Construction Law Newsletter

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NOTE FROM THE EDITOR

By *Rod Mills*
Seifer, Yeats & Mills, LLP

Where were you in September, 1993? It is hard to believe, but that was when you last received our section's Newsletter. With your help, we can resume publishing on a more frequent basis. Please contact me if you are interested in writing an article, or have an announcement or practice tip, of interest to our section members.

SUMMARY OF RECENT OREGON CONSTRUCTION CASES

By Susan *G. Whitney*
Stewart Sokol & Gray

Bell Hardware of Medford, Inc. u. Ed Szoyka Woodworking Co., 129 OrApp 332,879 P.2d 208, *rev. denied,* 320 Or 407 (1994).

The Court held that plaintiff's Complaint to foreclose a construction lien claim should not have been dismissed on a Rule 21 Motion. Although plaintiffs lien provided only a street address for the property, the description could be sufficient to enable defendants to identify the property subject to the lien, as required by ORS 87.035(3)(d). The requirements of Chapter 87 expressly override the stricter sections of Chapter 93.

Building Structures, Inc. u. Young, 131 OrApp. 88,883 P.2d 1308 (1994).

Among other things, the Court held that a one-page contract between the owner and the builder for design and construction was sufficiently specific to be enforceable, even though it did not include the essential terms of the price of the work or the scope of the work to be performed.

Calapooia Pole Structures, Inc. u. Mulder, 128 OrApp. 190,875 P.2d 495 (1994).

Plaintiff built, on defendant's residential property, a pole building which defendant intended to use for the commercial purpose of repairing recreational vehicles. Plaintiff failed to give defendant an Information Notice to Owner under ORS 87.093, but was nonetheless entitled to foreclose a construction lien. The Court (DeMuniz, J.) scrutinized ORS 87.093(5) and the definitions of "residential construction or improvement" and "residential construction or improvement contract" in ORS 87.093(7)(a) and (b), and held:

> "The notice requirements of the statute do not apply to any structure constructed upon residential property. It is not the location of the structure, but the nature of the contract that determines whether the statutory notice is necessary."

[This reporter agrees with the dissent (Leeson, J.). The majority's artificial limitation undermines the purpose of protecting residential property owners from lien foreclosures on their homes, absent proper notice. It could be argued that the contractor might reasonably believe that a notice required for residential construction was not necessary or appropriate for a commercial job and that permitting foreclosure of commercial buildings would not affect the rules protecting against foreclosures on homes absent notice].

Edwards u. Perry, 130 OrApp. 165,880 P.2d 507 (1994).

Plaintiff was entitled to recover for the value of goods and services he provided in painting defendant's apartment complex (non-residential work), even though plaintiff was registered with the Construction Contractors Board only as a residential contractor. The various registration classes are set forth in Board rules, but not in the statutes. Because the plaintiff was registered as required *by statute,* the plaintiff was entitled to maintain the action:

"Acontractor'sfailure to register in a particular category as required by the Board's rules exposes the contractor to penalties under ORS 701.135(1)(c) for violating the rule, but it does not trigger ORS 701.065(1)."

Emmert Zndustrial Corp. u. Sanders, 131 OrApp. 113,883 P.2d 1304 (1994).

Plaintiff had a contract to jack up defendant's house, construct a foundation and then lower the house. Defendant did not pay as required, and plaintiff stopped work, leaving the house on supporting beams with no foundation. More than four years later, plaintiff filed a construction lien. The Court held: (1) defendant's contractual liability was discharged by her intervening bankruptcy, but the construction lien was not; (2) the lien was untimely because leaving equipment on the site for over four years is not equivalent to "furnishing" materials, so the time for filing a lien began to run when plaintiff left the site; and (3)the trial court was required by ORS 87.060(5) to award attorney fees to defendant, who prevailed on the issues of the validity and foreclosure of the lien.

South Lake Center Partnership v. WakerAssociates, Inc., 129 OrApp. 581, 879 P.2d 1342 (1994).

Further direction from the Court of Appeals as to whether a claim for deficient performance of an engineering services contract sounds in tort or contract for purposes of the statute of limitations. Following Securities-Intermountain, Inc. *u.* Sunset Fuel Co., 289 Or. 243, 611 P.2d. 1158 (1980), the Court (Haselton, J.) concluded that, of the following allegations, (1) and (4) soundedin contract, and (2) and (3) did not:

(1) Failure to prepare the design for the storm drainage, sanitary and water systems.
(2) Failure to prepare and record the easement
(3) Failure to properly place the storm drain offset stakes.
(4) Failure to provide observation of the **work** in progress.

The exercise undertaken by the Court was to review carefully the engineering contract to determine whether each of these allegations was derived from a contractually specified duty of performance. [Reportee's Note: The lesson to be learned from South Lake is that if there is a potential statute of limitations problem, the allegations of the complaint should be couched in the specific language *of the contract.*]

Stockton u. Silco Construction Co., 319 Or 365,877 P.2d 71(1994).

After completion of a public works contract, employees of a subcontractor attempted to recover unpaid prevailing wages directly from the general contractor. The Supreme Court held that the employees were not entitled to maintain their claims for unpaid prevailing wages against the prime contractor under ORS 379.265(1), as that statutory remedy only was available while the work was ongoing. Moreover, the employees were not entitled to maintain their claims against the prime contractor as intended third party beneficiaries of the prevailing wage provisions in the public works contract.

Wegroup pc/Architects & Planners u. State of Oregon, 131 OrApp. 346,885 P.2d 709 (1994).

Red Alert for professional services contracts with the State of Oregon. The Court (Haselton, J.) conceded that its decision could [and did] lead to "draconian consequences." Plaintiff architectural firm had two contracts with the Corrections Division to provide design services for the conversion of the Eastern Oregon Hospital and Training Center into a prison. During the course of the work, the State changed its mind about a space which plaintiff had designed as required and directed plaintiffto re-design the unit. Neither party attempted to negotiate or modify the contract price before the additional services were performed. Plaintiff complied with the State's request and later submitted bills for the redesign work to the State, which the State refused to pay.

The State's motion for summary judgment was granted and affirmed. The Court relied on ORS 279.712 (which requires the Department of Administrative Services to approve all professional and personal services contracts before the contract becomes binding and before any service may be performed under the contract), and on similar provisions in *OAR* 291-26-025 and in the contract between the State and Wegroup. The Court also brushed aside plaintiffs implied contract claim because public contracting laws "circumscribe the state's ability to bind itself by express contract," citing Twohy Bros. Co. *u.* Ochoco Irrigation District, 108 Or 1, 33, 210 P. 873 (1923).

The Court said that the plaintiff should have stopped work until it had a formal change order:

"In particular, if the State's demand for the redesign of Unit C did, in fact, materially alter the scope and extent of plaintiffs services, plaintiffwas obligated to refuse to proceed until an appropriate contract amendment had been negotiated and approved in writing by all parties."

The Court's characterization of each change order as a *separate* contract is a startling development in Oregon construction law.

Phillips v. Gibson, 133 OrApp. 760,893 P.2d 574 (1995):

A building contractor sued an owner for lost profits. The owners ordered the contractor to stop work after he [sensibly] declined to sign a lender's document which would have obligated him both to cure the owners' default and to complete construction at his sole expense. The trial court found that the contractor's refusal to sign the guaranty was reasonable and that the owners' repudiation was a material breach. However, the trial court also held that the contractor had rescinded the contract and was precluded from seeking damages.

The Court of Appeals reversed, holding that "a party who wishes to exercise the right to rescind must give the other party notice that unequivocally and unconditionally conveys the intent to insist on the rescission." If an offer to rescind mixes "words of rescission" with "words of settlement and compromise", it does not, as a matter of law, meet the requirements for a legally effective notice of rescission.

Mackey v. TKCC, Inc., 134 OrApp. 121, 894 P.2d 1200, *rev. denied,* 321 Or. 429, 899 P.2d 1197 (1995):

This case may be instructive on how to plead and attack a claim of negligence against, among others, a contractor whose completed building contained unsafe levels of volatile organic compounds which made the plaintiff sick. At issue were the "knew or should have known" allegations, and the court held that "should have known" allegations are sufficient if they allege facts which would allow the factfinder to conclude that the risk was foreseeable.

Bannister v. Longview Fibre Co., 134 OrApp. 332, 894 P.2d 1259 (1995):

Another hapless contractor who failed to register with the Construction Contractor's Board was barred from bringing claims for breach of contract and for tort arising out of the termination of his contract for road construction and maintenance work on defendant's properties. The ongoing contractual relationship between the parties had begun in 1985 when the contractor was not required to be registered. It was held and affirmed that the contractor was unaware of the registration requirement, but that his non-compliance was the product of *inexcusable* neglect. The test under ORS 701.065(2) is a two-part test; mere ignorance will not suffice.

Miller v. Ogden, 134 OrApp. 589,896 P.2d 596 (1995), *rev. granted,* 322 Or. 612,911 P.2d 1230 (1996):

The Court of Appeals affirmed the judgment against plaintiffs Miller on their claims for specific performance of a contract to convey real property and for foreclosure of construction and nurseryman's liens. The parties had signed a "Memorandum of Contract Agreement" which the Court held was too indefinite to be enforced. After the contract was signed and before Ogden repudiated, plaintiffs repaired a barn, excavated and filled a road, and planted an orchard on the defendant's property. The defendant testified that he did not learn of the construction until after it was completed.

The Court held that the "constructive request" provision in ORS 87.030 does not apply when an owner first becomes aware of an unsolicited improvement after it has been completed. It applies only when two conditions are satisfied: (1) an owner becomes aware that unauthorized construction is occurring on his or her property; and (2)the owner does not act to disclaim that construction by posting a notice within three days thereafter.

[According to Keith **A.** *Miller, OSB member handling the appeal pro se, the Supreme Court granted review primarily because of the lien issues, but may in fact also address the specific performance issues. Briefs have been filed, but oral argument has not been set.]*

Independent Contractors of Oregon v. Construction Contractors Board, 135 Or.App. 556,899 P.2d 1216 (1995):

The Court held that *OAR* 812-03-002(1), promulgated by the CCB, was invalid because it violated ORS 701.035. The rule was inconsistent with the statute because the rule would require a contractor without employees to register as nonexempt when the statute would allow it to register as exempt.

The exemption is from workers' compensation insurance coverage. The lesson to take to heart is that sometimes those CCB regulations need to be looked at very carefully.

Estey v. MacKenzie Engineering Inc., 137 OrApp. 1,902 P.2d 631 (1995), *rev. granted*, 322 Or. 489,909 P.2d 161 (1996):

A homeowner sued the engineer and engineering firm which had performed a prepurchase house inspection, alleging negligence, negligent misrepresentation, and breach of contract. The homeowner had paid $200 for the inspection, and was seeking damages of $340,000 to repair and stabilize the house. The Court of Appeals [Richardson, C.J.] affirmed summary judgment for the defendants on all claims, based on a limitation of liability clause: "The liability of MEI and the liability of its employees are limited to the Contract Sum." The Court rejected all plaintiff's arguments, including a public policy argument. Apparently the Supreme Court is intrigued with at least one of the arguments.

Meininger u. Henris Roofing & Supply of Klamath County, Znc., 137 OrApp. 451, 905 P.2d 861 (1995), *rev. denied*, 322 Or. 489,909 P.2d 161 (1996):

This case constitutes an important development in the law as to the liability of a home inspector [who apparently was not fortunate enough to have a limitation of liability clause]. The trial court granted summary judgment against the plaintiffs on their negligent misrepresentation claim. The Court of Appeals [Warren, J.] reversed, holding that a roof inspector hired by the *sellers'* agent to inspect a roof in contemplation of the sale of a house has a duty to the *buyers* to avoid negligently misrepresenting the condition of the roof. The plaintiffs were held to be intended beneficiaries of the inspection contract under Restatement (Second) Torts § 552. *Onita Pacific Corp. u. Trustees of Bronson* was distinguished by the court.

Oak Crest Construction Co. u. Austin Mutual Insurance Co., 137 OrApp. 475, 905 P.2d 848 (1995):

Plaintiff general contractor was denied coverage under its commercial liability policy. Cabinets and woodwork were painted by plaintiffs subcontractor, but the paint failed to "cure" properly. The cost to repair was $10,240. The court held that the property damage was not caused by an occurrence as required by the policy. The court found that since the paint was intentionally applied, the property damage was not the *result* of an accident or unexpected event; it was *itself* the unexpected event. Apparently the distinction is that if the product fails causing damages only to itself there is no coverage. If other property is damaged, then there is coverage.

NOTE — still pending after all these years: Building Structures, Inc. u. Young, 131 Or.App. 88, 883 P.2d 1308 (1994), reu. granted, 320 Or. 587,890 P.2d 993 (1995).

Double Eagle Golf; Inc. v. City of Portland, 322 Or. 604,910 P.2d 1104 (In Banc)(1996):

The 1995 decision of the Court of Appeals [134 Or.App. 60,894 P.2d 514] was affirmed on different grounds. At issue was whether or not ORS 279.029(1), requiring that public agencies award contracts to the lowest responsible bidder, applied to a bid to operate concessions at a public golf course. The Court of Appeals had held that such contracts were exempt because they were "personal services" contracts. The Supreme Court did not address this holding, instead noting that the purpose of the golf concession contract was to raise the most possible revenue for the City from a responsible bidder, i.e. the "highest responsible bidder." The Court [Unis, J.] declined to substitute "high" for "low" in the statute and held that ORS 279.029(1) simply does not address the procedure for awarding concession contracts by public agencies. Although the result is probably wrong factually (the "highest" bidder did not get the contract), it is an appropriate application of the rules of statutory construction. The legislature certainly needs to act.

Steelman-Duff, Znc. v. State of Oregon, 323 Or. 220,915 P.2d 958 (In Banc) (1996):

This 1995 Court of Appeals case [135 Or. App. 545, 899 P.2d 752] was recently reversed and remanded by the Oregon Supreme Court. In an opinion that could have significant impacts on bid dispute litigation, the Court (Graber, J.) engaged in judicial lawmaking under the guise of statutory interpretation. At issue was entitlement to attorney fees in a suit by an adversely affected bidder

under ORS 279.067. Steelman-Duff brought a suit under the statute after ODOT announced its intent to award a contract to Compton, the second low bidder. The trial court determined that Steelman-Duff was not entitled to relief. Compton thereafter dismissed all its claims, except its claim for attorney fees, which was denied by the trial court and the Court of Appeals, on the basis that Compton, was not directly involved in the legal controversy between the aggrieved bidder and the public contracting agency.

In reversing, the Supreme Court held that Compton was "a successful party in a suit brought under this section" and was entitled to petition for an award of fees. The Court first determined that the "text and context" of the statute did not resolve the issue. Second, the legislative history revealed that the legislature contemplated the issue only in "traditional, two-sided terms." Maxims of statutory construction also provided no help, so the Court resorted to the special maxim developed for such situations: "When all else fails, this court will attempt to decide the case in accordance with what it believes the legislature would have done, had it considered the question." By footnote the Court reminded the trial court that an award of fees was not ***required*** under the statute — it "may" award "reasonable" fees. Your reporter, who may not be entirely neutral, wonders if Steelman-Duff had prevailed, would ODOT and Compton have been jointly liable for its fees? The Court did not, but should have, addressed this issue along with other ramifications of its decision.

P A E TIPS: CONSTRUCTION LIENS AND FORECLOSURE GUARANTEES

By Jeffrey B. ***Wilkinson***
Stewart, *Sokol & Gray*

A foreclosure guarantee is a form of title insurance. The policy of insurance guarantees the interests of a lien claimant, including construction lien claimants, against those interests in the real property that are subject to the lien. It identifies the individuals, such as the owner and mortgagee, who must (1) receive notice of the filing of the lien (ORS 87.039), notice of intent to foreclose (ORS 87.057), and who must be named in the foreclosure action in order to be bound by the result. Ideally, prior to *filing* all construction liens, a preliminary foreclosure guarantee is perceived as being too high at that early stage and the foreclosure guarantee's poorer cousin, the lot book report, is used instead.

For example, for a foreclosure guarantee of approximately $300,000, the premium is approximately $1,000. Many clients and practitioners are reluctant to expend that much money at the time of filing the lien. Their reluctance is fueled in part by the legitimate expectation that the claim may settle between the time of filing the lien and the date 120 later when the foreclosure must be filed. Often, if it settles in that time, it is difficult to obtain the cost of the title report as part of the settlement even though the cost is recoverable under the construction lien law (ORS 87.060), except where there is no question about the perfection of the lien or the amount in dispute (a rare occurrence).

As a compromise, some practitioners purchase lot book reports. That practice is an invitation to malpractice. A lot book report is not title insurance. Essentially, it is an abstract of title going back 10 years. The cost of a lot book report is usually $250, which accounts for its appeal.

Because a lot book report goes back only ten years, it may not identify mortgagees or other "owners" whose interests appear in the chain of title more than ten years prior to the date of the lot book report. Without that information, it may be impossible to notify all owners and mortgagees of the filing of the lien and the intent to foreclose. Obviously, the absence of that information will also prevent naming those entities in the foreclosure suit. Failure to notify the "owners" (which includes lessees) of the property of the filing of the lien and the intent to foreclose bars recovery of attorney fees that would otherwise be available. ORS 87.039. The only way to be sure about who the owners and mortgagees are is to purchase a foreclosure guarantee.

If cost is a significant factor, there is always the option (with full disclosure and consent of the client) to purchase the foreclosure guarantee in an amount that is less than the amount that is being foreclosed. Of course, if the foreclosure is later deemed defective (or attorney fees denied) because a party that should have been delivered a required notice was not mentioned and not delivered the required notice, then the recovery on the title insurance would be limited to the guaranteed amount.

SECTION NEWS

At the annual meeting of the Section in September, 1995, the following officers and Executive Committee Members were elected: Chair Susan Whitney, Portland, Chair Elect, Dale Hormann, Salem, Past Chair, Thomas Murphy, Tigard; Secretary-Chris Carson, Portland, Treasurer-Milt Lankton, Portland.

Executive Committee Members- at-Large: Stephen Eichelberger, Salem; Carl (Bill) Hopp, Bend; Bill Purdy, Medford; Jeff Wilkinson, Portland; Cynthia Forbes, Salem; Dave Bartz, Portland; Rod Mills, Portland; Isaac Dickson (Board of Governors Liaison), Tualatin, Rich Cecchetti, Oregon State Bar Staff Liaison.

ARBITRATOR/MEDIATOR LIST

The executive committee has voted to maintain a list of section members who are interested in serving as arbitrators and/or mediators regarding construction disputes. Anyone interested in being included on the list should complete and submit the "Construction Section Arbitrator/Mediator List" form included in this newsletter. The section is not undertaking a selection process. Anyone who signs up will be on the list. The list will be provided simply as a service to our membership and it is up to those choosing the arbitrators and mediators to determine if they are qualified. Anyone with questions regarding the Arbitrator/Mediator List should contact Susan Whitney.

NEW BOOKLET AVAILABLE

The Construction Law Section of the Oregon State Bar and the Oregon Construction Contractors Board have joined forces to produce a booklet for use in explaining to homeowners the ins and outs of picking the right contractor, selecting your lender, understanding title insurance and how to avoid construction liens.

A copy of the booklet is enclosed. Additional copies are available by contacting Gayle Allen of Furrer & Scott, LLC, at (503) 620-4540 or 1-800-334-8986.

ODOT SEEKS APPLICANTS FOR SERVICE ON CLAIM REVIEW BOARDS

The Oregon Department of Transportation (ODOT) is seeking qualified individuals for service on review boards to hear and recommend resolution on construction contract claims. Three-member boards are convened only when in-house resolution is not accomplished. Board members are chosen from the list of individuals by both ODOT and the contractor. Compensation is negotiable. Contact Ken Karnosh at (503)986-3012 or by mail at 800 Airport Road SE, Salem, OR 97310 for an application.

SCHEDULE OF UPCOMING EVENTS

September 27, 1996: Annual meeting and election at the Red Lion Inn, Medford, Oregon from 12:30 p.m. to 1:00 p.m. followed by a CLE from 1:00 p.m. to 2:30 p.m. on "New Developments in Construction Law" featuring speakers Mike Scott, Jeff Wilkinson and Madelyn Wessel. 1.5 hours of general CLE credit.

CONSTRUCTION SECTION ARBITRATOR/MEDIATOR LIST

Name _____

Firm _____

Address _____

Telephone _____ Fax _____

E-mail Address _____ Bar Number _____

Bar Memberships _____

Areas of Concentration _____

Hourly and daily rates _____

☐ **Available to Serve as an Arbitrator**

☐ **Available to Serve as a Mediator**

■ Arbitration/Mediation Experience:

_____

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_____

☐ Arbitration/Mediation Training:

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_____

■ Service on any other arbitration/mediation panels:

_____

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■ Other related experience, education, or expertise:

_____

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