

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

NEW CARE CONSTRUCTION, LLC, a Washington limited liability company,)	No. 29104-9-III
)	
Respondent,)	Division Three
)	
v.)	
)	UNPUBLISHED OPINION
MIKE HARVEY'S PLUMBING SERVICES, INC., a Washington corporation,)	
)	
Appellant.)	
)	

Brown, J. — Mike Harvey's Plumbing Services, Inc. (MHP), a subcontractor to New Care Construction, LLC (New Care), appeals the trial court's decision granting New Care's request to release MHP's lien filed about 21 months after MHP's last work. We agree with the trial court that the lien filing was untimely and frivolous, meriting attorney fees and costs under RCW 61.24.081. Accordingly, we affirm.

FACTS

New Care was a general contractor for a construction project in Walla Walla known as the Park Manor Rehabilitation Center (Park Manor). In July 2007, New Care subcontracted with MHP for plumbing services at Park Manor. The agreement partly

No. 29104-9-III
New Care Constr. v. Mike Harvey's Plumbing Servs.

provided: "Subcontractor shall guarantee its work against all defects in material and workmanship for a period of one (1) year from the date of final acceptance of the Project by Owner." Clerk's Papers (CP) at 15 ¶ 26.

MHP last worked at Park Manor on April 23, 2008. MHP does not dispute it did not perform any work on the project during the next 21 months. New Care made its last payment to MHP on June 11, 2008. MHP failed to complete the work pursuant to the contract and New Care hired another subcontractor to complete the project.

In September 2009, New Care wrote MHP apparently in response to a letter from MHP requesting payment. New Care's letter disputes the amount due and alleges numerous breaches of the subcontract agreement by MHP. First, the letter references the last payment made by New Care to MHP occurred in June 2008. Next, the letter references several provisions from the subcontract, including:

Final payment shall be made within a reasonable time after the completion and acceptance of the subcontract work.
Subcontractor's work under this Subcontract shall not be deemed complete until such time as Subcontractor has fully performed all work in accordance with the contract documents and the work has been finally approved and accepted by the Contractor and Owner.

CP at 60, 61.

Finally, the letter concludes:

[New Care] has diligently attempted to close out this project with MHP. At present communication has been one sided as stated previously. We have approximately 10 unanswered requests to finalized [sic] the contract amount and close out this project. [New Care] is still waiting for final [sic] AS-Built drawings from MHP per the terms of the contract. [New Care] would gladly discuss the close out of this project with MHP if there are any questions. [New Care] has only one objective that is to close out the

No. 29104-9-III
New Care Constr. v. Mike Harvey's Plumbing Servs.

project per the terms of the subcontract between [New Care] and MHP.

CP at 64.

On November 25, 2009, MHP contacted Les Wright, the maintenance manager for Park Manor. MHP inquired as to whether Mr. Wright received "as built" drawings. Mr. Wright informed MHP that Park Manor did, in fact, have copies of the "as built" drawings, which were provided to Park Manor in April 2008.

On January 29, 2010, MHP recorded a claim of lien pursuant to chapter 60.04 RCW with the Walla Walla County Auditor in the amount of \$29,880.74.

In February 2010, Mr. Wright contacted MHP regarding a problem with the water temperature at the Park Manor facility. MHP visited the property and fixed a circulating pump. MHP informed Mr. Wright that there would be no charge for the repair, as he considered it fulfillment of the original subcontract.

In March 2010, New Care sued, seeking release of the claim of lien as frivolous and an award of its attorney fees and costs pursuant to RCW 60.04.081(4). Following oral argument, the court issued a letter opinion providing (1) MHP's "active role on the project ended April 23, 2008," (2) the inquiry by MHP regarding "as built" drawings did not constitute a request by the property owner or New Care for additional work, and (3) there was no contractual requirement for MHP to provide the repairs to the circulating pump. CP at 79, 80. As such, the trial court ruled the claim of lien was "frivolous, being untimely," thereby releasing the lien and awarded attorney fees and costs to New Care pursuant to RCW 60.04.081(4). CP at 80. MHP appealed.

ANALYSIS

The issue is whether the trial court erred in finding MHP's claim of lien was frivolous under RCW 61.24.081. MHP contends its lien was timely and valid.

"We consider a summary procedure under RCW 60.04.081 analogous to a trial by affidavit." *Geo Exch. Sys., LLC v. Cam*, 115 Wn. App. 625, 628, 65 P.3d 11 (2003). Thus, both the legal and factual determinations are reviewed on appeal. *Id.* at 628. To the extent that the trial court's ruling is based on a resolution of factual disputes, we review the ruling to determine whether substantial evidence supports the factual determinations, and whether the trial court made an error of law that may be corrected on appeal. *W.R.P. Lake Union Ltd. P'ship v. Exterior Servs., Inc.*, 85 Wn. App. 744, 750, 934 P.2d 722 (1997).

Here, the trial court considered the parties' arguments and, although it did not enter any findings of fact, the trial court's reasoning for entering the order is apparent from the record. Thus, we review the order to determine whether substantial evidence supports the factual determinations, and whether the trial court made an error of law that may be corrected on appeal.

Under RCW 60.04.021:

(1) Any person furnishing labor, professional services, materials, or equipment for the improvement of real property shall have a lien upon the improvement for the contract price of labor, professional services, materials, or equipment furnished at the instance of the owner.

No. 29104-9-III
New Care Constr. v. Mike Harvey's Plumbing Servs.

However, the person must file a claim of lien within 90 days of ceasing to furnish labor, professional services, materials, or equipment. RCW 60.04.091.

Under RCW 60.04.081, a property owner may quickly obtain the release of a lien that is frivolous and made without reasonable cause or that is clearly excessive.

W.R.P. Lake Union Ltd. P'ship, 85 Wn. App. at 749. RCW 60.04.081 partly states:

(1) Any owner of real property subject to a recorded claim of lien under this chapter, or contractor, subcontractor, lender, or lien claimant who believes the claim of lien to be frivolous and made without reasonable cause, or clearly excessive may apply by motion to the superior court for the county where the property, or some part thereof is located, for an order directing the lien claimant to appear before the court . . . and show cause, if any he or she has, why the relief requested should not be granted. The motion shall state the grounds upon which relief is asked, and shall be supported by the affidavit of the applicant or his or her attorney setting forth a concise statement of the facts upon which the motion is based.

. . . .
(4) If, following a hearing on the matter, the court determines that the lien is frivolous and made without reasonable cause, or clearly excessive, the court shall issue an order releasing the lien if frivolous and made without reasonable cause, or reducing the lien if clearly excessive, and awarding costs and reasonable attorneys' fees to the applicant to be paid by the lien claimant. If the court determines that the lien is not frivolous and was made with reasonable cause, and is not clearly excessive, the court shall issue an order so stating and awarding costs and reasonable attorneys' fees to the lien claimant to be paid by the applicant.

Thus, at this summary proceeding, the party seeking the release of the lien bears the burden of proving that the lien is frivolous and without reasonable cause.

W.R.P. Lake Union Ltd. P'ship, 85 Wn. App. at 751. Once this moving party provides a reason that the lien is frivolous and without reasonable cause, the burden shifts to the

No. 29104-9-III

New Care Constr. v. Mike Harvey's Plumbing Servs.

non-moving party to present a prima facie case as to why the lien is not frivolous. *Id.*

Once the non-moving party makes a showing that the lien is not frivolous, the burden shifts back to the moving party to prove that the lien is frivolous. *Id.* at 752.

Here, New Care argued MHP's lien was frivolous because it was filed well outside the required 90-day limit. In response, MHP asserts it performed work on the contract in the 90 days before and after filing the claim of lien. Argument from the show cause hearing is not included in the record. In any event, the trial court agreed with New Care, noting MHP's active role on the project ended on April 23, 2008; MHP went to Mr. Wright on its own initiative and for its own purposes; and no legal requirement existed under the subcontract for MHP to perform warranty work 22 months after completion of the project; and concluding the lien was "therefore frivolous, being untimely." CP at 80.

To be frivolous, a lien must be improperly filed beyond legitimate dispute. *W.R.P. Lake Union Ltd. P'ship*, 85 Wn. App. at 752. A lien is not necessarily frivolous because a party ultimately loses on a factual or legal ground. *Id.* Even if a lien is ultimately found to be invalid, it is frivolous only if it presents no debatable issues and is so devoid of merit that it had no possibility of succeeding. *Id.*

MHP argues its lien was timely, so it could not be frivolous. The court reasoned MHP could not create a debatable issue simply by visiting the project site 22 months after ceasing to furnish labor, professional services, materials, or equipment. The court cited to *Hopkins v. Smith*, 45 Wn.2d 548, 276 P.2d 732 (1954) for the rule that "work

No. 29104-9-III

New Care Constr. v. Mike Harvey's Plumbing Servs.

must in fact be done as part of the project and not be done gratuitously or as a mere pretext to justify an otherwise late lien filing.” CP at 80. It twice noted that MHP performed this work while aware of the legal issues pending between it and New Care. The court rejected the proposition that the review of the “as-built” diagrams “involved his professional services.” CP at 79. The court found MHP’s contentions meritless. It found MHP actually completed its project work in April 2008. Substantial evidence supports those determinations.

MHP contends that because it had not finished the job, the warranty provision in its contract had not yet begun to run. Therefore, it argues the repair work it performed in February 2010 was still part of its contract with New Care. MHP cannot extend the completion date by quitting and failing to finish its job. The quit date is the relevant date for purposes of the 90-day calculation. Substantial evidence supports the trial court’s determination that April 23, 2008 was that date. MHP does not dispute its active role on the project ended then. Since MHP filed its claim of lien in January 2010, it was improperly filed well beyond the time for legitimate dispute. Therefore, the trial court did not err in finding MHP’s lien frivolous.

New Care requests attorney fees and costs on appeal under RCW 60.04.081(4) and RAP 18.1. Because New Care prevails, its request for fees and costs is granted. Thus, we do not address New Care’s attorney fees request under the contract. And, because MHP has not prevailed here, we do not address its request for attorney fees and costs under RCW 60.04.081(4) and RAP 18.1.

No. 29104-9-III

New Care Constr. v. Mike Harvey's Plumbing Servs.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the

No. 29104-9-III
New Care Constr. v. Mike Harvey's Plumbing Servs.

Washington Appellate Reports, but it will be filed for public record pursuant to RCW
2.06.040.

WE CONCUR:

Brown, J.

Kulik, C.J.

Siddoway, J.