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Washington's Summary Procedure for Removal of a Frivolous Construction Lien

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In 1991, the Washington legislature enacted a statute – RCW 60.04.081 – designed to provide a property owner, lender, general contractor, or other party in interest a mechanism for removal of a construction lien that is "frivolous and made without reasonable cause." Further, under this statute, if the court determines that a construction lien is "clearly excessive," the court is authorized to reduce the lien to the amount that the court determines to be reasonable.

This article discusses the procedural requirements under RCW 60.04.081, and discusses the high standard that has been imposed by courts in relation to removal of a construction lien under this statute. This article also discusses the advantages and disadvantages of utilizing the procedure under RCW 60.04.081.

1. Procedural Requirements under RCW 60.04.081

Under RCW 60.04.081 (1), the party challenging the lien (hereinafter "applicant") files a motion, affidavit, and order to show cause with the Superior Court in the county where the liened property is located. The

motion must state the grounds upon which relief is sought, and the affidavit must provide "a concise statement of the facts upon which the motion is based." *Id*. The affiant must be either the applicant or the applicant's attorney. *Id*.

The order to show cause must clearly state that if the lien claimant fails to appear at the time and place set forth in the order for the hearing on the motion, the lien will be released, and the lien claimant will be ordered to pay the applicant's costs, including reasonable attorney fees. RCW 60.04.081 (2).

The hearing date must be a date no earlier than six days, nor later than fifteen days, following service of the motion, affidavit, and order on the lien claimant. RCW 60.04.081 (1). The motion may be filed at any time after the subject construction lien has been recorded, even before a lien foreclosure suit has been filed. If the lien claimant has already filed a suit to foreclose the lien, the motion, order, and affidavit are filed under that case. If no suit has been filed to foreclose the lien, then the applicant pays a filing fee (currently $35), and the clerk assigns a cause number to the motion or application. RCW 60.04.081 (3). The court, of course, has discretion to modify the date of the hearing for various reasons. For example, a judge may not be available to conduct a hearing within such an expedited time frame.

In some cases, there may be a hearing on whether to even issue the order to show cause. This situation may arise where a lien foreclosure suit has already been filed, both the applicant and lien claimant are represented by counsel, and the lien claimant's counsel has indicated opposition to issuance of the order to show cause. Since courts will rarely ever decide a contested matter on an *ex parte* basis, a hearing will likely be set to decide whether to issue the order to show cause.

Assuming that the court issues an order to show cause and the matter proceeds to a hearing on the merits, the court will need to decide, in accordance with the standard discussed in the next section below, whether the lien is frivolous and made without reasonable cause, or whether it is clearly excessive. Evidence for the hearing is presented by affidavit or declaration along with exhibits. Given the summary nature of the proceeding, it is unlikely that a court will permit live testimony at the hearing, even if a court were given advance notice of a party's intent to present live testimony.

As part of its ruling, the Court is required under RCW 60.04.081 (4) to award attorney fees to the party who prevails. Accordingly, if the applicant fails to show that the lien is frivolous and without reasonable cause or fails to show that the lien is clearly excessive, the applicant must pay the reasonable attorney fees and costs of the lien claimant.

2. Case Law

Neither RCW 60.04.081, nor any of the Washington construction lien statutes, define the words "frivolous and made without reasonable cause." However, there is sufficient case law interpreting RCW 60.04.081 which establishes the standard for courts to follow.

That standard is a very high one. In *Williams v. Athletic Field, Inc.*, 172 Wn 2d 683, 699 (2011), the Washington Supreme Court held that a frivolous lien is one that "presents no debatable issues and is so devoid of merit that it has no possibility of succeeding." In *S.D. Deacon Corp. v. Gaston Bros. Excavating, Inc.*, 150 Wn App 87, 95 (2009), the Court held that "[t]he determination to be made when a lien claim is alleged to be frivolous is analogous to deciding whether an appeal is frivolous; the claim of lien must present no debatable issues and it must be so devoid of merit that no possibility of sustaining the lien exists." The Court of Appeals went on to state that the parties' contractual dispute at issue in that case "is not the type of dispute that can be resolved in a summary proceeding." *Id*.

Further, in *Pac Industries, Inc. v. Singh*, 120 Wn App 1, 5 (2003), the Court noted that "[e]very frivolous lien is invalid, but not every invalid lien is frivolous." (citing *In Intermountain Elec., Inc. v. G-A-T Bros. Constr.*, 115 Wn App 384, 394 (2003)).

In *Singh*, the court held that the management and coordination services performed offsite were not lienable, holding that such work did not meet the definition of labor under the lien statute, because the work did not improve the subject property and was not performed at the site. *Singh*, 120 Wn App at 9. However, the court declined to hold that the lien was frivolous, noting that "[t]here is a debatable issue of law because no Washington authority holds that a person providing development services cannot file a lien under chapter 60.04 RCW." *Id*. at 10.

The standard for summary judgment is much different than the standard under RCW 60.04.081, as illustrated by the case of *Blue Diamond Group v. KB Seattle 1, Inc.*, 163 Wn App 449, 455 (2011), in which the court upheld the trial court's order dismissing the lien claimant's lien foreclosure action on summary judgment. The lien claimant in the *Blue Diamond* case performed the same type of services as did the lien claimant in the *Singh* case – offsite management and coordination services. The *Blue Diamond* court held that such work was not lienable, and in fact cited the *Singh* case in support of that holding, but unlike the *Singh* court, the *Blue Diamond* court ordered that the lien be released. *Id*. at 455.

3. Discussion

The procedure under RCW 60.04.081 is a valuable tool but must be used under the right circumstances. Clearly, the primary risk in challenging a lien under RCW 60.04.081 is the risk of the applicant being ordered to

pay the lien claimant's attorney fees if the challenge is not successful. Even though a court will review the amount of the prevailing party's attorney fees to determine if the fees are reasonable and may conduct a separate hearing regarding the amount of attorney fees, the attorney fees awarded may be a significant amount. Further, an unsuccessful challenge can illuminate the weaknesses of the applicant's alleged defenses to the lien and add momentum to the lien claimant's case.

These risks need to be weighed against the obvious benefit of a successful challenge—complete removal of the lien, or reduction in the amount of the lien if the court has found that the amount of the lien is clearly excessive. Another option, of course, as illustrated by the *Singh* case, *supra*, and *Blue Diamond* case, *supra*, is for the applicant to file a summary judgment motion in an appropriate case, unless the applicant is convinced that they can satisfy the high standard for summary dismissal of a lien under RCW 60.04.081.

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