9-27-2012

American Bank v. Wadsworth Golf Construction Co Appellant's Reply Brief Dckt. 39415

IN THE SUPREME COURT OF THE STATE OF IDAHO

AMERICAN BANK,

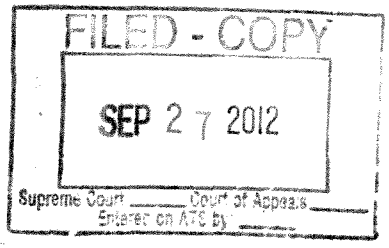
Plaintiff/Cross-Defendant/Appellant,

vs.

WADSWORTH GOLF CONSTRUCTION COMPANY OF THE SOUTHWEST,

Defendant/Cross-Claimant/Respondent.

Supreme Court No. 39415-2011



APPELLANT/CROSS-RESPONDENT AMERICAN BANK'S REPLY BRIEF AND CROSS-RESPONDENT'S BRIEF

Appeal from the District Court of the First Judicial District of the State of Idaho in and for the County of Kootenai

Honorable John P. Luster presiding

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I. INTRODUCTION

Respondent/Cross-Appellant Wadsworth Golf Construction Company of the Southwest's ("Wadsworth") respondent's brief does not address many of the critical issues raised by Appellant/Cross-Respondent American Bank ("American Bank") in its opening brief. More specifically, when asserting that the district court erred by mooting the issue of lien priority upon the posting of the Lien Release Bond,[1] American Bank argued that the district court failed to give effect to the phrase "to have been secured by his lien," as used in Idaho's Lien Bond Statute. American Bank argued that the phrase "to have been secured by his lien" refers to the amount that Wadsworth's lien was secured by the Property, thus limiting Wadsworth's recovery to the amount that it would have recovered by foreclosing its lien against the Property, i.e., put Wadsworth in the same position that it would have been had its lien remained attached to the Property. Wadsworth does not address this argument or suggest an alternative reasonable meaning of the phrase "to have been secured by his lien."

Additionally, American Bank argued in its opening brief that allowing the district court's ruling to stand would defeat the purpose of Idaho's Lien Bond Statute and disturb a long-standing practice in the Idaho title industry with respect to use of the Lien Bond Statute. Wadsworth does not address this argument either.

Rather than addressing American Bank's statutory construction and legislative purpose arguments, Wadsworth cites to a plethora of out-of-state cases. In some instances, Wadsworth misstates the holdings of those out-of-state cases. And with respect to the other out-

[1] All capitalized terms are defined in American Bank's Opening Brief.

of-state cases cited by Wadsworth, they are either distinguishable or irrelevant for the reasons articulated below.

In sum, Wadsworth should not be granted a windfall of $2,425,483.50 simply because American Bank posted the Lien Release Bond. Rather, Wadsworth's recovery should be limited to the amount determined "to have been secured by his lien," which requires consideration of the fact that Wadsworth's lien was subordinated to American Bank's mortgage.

With respect to Wadsworth's violations of the Idaho Contractor Registration Act ("ICRA"), Wadsworth suggests that dismissing its lien foreclosure claim in its entirety would violate the Idaho Constitution. There is no merit to Wadsworth's constitutionality argument because the ICRA penalty provision merely creates a jurisdictional limitation on a contractor's ability to bring an action to foreclose a mechanic's lien, just as other provisions of Idaho's mechanic lien statute place a complete jurisdictional bar on contractors who record their liens too late or file their actions to foreclose their liens too late. Additionally, Wadsworth's citations to other Idaho appellate cases in support of its severability argument is misguided, as they are based upon a case that dealt with a different licensing statute with a different penalty provision from the ICRA.

With respect to Wadsworth's cross-appeal, Wadsworth fails to establish that the district court's factual finding, that Wadsworth was contractually obligated to use the Golden Lien Releases, is clearly erroneous. Additionally, Wadsworth fails to establish error in regard to the district court's conclusions of law that the Golden Lien Releases were supported by

consideration and waived Wadsworth's right to lien for the $343,985 owing for labor, services, equipment, and materials supplied to the Project prior to July 31, 2008.

II. ARGUMENT

A. Wadsworth Failed To Address American Bank's Statutory Construction Argument and Legislative Purpose Argument.

In its opening brief, American Bank argued that the district court erred as a matter of law by determining that the issue of lien priority was no longer relevant once American Bank posted the Lien Release Bond. More specifically, American Bank argued that the district court erred by failing to apply proper rules of statutory construction that required the district court to construe Idaho's Lien Bond Statute as a whole. *See* American Bank's Opening Brief at 16-20. Wadsworth never directly addresses this argument in its responsive brief. Rather, Wadsworth simply recites various provisions of Idaho's Lien Bond Statute to reach its conclusion that "[t]o collect upon the bond, Wadsworth was required to prove that it had a valid lien and the amount of the lien. . . . There is nothing that required Wadsworth to establish its lien priority. Lien priority has nothing to do with lien validity." *See* Respondent's Brief at 17.

Detrimental to Wadsworth's argument, there is nothing in Idaho's Lien Bond Statute that recites that Wadsworth only has to prove the validity of its lien and the amount of its lien to collect from the lien bond. In fact, the word validity is not used anywhere in Idaho's Lien Bond Statute. Rather, the key relevant language is found in Idaho Code Section 45-519, which language is recited verbatim in the lien bond posted by American Bank. Namely, American Bank and the bond surety are liable to Wadsworth for "such amount as a court of competent

jurisdiction may adjudge to have been secured by [Wadsworth's] lien, with interest, costs and attorney's fees." *See* IDAHO CODE § 45-519 and R. Vol. 4 at 848.

In its opening brief, American Bank argued that the past-tense phrase "to have been secured by his lien," as used in Idaho Code Section 45-519 and the lien bond posted by American Bank, refers to Wadsworth's prior security interest in the Property, thus limiting Wadsworth's recovery to the amount it would have recovered by foreclosing its lien against the Property. *See* American Bank's Opening Brief at 16-20. Wadsworth's respondent's brief does not address this argument—or suggest another alternative reasonable meaning of the phrase "to have been secured by his lien."

In its opening brief, American Bank argued that the district court's ruling defeats the purpose of Idaho's Lien Bond Statute that allows a lien holder to bond around another competing party's lien for purposes of preventing waste to the property while at the same time preserving the competing lien holder's legal rights by providing another alternative source of collateral that ensures that the bonded off lien holder recovers every penny it would have recovered by foreclosing its lien against the property. *See* American Bank's Opening Brief at 21-25. Wadsworth's respondent's brief does not address this argument either.

Rather than addressing American Bank's statutory construction argument and legislative purpose argument, Wadsworth cites to a plethora of out-of-state cases that are called into question by subsequent rulings in those cases and that are otherwise distinguishable.

1. **The four unreported Connecticut decisions cited by Wadsworth are limited to the motion before that lower Connecticut court and are distinguishable by a procedural provision in Connecticut's lien bond statute that has no comparable provision in Idaho's Lien Bond Statute.**

Wadsworth cited four unreported decisions issued by the same Connecticut trial judge on the same day: *Ashforth Properties Construction, Inc. v. Bank of Scotland*, 2009 WL 1175538 (Conn. Super. Ct. 2009); *Dalene Hardwood Floorings Co., Inc. v. Ashforth Properties Construction, Inc.*, 2009 WL 1175516 (Conn. Super. Ct. 2009); *Shepard Steel Co., Inc. v. Bank of Scotland*, 2009 WL 1175527 (Conn. Super. Ct. 2009); and *Thyssenkrupp Elevator Corp. v. Bank of Scotland*, 2009 WL 1143143 (Conn. Super. Ct. 2009). All four unreported decisions dealt with the same construction project and mechanic's liens filed against that project. Like the matter at hand, the lender for the construction project filed a lien bond to remove the contractors' liens against the property that secured the lender's mortgage. The lender then moved for summary judgment to declare the contractors' liens invalid under Connecticut's lien bond statute, arguing that the lender's senior and prior mortgage invalidated the contractors' junior liens. The district court denied the lender's motions for summary judgment, holding that the priority of the lender's mortgage was not relevant to the issue of whether the contractors' liens were valid. *Ashforth Props.*, 2009 WL 1175538 at *6; *Darlene Hardwood Floorings Co.*, 2009 WL 1175516 at *6; *Shepard Steel,* 2009 WL 1175527 at *6; *Thyssenkrupp Elevator Corp.*, 2009 WL 1143143 at *6.

The lender then filed a motion for clarification and/or motion to reargue, seeking clarification as to whether the court was mooting priority for all remaining proceedings in the

action or simply holding that priority had nothing to do with lien validity. *See* Addendum A to this Reply Brief. The Connecticut Superior Court granted the motion for clarification, holding that "the Court finds that its decision of April 7, 2009 is, by its language, limited to the context of a motion pursuant to general statute sec. 49-37(b)(3) to invalidate the lien and the Court has not determined whether the issue of priority can be considered in the action on the bond on the merits." *See* Addendum B to this Reply Brief.

Thus, the four unreported Connecticut decisions have no bearing in this action as they were limited to the motion pending before the court, i.e., the lender's motion for summary judgment to invalidate the contractors' liens, and an interpretation of a particular procedural portion of Connecticut's lien bond statute that has no similar comparable provision in Idaho's Lien Bond Statute, i.e., Connecticut General Statutes Section 49-37(b)(3), which states: "If an action on the bond is pending before any court, any party to that action may at any time prior to trial . . . move that the lien for which the bond was substituted be declared invalid or reduced in amount."

Additionally, American Bank has never argued that the priority of its mortgage invalidated Wadsworth's claim of lien. Rather, American Bank argues that Wadsworth would have recovered nothing by foreclosing its lien against the Property and, thus, should recover nothing from the lien bond that merely acts as an alternative form of collateral.

2. The cases cited by Wadsworth from the Florida and North Carolina Courts of Appeals are of no value because they are based upon distinguishable lien bond statutes and distinguishable facts.

In *Gesco, Inc. v. Edward L. Nezelek, Inc.*, 414 So. 2d 535 (Fla. Dist. Ct. App. 1982), a contractor was sued by a property owner for defective workmanship. The contractor counterclaimed for amounts owing for the contractor's labor, equipment, and materials supplied to the construction project. The contractor also filed an action to foreclose its claim of lien and, as part of such action, joined Chase Manhattan Bank and Seabord Surety Company because Chase had a competing mortgage lien and posted a lien bond guaranteed by Seabord to remove the contractor's lien against the property.

The contractor ultimately prevailed in its counterclaim against the property owner and proved up the validity and amount of its lien. Thereafter, the district court entered a judgment that allowed the contractor to collect the judgment from the lien bond. Chase and Seabord argued on appeal that the district court erred by allowing the contractor to collect from the lien bond even though the contractor's lien was subordinated to Chase's mortgage and the contractor failed to prove that the proceeds of a foreclosure sale would leave a surplus after payment of the prior and superior mortgage lien.

The Florida Court of Appeals rejected Chase's and Seabord's arguments, finding that priority was not relevant to the contractor's action to collect on the lien bond. But in so finding, the Florida appellate court focused on the language of the lien bond posted by Chase that "clearly established an unconditional obligation for payment of the sum that the court determined

was due the contractor" and "did not limit the surety's obligation to that which the contractor might have collected absent execution of the bond." *Id.* at 540.

In *Gelder & Associates, Inc. v. St. Paul Fire & Marine Insurance Co.*, 34 N.C. App. 731, 239 S.E.2d 604 (1977), the owner of certain real property burdened by a mechanic's lien posted a bond to remove the mechanic's lien encumbering its property. The bond posted by the owner stated that the owner and surety agreed to "protect and save harmless the [lien claimant] from any loss up to the sum of Twenty-Three Thousand Five Hundred Thirty-Eight Dollars and Seventy-Nine Cents ($23,538.79), costs of court, and interest, as the same shall be determined to be due [lien claimant] by [owner] by the courts of North Carolina upon a final determination in the above referenced action . . . ."

The bond surety argued that the bond was intended to secure the amount that the lien claimant would have collected by foreclosing its lien against the real property. The North Carolina Court of Appeals rejected that argument, holding the bond surety's "argument ignores the plain wording of the bond. The bond unconditionally obligates [the bond surety] to pay any sum that the courts finally determine to be due [lien claimant] by [owner], up to the amount of $23,538.79, plus court costs and interest. . . . There is nothing in the contract to limit [the bond surety's] obligations to what [lien claimant] might have collected had the lien not been discharged." *Gelder*, 34 N.C. App. at 732-33, 239 S.E.2d at 605.

In this action, the lien bond posted by American Bank expressly limits American Bank's and the bond surety's liability to "such amount as a court of competent jurisdiction may adjudge to have been secured by [Wadsworth's] lien, with interest, costs and attorney's fees."

Such language limiting American Bank's liability is copied verbatim from the language required by Idaho Code Section 45-519. Florida's and North Carolina's lien bond statutes have no comparable language limiting a principal's and surety's liability, but rather broadly state that the principal and surety unconditionally obligate themselves to pay the amount determined to be due in satisfaction of the lien. *See* FLA. STAT. § 713.24(1)(b) ("Such deposit or bond shall be conditioned to pay any judgment or decree which may be rendered for the satisfaction of the lien for which such claim of lien was recorded."); N.C. GEN. STAT. § 44A-16(a)(6) ("Any claim of lien on real property filed under this Article may be discharged by any of the following methods: . . . Whenever a corporate surety bond, in a sum equal to one and one-fourth times the amount of the claim or claims of lien on real property claimed and conditioned upon the payment of the amount finally determined to be due in satisfaction of said claim or claims of lien on real property, is deposited with the clerk of court . . . .").

Thus, because Idaho's Lien Bond Statute provides for a more limited scope of liability than Florida's and North Carolina's lien bond laws, and because the lien bond posted in this case expressly limits American Bank's and the lien bond surety's liability to the amount adjudged to have been secured by Wadsworth's lien, while the lien bonds in the *Gesco* and *Gelder* cases did not so limit the principal's and bond surety's liability, the *Gesco* and *Gelder* cases are distinguishable.

3. The Arizona case cited by Wadsworth only dealt with the issue of whether a contractor can file a lis pendens after a lien bond removed such contractor's lien against the property.

In *Hatch Companies Contracting, Inc. v. Arizona Bank*, 170 Ariz. 553, 826 P.2d 1179 (Ariz. Ct. App. 1992), the Arizona Court of Appeals addressed the issue of whether a subcontractor could record a lis pendens after its lien was removed against the property upon the posting of a lien bond. The Arizona Court of Appeals ultimately held that the subcontractor could not record a lis pendens, as that would defeat the purpose of the lien bond statute, i.e., removing the lien against the property by substituting the bond as the collateral for the lien. 170 Ariz. at 558, 826 P.2d at 1184 ("The filing of the bond discharged the lien and the proceeding which followed thereafter cannot be said to be one 'affecting title to real property.' The trial court correctly concluded that the lis pendens Hatch filed was a groundless document proscribed by A.R.S. Section 33-420."). Thus, *Hatch* has no bearing on the issue of whether the lien priority remained relevant after American Bank posted the lien bond.

4. The Louisiana case cited by Wadsworth did not address the priority issue, but rather, whether a bond surety was bound by a default judgment entered against the principal of the bond.

Wadsworth's citation to *Groom v. W.H. Ward Lumber Co., Inc.*, 432 So. 2d 984 (La. Ct. App. 1983), is uncertain. In any event, the bond surety in *Groom* obligated itself to pay the amount owing on a mechanic's lien filed by W.H. Ward Lumber Co., Inc. ("Ward"). In a prior legal action, Ward obtained a default judgment against the principal of the lien bond. That default judgment was entered prior to the posting of the lien bond. As a result, the Louisiana Court of Appeals held that the bond surety obligated itself to pay the default judgment entered in

favor of Ward and against the principal of the lien bond. *Id.* at 986. *Groom* is, thus, factually distinguishable on many fronts, including: (1) it did not address how the issue of priority between competing lien claimants is affected by the posting of a lien bond; and (2) it did not address whether Louisiana's lien bond statute limited the bond claimant's recovery to the amount determined to have been secured by his lien.

5. Wadsworth misstates Virginia law on the critical issue of whether the posting of a lien bond waives the issue of priority.

Wadsworth cites the case of *George W. Kane, Inc. v. NuScope, Inc.,* 243 Va. 503, 416 S.E.2d 701 (1992), for the proposition that "the relative priority between a lien and a deed of trust becomes irrelevant when the lien is released by the filing of a bond." *See* Respondent's Brief at 21. Even if that were the holding of the Virginia Supreme Court in *George W. Kane*, which it is not, that holding would be overruled by the later Virginia Supreme Court decision issued in *York Federal Savings & Loan Ass'n v. Hazel*, 256 Va. 598, 506 S.E.2d 315 (1998), which, by Wadsworth's own admission, held that a lien claimant is only entitled to collect from the lien bond that amount it would have collected through the foreclosure of its lien against the property, after considering the priority of any senior liens. *See* Respondent's Brief at 24-25.

> In *George W. Kane, Inc. v. NuScope, Inc.*, 243 Va. 503, 509, 416 S.E.2d 701, 704 (1992), we said that "with respect to a bond enforcement suit, the party-plaintiff has the burden of proving the same elements of his claim that he would have had to prove in a suit to enforce the [mechanic's] lien released by that bond."
>
> * * *
>
> In our opinion, the bonding off statute merely releases the real estate from the mechanic's lien claim by requiring that the payment of the bond be "conditioned for the payment of such

> judgment adjudicating the lien or liens to be valid and determining the amount for which the same would have been enforceable against the real estate." This provision substitutes the bond for the real estate.
>
> Hence, we conclude that the court erred in deciding that no issue remained as to the priority Hazel would have had in the bonded off real estate and consequently in entering summary judgment.

York, 256 Va. at 602, 506 S.E.2d at 317.

B. Wadsworth Did Not Comply With the ICRA and the District Court Erred by Not Enforcing the Penalty Provisions of the ICRA To Bar Wadsworth's Counterclaim Seeking To Foreclose Its Mechanic's Lien.

Wadsworth makes a very strained constitutional argument that suggests that this Court should ignore the plain and unambiguous language of the ICRA because article XIII, section 6 of the Idaho Constitution states: "The legislature shall provide by proper legislation for giving to mechanics, laborers, and material men an adequate lien on the subject matter of their labor."

American Bank's argument in its opening brief is as follows. The ICRA states that "[n]o person . . . may bring or maintain any action . . . without alleging and proving that he was a duly registered contractor . . . at all times during the performance of such act or contract." IDAHO CODE § 54-5217(2). The district court found that Wadsworth was not exempt from the ICRA and that "Wadsworth was not registered 'at all times during the period that it furnished work or labor or supplied materials in constructing [the golf course]' as required by Idaho Code Section 54-5217(2). . . ." R. Vol. 13, p. 3225 (emphasis in original). Applying the district court's finding that Wadsworth was not registered under the ICRA at all times it worked on the Project, with the clear and unambiguous language of Idaho Code Section 54-5217(2) that thus

barred Wadsworth from bringing any action to collect for its work on the Project, American Bank asserts that the district court erred by allowing Wadsworth to recover on its claim of lien.

In response to American Bank's argument, Wadsworth asserts that the penalty provision of the ICRA is unconstitutional. Wadsworth bases its constitutionality argument upon this Court's 1921 decision issued in *State ex. rel. Black v. State Board of Education*. However, as conceded by Wadsworth in its respondent's brief, the holding of *State ex. rel. Black v. State Board of Education*, 33 Idaho 415, 196 P. 201 (1921), only applies when "a constitutional provision or legislative act is fairly open to two constructions . . . ." *Id.* at 205. Detrimental to Wadsworth's argument, this Court has already determined that the penalty provision of the ICRA, Idaho Code Section 54-5217(2), is unambiguous and, thus, not subject to two reasonable constructions. *Stonebrook Constr., LLC v. Chase Home Fin., LLC*, 277 P.3d 374, 377-78 (Idaho 2012) ("When the Legislature enacted the ICRA, it took the extraordinary step of expressly stripping the economic protections typically extended to contractors . . . . In view of the unambiguous language specifying the significant penalties imposed upon unregistered contractors . . . ."). Thus, because the penalty provision of the ICRA is unambiguous, this Court should reject Wadsworth's constitutionality argument at the outset.

Further, this Court has upheld other similar statutes that invalidate liens that are untimely recorded or untimely foreclosed. *Agri-Tech, Inc. v. Yamamoto*, 101 Idaho 28, 29, 607 P.2d 1082, 1083 (1980); *Palmer v. Bradford*, 86 Idaho 395, 401, 388 P.2d 96, 99 (1963). Thus, just as Idaho's mechanic lien statute requires liens to be recorded within 90 days of completion of the contractor's work (IDAHO CODE § 45-507(2)) and requires an action to foreclose any lien

to be commenced within six months of the recording of the lien (IDAHO CODE § 45-510), the ICRA requires a contractor to be registered at all times it performed work on the project or forever be barred from bringing an action to foreclose its mechanic's lien in Idaho state courts. *See* IDAHO CODE §§ 54-5208 and 54-5217(2). These limitations are jurisdictional limitations that have long since been upheld by this Court. *Palmer,* 86 Idaho at 401, 388 P.2d at 99.

> The statute also gives jurisdiction to the court to foreclose or enforce a lien on certain conditions, - the filing of a claim of lien, and the commencement of the action within the time specified after such claim is filed. If these things are not done no jurisdiction exists in the court to enforce the lien.

Id.

In sum, there is nothing unconstitutional about statutorily proscribing limitations upon which a contractor can file a lien and commence proceedings to enforce such lien. The Idaho Constitution only requires the legislature to provide an "adequate lien," and Wadsworth could have avoided this situation altogether by registering under the ICRA before it commenced any work as a contractor in the state of Idaho. Its self-proclaimed ignorance of the law, which is certainly suspect given its numerous registrations in other states, is simply no excuse.

C. The Issue of Severability Is Irrelevant As the ICRA Bars a Contractor From Bringing Any Action If It Failed To Maintain Its Registration "At All Times" It Performed Work On the Project.

Wadsworth argues that its labor, services, material, and equipment supplied to the Project during times it was registered should be severed from its labor, services, material, and equipment supplied when it was not registered, allowing Wadsworth to collect for the former and not for the later. This argument is in essence asking this Court to rewrite Idaho Code

Section 54-5217(2) so that Wadsworth is only barred from bringing an action to collect for its work performed during periods of time that it was not registered under the ICRA.

Detrimental to Wadsworth's argument, the ICRA does not bar actions for just those periods of time the contractor is unregistered. Rather, the ICRA unambiguously states that "[n]o person . . . may bring or maintain any action . . . without alleging and proving that he was a duly registered contractor . . . at all times during the performance of such act or contract." IDAHO CODE § 54-5217(2) (emphasis added).

Wadsworth cites *Farrell v. Whiteman*, 146 Idaho 604, 200 P.3d 1153 (2009), in support of its severability argument. In *Farrell*, the Idaho Supreme Court held that work performed by an architect before he was licensed in Idaho was illegal, but work performed after he was licensed was legal, and thus, the architect could sue to collect his fees earned after he obtained his license. *Farrell's* holding that the architect could recover for his work performed after he obtained his architect's license in Idaho is distinguishable from the matter at hand because Idaho's architect's licensing statute does not contain a penalty provision similar to the ICRA, which requires—as a condition precedent to bringing any civil action—that the contractor prove it was registered "at all times" it performed work on that particular job. *Compare* IDAHO CODE § 54-310 with IDAHO CODE § 54-5217.

In sum, American Bank is asking this Court to enforce the plain meaning of the words used in the penalty provision of the ICRA. Only if this Court finds the penalty provisions of the ICRA to be ambiguous, which would be a deviation from this Court's recent holding in *Stonebrook*, should this Court consider cases addressing other penalty provisions of other

licensing and registration acts. If this Court does consider other cases, this Court should consider the holding from the Oregon Court of Appeals that is summarized immediately below.

D. The Oregon Court of Appeals Affirmed the Dismissal of Similar Claims Because That Oregon Contractor, Like Wadsworth, Was Not Registered At All Times During Performance of Its Work On That Construction Project.

No Idaho appellate court has addressed the factual scenario presented here, i.e., a contractor who was not registered at all times it performed construction services on a particular project. However, in *Parthenon Construction & Design, Inc. v. Neuman*, 166 Or. App. 172, 999 P.2d 1169 (2000), the Court of Appeals of Oregon addressed a factually similar lien foreclosure action by a contractor on a residential construction project. The district court in *Parthenon* dismissed the contractor's lien foreclosure action because the contractor was not continuously registered under Oregon's contractor registration act at all times it performed work on the project at issue. The particular Oregon statute in question provided:

> (1) A contractor may not file a lien, file a claim with the board or bring or maintain in any court of this state a suit or action for compensation for the performance of any work or for the breach of any contract for work which is subject to this chapter, unless the contractor was: (a) Registered under this chapter at the time the contractor bid or entered into the contract for performance of the work; and (b) Registered continuously while performing the work for which compensation is sought.

Id. at 176-77, 999 P.2d at 1172 (quoting ORS 701.065 (1995)).

The facts of *Parthenon* established that the contractor was registered at the time it bid on the project, the time it entered into a contract for the project, and for the majority of time it performed work on the project, but with several lapses in its registration during periods of time that its liability insurance coverage lapsed. The defendants moved for summary judgment,

arguing that the contractor's failure to remain continuously registered at all times during the course of its employment as a general contractor on the subdivision project precluded any claim based on its performance of the work. The district court granted the defendants' motion for summary judgment and the contractor appealed. Ultimately, the Oregon Court of Appeals affirmed the district court, holding, "because plaintiff was not 'registered continuously while performing the work for which compensation is sought,' plaintiff's construction-related claims are precluded." *Id.* at 181, 999 P.2d at 1175. In so holding, the *Parthenon* court reasoned as follows:

> Ultimately, however, plaintiff's proposed construction cannot be reconciled with other aspects of the statutory text and, particularly, the "registered *continuously*" language. *See Bannister v. Longview Fibre Co.*, 134 Or. App. 332, 335-36, 894 P.2d 1259 (1995) ("The registration requirement attaches 'at the time the contractor bid or entered into the contract for performance of the work' *and* continues throughout the time of performance of the work for which compensation is sought.") (emphasis in original). If "the work" simply meant individual components of a contractor's total performance, the requirement of *continuous* registration would be a *non sequitur*. The contractor could avoid that requirement by simply defining "the work" in patchwork, pick-and-choose fashion by reference to which services were performed while registration was maintained and which were performed while the registration had lapsed. The former would be "the work" and, hence, compensable; the latter would not - and "continuously" would be effectively deleted from the statute.

Id. at 179, 999 P.2d at 1173-1174.

> In construing statutes we are "not to omit what has been inserted or insert what has been omitted" by the legislature. ORS 174.010. Consequently, we endorse defendants' construction of ORS 701.065 (1995) as giving full effect to the statutory text: "the work" connotes the contractor's entire performance as defined by the parties' agreement. Thus, plaintiff was not "registered

> continuously" while performing "the work for which compensation was sought." ORS 701.065(1)(b) (1995).

Id. at 179, 999 P.2d at 1174.

While *Parthenon* is based upon Oregon's contractor registration act, it is still persuasive because of its factual similarities, and further, like Idaho's statutory penalty provision that requires proof of registration "at all times during the performance of such act or contract," the Oregon statutory penalty provision requires proof that the contractor was "registered continuously while performing the work for which compensation is sought." *Compare* IDAHO CODE § 54-5217(2) with ORS 701.065(1)(b) (1995).

Like the Oregon law cited in *Parthenon*, Idaho's rules of statutory construction require this Court to apply the penalty provision of the ICRA according to the "plain, usual, and ordinary meaning" of the words used therein, giving "effect to [e]very word, clause, and sentence of [the] statute, where possible." *Flying Elk Inv., LLC v. Cornwall*, 149 Idaho 9, 15, 232 P.3d 330, 331 (2010); *Univ. of Utah Hosp. & Med. Ctr. v. Bethke*, 101 Idaho 245, 248, 611 P.2d 1030, 1033 (1980).

More specifically, as it pertains to this case, the district court erred by failing to give effect to the phrase "at all times" as used in Idaho Code Section 54-5217(2).

E. Wadsworth's Issues Raised In Its Cross-Appeal Relating To the Enforceability and Legal Effect of the Golden Lien Releases Lack Merit.

1. Restatement of issues raised by Wadsworth in its cross-appeal.

Wadsworth in essence raises three issues by way of its cross-appeal: (1) did the district court err in its findings of fact that Wadsworth was contractually obligated to use the

Golden Lien Releases with each payment application it submitted to BRN; (2) did the district court err in its conclusion of law that the Golden Lien Releases were supported by consideration; and (3) did the district court err in its conclusion of law that the Golden Lien Releases waived Wadsworth's right to lien for its unpaid retainage. Wadsworth's fourth issue raised in its cross-appeal, that the district court's award of costs and attorneys' fees should be increased, hinges on the success of the first three issues summarized in the preceding sentence.

2. Standard of review for issues raised in Wadsworth's cross-appeal.

Wadsworth raises a number of issues in regard to its argument that it should not be bound by the Golden Lien Releases. Some of Wadsworth's arguments contest the factual findings of the district court and some of Wadsworth's arguments contest the legal findings of the district court. The standard of review of any factual findings of the district court is a clearly erroneous standard, while the standard of review of the district court's conclusions of law is *de novo*.

> On appeal this Court does not set aside findings of fact, unless they are clearly erroneous. I.R.C.P. 52(a); *Carney v. Heinson,* 133 Idaho 275, 281, 985 P.2d 1137, 1143 (1999); *Marshall v. Blair*, 130 Idaho 675, 679, 946 P.2d 975, 979 (1997). If a district judge's findings of fact are supported by substantial and competent, although conflicting, evidence, this Court will not disturb those findings. *Carney*, 133 Idaho at 281, 985 P.2d at 1143; *Marshall*, 130 Idaho at 679, 946 P.2d at 979. This Court gives due regard to the district judge's special opportunity to judge the credibility of witnesses who personally appeared before the judge. *Id.* The Court will not substitute its view of the facts for the view of the district judge. *Id.* However, unlike the Court's review of the district judge's findings of fact, the Court exercises free review over the district judge's conclusions of law. *Id.*

Trees v. Kersey, 138 Idaho 3, 6, 56 P.3d 765, 768 (2002).

3. The district court's factual finding that Wadsworth was contractually obligated to use the Golden Lien Releases is supported by substantial and competent evidence and, thus, should not be disturbed on appeal.

In the proceedings below, the district court determined that Wadsworth was contractually obligated to submit a Golden Lien Release (referred to by Wadsworth in its Responsive Brief as the "BRN lien release form") with each payment application it submitted to BRN. R. Vol. 13, pp. 3219 and 3235-3236. More specifically, the district court stated in its findings of fact that:

> At trial, Mr. Capps testified that BRN Development expected Wadsworth to use the lien waiver form that was attached to the Wadsworth Contract (the Golden Release), and that during contract negotiations Wadsworth never requested to use a different lien waiver form than was attached to the contract. Mr. Harrell testified that he did not know that the Golden Releases and the Arizona Releases had different language. Mr. Harrell also testified that he believed the Arizona Release form was a satisfactory replacement for the Golden Release forms. This Court finds Mr. Capps more credible on this issue because both Mr. Capps and Mr. Harrell signed the Wadsworth Contract and initialed the Golden Release form template that was attached the contract as Exhibit B.

R. Vol. 13 at 3219, ¶24.

Similarly, the district court stated in its conclusions of law that:

> As was established at trial through the testimony of Mr. Capps, the Golden Release form was incorporated by reference into Wadsworth's contract with BRN Development. Further, Mr. Capps testified that BRN Development's contract required Wadsworth to submit a Golden Release with each payment application it submitted to BRN Development. Further, Mr. Capps testified that: (1) that BRN Development never agreed to accept the Arizona lien releases in lieu of a Golden Release; (2) that BRN Development never waived or agreed to modify Wadsworth's contractual obligation to submit a Golden Release with each

> payment application; and (3) that Wadsworth never provided additional consideration to effectuate any modification to the contract and thereby allow the use of the Arizona Release in lieu of the Golden Release.

R. Vol. 13, pp. 3235-3236.

In its cross-appeal, Wadsworth ignores the district court's findings of fact. And rather than arguing that the district court's findings of fact are clearly erroneous, which Wadsworth must prove to overturn the district court's findings of fact, Wadsworth simply regurgitates facts rejected by the district court in the proceedings below, e.g., that Wadsworth on multiple occasions submitted Arizona lien releases with its payment applications, and the self-serving testimony of its president, Steven Harrell, that he did not understand that there was a difference between the Wadsworth Arizona lien releases and the Golden Lien Releases.[2]

The district court's finding that Wadsworth was contractually obligated to use the Golden Lien Release is supported by substantial and competent evidence. First, Wadsworth's contract with BRN required Wadsworth to submit a lien waiver in a form acceptable to BRN

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[2] The fact that Mr. Harrell did not read or understand the legal significance of what he signed has no relevance to the issue of the enforceability of the Golden Lien Releases. *See McCall v. Potlatch Forests,* 69 Idaho 410, 415, 208 P.2d 799, 802 (1949) ("failure of a party to read a contract, not being so prevented or otherwise circumvented by the other party, is not ground for setting it aside."); *Liebelt v. Liebelt,* 118 Idaho 845, 848-49, 801 P.2d 52, 55-56 (Ct. App. 1990) ("As a corollary, a written contract cannot be avoided by one of the parties to it on the ground that he signed it without reading it and did not understand it; failing to read the contract or to have it read to him or to otherwise inform himself as to the nature, terms and conditions of the contract constitutes nothing more than gross negligence on that party and is an insufficient ground upon which to set the contract aside."). This is particularly true for Mr. Harrell, who is president of a multi-million dollar company that builds high-end resort golf courses throughout the United States and other places in the world. Tr. p. 251, L. 25 – p. 254, L. 24.

with every payment application that Wadsworth submitted to BRN, as a condition precedent to receiving progress payments from BRN. Ex. 1, p.4; Tr. p. 265, L. 22 – p. 267, L. 7. Second, the Golden Lien Waiver is obviously a lien waiver acceptable to BRN, as it was attached as an exhibit to the contract and expressly incorporated by reference. Ex. 1, pp. 2 and 21; Tr. p. 267, L. 8 – p. 268, L. 11. Third, BRN's project manager, Kyle Capps, who was involved in the contract negotiations with Wadsworth, testified that Wadsworth's Arizona lien releases were not acceptable to BRN, that BRN expected Wadsworth to use a Golden Lien Release with each payment application it submitted to BRN, that BRN never waived or agreed to modify Wadsworth's contractual obligation to submit a Golden Lien Release with each payment application, and that Wadsworth never provided additional consideration to effectuate any modification to its contract and thereby allow the use of an Arizona release in lieu of a Golden Lien Release. *See* Tr. p. 351, L. 1 – p. 356, L. 23.

In sum, Wadsworth has not made any showing that the district court's findings of fact are clearly erroneous. In fact, Wadsworth in its cross-appeal does not even mention that the district court found Mr. Capps' testimony more credible than Wadsworth's president Steven Harrell's testimony. Applying the applicable standard of review, this Court must give "due regard to the district judge's special opportunity to judge the credibility of witnesses who personally appeared before the judge," must not "substitute its view of the facts for the view of the district judge," and must not disturb the district court's findings of fact that "are supported by substantial and competent, although conflicting, evidence," unless such findings of fact are "clearly erroneous." *Trees*, 138 Idaho at 3, 56 P.3d at 768.

4. The district court's legal conclusion that the Golden Lien Releases are supported by sufficient consideration is well founded in law.

Next, Wadsworth argues that the Golden Lien Releases are not enforceable because they are not supported by consideration. In so arguing, Wadsworth cites a number of cases for the proposition that consideration requires a party to obligate itself to do something more than what it is already obligated to do. While that proposition of the law is correct as far as it goes, that is not what the district court relied upon when finding that the Golden Lien Releases were supported by consideration. Rather, the district court relied upon American Bank's and Wadsworth's stipulated findings of fact, wherein Wadsworth conceded that "Wadsworth received full consideration for each of the six (6) Golden Lien Releases that Wadsworth submitted to BRN." R. Vol. 13 at 3240. Further, the district court relied upon black letter law that "[c]onsideration was also provided by Wadsworth contractually agreeing to use the Golden Releases as part of its bilateral contract with BRN." *Id.*

While Wadsworth tries to explain away its admission in the parties' stipulated findings of fact, Wadsworth does nothing to contest the district court's other conclusion of law that consideration was supplied by the exchange of mutual promises in the bilateral contract executed by Wadsworth and BRN that required Wadsworth to use the Golden Lien Release. Nor can Wadsworth dispute the validity of that conclusion of law. *Enders v. Wesley W. Hubbard & Sons, Inc.*, 95 Idaho 590, 593, 513 P.2d 992, 995 (1973) ("It is fundamental contract law that when entering into a bilateral contract . . . a promise for a promise is sufficient legal consideration.").

In this instance, BRN agreed to make periodic progress payments to Wadsworth in exchange for Wadsworth's return promise to provide executed Golden Lien Releases with each payment application. Ex. 1, pp. 2, 4, and 21. Further, as noted by the district court, through the language of the Golden Lien Releases, Wadsworth agreed to subordinate its lien priority for all liens that attached to the Property up through the date inserted in the Golden Lien Release. R. Vol. 13 at 3236-37. This waiver and lien subordination language allowed BRN to comply with its other contractual obligations to American Bank, wherein BRN granted American Bank a first priority lien to the Property encompassing the Project.[3] *Id.*

5. The district court's legal conclusion that the Golden Lien Releases clearly and unambiguously waived Wadsworth's right to lien for its unpaid retainage is well founded in law.

The last issue raised by Wadsworth is whether the district court erred in its conclusions of law that the Golden Lien Releases waived Wadsworth's right to lien for its unpaid retainage.[4] As noted by Wadsworth, BRN and Wadsworth contractually agreed that five percent

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[3] Of note, Wadsworth does not contest the district court's conclusion of law that American Bank was an intended third-party beneficiary of Wadsworth's contract with BRN that required the use of the Golden Lien Releases. *See* American Bank's Opening Brief at 7-8, Course of Proceedings § 12. Nor does Wadsworth contest the district court's conclusion of law that the Golden Lien Releases subordinated Wadsworth's claim of lien to American Bank's mortgage. *Id.* Because Wadsworth did not contest those conclusions of law with any legal argument or authority in its opening brief in support of its cross-appeal, Wadsworth has waived its right to contest those conclusions of law. *State v. Burris*, 101 Idaho 683, 684, n.1, 619 P.2d 1136, 1137, n.1 (1980) (". . . the failure to support the alleged assignment of error with argument and authority is deemed a waiver of the assignment.").

[4] Throughout this action, Wadsworth has tried to confuse the issues by asserting that American Bank is claiming that the Golden Lien Releases waived Wadsworth's right to collect unpaid retainage. That is a mischaracterization of American Bank's argument. American Bank

(5%) of each payment application submitted by Wadsworth would be held back as retainage and paid upon substantial completion of Wadsworth's work on the Project.

Wadsworth's argument that the Golden Lien Releases did not waive Wadsworth's right to lien for its unpaid retainage is disingenuous. BRN admitted in its post-trial memorandum of law to the district court that, "[o]n its face, the BRN prepared form could be read to waive any lien rights for retention." *See* R. Vol. 12 at 3035. The district court relied upon that admission in its conclusion of law that the Golden Lien Releases waived Wadsworth's right to lien for unpaid retainage. *See* R. Vol. 13 at 3237-38. Additionally, Wadsworth's president, Steven Harrell, admitted on cross-examination at trial that the language of the Golden Lien Releases clearly and unambiguously waived Wadsworth's right to lien for its unpaid retainage. *See* Tr. p. 302, L. 20 – p. 303, L. 16; Ex. 29.

Notwithstanding Wadsworth's 180-degree turn on this issue on appeal, the district court's finding that the Golden Lien Releases waived Wadsworth's right to lien for its unpaid retainage is well founded in law. In Idaho, when contract language is "clear and unambiguous, its interpretation is a question of law and the language will be given its plain meaning." *Harris v. State ex rel. Kempthorne*, 147 Idaho 401, 405, 210 P.3d 86, 90 (2009). Further, "the meaning of a contract and intent of the parties must be determined from the plain meaning of the contract's own words." *City of Idaho Falls v. Home Indem. Co.*, 126 Idaho 604, 607, 888 P.2d 383, 386 (1995).

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is simply arguing that the Golden Lien Releases waived Wadsworth's right to lien for retainage, but not Wadsworth's breach of contract claim against BRN to collect any unpaid retainage.

The language of the Golden Lien Releases is clear and unambiguous.

> Upon receipt of payment of the sum of $_____, the undersigned waives any and all right to any lien whatever and releases all rights to lien or claim any lien against the real property associated with the above Project by the undersigned in connection with any and all work or labor performed, materials, equipment, goods, or things supplied or furnished, or any other claims or obligations owed through the date shown above, on the above-named Project.
>
> This waiver and release does not cover rights or obligations that might accrue after the above date for additional work that may be performed. In addition, upon receipt of the payment stated above, the undersigned agrees that any lien that may be filed for work performed after said date will only have lien priority from and after the date stated above and will be subordinate to any liens or encumbrances attaching to the subject property prior to said date.

Tr. Exs. 29 – 34. Broken down, the Golden Lien Releases state in the first paragraph that upon receipt of the payment identified in the release, Wadsworth "waives" and "releases" "all rights to lien or claim any lien against the real property . . . in connection with any and all work or labor performed, materials, equipment, goods, or things supplied or furnished, or any other claims or obligations owed through the date shown above." *Id.* Each release contains a date at the top of the document that establishes "the date shown above." The second paragraph further clarifies that the release and waiver is not intended to waive lien rights for "additional work that may be performed" "after the date stated above," further clarifying that "any lien that may be filed for work performed after said date will only have lien priority from and after the date stated above and will be subordinate to any liens or encumbrances attaching to the subject property prior to said date."

All of this language makes sense from a practical standpoint. Idaho law establishes a contractor's lien priority date as the date it first made an improvement to the property. *See* IDAHO CODE § 45-506; *Metro. Life Ins. Co. v. First Sec. Bank,* 94 Idaho 489, 492, 491 P.2d 1261, 1264 (1971). However, contractors can and often do waive their lien priority dates in those instances such as this where a lender requires that its subsequently recorded mortgage take priority over all other interests to the property, including lien rights of any contractor who made improvements to the property before the lender recorded its mortgage. *Smith v. Faris-Kesl Constr. Co., Ltd.,* 27 Idaho 407, 429, 150 P. 25, 32 (1915); *Mut. Sav. Ass'n v. Res/Com Props., LLC*, 32 Kan. App. 2d 48, 66, 79 P.3d 184, 196 (2003) (". . . a lender may ensure a mortgage has priority over later perfected liens by ensuring such lender has lien waivers from all who have provided labor or materials to the project prior to the date the mortgage is filed."). Thus, the Golden Lien Releases in this instance insured that Wadsworth could not lien for its unpaid retainage, which retainage in this instance related back to work performed prior to the recording of American Bank's mortgage. Additionally, and more expressly, the Golden Lien Releases provide that Wadsworth's lien priority will be from and after the date identified in the Golden Lien Release, again ensuring that Wadsworth cannot attack the priority of American Bank's mortgage.

Applying the plain meaning of the language of the Golden Lien Releases to the parties' stipulated facts that Wadsworth's first twenty payment applications up through July 31, 2008, were paid in full and that Wadsworth's unpaid retainage for its labor, services, equipment, and materials supplied to the Project prior to July 31, 2008, totaled $343,985 (R. Vol. 12 at 3009,

¶ 11), the district court correctly concluded that Wadsworth's claim of lien should be reduced by $343,985, as Wadsworth waived its right to lien for that unpaid retainage amount.

III. CONCLUSION

With respect to American Bank's appeal, the district court erred by refusing to consider the priority of American Bank's mortgage over Wadsworth's claim of lien when determining the amount that Wadsworth could collect from the Lien Release Bond. This matter should be remanded to the district court for a factual determination of the amount that Wadsworth's claim of lien was secured by the Property, after considering its subordination to American Bank's mortgage, as that is the amount Wadsworth should recover from the Lien Release Bond.

Alternatively, and again with respect to American Bank's appeal, because of Wadsworth's failure to maintain registration under the ICRA at all times it worked on the Project, and because of Wadsworth's additional violation of the ICRA by using unregistered subcontractors, this Court should invalidate Wadsworth's claim of lien in its entirety and remand the matter back to the district court with instructions to dismiss Wadsworth's counterclaim.

Finally, with respect to American Bank's appeal, the district court's award of prejudgment interest, costs, and attorneys' fees should be reversed because Wadsworth would not have recovered those sums had it foreclosed its lien against the Property, or alternatively, Wadsworth's lien is invalid in its entirety because of Wadsworth's multiple violations of the ICRA.

With respect to Wadsworth's cross-appeal, the district court's factual finding that Wadsworth was contractually obligated to use the Golden Lien Releases is supported by substantial and competent evidence and is not clearly erroneous. Further, the district court's conclusions of law that the Golden Lien Releases (1) are supported by consideration and (2) waived Wadsworth's right to lien for $343,985 in retainage owing for labor, services, equipment, and materials provided to the Project prior to July 31, 2008, are well supported in law.

Finally, with respect to Wadsworth's cross-appeal, because there are no grounds to modify the district court's findings with respect to a reduction in Wadsworth's claim of lien for the $343,985 dollar amount, there is no reason to increase the district court's fee and cost award to Wadsworth.

Should American Bank prevail in its appeal, this Court should award American Bank its costs as allowed by I.A.R. 40.

DATED this 27th day of September, 2012.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By _____
C. Clayton Gill – Of the Firm
Attorneys for American Bank

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of September, 2012, I caused a true and correct copy of the foregoing **APPELLANT/CROSS-RESPONDENT AMERICAN BANK'S REPLY BRIEF AND CROSS-RESPONDENT'S BRIEF** to be served by the method indicated below, and addressed to the following:

Edward J. Anson
WITHERSPOON, KELLEY, DAVENPORT
& TOOLE, P.S.
608 Northwest Blvd. #300
Coeur d'Alene, ID 83814-2146
Facsimile (208) 667-8470

(✓) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
( ) Facsimile

C. Clayton Gill

ADDENDUM A

DOCKET NO. X10-UWY-CV-08-5010673-S	:	SUPERIOR COURT
DALENE HARDWOOD FLOORINGS COMPANY, INC.	:	J.D. OF WATERBURY
	:	AT WATERBURY
V.	:	
ASHFORTH PROPERTIES CONSTRUCTION, INC., ET AL		APRIL 24, 2009

DEFENDANTS' MOTION FOR CLARIFICATION AND/OR MOTION TO REARGUE

The Defendants, TD Bank, N.A. and Bank of Scotland plc (collectively, the "Defendants"), respectfully file this Motion for Clarification and/or Motion to Reargue this Court's (Scholl, J.) Memorandum of Decision re: Issue of Priority dated April 7, 2009 (the "Decision"). The Defendants seek clarification to determine whether the Court has concluded that the issue of priority has no bearing on this lawsuit brought against the bond substituted in lieu of a mechanic's lien, or simply that the issue of priority may not be considered by the Court in the context of a bond reduction and/or discharge hearing brought pursuant to Conn. Gen. Stat. § 49-37(b)(3). While the Defendants appreciate the Court's review and consideration of the briefing in this matter, the Defendants believe further clarification as to the scope of the Court's ruling is necessary given the potential ramifications of this Decision.

ORAL ARGUMENT REQUESTED
NO TESTIMONY REQUIRED

I. FACTUAL AND PROCEDURAL BACKGROUND

As this Court is aware, the Plaintiff in this action was initially named as a defendant in a foreclosure action before this Court, wherein T.D. Bank sought to foreclose a $50 million dollar first mortgage and credit line on a mixed-use residential and commercial development known as "Southport Green", located in Fairfield, Connecticut (the "property" or "project").[1] Multitudes of mechanic's liens were recorded against the property by the Plaintiff and the other approximately 25 subcontractors on the project.

In June 2008, this Court (Scholl, J.) granted a motion filed by TD Bank in the foreclosure suit to bond off the approximately 25 mechanic's lienors upon the substitution of bonds with TD Bank as principal, and Bank of Scotland as surety. TD thereafter posted one Bond for each Lienor in the aggregate amount of over $10 million, specifically reserving in the Court's Order and in the language of the bonds the determination of issues of priority and amounts owed to the Lienors for later proceedings. This Court (Scholl, J.) retained jurisdiction and informally companionized the approximately twenty suits on the bonds brought by the Plaintiff, the general

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[1] T.D. Banknorth, N.A. v. Southport Village et al, No. X10-UWY-CV-07-5007641-S.

contractor on the project, A.P. Construction Co. ("AP"), and the other twenty-five or so subcontractors on the project.[2]

On or about October 15, 2008, the Defendants filed a Motion to Reduce and Discharge the Bonds substituted by this Court pursuant to Conn. Gen. Stat. 49-37(b)(3) on the grounds that AP's bond should be reduced by the amount of the admitted overlap with the bonds for the Subcontractors which resulted in excessive bond amounts, *i.e.*, the Overlap Claim, and, that the original mechanic's liens in favor of AP and the subcontractors were subordinate to the $50 million dollar mortgage in favor of the Defendants, and since there was no equity in the property to which those liens could attach, they were invalid, *i.e.*, the Priority Claim.

At a hearing held in December 2008, the Court requested the parties to brief whether or not the Overlap and Priority claims were proper grounds for a bond reduction

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[2] By virtue of a February 24, 2009 stipulation entered into with AP (the "Stipulation'), AP has withdrawn each subcontractor lawsuit filed against the Defendants by AP in its capacity as assignee of said Subcontractor, and the bonds posted in favor of those subcontractors have been deemed void by the Court. Thus, there are five remaining companionized suits in addition to the instant litigation. See Sarracco Mechanical v. Bank of Scotland et al, X10-UWY-CV-08-5010233-S; A.P. Construction v. Bank of Scotland et al, X10-UWY-CV-5010671-S; ThyssenKrupp Elevator v. Bank of Scotland et al, X10-UWY-CV-5010927-S; Santos Foundation v. Bank of Scotland at al, X10-UWY-5010667-S; Dalene Hardwood v. Bank of Scotland at al; X10-UWY-CV-5010667-S.

motion pursuant to Conn. Gen. Stat. § 49-37(b)(3).[3] In response to that request, the Defendants filed their Supplemental Memorandum of Law in Support of Motion to Reduce and Discharge the Bonds on December 15, 2008. The Court thereafter issued its Memorandum of Decision re: Issue of Priority on April 7, 2009. It is from that decision which the Defendants seek clarification and potential rearguement.

Specifically, the Defendants seek clarification as to whether or not this Court has concluded that priority has no bearing on a lawsuit against a bond, or, simply that the issue of priority may not be considered by the Court in the context of a bond reduction hearing brought pursuant to § 49-37(b)(3). The Court's decision is unclear on whether it is limited to a finding that priority is not to be considered in the context of a reduction hearing,[4] and simply request the Court to provide this written clarification. However, if

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[3] The Defendants did not pursue the Overlap Claim as it was rendered moot by the February 2009 Stipulation with AP, which resulted in the release of the duplicative bonds that were posted in favor of the subcontractors that had assigned their claims to AP.

[4] Although the Defendants respectfully disagree with the Court's conclusion that priority is not a valid consideration in determining the lien's validity pursuant to §49-37(b)(3), they recognize the split of authority on the issue in this State. See First Federal Savings v. J.F. Barrett & Sons, Inc., 11 Conn. L. Rptr. 634 (West, 1994); PDS Engineering & Construction, Inc., v. Double RS, 42 Conn. Supp. 460 (1992, Satter).

the Court has, in fact, ruled that priority is not to be considered in an action against a bond, such a ruling would be contrary to established Connecticut precedent, practice and statutory procedures, and could have a profound impact as it could potentially be construed as *law of the case* in this matter and the five informally companionized lawsuits, and thus the Defendants respectfully request reargument for the reasons cited below.

II. ARGUMENT

A. TO FIND THAT PRIORITY HAS NO BEARING ON A SUIT AGAINST A BOND WOULD RENDER THE STATUTE MEANINGLESS AND IS DIRECTLY CONTRARY TO BOND STATUTE LANGUAGE.

As articulated by this Court, "[w]hen a bond has been substituted for a mechanic's lien pursuant to § 49-37, the effect is to shift the lien from the real property to the bond."[5] (Decision at page 3.) The statutory provisions are designed to enable

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[5] Conn. Gen. Stat. § 49-37 provides in relevant part: "(a) [w]henever any mechanic's lien has been placed upon any real estate pursuant to sections 49-33, 49-34, and 49-35, the owner of such real estate, or any person interested therein, may make an application to any judge of the superior court that such lien be dissolved upon the substitution of a bond with surety...If such judge is satisfied that the applicant in good faith intends to contest such lien, he shall, if the applicant offers a bond, with sufficient surety, conditioned to pay to the lienor or his assigns such amount as a court of competent jurisdiction may adjudge to have been secured by such lien, with interest and costs, order such lien to be dissolved and such bond substituted for the lien...

the owner of the real property to facilitate the transfer of that property by dissolution of the encumbrance of the lien. (Decision at page 3 citing Six Carpenters, Inc. v. Beach Carpenters Corporation, 172 Conn. 1, 6 (1976)). Further, while the statutory provisions are designed to facilitate the transfer of the property by dissolution of the lien, they are also intended to ensure the continued existence of assets out of which the lienor may satisfy his claim if he should later prevail and obtain a judgment on the merits of the mechanic's lien." Id.

The law is clear that where a bond is given in lieu of a mechanic's lien pursuant to Conn. Gen. Stat. § 49-37, "the [lienor's] rights on the bond can rise no higher than those acquired under the underlying mechanic's lien for which the bond is merely a substitute"- and even then only to the extent the liens attached to equity behind the mortgagee's position. Camputaro v. Stuart Hardwood Corporation, 180 Conn. 545, 549 (1980). Thus, the liability of a principal and a surety on a bond continues to depend upon the validity of the underlying mechanic's lien, Biller v. Harris, 147 Conn. 351, 355 (1960); Hartlin v. Cody, 144 Conn. 499, 508 (1957); see also Connecticut Foreclosures, by Dennis R. Caron and Jeffrey Milne, 4th Ed. Section 13.07A, thereby maintaining each party's rights.

Posting a bond does not create a pool of money that is there to pay a contractor. It only ensures that the contract is no worse off than when it had its lien. If the lien was no good or had no equity to secure it, the bond is then void, that is black and white under Connecticut law. Camputaro, supra. Thus, the original priority of the mechanic's lien and whether there was any equity for it is still a major factor of this bond case! The Bonds posted by the Defendants should only have to cover the equity the original liens attached. See Bankers Trust of California, N.A. v. Neal, 64 Conn. App. 154, 158 (2001) ("When the debt of a prior mortgage exceeds that of a later encumbrance, the latter is worthless because the property contains no equity to satisfy the later encumbrance.") Since Conn. Gen. Stat. § 49-37 mandates that the amount of the bond be "such amount as a court of competent jurisdiction may adjudge to have been secured by the lien", it goes without saying that if the original mechanics lien did not attach to any equity, then the bond is, in effect, worthless.

In sum, while it may be true that an "action on the bond is no longer an action in which the plainitiff is seeking foreclosure of the mechanic's lien," a party that substitutes a bond for a mechanic's lien in accordance with Conn. Gen. Stat. § 49-37 does not forfeit or waive its ability to contest the validity and/or priority of the lien following the substitution of a bond. Disallowing a contest to the priority of the lien would give the

lienor greater rights and protections than those prescribed by statute or those which the lienor had prior to the substitution of the bond which would, in turn, lead to an absurd result that is contradictory to the intent and plain language of Conn. Gen. Stat. § 49-37(b).

B. THE COURT DID NOT LOOK TO THE CLEAR LANGUAGE OF THE BOND, WHICH AFFORDS THE DEFENDANTS THE RIGHT TO CHALLENGE PRIORITY IN THIS SUIT AGAINST THE BOND.

In the Decision, the Court reasoned that upon the substitution of a bond in lieu of a mechanic's lien, "[t]he action is no longer an action involving land or foreclosure of a lien on real property...[t]he action is a conventional civil action....[t]he underlying action is now on a bond, which is a contract obligating a third party to respond in damages....." (Decision at 4-5 citing A. Petrucci Construction Co. v. Alaimo Excavators & Blasters, Inc., 2 Conn. L. Rptr. 106 (1990). While it is the Defendants' position that the suit against the bond remains one in equity, even assuming that the action is now contractual, the Court failed to take into account the terms of the bond which clearly state that the Defendants intend to challenge priority in any subsequent suit against the bond:

> **WHEREAS, TD Banknorth, N.A. intends to dispute the claims of Ashforth Properties Construction d/b/a A. P. Construction Company, including those of priority, redundancy and balance owed upon such Lien;**

The contractual language of the bond clearly affords the Defendants the right to contest priority in this lawsuit against the bond. See Downs v. National Casualty Co., 146 Conn. 490, 494, 1959 ("[t]he court will not torture words to import ambiguity where ordinary meaning leaves no room for ambiguity").

III. CONCLUSION

For all of the reasons discussed herein, the Defendants respectfully request that the Court clarify the scope of its April 7, 2009 Decision re: Priorities. Assuming that the Court's Decision is limited to a finding that priority is not to be considered in the context of a reduction hearing brought pursuant to §49-37(b)(3), the Defendants simply request the Court to provide this written clarification. However, if the Court has, in fact, ruled that priority is not to be considered in an action against a bond, such a ruling would have a profound impact as it could potentially be construed as *law of the case* in this matter and the five informally companionized lawsuits, and thus the Defendants respectfully request the opportunity to reargue this issue.

THE DEFENDANTS,
TD BANK, N.A. f/n/a TD BANKNORTH, N.A.
and BANK OF SCOTLAND PLC

By: /s/Edward P. McCreery, III

Edward P. McCreery III
Jessica A. Slippen
Pullman & Comley, LLC
850 Main Street, P.O. Box 7006
Bridgeport, CT 06601-7006
Juris No. 47892
Telephone 203 330 2000
Facsimile 203 576 8888
Its Attorneys

ORDER

The foregoing motion having been duly heard, it is hereby, **GRANTED/DENIED**.

BY THE COURT

_____
Judge/Clerk

CERTIFICATION

Pursuant to Practice Book § 10-14, I hereby certify that a copy of the above was mailed or electronically delivered on the date hereon to all counsel and pro se parties of record.

Anthony Natale
Natale Law Firm LLC
750 Main Street, Suite 600
Hartford, CT 06103
Attorney for Plaintiff

James E. Regan
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44 Trumbull Street
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/s/Edward P. McCreery, III
Edward P. McCreery III
Jessica A. Slippen

Bridgeport/72031.1/EPM/757311v1

ADDENDUM B

SUPERIOR COURT
COMPLEX LITIGATION DOCKET
400 Grand St
Waterbury, CT 06702
Phone: (203) 236-8050
Fax: (203) 236-8073
Jonathan.Stuckal@jud.ct.gov

To: Lani **Fax:** 208 385 5384

From Jonathan Stuckal, Court Officer Complex litigation **Date:** 4/9/12

Re: Dalene Hardwood Decision **Pages:** 2 including cover page

CC:

Urgent **For Review** • **Please Comment** • **Please Reply** • **Please Recycle**

UWY-CV08-5010673-S DALENE HARDWOOD FLOO v. ASHFORTH PROPERTIES ET AL
Date Sent: 05/20/2009 Sequence #: 1

Notice Content:
*** RULING ***
MOTION FOR CLARIFICATION AND/OR MOTION TO REARGUE, ENTRY 117.
IT IS HEREBY ORDERED: GRANTED. THE COURT FINDS THAT ITS DECISION OF APRIL 7, 2009 IS, BY ITS LANGUAGE, LIMITED TO THE CONTEXT OF A MOTION PURSUANT TO GENERAL STATUTE SEC. 49-37(B)(3) TO INVALIDATE THE LIEN AND THE COURT HAS NOT DETERMINED WHETHER THE ISSUE OF PRIORITY CAN BE CONSIDERED IN THE ACTION ON THE BOND ON THE MERITS.
BY THE COURT,
SCHOLL, J.
MAY 18, 2009

X10P

Appearances:
Attys: GARCIA & MILAS PC, 44 TRUMBULL STREET NEW HAVEN CT 06510
Attys: NATALE & WOLINETZ, 750 MAIN STREET SUITE 600 HARTFORD CT 061032703
Attys: PULLMAN & COMLEY LLC, 850 MAIN STREET PO BOX 7006 BRIDGEPORT CT 066017006