured, and are in the plaintiffs' possession, ready to be canceled. The complaint claimed judgment for $ 305, and interest at ten per cent. from Oct. 3, 1857, and that the real estate described might [**2] be sold to pay the same.

No answer was served, and judgment was taken October 30, 1858. The judgment was in favor of the plaintiffs, against the defendant, for the amount found due, including interest at ten per cent., for a lien upon the premises described in the complaint, to that amount, to secure the payment thereof; and ordering the sale of the premises, to make the amount of the judgment.

1859--May 7. The defendant filed an affidavit showing that the premises described in the complaint were advertised for sale by the sheriff, by virtue of the above judgment, without execution issued other than a certified copy of the judgment. He moved that the sale be stayed perpetually, except upon execution to be issued. Also, that the judgment be vacated or modified, by striking out all that part authorizing the sale of specific real property. This motion was argued and decided by the following order:

Ordered, that so much of the motion and order to show cause, heretofore made, as relates to the modification of the judgment, by striking out all that part thereof which describes particular real estate, be and is denied and discharged. And further ordered, that no sale under [**3] the judgment be made without the issuing of an execution.

The plaintiffs appealed from the last clause of this order, and the defendant appealed from the remainder, and from the judgment.

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff contractors appealed the order by the Milwaukee County Circuit Court (Wisconsin), which amended its judgment in their favor to require a writ of execution prior to the sale of defendant landowner's property in an action to impose a mechanic's lien. The landowner filed a cross-appeal.

OVERVIEW: The contractors erected a fence on the landowner's property. When the fence was not paid for, the contractors filed an action to impose a mechanic's

lien. The trial court found in favor of the contractors, but modified its judgment to require an execution before the property could be sold. On appeal, the court affirmed. Pursuant to Wis. Rev. Stat. ch. 153, § 12, the contractors were entitled to a lien because they performed labor on the land in erecting the fence. The fact that the contractors had accepted a note with a term of less than a year did not bar them from seeking a mechanic's lien. Because the parties had agreed to an interest rate in excess of the statutory rate, the trial court properly used the agreed upon rate in the judgment. Pursuant to Wis. Rev. Stat. ch. 153, § 9, an execution was required before the property was sold under the lien.

OUTCOME: The court affirmed the trial court's judgment.

CORE TERMS: fence, mechanic's, person performing, manual labor, labor done, extended beyond, ordinary cases, mechanic's lien, preparing, commence, accrued, timber, lumber, execution issued, higher rate, real estate, issuing

LexisNexis(R) Headnotes

Real Property Law > Nonmortgage Liens > Mechanics' Liens

[HN1]Wis. Rev. Stat. ch. 153, § 12 (1858) provides that any person performing manual labor upon any land, timber or lumber shall be entitled to a lien thereon, to be enforced according to the provisions of that chapter. The words "work done on land," are somewhat indefinite in their character, and it might be a matter of some difficulty to determine accurately all the kinds of labor for which they would give a lien. But they were certainly designed to include all labor done directly upon the land, for the purpose of preparing it for use as such. And fencing would seem to fall within this class. It is done upon the land, the fence becomes appurtenant to the land, and its object is to enable the land to be used or occupied as such.

Contracts Law > Negotiable Instruments > Enforcement > Defenses > Statutes of Limitations
Real Property Law > Nonmortgage Liens > Mechanics' Liens

[HN2]The taking of a note which does not extend the credit beyond the time in which the party is required to sue to maintain his lien is not a waiver of the right to obtain a mechanic's lien.

Civil Procedure > Judgments > Relief From Judgment > Motions to Alter & Amend
Civil Procedure > Remedies > Judgment Interest > General Overview
Real Property Law > Nonmortgage Liens > Mechanics' Liens

[HN3]Wis. Rev. Stat. ch. 153, § 12 provides a lien for debt, and interest is an incident to the debt. In the absence of any agreement by the parties, the law would fix it at seven per cent. But the same law allows the parties by agreement to fix it at a higher rate not exceeding twelve. And having fixed it, the interest at such higher rate follows the debt, just as the legal rate would in the absence of an agreement.

Civil Procedure > Judgments > Entry of Judgments > Enforcement & Execution > Writs of Execution
Real Property Law > Nonmortgage Liens > Mechanics' Liens

[HN4]It is true that a sale of property against which a specific lien is adjudged under Wis. Rev. Stat. ch. 153 is more analogous to a sale on foreclosures than it is to an ordinary sale on an execution issued against the property generally. And it might be more consistent if the statute should provide for a similar proceeding. But it has not done so. On the contrary it provides expressly in § 9, that execution may issue and be levied upon the premises subject to such lien, and sale thereof be made in the manner prescribed by law in ordinary cases. This seems to place it on a similar footing with a sale on execution upon a judgment where real estate has been attached. Wis. Rev. Stat. ch. 131, § 59, provides that, in the latter case, the execution may among other things, direct a sale of the interest of the defendant in the property at the time the lien accrued" which time should be specified in the judgment. It is true there is no express provision of the statute for the insertion of such a direction. But it does provide that the sale may be on execution, and the very nature and object of the proceeding would seem to imply an authority to adapt the execution to the end provided for.

HEADNOTES

Mechanic's lien--Includes fences--Sale must be by execution--No waiver by note.

The 12th section of the act concerning the lien of mechanics and others, which provides that "any person performing manual labor *upon any land*, timber or lumber, shall be entitled to a lien thereon, to be enforced according to the provisions of this act," was certainly designed to include all labor done directly upon the land, for the purpose of preparing it for use, and will include the making of fences on the land, and an action may be

maintained therefor. (See *Paine v. Gill*, 13 Wis., 561; *Paine v. Woodworth*, 15 id., 298.)

A party having a mechanic's lien upon land does not waive the same by taking a note for the amount, unless the time of payment is extended beyond the year in which he is required to commence his action. (Followed *Schmidt v. Gibson*, 14 Wis., 514. So enacted by sec. 5, ch. 113, Laws of 1859. *Aliter* if note be accepted as a payment. *McCoy v. Quick*, 30 Wis., 521.)

A party having a mechanic's lien upon land may contract by note for the payment of the debt, and fix the rate of interest, as in other contracts.

A judgment entered under the act concerning the lien of mechanics must order the land to be sold upon execution, as in ordinary cases, and the execution may direct a sale of defendant's interest at the time the lien accrued. (See *Marsh v. Fraser*, 27 Wis., 596.)

COUNSEL: Waldo & Ody, for the plaintiffs.

Smith & Salomon, for the defendant.

JUDGES: BYRON PAINE, J.

OPINION BY: PAINE

OPINION

[*290] *By the Court*, PAINE, J. The principal question presented by this appeal is whether a party is entitled to a lien for building a fence. We think it clear that he would not be, if in order to sustain the lien, it was necessary to hold that a fence was a "building," within the meaning of that word, as used in chapter 153, Revised Statutes 1858, concerning the lien of mechanic's and others. We had occasion to place a construction upon that word, in the case of the *LaCrosse and Milwaukee Railroad Co. v. Vanderpool et al., ante*, 124, decided at this [*291] term, where we held that it did not include bridges, fences, and other erections of a similar character.

[HN1]But section 12 provides that "any person performing manual labor *upon any land*, timber or lumber," shall be entitled to a lien thereon, to be enforced according to the provisions of that chapter. [**4] The words "work done on land," are somewhat indefinite in their character, and it might be a matter of some difficulty to determine accurately all the kinds of labor for which they would give a lien. But without at tempting to decide whether they have any further extent, we think they were certainly designed to include all labor done directly upon the land, for the purpose of preparing it for use as such. And fencing would seem to fall within this class. It is done upon the land, the fence becomes appurtenant to the land, and its object is to enable the land to be used or occupied as such. We think, therefore, that under this section, the plaintiffs were entitled to a lien.

We think, also, it was not waived by taking a note, the time of the payment not being extended beyond the year in which the party was required to commence his action. There have been authorities, we are aware, which have held the contrary; but we think the weight of authority is decidedly in favor of the position, that [HN2]the taking of a note which does not extend the credit beyond the time in which the party is required to sue to maintain his lien, is not a waiver of it, and we can see no substantial reason why it [**5] should be.

The interest was properly included. [HN3]The law provides a lien for the debt, and interest is an incident to the debt. It is true that in the absence of any agreement by the parties, the law would have fixed it at seven per cent. But the same law allows the parties by agreement to fix it at a higher rate not exceeding twelve. And having fixed it, the interest at such higher rate follows the debt, just as the legal rate would in the absence of an agreement. We think, therefore, that the [*292] judge properly denied that part of the defendant's motion, which asked that the judgment might be modified, by striking out all that part that described particular real estate.

The only remaining question is as to that part of the order forbidding a sale without the issuing of an execution. [HN4]It is true that a sale of property against which a specific lien is adjudged under this law is more analogous to a sale on foreclosures than it is to an ordinary sale on an execution issued against the property generally. And it might be more consistent if the statute should provide for a similar proceeding. But it has not done so. On the contrary it provides expressly in section 9, that "execution [**6] may issue and be levied upon the premises subject to such lien, and sale thereof be made in the manner prescribed by law in ordinary cases." This seems to place it on a similar footing with a sale on execution upon a judgment where real estate has been attached. Section 59, chapter 131, provides that, in the latter case, the execution "may among other things, direct a sale of the interest of the defendant in the property at the time the lien accrued," which time should be specified in the judgment. It is true there is no express provision of the statute for the insertion of such a direction. But it does provide that the sale may be on execution, and the very nature and object of the proceeding would seem to imply an authority to adapt the execution to the end provided for.

Without saying, therefore, what would be the effect of a sale upon a certified copy of the judgment in such a case, without the issuing of any execution, in the absence of any order to the contrary by the court below, we cer-

tainly cannot in the face of this statute say that the court below erred in directing the sale to be on execution issued. We must therefore affirm the entire order, without costs.

PHOENIX MANUFACTURING COMPANY, Appellant, v. MCCORMICK HARVESTING MACHINE COMPANY, imp., Respondent.

[NO NUMBER IN ORIGINAL]

SUPREME COURT OF WISCONSIN

111 Wis. 570; 87 N.W. 458; 1901 Wisc. LEXIS 50

September 27, 1901, Argued
October 15, 1901, Decided

PRIOR HISTORY: [***1] APPEAL from a judgment of the circuit court for Chippewa county: A. J. VINJE, Circuit Judge. Reversed.

Between December 29, 1899, and March 7, 1900, the plaintiff furnished to the defendant Barnhart machinery consisting of boiler, engine, sawmill machinery, etc., to be wrought into a sawmill to be built by said Barnhart upon certain real estate held by him under land contract from the defendant Matthes, amounting in all to $ 470.03. Of this $ 434.40 were delivered on December 29th, the remainder on and subsequent to January 17, 1900. On January 12th Barnhart executed a chattel mortgage upon "all that certain personal property, to wit," the description including the property thus sold by the plaintiff and other chattels, with the statement, "All clear, except $ 234, given to Phoenix Manufacturing Company, Eau Claire, Wis., for purchase price." On January 17th Barnhart executed to the plaintiff a chattel mortgage for $ 225 (the unpaid balance) upon "the following described goods, chattels, and personal property, to wit," describing specific articles theretofore received from plaintiff, securing a note for $ 225, due May 17, 1900. On June 2, 1900, plaintiff duly filed his claim for [***2] lien for the balance then due, consisting of the $ 225 balance due January 17th and $ 35.63 thereafter charged. Barnhart and Matthes interposed no defense. The defendant McCormick Harvesting Machine Company set up the receipt of the note and chattel mortgage of January 17th both as payment and as waiver of the right to mechanic's lien. The court made no finding of fact as to the intent with which the note and mortgage were received, but found as a conclusion of law that it had the effect to waive the right to lien for the indebtedness thereby evidenced and secured, and therefore denied lien for $ 225 of the claim, and awarded judgment of lien for the balance of $ 35.63. From this judgment the plaintiff appeals.

DISPOSITION: Judgment reversed and cause remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant supplier challenged an order of the Circuit Court for Chippewa County (Wisconsin), which determined that receipt of a note and chattel mortgage had the effect of waiving the right to lien for the indebtedness thereby evidenced and secured and denied the supplier a mechanic's lien for $ 225 of the claim, but did award judgment of lien for the balance of $ 35.63.

OVERVIEW: The supplier furnished to defendant builder a boiler, engine, sawmill machinery, as well as other items to be wrought into a sawmill. The builder executed to the supplier a chattel mortgage securing a note for $ 225. The supplier filed his claim for lien for a balance due, including the $ 225 and $ 35.63 thereafter charged. Defendant machine company set up the receipt of the note and chattel mortgage both as payment and as waiver of the right to mechanic's lien. The trial court made no finding of fact as to the intent with which the note and mortgage were received, but found as a conclusion of law that it had the effect to waive the right to lien for the indebtedness thereby evidenced and secured, and therefore denied lien for $ 225 of the claim, and awarded judgment of lien for the balance of $ 35.63. In reversing,

the court held that the supplier did not waive his right to mechanic's lien upon the real estate by taking for the purchase price thereof the promissory note and chattel mortgage. The court noted that it was not the intent of the parties to waive the lien.

OUTCOME: The court reversed and remanded with directions to enter judgment for the supplier for $ 269.33 plus interest and for mechanic's lien upon the premises, together with costs.

CORE TERMS: chattel, mechanic's lien, real estate, purchase price, waived, promissory note, property sold, personal property, annexation, purchaser, interval, wrought, vendor, chattel mortgage, machinery, evidence of indebtedness, statutory lien, accomplished, common-law, ascribed, affixed, forego, waive

LexisNexis(R) Headnotes

Contracts Law > Negotiable Instruments > Discharge & Payment > Payment > Time for Payment
Contracts Law > Negotiable Instruments > Enforcement > General Overview
Real Property Law > Financing > Mortgages & Other Security Instruments > Definitions & Interpretation
[HN1]A mechanic's lien will be deemed waived either by taking therefor a promissory note maturing not until after the statutory time fixed for enforcing the lien, or by taking independent security. This rule has been modified by Wis. Stat. § 3317 (1898), which denies any such effect to the taking of a note or other evidence of indebtedness. This statute, however, does not change the common-law rule as to the effect of taking independent security; nor has this court yet had occasion to decide as to the effect of such act, save in the one respect hereafter to be mentioned. The ultimate question is one of intent. If the parties, by their transaction, intended a waiver of the lien, no doubt such result is accomplished. If they intended that the lien should not be waived, but that the security should be taken merely as additional thereto, such intent will be given full effect by the courts. The significance, therefore, of such acts is evidentiary only. They may serve to warrant the inference of an intent to waive in the absence of other satisfactory evidence on the subject.

Contracts Law > Types of Contracts > Personal Property
Real Property Law > Financing > Mortgages & Other Security Instruments > Definitions & Interpretation
Real Property Law > Nonmortgage Liens > Mechanics' Liens
[HN2]A mere reservation of title by the vendor of personal property intended to be wrought into real estate as security for the payment of the purchase price does not raise any such implication for the reason that it is in no wise inconsistent with the intent to claim the statutory lien upon the real estate, so soon as the personal property sold shall have become so affixed thereto that the lien arises. An interval of more or less duration may, and usually does, exist between the time when the property is sold and the time when it so becomes affixed. During that interval the seller is subject to various perils, such as the sale to others by his vendee of the property, or the levy thereon by other creditors; and, while he may be entirely willing to extend credit upon the faith of the lien on real estate to which the annexation of the personal property will entitle him, he is not willing to rely solely upon the credit of the purchaser during that interval. Hence his act in holding the specific property sold as security for its purchase price may be ascribed wholly to his anxiety in the latter respect.

HEADNOTES

Mechanics' liens: Waiver: Intent: Chattel mortgages.

1. Sec. 3317, Stats. 1898 (declaring that the taking of a promissory note or other evidence of indebtedness for work or materials shall not discharge the lien therefor unless expressly received as payment therefor and so specified therein), does not change the common-law rule that the taking of independent security is a waiver of the lien if the parties so intended.

2. Where machinery is sold for the purpose of annexation to real property, the intention to waive the right to a lien on the realty is not to be inferred from the mere fact that, before the annexation, the vendor takes a chattel mortgage on the machinery as security for its purchase price.

COUNSEL: For the appellant there was a brief by Teall & Thomas, and oral argument by De Alton S. Thomas. They argued, among other things, that the plaintiff, by taking the note and chattel mortgage, did not waive its right to a mechanic's lien. Mervin v. Sherman, 9 Iowa, 331; Gilcrest v. Gottschalk, 39 Iowa, 311; Peninsular G. E. Co. v. Norris, 100 Mich. 496; Powell, Mortgages, 1062b; Phillips, Mechanics' Liens, §§ 272-276, 279; Peck v. Bridwell, [***3] 10 Mo. App. 524; Union Stock Yards S. Bank v. Baker, 42 Neb. 880; Chapman v. Brewer, 43 Neb. 890; Jones, Liens, § 1013; Payne v. Wilson, 74 N. Y. 348; Howe v. Kindred, 42 Minn. 433; Charles Bechter Co. v. Cleveland, 13 S. Dak. 347; Chicago B. & M. Co. v. Talbotton C. & M. Co. 106 Ga. 84; Southern B. & L. Asso. v. Bean, 49 S. W. Rep. 910; Farmers' & M. Nat. Bank v. Taylor, 40 S. W. Rep. 876;

Atlantic T. Co. v. Carbondale C., Co. 99 Iowa, 234; Case Mfg. Co. v. Smith, 5 L. R. A. 231; Maryland B. Co. v. Spilman, 17 L. R. A. 601; Chicago & A. R. Co. v. Union R. M. Co. 109 U.S. 719; McKeen v. Haseltine, 46 Minn. 426; Henry & Coatsworth Co. v. Fisherdick, 37 Neb. 207; Kilpatrick v. K. C. & B. R. Co. 38 Neb. 620; Kirkwood v. Hoxie, 95 Mich. 62; Allis v. Meadow Spring D. Co. 67 Wis. 16; Edward P. Allis Co. v. Madison E. L., H. & P. Co. 9 S. Dak. 459; 3 Am. & Eng. Ency. of Law (1st ed.), 310, 311.

Arthur H. Shoemaker, for the respondent, contended, inter alia, that the taking of a mortgage as security is a waiver of the statutory lien, since it shows an intention to abandon the statutory lien and substitute in its place one of a higher nature. This is upon the ground that the two liens [***4] are inconsistent, rather than upon the ground of merger. Waiver of a statutory lien will result by implication from the acceptance of additional security. Kneeland, Mechanics' Liens, §§ 139, 139a; Phillips, Mechanics' Liens, § 280; Gorman v. Sagner, 22 Mo. 137; Grant v. Strong, 18 Wall. 623; Trullinger v. Kofoed, 7 Oreg. 228; 2 Jones, Liens, §§ 1519, 1524; Houck, Liens, 202, 208; Taylor v. B., C. R. & M. R. Co. 4 Dill. 570; Central T. Co. v. R., N., I. & B. R. Co. 31 U.S. App. 675; Barrows v. Baughman, 9 Mich. 213. The lien of a vendor of real estate is waived by taking a distinct collateral security. Gilman v. Brown, 1 Mason, 212; Brown v. Gilman, 4 Wheat. 255; Fish v. Howland, 1 Paige, 20; 4 Kent, Comm. 153; Boon v. Murphy, 6 Blackf. 272; Dibblee v. Mitchell, 15 Ind. 435; Mayham v. Coombs, 14 Ohio, 428; Hunt v. Waterman, 12 Cal. 301; Camden v. Vail, 23 Cal. 634; Griffin v. Blanchar, 17 Cal. 70; Way v. Patty, 1 Ind. 102; Wilson v. Graham's Ex'r, 5 Munf. 297; Bradford v. Marvin, 2 Fla. 463; Williams v. Roberts, 5 Ohio, 35; Johnson v. Thompson, 4 J. J. Marsh. 380; Trustees v. Wright, 11 Ill. 603; Johnson v. Sugg, 13 Sm. & M. 346; Palmer's Appeal, 1 Doug. (Mich.), 422; Sears v. Smith, [***5] 2 Mich. 244; Baum v. Grigsby, 21 Cal. 172; White v. Dougherty, Mart. & Y. 309; Francis v. Hazlerigg's Ex'r, Hard. 48; Ducker v. Gray, 3 J. J. Marsh. 163; Gann v. Chester, 5 Yerg. 205; Campbell v. Baldwin, 2 Humph. 248; Ross v. Whitson, 6 Yerg. 50; Phelps v. Conover, 25 Ill. 309; Selby v. Stanley, 4 Minn. 65; Buntin v. French, 16 N. H. 592; Parker Co. v. Sewell, 24 Tex. 238. Taking a mortgage for unpaid purchase money of real estate is an abandonment of the vendor's equitable lien, and such abandonment once fairly and voluntarily made is an abandonment forever. Mattix v. Weand, 19 Ind. 151; Harris v. Harlan, 14 Ind. 439; Richards v. McPherson, 74 Ind. 158; Camden v. Vail, 23 Cal. 633; Young v. Wood, 11 B. Mon. 123; Shelby v. Perrin, 18 Tex. 515; Little v. Brown, 2 Leigh, 353; Coit v. Fougera, 36 Barb. 195; Perry v. Grant, 10 R. I. 334.

JUDGES: JOSHUA ERIC DODGE, J.

OPINION BY: DODGE

OPINION

[*573] [**458] DODGE, J. The single question raised upon this appeal is whether the plaintiff must, as matter of law, be held to have waived his right to a mechanic's lien upon the real estate into which was wrought the property sold by him for that purpose, by the act of taking for the purchase price [***6] thereof a promissory note and a chattel mortgage upon the specific chattels sold.

The preponderance of authority doubtless is to the effect that [HN1]a mechanic's lien will be deemed waived either by taking therefor a promissory note maturing not until after the statutory time fixed for enforcing the lien, or by taking independent security. *Bailey v. Hull*, 11 Wis. 289; *Schmidt v. Gilson*, 14 Wis. 514; *De Forest v. Holum*, 38 Wis. 516, 524; Kneeland, Mechanics' Liens, § 138 *et seq.;* Jones, Liens, §§ 1013, 1519, *et seq.;* Phillips, Mechanics' Liens, §§ 273, 280. This rule has been modified by our statute, now sec. 3317, Stats. 1898, which denies any such effect to the taking of a note or other evidence of indebtedness. This statute, however, does not change the common-law rule as to the effect of taking independent security; nor has this court yet had occasion to decide as to the effect of such act, save in the one respect hereafter to be mentioned. The ultimate question is one of intent. If the parties, by their transaction, intended a waiver of the lien, no doubt such result is accomplished. [*574] If they intended that the [***7] lien should not be waived, but that the security should be taken merely as additional thereto, such intent will be given full effect by the courts. The significance, therefore, of such acts is evidentiary only. They may serve to warrant the inference of an intent to waive in the absence of other satisfactory evidence on the subject. *Farmers' & M. Nat. Bank v. Taylor* (Tex. Civ. App.), 40 S.W. 876; *S. C.* 91 Tex. 78; *McKeen v. Haseltine*, 46 Minn. 429, 49 N.W. 195; Kneeland, Mechanics' Liens, § 138; *De Forest v. Holum*, 38 Wis. 516.

It has been held by a very respectable array of authority--even by those courts which raise an implication of waiver from the taking of independent security, as also by our own--that [HN2]a mere reservation of title by the vendor of personal property intended to be wrought into real estate as security for the payment of the purchase price does not raise any such implication for the reason that it is in no wise inconsistent with the intent to claim the statutory lien upon the real estate, so soon as the personal property sold shall have become so affixed thereto that the lien arises. Jones, Liens, [***8] § 1015; *Chicago & A. R. Co. v. Union R. M. Co.* 109 U.S. 702,

720, 27 L. Ed. 1081, 3 S. Ct. 594; *Case Mfg. Co. v. Smith*, [**459] 40 F. 339; *Hooven O. & R. Co. v. Featherstone*, 99 F. 180; *Clark v. Moore*, 64 Ill. 273, 279; *Cooper v. Cleghorn*, 50 Wis. 113, 6 N.W. 491. An interval of more or less duration may, and usually does, exist between the time when the property is sold and the time when it so becomes affixed. During that interval the seller is subject to various perils, such as the sale to others by his vendee of the property, or the levy thereon by other creditors; and, while he may be entirely willing to extend credit upon the faith of the lien on real estate to which the annexation of the personal property will entitle him, he is not willing to rely solely upon the credit of the purchaser during that interval. Hence his act in holding the specific property sold [*575] as security for its purchase price may be ascribed wholly to his anxiety in the latter respect. Indeed, the very act of taking such security upon the property as chattels would seem to repudiate the idea that he was willing [***9] to rely on the personal responsibility of the purchaser, and therefore indicates that he does not intend to forego his lien upon real estate after the chattels sold had been wrought into it and thereby lost their character as personal property, so that his chattel security thereon is or may be destroyed,--a result which may well come, notwithstanding any agreement he might have with the purchaser of the chattels. *Gunderson v. Swarthout*, 104 Wis. 186, 190, 80 N.W. 465; *Fuller-Warren Co. v. Harter*, 110 Wis. 80, 85 N.W. 698.

No valid distinction is, nor, as we think, can be, suggested between an agreement reserving title in the vendor as security and one reconveying that title to him for the same purpose, namely, a chattel mortgage. The same object is sought to be accomplished in both instances, and the same inference of intent may legitimately be drawn from each. We are convinced that no intent or purpose can be ascribed to plaintiff to forego his statutory lien on the real estate when his chattels became annexed thereto merely because he took security upon those chattels while they still had that character. That would be to predicate a purpose of confidence [***10] or negligence upon acts of suspicion and vigilance.

The circuit court erred in the conclusion of law that plaintiff had waived his right to mechanic's lien for any part of the purchase price of the machinery and materials furnished by him, and, as consequence, in denying him judgment of lien for the full amount found due, together with full costs as against the defendant *McCormick Harvesting Machine Company*. The amount of those costs can only be ascertained upon taxation in the circuit court, and for that [*576] reason we cannot fully correct the errors committed by modification of the judgment here.

By the Court.--Judgment reversed, and cause remanded with directions to enter judgment for plaintiff for $ 269.33, with interest from March 7, 1900, and for mechanic's lien upon the premises described in the complaint, together with full costs.

Gorman, Plaintiff in Error, v. Sagner and others, Defendants in Error.

[NO NUMBER IN ORIGINAL]

SUPREME COURT OF MISSOURI, ST. LOUIS

22 Mo. 137; 1855 Mo. LEXIS 16

October, 1855, Decided

PRIOR HISTORY: [**1] Error to St. Louis Circuit Court.

Scire facias to enforce a mechanic's lien. Among other facts which it is unnecessary to state, it appeared upon the trial that the plaintiff, Gorman, had accepted from Sagner, for whom the work and labor that gave rise to the lien was done, and who was at that time owner of the building upon which the same was done, two promissory notes payable in ninety days and four months, and also a deed of trust upon said building to secure the payment of said notes. Billings, one of the defendants, claimed said building by purchase at sheriff's sale, under a judgment upon a mechanic's lien. On the trial, plaintiff offered to surrender the two notes of Sagner. The court ruled that plaintiff could not recover.

DISPOSITION: Judgment affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff filed an action against defendants to enforce a mechanic's lien on certain property. Plaintiff challenged an order of the St. Louis Circuit Court (Missouri), which entered a judgment in favor of defendants.

OVERVIEW: Defendants claimed that plaintiff's lien was extinguished and that he was not entitled to recover. The court agreed and affirmed the judgment of the trial court. The facts indicated that plaintiff had accepted two promissory notes and a deed of trust for the work and labor that gave rise to the lien. Finally, the court found that it made no difference that the notes were payable some time in the future, as long as the acts of the parties were construed in such a manner as to prevent deceit and imposition upon third parties.

OUTCOME: The court affirmed the judgment of the trial court.

CORE TERMS: deed of trust, mechanic's lien, debt secured, extinguished, deed

LexisNexis(R) Headnotes

Contracts Law > Third Parties > General Overview
[HN1]When the acts of individuals became the motive to the conduct of others, it is important that such acts should be made to bear their natural construction, so that deceit and imposition upon third persons may be prevented.

Contracts Law > Negotiable Instruments > General Overview
Contracts Law > Third Parties > General Overview
[HN2]Courts are inclined to regard securities as cumulative, when it can be done without violence to the rights of third persons.

HEADNOTES

1. An acceptance, by one having a mechanic's lien upon a building, of a deed of trust upon the same, to secure the payment, at a future day, of promissory notes

given for the debt which gave rise to the lien, amounts to a waiver of the lien.

COUNSEL: Krum & Harding and Gray, for plaintiff in error. 1. The execution of the notes and the deed of trust to plaintiff by Sagner did not extinguish plaintiff's lien. It was not an equitable but a legal lien, expressly given by statute, and would not be merged by a mortgage, deed of trust, or judgment. Nothing but payment or an express release would discharge it. (14 J. R. 404; 2 Browne, 297; 14 S. & R. 32; 1 Hals. Ch. 485; 5 Watts, [**2] 118; 2 Miles, 214; 6 B. Mon. 67; 2 Wheat. 390.) 2. No injustice would be done to Billings by allowing plaintiff to recover; for plaintiff's lien was regularly filed in the Circuit Court, and suit was commenced on it, before Billings bought, and he bought therefore with full notice. He was bound to take notice of plaintiff's lien claim from the filing of it.

Knox & Kellogg, for respondent.

JUDGES: Scott, Judge, delivered the opinion of the court.

OPINION BY: Scott

OPINION

[*138] Scott, Judge, delivered the opinion of the court.

From the view we take of this case, it will not be necessary to determine the points of law raised on the trial; for if the plaintiff's lien was extinguished, it follows as a consequence that he can not recover.

The record raises the question whether the giving of notes, payable at a future day, and a deed of trust to secure their payment on the property on which the lien exists, is a waiver of the mechanic's lien for the debt secured by the notes and deed of trust. Did this question concern only the immediate parties to the deed, it would be a matter of little consequence how it was determined. But [HN1]when the acts of individuals became the motive to the conduct [**3] of others, it is important that such acts should be made to bear their natural construction, so that deceit and imposition upon third persons may be prevented. [*139] When a mechanic's lien exists for a debt, if the giving of a deed of trust to secure the payment at a future day of notes executed for that debt, when that deed covers the identical property covered by the lien, is not a waiver of the lien, it would be difficult to say what act by implication of law would constitute such a waiver. The notes being for the debt secured by the mechanic's lien, and payable at a future day, that lien could not be enforced during the time the notes had to run; and on their becoming due, there being a power in the trustees to sell the premises for their payment, no end would be attained by holding on to the mechanic's lien. Why this should be done but for the purpose of discharging the lien and substituting another mode of satisfaction in its stead, it is difficult to imagine. Such conduct is entirely inconsistent with the idea of the continuance of the lien, and third persons who act upon the faith of such conduct should not be deceived and disappointed of their just expectations. If either [**4] party to the transaction was overreached or was in error as to its consequences, that error can not be remedied at the expense of third persons.

The cases cited by the plaintiff have been examined, and they do not contradict any thing here said. Although there may be some distinction between an equitable lien and one expressly given by law, yet there is nothing in the cases hostile to the idea that a lien conferred by statute may be extinguished by implication arising from the conduct of the parties. The strong feature in this case is, that the deed of trust was on the very property subject to the lien. Had it been on other property the case might have been different. [HN2]Courts are inclined to regard securities as cumulative, when it can be done without violence to the rights of third persons.

From the view we have taken of the case, it can make no difference that the lien was filed when the defendant, Billings, became the purchaser. The deed of trust was also in existence.

The judgment will be affirmed, the other judges concurring.

GRANT v. STRONG.

SUPREME COURT OF THE UNITED STATES

85 U.S. 623; 21 L. Ed. 859; 1873 U.S. LEXIS 1335; 18 Wall. 623

January 12, 1874, Decided; OCTOBER, 1873, Term

PRIOR HISTORY: [***1] APPEAL from the Supreme Court of the District of Columbia.

Strong filed a bill in equity in the court below against Grant to establish a mechanic's lien for the sum of $1547.There was no denial that work was done, nor that it was of the value alleged, nor that it was of that character for which liens are allowed by the laws of the District.

The question was whether, under all the circumstances of the case, such a lien ever attached.

The material facts were these:

On the 14th day of October, 1869, the parties made an agreement that Strong should do the brickwork on sixteen houses which Grant was building. The price of the work per thousand bricks was agreed upon, and that Strong should take one of the houses in payment for his work, the price of which was also fixed; and this contract was reduced to writing. A conveyance was made by Grant of the lot which Strong was to have, and the deed duly acknowledged and recorded and placed in the hands of Enoch Totten, as an escrow, to be delivered to Strong when the work was completed. During the progress of the work dissatisfaction arose between the parties after the larger part of it had been done, and on the 27th of November, a [***2] new written contract was made. This, after reciting the former agreement, says that it is agreed that Strong shall finish all the brickwork up to the first floor joists without delay. The price was changed, but the old agreement was referred to for the mode of measurement. It is then said that the same is to be paid for in Grant's negotiable note, payable within three months from the date of the completion of the work, and then the agreement of October 14th shall be cancelled and declared null and void, and of no effect, and the escrow in the hands of Totten be delivered up to Grant, otherwise said agreement to remain in full force and effect.

Another paper, signed by both parties, dated January 1st, 1870, recites the former agreements, and that the work had been finished and measured, and that Grant had given his promissory note for the amount, according to the contract of November 27th; and that, therefore, the escrow in Totten's hands is declared null and void, and is to be delivered to Grant by Totten.

A good deal of evidence was found in the record as to what was said and done by the parties in the matter, and the court below decreed that a lien existed. From that decree [***3] this appeal was taken.

CORE TERMS: mechanic's lien, escrow, deed, measured, builder

LAWYERS' EDITION HEADNOTES:

Mechanics' lien, how waived. --

Headnote:

Taking real estate security for the price for erecting a building, is inconsistent with the idea of a mechanics' lien, and no such lien attaches in the case.

SYLLABUS

A builder's lien held not to have attached where a builder took a real security for payment of the work which he was to do, and afterwards, the work being all done, gave it up and took a mere note.

COUNSEL: Messrs. W. A. Meloy and F. Miller, for the appellant, referred to Barrows v. Baughman, [1] Haley v. Prosser, [2] and numerous other cases, to show that a

builder's lien cannot exist where the agreement provides for another sort of security.

1 9 Michigan, 213.
2 8 Watts & Sergeant, 133.

Mr. W. A. Cook, contra, cited The Kimball, [3] and many cases, arguing from them, and on principle, that a lien is never extinguished by a mere note, except on the plainest evidence of an intention to extinguish it; but on the contrary, when a lien clearly exists, that a note is always regarded as but cumulative.

3 3 Wallace, 37.

OPINION BY: MILLER

OPINION

[*624] [**860] Mr. Justice MILLER delivered the opinion of the court.

We have much argument in the case as to the effect of the note as a negotiable security operating as a release of the mechanic's lien. We think this has but little pertinency to the case. We admit that when a lien has once attached, [***4] the taking of such a note does not of itself operate as a release. The question whether a lien is obtained, or is displaced when it once attaches, is largely a matter of intention to be inferred from the acts of the parties and all the surrounding [*625] circumstances. In the case before us, much conflicting testimony as to what was said and done by the parties, is found in the record. We need not consider this, for in our view the decision of the case must rest on the written agreements we have mentioned, and from them we are forced to the conclusion that the appellee always relied wholly upon other security than a mechanic's lien for his pay, which he deemed sufficient, and which he voluntarily agreed to surrender.

It is very clear that under the first contract, the one under which the larger part of the work was done, he was to take his pay, not in money, but in the lot on which one of the houses was built; and that to secure the completion by Grant of the sale when the work was done, the deed was made and placed in the hands of Totten. Under these circumstances no lien could accrue for the work on that, or on the other buildings. When the second contract of November [***5] 27th was made, Strong did not give up this security, but still retained and relied on it, and it was made a part of the new contract, that the escrow should remain in the hands of Totten, and should be in full force until the work was completed, measured, and the sum due on it paid by the promissory note of Grant. Now with this security in Totten's hands during all the time the work was going on, looked to and relied upon by Strong, how can it be said that Strong relied upon a mechanic's lien, or that Grant intended in addition to that deed for one lot to allow Strong to obtain a lien upon all the others? And so much reliance was placed on this escrow by Strong, that only after all was settled, the work measured and paid for, as the parties had stipulated by Grant's note, did Strong sign the order for the delivery to Grant of the deed. During this time all the facts repel the idea of a lien.

We do not think that the giving up of the escrow, and the taking of the note in its place, according to the terms of an agreement previously made, and which obviously did not look to a mechanic's lien as part of the transaction, would create a lien where none existed before.

In short, we [***6] are of opinion that these agreements show an [*626] acceptance and reliance by Strong on another and very different security for the payment for his work, inconsistent with the idea of a mechanic's lien, and that no such lien ever attached in the case.

DECREE REVERSED, with directions to

DISMISS THE BILL.

Mr. Justice SWAYNE dissenting.

No. 65732-1-I

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

COASTAL COMMUNITY BANK,

Third-Party Defendants/Appellants,

vs.

MADI GROUP, INC.,

Third Party Plaintiff/Respondent.

CERTIFICATE OF SERVICE

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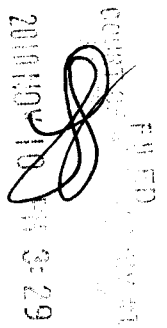

I HEREBY CERTIFY under penalty of perjury under the laws of the State of Washington that on this 10th day of November, 2010, I caused to be served a true and correct copy of the following document(s):

1. Brief of Respondent; and
2. Certificate of Service

to the individual(s) named below in the specific manner indicated:

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☐ U.S. Mail
☐ Certified Mail
☐ Hand Delivered
☐ Overnight Mail

DATED this 10th day of November, 2010, at Bellevue, Washington.

Lisa White