

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

MOUNTAIN WEST CONSTRUCTION, LLC,
a Washington limited liability company,
Respondents,

v.

JAMES ALAN, LLC, a Washington limited
liability company, DAVID ALAN
DEVELOPMENT, LLC, an Arizona limited
liability company, SOUND BUILT HOMES,
INC., a Washington corporation, STERLING
SAVINGS BANK, a Washington Bank,
TEAM4 ENGINEERING, a Washington
limited liability company, DAVID MILNE and
JANE DOE MILNE, individually and as to the
marital community,
Appellants.

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UNPUBLISHED OPINION

Van Deren, J. — Sterling Savings Bank and James Alan, LLC (JA) appeal from the trial court's entry of several orders relating to its grant of summary judgment in favor of Mountain West Construction, LLC. Sterling contends that (1) the trial court erred in relying on Sterling's stipulation that Mountain West's lien was superior to Sterling's deed of trust interest when it granted summary judgment in favor of Mountain West, (2) the trial court violated Sterling's due process rights by relying on the stipulation as a basis for granting Mountain West's requested

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relief, and (3) the trial court abused its discretion in denying Sterling's motion to amend its answer. JA contends that the trial court erred in granting summary judgment in favor of Mountain West because genuine issues of material fact exist about who had authority to act for JA. We affirm.

FACTS

Before May 2007, David Alan Development, LLC (DAD) was the owner and developer of certain property located in Poulsbo, Washington. DAD's sole member and manager is David Milne. No later than June 7, 2007, Milne transferred title to the property from DAD to JA. David Milne is also the sole member of JA.

In early 2007, Milne applied for a \$7,535,000 loan from Sterling. According to Sterling, Milne intended to use the loan to finance development of the property and to satisfy two prior debts secured by deeds of trust recorded against the property. Sterling agreed to provide the loan on the conditions that (1) Sterling's deed of trust securing the new loan would be superior to all existing liens of other lenders and contractors and (2) Milne or JA and DAD would contribute substantial additional funds to the project and guarantee the loan. Sterling approved the loan on May 9, 2007.

On May 10, 2007, JA entered into a written contract with Mountain West under which Mountain West was to perform site preparation work at the property for \$2,440,977.22, subject to additions or subtractions as provided in the contract. Mountain West's records indicate that it began work on the property on May 14, 2007, "at the request of owner." Clerk's Papers (CP) at 385. On June 11, 2007, Sterling recorded a deed of trust against the property to secure JA's debt.

During Mountain West's work on the property, JA approved numerous changes in the scope of work. The parties memorialized all changes in "written change orders . . . signed by Jim James or Don Poe, JA's project managers." CP at 95. Both Poe and James testified that they were JA's project or "construction" managers for the development, that they were authorized to and did sign change orders, and that they discussed change orders with Milne. CP at 573. JA's engineer, Norman Olson, testified that James and Poe had "interchangeable" roles, that he discussed various change orders with them, and that he discussed change orders with Milne. CP at 590.

On one occasion, Mountain West General Manager Stephen Davis wrote directly to Milne to confirm James and Poe's authority to sign change orders. Specifically, his letter to Milne stated:

Per your instructions, all decisions and changes related to [work on the property] will be r[u]n through Don Poe, Jim James and at times Norm Olson. These individuals have the authority to make the decisions required to move this project forward and David Alan Development agrees to be bound by their decisions [i]f this understanding is not correct notify me at my office in writing immediately.

CP at 143. In a subsequent e-mail to Mountain West, Milne, referring to James and Poe, stated that "construction management [wa]s delegated to these 2 individuals." CP at 145. Additionally, Mountain West copied Milne with e-mails between Mountain West and Poe that discussed large-item change orders approved by Poe. Mountain West performed change order work costing \$409,196—bringing the total cost for work performed under the contract to \$2,850,173, excluding sales tax.

On July 21, 2008, Mountain West began a lien foreclosure action against JA for payment for work it performed under the contract. On July 24, Sterling answered Mountain West's

complaint and did not plead lien priority through equitable subrogation as an affirmative defense.

Over the next two months, the parties conducted written discovery regarding lien priority, including Mountain West and Sterling responding to each other's written discovery.

On October 17, 2008, Mountain West filed a motion for partial summary judgment against Sterling, requesting that the court establish that Mountain West's lien against the property was superior to Sterling's deed of trust interest because Mountain West began work on the property before Sterling recorded its deed of trust.¹ A few days before Sterling's responsive briefing was due, Sterling's counsel contacted Mountain West's counsel and indicated that his client would agree that Sterling's interest was inferior to Mountain West's lien and that the trial court could enter partial summary judgment establishing lien priority in accord with the stipulation. Sterling's counsel drafted and signed a stipulation and order for partial summary judgment establishing Mountain West's lien as superior to Sterling's. On November 14, the trial court entered the lien priority stipulation and order. They provided in pertinent part:

2. Sterling Savings hereby stipulates that the materialman's lien of Mountain West is superior to Sterling Savings' deed of trust interest.

3. Mountain West stipulates that a partial summary judgment may be entered concerning the same.

.....
IT IS HEREBY ORDERED that Mountain West's Motion for Partial Summary Judgment that its materialman's lien is superior to Sterling Savings Bank's deed of trust interest is GRANTED.

CP at 429-30.

¹ 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 time of commencement of labor or professional services or first delivery of materials or equipment by the lien claimant.

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On February 27, 2009, Sterling filed an amended answer without first moving for leave of court. Sterling did not plead equitable subrogation in this amended answer. On May 11, Sterling filed a second amended answer raising its equitable subrogation defense, again without first moving for leave of court.

On May 15, 2009, Mountain West moved for summary judgment against JA for the principal amount due on the lien, \$801,354.58; plus attorney fees, costs, and interest. Mountain West noted that the trial court had earlier established that its lien was superior to Sterling's interest in the property, and its proposed order on summary judgment against JA allowed Mountain West, after an award of attorney fees and costs, to foreclose its lien against the other lien claimants, including Sterling. Mountain West served the motion and proposed order on Sterling. Sterling responded, objected to the portions of the proposed order finding that Mountain West's lien was superior to Sterling's interest, and asserted its equitable subrogation defense.

Between the filing of Sterling's response brief and the hearing on Mountain West's summary judgment motion, Sterling substituted new counsel. At the hearing, Sterling's new counsel requested leave to file an amended answer to add an equitable subrogation defense. The trial court "instructed that Sterling not file any motion prior to determination of the pending summary judgment motion" against JA. CP at 623.

On July 20, 2009, the trial court entered an order of partial summary judgment in favor of Mountain West against JA. The trial court found that Sterling's interest was junior to Mountain West's lien. It also found that a portion of Mountain West's lien was undisputed and granted summary judgment for \$381,475.95. It denied summary judgment for the remaining \$419,878.63

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for retainage allegedly not yet due, sales tax, and interest.

On July 29, 2009, Mountain West filed a motion for reconsideration of the partial summary judgment granted against JA for the full sum due. On September 18, the trial court granted Mountain West's motion for reconsideration and entered an order granting summary judgment in favor of Mountain West against JA for the full lien amount. The order provided that Mountain West's lien was superior and would foreclose all junior recorded interests. Sterling did not file a motion for reconsideration.

On September 29, 2009, Mountain West filed a motion seeking attorney fees, costs, interest, certification of finality of the summary judgment against JA, and a decree of foreclosure. On October 1, Sterling filed a motion seeking leave of court to amend its answer to add its equitable subrogation defense against Mountain West. On October 8, Sterling also responded to Mountain West's motion, arguing that the trial court should not certify the judgment as final and enter a decree of foreclosure because of Sterling's equitable subrogation defense.

The trial court, after hearing oral argument, decided both parties' motions on the same day. The trial court denied Sterling's motion to amend its answer "based on the Stipulated Order entered on November 14, 2008." CP at 774. The trial court granted Mountain West's motion and entered an order supplementing/amending summary judgment and certifying judgment as final and decree of foreclosure.

Sterling and JA appeal.

ANALYSIS

I. Summary Judgment Standard of Review

A trial court properly grants summary judgment if the pleadings, affidavits, and

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depositions establish that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. CR 56(c). When reviewing a summary judgment order, we review the evidence in a light most favorable to the nonmoving party. *Herron v. Tribune Publ'g Co.*, 108 Wn.2d 162, 170, 736 P.2d 249 (1987). After the moving party submits adequate affidavits, the nonmoving party must set forth specific facts rebutting the moving party's contentions and disclosing that a genuine issue of material fact exists. *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 12-13, 721 P.2d 1 (1986). Mere allegations or conclusory statements of facts, unsupported by evidence, do not sufficiently establish such a genuine issue. *Baldwin v. Sisters of Providence in Wash., Inc.*, 112 Wn.2d 127, 132, 769 P.2d 298 (1989). In addition, the nonmoving party “may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value.” *Seven Gables Corp.*, 106 Wn.2d at 13. Summary judgment is proper when reasonable minds could reach but one conclusion regarding the material facts. *Van Noy v. State Farm Mut. Auto. Ins. Co.*, 142 Wn.2d 784, 790, 16 P.3d 574 (2001).

II. Stipulation

Sterling contends that, because the declaration of Sterling’s counsel and the stipulation itself establish that Sterling stipulated only to the superiority of Mountain West’s “record interests” without discussing equitable considerations, the stipulation does not foreclose Sterling from subsequently raising an equitable subrogation defense. Sterling Br. of Appellant at 16. Mountain West counters that Sterling unambiguously stipulated that Mountain West’s lien was superior to Sterling’s deed of trust interest.

Courts interpret stipulations between parties in the same manner as contracts. *Riley*

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Pleas, Inc. v. State, 88 Wn.2d 933, 937-38, 568 P.2d 780 (1977). When interpreting a contract, we seek to determine and to effectuate the parties' mutual intent. *Berg v. Hudesman*, 115 Wn.2d 657, 663, 801 P.2d 222 (1990). Interpretation of a contract provision is usually a question of fact. *Martinez v. Kitsap Public Servs., Inc.*, 94 Wn. App. 935, 943, 974 P.2d 1261 (1999).

“When analyzing the parties' intent, a court must examine not only the four corners of any writing the parties may have signed, but also the circumstances leading up to and surrounding the writing,” for which extrinsic evidence is admissible. *Hall v. Custom Craft Fixtures, Inc.*, 87 Wn. App. 1, 8, 937 P.2d 1143 (1997). In considering the agreement's surrounding circumstances, we examine the parties' objective manifestations of intent, but not their unilateral or subjective purposes and intentions about the writing's meaning. *Hall*, 87 Wn. App. at 9. In other words, we “strive[] to ascertain the meaning of what is written in the contract, and not what the parties intended to be written” but did not memorialize. *Bort v. Parker*, 110 Wn. App. 561, 574, 42 P.3d 980 (2002).

Contract interpretation involves “a question of law only when (1) the interpretation does not depend on the use of extrinsic evidence, or (2) only one reasonable inference can be drawn from the extrinsic evidence.” *Martinez*, 94 Wn. App. at 943 (quoting *Tanner Elec. Coop. v. Puget Sound Power & Light*, 128 Wn.2d 656, 674, 911 P.2d 1301 (1996)). If the contract's language is clear and unambiguous, then we must enforce the contract as written. *Allstate Ins. Co. v. Peasley*, 131 Wn.2d 420, 424, 932 P.2d 1244 (1997). Extrinsic evidence offered to contradict the terms of an unambiguous contract is inadmissible. *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695, 974 P.2d 836 (1999).

Here, the stipulation between Mountain West and Sterling unambiguously states, without

disclaimers or reservations, that Mountain West's lien was superior to Sterling's deed of trust interest. Sterling's counsel's declaration, stating that Sterling intended to stipulate only that Mountain West commenced work before Sterling recorded its deed of trust without foreclosing equitable relief, amounts to extrinsic evidence of Sterling's unilateral intent that we do not consider, especially when the newly expressed intent is contrary to the stipulation's unambiguous terms. We hold that the stipulation foreclosed Sterling's subsequent attempts to seek lien priority through an equitable subrogation defense.

III. Findings and Orders on Lien Priority

Sterling next contends that the trial court erred in entering findings on Mountain West's lien superiority in the July 2009 order granting partial summary judgment against JA because Mountain West failed to meet its burden of proof on summary judgment and failed to request a ruling on lien priority in its motion. Mountain West counters that it did not need to present further evidence or again request the trial court's determination of lien priority due to Sterling's stipulation to and the trial court's November 2008 order of partial summary judgment on lien priority in favor of Mountain West. Sterling also contends that the trial court erred in the September 2009 order on reconsideration by finding that Mountain West's lien was superior to all other liens and that it was entitled to foreclose immediately on the property because this order exceeded the proof and scope of Mountain West's motion for reconsideration. Mountain West points out again that it was not necessary for it to present further evidence or request another order on lien priority because the trial court resolved that issue in the November 2008 stipulated order on lien priority and that it also need not have further requested foreclosure against other lien holders and the property owner because it had already requested that relief in its summary

judgment motion against JA.

First, no genuine issue of material fact existed regarding Mountain West's lien priority due to the November 2008 stipulated order on summary judgment granting Mountain West lien priority over Sterling. Mountain West bore no burden in its later summary judgment motion against JA to prove an issue already resolved by the trial court. Likewise, Mountain West need not have requested the same relief already granted by the trial court. Sterling's claims fail.

Similarly, Mountain West bore no burden to prove the previously decided lien priority issue in its motion for reconsideration. Further, Mountain West had requested foreclosure in its proposed order submitted with its motion for summary judgment against JA. Because the trial court initially granted only partial summary judgment against JA, foreclosure was not appropriate. When the trial court granted full summary judgment against JA on reconsideration, it resolved all claims against the property. Thus, it granted Mountain West's original proposed order requesting foreclosure. Sterling's claims fail.

IV. Due Process

Sterling first contends that the trial court's finding in July 2009 that Mountain West's lien was superior to Sterling's lien granted relief beyond that requested by Mountain West, thus violating Sterling's due process rights by depriving it of adequate notice and an opportunity to defend its lien priority. Sterling also contends that the trial court's instruction to Sterling not to file a motion to amend its answer before resolution of Mountain West's pending summary judgment motion against JA "denied Sterling the opportunity for its full day in court." Sterling Br. of Appellant at 19. Mountain West counters that its summary judgment motion and Sterling's response to that motion demonstrate that Sterling had adequate notice of and opportunity to

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contest the lien priority issue.

The United States Constitution amendment XIV, section 1 prohibits government deprivations of “life, liberty, or property, without due process of law.” A fundamental due process requirement is “notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *City of Redmond v. Arroyo-Murillo*, 149 Wn.2d 607, 617, 70 P.3d 947 (2003) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950)).

First, Sterling was already aware that Mountain West’s lien was superior to its interest due to having previously stipulated to Mountain West’s lien priority. Further, Mountain West noted its lien priority, based on the stipulation, in its summary judgment motion. Finally, Sterling received notice of this claim and an opportunity to contest it, as demonstrated by Sterling raising equitable subrogation as a defense to Mountain West’s lien priority in its response to the summary judgment motion. Sterling’s claim fails.

Second, Sterling fails to cite legal authority for its contention that the trial court’s denial of Sterling’s motion to amend its answer before resolution of the summary judgment motion “denied Sterling the opportunity for its full day in court.” Sterling Br. of Appellant at 19. We do not review arguments without citations to legal authority. *Satomi Owners Ass’n v. Satomi, LLC*, 167 Wn.2d 781, 807-08, 225 P.3d 213 (2009); RAP 10.3(a)(6). Even if we considered this argument, it fails for the reasons stated above.

V. Motion to Amend

Sterling also contends that the trial court abused its discretion in denying Sterling’s motion

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to amend its answer because justice required that it be allowed to amend its answer to include its equitable subrogation claim and because amendment would not have prejudiced Mountain West. Mountain West counters that the trial court did not abuse its discretion because the trial court had already entered summary judgment on the lien priority issue and because Sterling offered no just reason for amendment.

We review a trial court's denial of a motion to amend pleadings for abuse of discretion. *Del Guzzi Constr. Co. v. Global Nw. Ltd.*, 105 Wn.2d 878, 888, 719 P.2d 120 (1986). A trial court abuses its discretion when it bases its decision on unreasonable or untenable grounds. *T.S. v. Boy Scouts of Am.*, 157 Wn.2d 416, 423, 138 P.3d 1053 (2006). When a party moves to amend after an adverse grant of summary judgment, the motion disrupts the normal course of proceedings, and the trial court should consider whether the party could have timely made the motion earlier in the proceedings. *Doyle v. Planned Parenthood of Seattle-King County, Inc.*, 31 Wn. App. 126, 130-31, 639 P.2d 240 (1982). A trial court appropriately denies a motion to amend when a claim is without merit. *Syputa v. Druck, Inc.*, 90 Wn. App. 638, 649, 954 P.2d 279 (1998). A trial court also properly denies a motion to amend when the case has been pending for 17 months and the party seeking to amend offers no reason why the amendment had not occurred earlier. *Morgan Bros., Inc. v. Haskell Corp.*, 24 Wn. App. 773, 781, 604 P.2d 1294 (1979).

Here, Sterling moved to amend its answer to add an equitable subrogation claim after an adverse grant of summary judgment. But this claim was meritless due to its stipulation to the newly contested lien priority following its own stipulation. Further, Sterling moved for permission to amend its answer 14 months after the proceedings began and 11 months after the

summary judgment in favor of Mountain West on the relative lien priorities. We hold that the trial court did not abuse its discretion in denying Sterling's motion to amend.

VI. Agency

JA contends that the trial court erred in granting summary judgment on the full amount of Mountain West's lien because JA raised a genuine issue of material fact regarding Don Poe's authority to sign change orders. Mountain West counters that JA merely raised contrary, conclusory facts in a declaration insufficient to defeat summary judgment based on documented facts contrary to the declaration's assertions.

In the summary judgment context, parties cannot rely on declarations considered at face value and cannot raise issues of material fact merely by claiming contrary facts. *Meyer v. Univ. of Wash.*, 105 Wn.2d 847, 852, 719 P.2d 98 (1986). When the facts are undisputed and susceptible to only one interpretation, courts may decide agency as an issue of law. *Bill McCurley Chevrolet, Inc. v. Rutz*, 61 Wn. App. 53, 57, 808 P.2d 1167 (1991).

An agent can bind its principal to a contract when the agent has either actual or apparent authority. *King v. Rivelund*, 125 Wn.2d 500, 507, 886 P.2d 160 (1994). An agent has apparent authority to act for a principal only when the principal makes objective manifestations of the agent's authority "to a third person." *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 555, 192 P.3d 886 (2008) (quoting *King*, 125 Wn.2d at 507). A principal's objective manifestations create apparent authority when they cause the third person "to actually, or subjectively, believe that the agent has authority to act for a principal" and "be such that the [third person's] actual, subjective belief is objectively reasonable." *Ranger Ins. Co.*, 164 Wn.2d at 555 (quoting *King*, 125 Wn.2d at 507). A principal ratifies an agent's agreement if he accepts the benefits and

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remains silent or fails to repudiate it. *Hoglund v. Meeks*, 139 Wn. App. 854, 870 n.7, 170 P.3d 37 (2007).

Here, Mountain West directly wrote Milne to confirm that Poe had authority to sign change orders. In a subsequent e-mail, Milne confirmed, “construction management is delegated to [Poe and James].” CP at 145. Milne later stated in a declaration that he did not “recall” receiving Davis’s letter, that Mountain West took the e-mail “out of context” and the e-mail did “not state that Don Poe ha[d] authority to approve change orders.” CP at 189. But a party’s denial of receipt of a document does not defeat summary judgment without introducing specific facts of a delivery failure. *Hansen v. U.S.*, 7 F.3d 137, 138 (9th Cir. 1993). Likewise, the record does not support Milne’s claim that Mountain West took the e-mail out of context. Milne’s declaration that Poe did not have authority to sign change orders and that Poe was not working on the property during the period in which he signed some change orders, are respectively conclusory or unsupported by the record.

Further, Mountain West copied Milne with e-mails between Mountain West and Poe that discussed large-item change orders approved by Poe. Milne never disputed receiving these e-mails or contemporaneously repudiated Poe’s authority over change orders. Finally, JA paid for the change order work, including change orders approved by Poe, until it fell behind in payments.

Here, the undisputed facts are susceptible only to the interpretation that Poe had authority to sign change orders. Accordingly, we hold that the trial court did not err in granting summary judgment against JA for the full lien amount in favor of Mountain West.

VII. ATTORNEY FEES

Mountain West requests attorney fees and costs on appeal under terms authorized in the

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contract and RCW 60.04.181. RAP 18.1 allows attorney fees if applicable law authorizes them.

Here, the contract provided that JA would bear collection costs in the event of nonpayment. Furthermore, RCW 60.04.181(3)² allows a prevailing party in a lien action to recover attorney fees and costs on appeal. We award Mountain West fees and costs on appeal.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, J.

We concur:

Hunt, J.

Quinn-Brintnall, P. J.

² RCW 60.04.181(3) provides:

The court may allow the prevailing party in the action, whether plaintiff or defendant, as part of the costs of the action, the moneys paid for recording the claim of lien, costs of title report, bond costs, and attorneys' fees and necessary expenses incurred by the attorney in the superior court, court of appeals, supreme court, or arbitration, as the court or arbitrator deems reasonable. Such costs shall have the priority of the class of lien to which they are related, as established by subsection (1) of this section.