

STATE OF IDAHO)
County of KOOTENAI)^{ss}

FILED _____

AT _____ O'clock ____M
CLERK OF DISTRICT COURT

Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

**BIGHORN BUILDERS, INC., an Idaho
corporation,**

Plaintiff,

vs.

**LIENDATA U.S.A. INCORPORATED, a
Washington corporation,**

Defendant.

Case No. CV 2005 8302

**MEMORANDUM DECISION AND
ORDER DENYING SUMMARY
JUDGMENT**

I. BACKGROUND.

This case involves a breach of contract claim and a negligence claim filed by plaintiff Bighorn Builders, Inc. against defendant LienData U.S.A. Inc. LienData seeks dismissal of both claims on the ground that there is no genuine issue of material fact.

LienData is a business that prepares and records materialman’s liens for contractors, builders, subcontractors, etc. In April 2002, Bighorn engaged LienData’s services for the purpose of preparing and recording claim of liens in the State of Idaho. Complaint, p. 2, ¶ 5. Bighorn wanted a lien prepared against property owner Post Falls Park Ridge, for work that Bighorn completed on behalf of a contractor, Pacific West Builders, Inc. On January 19, 2005, LienData filed the Claim of Lien on behalf of Bighorn against Park Ridge. Complaint, p. 2, ¶ 5, Exhibit A. In February 2005, Bighorn filed a foreclosure action against Park Ridge on the Claim of Lien, in Kootenai County

Case No. CV 2005 1238. In March 2005, Park Ridge filed a motion to dismiss the foreclosure action. In July 2005, Bighorn agreed to the voluntary dismissal of that action without prejudice and an Order of dismissal was entered on July 1, 2005.

On November 4, 2005, Bighorn then filed this action against LienData, alleging the Claim of Lien filed against Post Falls Park Ridge was defective on its face. Bighorn alleges the defective Claim of Lien made it such that Bighorn could not perfect the lien on the Post Falls Park Ridge property and collect on the debt owed to Bighorn by Pacific West Builders.

II. ANALYSIS.

LienData argues this case should be dismissed on summary judgment because the Claim of Lien contained all items required by Idaho Code §45-507, and was acknowledged and verified in conformity with that statute. LienData also argues that Bighorn is precluded from bringing its claim because it voluntarily dismissed the original foreclosure action against Post Falls Park Ridge. LienData contends Bighorn's proper course of action to recover the funds was the foreclosure action against the property, which Bighorn voluntarily dismissed in a preceding action. Memorandum in Support of Motion for Summary Judgment, p. 8. Along those lines, at oral argument, LienData claimed estoppel, mootness, or lack of ripeness, due to the dismissal of this earlier case.

A. Requirements of Idaho Code § 45-507.

Bighorn argues the motion for summary judgment should be denied because the verification on the Claim of Lien did not conform to the statute. Bighorn points out the requirements of Idaho Code § 45-507 are not satisfied because the verification used in the Claim of Lien does not include a statement that the person signing the Claim of Lien believes the claim "to be just." Bighorn claims LienData's failure to comply with the statute is both a breach of contract and negligence. Bighorn also asserts that LienData was not authorized to do business in the State of Idaho and therefore

defendant engaged in the unauthorized practice of law, creating a claim of negligence per se. Bighorn asks the court to deny defendant's motion for summary judgment and asks the court to make a determination that the Claim of Lien does not comply with I.C. §45-507, making it invalid and unenforceable as a matter of law.

Idaho Code § 45-507(4) states that a Claim of Lien “must be verified by the oath of the claimant, his agent or attorney, *to the effect* that the affiant believes the same to be *just*.” (emphasis added). The verification requirement of I.C. § 45-507 goes beyond mere requirement that the document be “acknowledged.” *Treasure Valley Plumbing and Heating, Inc. v. Earth Res. Co.*, 106 Idaho 920, 922, 684 P.2d 322, 324 (1984). The mere statement of the claimant having appeared before a notary, and having sworn that he executed the document in his authorized capacity, is insufficient to satisfy I.C. § 45-507. *Cornerstone Builders, Inc. v. McReynolds*, 136 Idaho 843, 845, 41 P.3d 271, 273 (Idaho Ct.App.2001). Such language does not fulfill the requirement of I.C. § 45-507 that the claims be “verified by the oath of the claimant...to the effect that the affiant believes the same to be just.” *Id.*

The language of the statute makes it clear that the verification on a Claim of Lien to contain a statement “to the effect” that the person verifying the document “believes the claim to be just.” It is also without dispute that LienData's verification on the Claim of Lien did not contain that exact terminology. The verification on LienData's Claim of Lien states the claimant believes “the same to be true and correct.” This could lead to a conclusion that Bighorn's Claim of Lien prepared by LienData is defective on its face because it does not follow the *strict* language of the statute.

However, it could be argued that the language contained in the verification, when taken as a whole, has the same effect as claiming the contents of the claim to be “just.” LienData's verification statement certifies that the claimant “believe[s] the same to be true and correct and that the Claim of Lien *is not frivolous and is made with reasonable cause, and is not clearly excessive* under penalty

of perjury” (exhibit B) (emphasis added). Interpretation of this statement could lead a reasonable person to find that the verbiage in the Claim of Lien has the same effect as stating the claimant believes the claim to be “just.” Since different interpretations of the verification statement may lead to different conclusions or inferences from the evidence, and the motion for summary judgment should ordinarily be denied on this ground.

However, the pertinent facts in this case are not in dispute. What is printed on the verification is not in dispute. Also, this case is to be tried to the Court. At summary judgment, all disputed facts are to be construed liberally in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party. *Infanger v. City of Salmon*, 137 Idaho 45, 44 P.3d 1100 (2002). Summary judgment is appropriate if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Id.* If the matter will be tried to the court rather than the jury, the judge is free to determine what reasonable inferences should be drawn from the undisputed facts. *Union Pac. Corp. v. Idaho State Tax Comm'n*, 139 Idaho 572, 83 P.3d 116 (2004). Where both parties file motions for summary judgment relying on the same facts, issues and theories, the judge, as trier of fact, may resolve conflicting inferences if the record reasonably supports the inferences. *Riverside Dev. Co. v. Ritchie*, 103 Idaho 515, 518-20, 650 P.2d 657, 661-62 (1982). All reasonable inferences are to be drawn in favor of the party opposing the summary judgment motion. *Union Pacific Corp. v. Idaho State Tax Comm'n*, 136 Idaho 34, 28 P.3d 375 (2001).

This really comes down to the distinction between “*substantial* compliance” and “*strict* compliance” with Idaho Code § 45-507. Since LienData’s language on its Claim of Lien does not precisely mirror the language set forth in Idaho Code § 45-507, the lien prepared by LienData fails

the “strict compliance” test, since it fails to recite the words “... the affiant believes the same to be just.” On the other hand, the verification on LienData’s Claim of Lien clearly states who the claimant is, his/her capacity, that the affiant has “read or heard the foregoing claim, read and know the contents thereof, and believe the same to be true and correct and that the claim of lien is not frivolous and is made with reasonable cause, and is not clearly excessive under penalty of perjury.” Under the “substantial compliance” test, this Court finds, giving all reasonable inferences to Bighorn, the language on the verification on LienData’s Claim of Lien form substantially complies with the language in Idaho Code § 45-507, that “... the affiant believes the same to be just.”

This Court further finds that “substantial compliance” is what is required. The Idaho Court of Appeals danced around that issue in *Cornerstone Builders, Inc. v. McReynolds*, 136 Idaho 843, 41 P.2d 271 (Ct.App. 2002). The Court of Appeals noted: “The district court reviewed the claims of lien and held that their wording substantially complied with I.C. § 45-507.” 136 Idaho at 844, 41 P.3d at 272. The Court of Appeals then held: “In this case, we need not reach the issue of whether Cornerstone’s liens strictly or substantially comply with I.C. § 51-109(4).” 136 Idaho at 846, 41 P.3d at 274. Idaho Code § 51-109(4) is the verification statute. The Court of Appeals in *Cornerstone* found the claims of lien were “severely lacking in the verification requirement”, and thus “fail to even substantially comply with the requirements of I.C. § 45-507 and are therefore invalid.” *Id.*

This Court is convinced the “substantial compliance” standard is warranted for three reasons. First, while the Court of Appeals specifically did not decide the issue in *Cornerstone*, the Court of Appeals noted the district court in that case used the “substantial compliance” standard without any negative comment. Second, the language of the statute indicates that “substantial compliance” is the appropriate standard, since the statute reads a Claim of Lien: “must be verified by the oath of the claimant, his agent or attorney, *to the effect* that the affiant believes the same to be *just*.” (emphasis

added). The language “to the effect” indicates that the precise words “to be just” need not be included, but rather words “to the effect” of the claim being “just” would also suffice. That has occurred in this case as the Claim of Lien clearly states who the claimant is, his/her capacity, that the affiant has “read or heard the foregoing claim, read and know the contents thereof, and believe the same to be true and correct and that the claim of lien is not frivolous and is made with reasonable cause, and is not clearly excessive under penalty of perjury.” Third, “This court [the Idaho Supreme Court] has consistently held that the provision of our lien laws must be liberally construed with a view to effect their objects [in favor of the workman] and promote justice.” *Dybvig v. Willis*, 59 Idaho 160, 167, 82 P.2d 95, 102 (1938). Since the purpose of this section is to compensate persons who perform labor upon or furnish materials to be used in the construction, alteration, or repair of a building or structure, this section will be liberally construed, but “...the statutory requirements *must be substantially complied with* in order to perfect a valid lien.” *Pierson v. Sewell*, 97 Idaho 38, 41, 539 P.2d 590, 593 (1975).

There is no dispute of fact over the language of the Claim of Lien. Even giving Bighorn the benefit of all reasonable inferences, this Court is unable to find that the above language does not “substantially comply” with the language and requirements of I.C. § 45-507. However, for reasons set forth below, summary judgment cannot be granted in favor of LienData at this time.

B. Bighorn Builder’s Voluntary Dismissal of the Original Foreclosure Action.

The proper course of action to recover funds on a Claim of Lien is to file a foreclosure action against the owner of the property. I.C. §45-507. A claim of lien must be filed within ninety (90) days after the completion of the labor or services, or furnishing of materials. I.C. §45-507(2). Idaho Code §45-510 states that no lien is valid for a period longer than six (6) months after a Claim of Lien has been filed, unless proceedings are commenced in a proper court. This period is more than a mere statute of limitations which is waived if not pleaded. *Wills v. Palmer*, 78 Idaho 104, 108, 298

P.2d 972, 974 (1956). The time fixed by the statute is regarded as a limitation upon the right, as well as upon the remedy, and the lien is lost if the action is not brought within the specified time. *Id.*

LienData brought a Claim of Lien against Pacific West Builders (originally believed to be the same owner/contractor as Post Falls Park Ridge) on January 19, 2005. Bighorn Builders then brought a foreclosure action against Post Falls Park Ridge on February 16, 2005. That action was later voluntarily dismissed by Bighorn Builders on June 24, 2005. The motion to dismiss, filed by Post Falls Park Ridge, stated the grounds for dismissal as ineffective service of claim and non-compliance with the lien statute, I.C. §45-507. Bighorn Builders stipulated to dismissal of the complaint and an order of dismissal without prejudice was entered.

LienData argues that Bighorn Builders' voluntary dismissal of the foreclosure action against Post Falls Park Ridge cut off its ability to have a judicial determination as to whether or not the lien could be perfected. LienData points out that it has now been over six months since Bighorn Builders dismissed its complaint against Post Falls Park Ridge, and therefore Bighorn lost its cause of action and its right to a remedy under the statute. It is true that Bighorn Builders' remedy of foreclosure against Post Falls Park Ridge has been cut off by the statutory period under I.C. §45-510.

At oral argument, LienData expanded this argument to include estoppel, mootness and lack of ripeness. LienData argued that mootness, lack of ripeness and estoppel should apply since Bighorn dismissed the lien foreclosure case. Since LienData created the controversy, the equitable doctrine of estoppel should not lie, since LienData comes to the court with "unclean hands."

Campbell v. Kidlew, 141 Idaho 640, 648, 115 P.3d 731, 739 (2005). LienData has furnished no case law that indicates that the party which creates such controversy should still be able to use mootness or lack of ripeness as a defense to its actions which caused the controversy. As discussed in more detail below in the analysis of Bighorn's negligence claim, even though this Court now finds

LienData substantially complied with Idaho's lien statute, since the issue of that compliance is essentially one of first impression, LienData cannot avail itself of the defenses of mootness, lack of ripeness and estoppel. For all these reasons, this Court is not persuaded by LienData's claims of mootness, lack of ripeness and estoppel.

C. Reasons Why Summary Judgment Cannot Be Granted.

1. Breach of Contract Claim.

LienData seeks summary judgment against Bighorn on Bighorn's breach of contract claim. That breach of contract claim is found in the Complaint at page 2, ¶¶ 7-10. However, neither LienData nor Bighorn have placed the contract before the Court. Bighorn alleges that they entered into a contract with LienData on or about April 3, 2002, but neither party has produced a copy of the contract. Complaint, p. 2, ¶5. It may be that the contract specifically provides that LienData will provide for preparation and recording claims of liens for Bighorn in Idaho which precisely comply with the Idaho lien statute. If so, LienData may be in breach. It may be that the contract provides that LienData will provide for preparation and recording claims of liens for Bighorn in Idaho which substantially comply with Idaho law. If so, LienData might not be in breach. Without the contract, the Court is unable to decide this issue on summary judgment.

2. Negligence Claim.

LienData seeks summary judgment against Bighorn on Bighorn's negligence claim. The negligence claim is found in the Complaint at page 2, ¶¶ 11-12. Bighorn alleges that: "LienData failed to exercise the applicable standard of reasonable and ordinary care in performing the services related to the contract with Bighorn." *Id.* ¶ 11. While LienData has made the argument that the lien they prepared is not defective on its face, and while the Court is persuaded by that argument, LienData has failed to address what might be the appropriate "standard of care" in a case such as this. LienData's standard of care might be to follow Idaho's lien statute to the letter, and provide

Bighorn a lien that tracks that statute precisely, so as to avoid any controversy as to the legitimacy of the lien. LienData's standard of care might be a lower standard, to simply use one lien for all states, and hope that the Court in the state where the lien happens to be used finds that: 1) substantial compliance is all that is required, and 2) a "one size fits all" lien substantially complies with that particular state's statute. If the standard of care is the former, LienData has not met the standard of care and is negligent. If the standard of care is the latter, LienData has met the standard of care and is not negligent.

Another and related issue is damage. Essentially, this is the element of negligence addressed by LienData's argument that the lien they prepared is not defective on its face. LienData admits they did not specifically comply with the Idaho statute, but argue, successfully, that they substantially complied with that statute. That being the case, LienData argues Bighorn should have never dismissed its lien foreclosure suit, since they did, Bighorn has cut off its own damages. However, Bighorn can argue that the lien language used by LienData, put Bighorn into a position where it was faced with the Hobson's choice of deciding to: 1) risk attorney fees and damages in the underlying lien lawsuit if the lien was determined by that court to be defective, or 2) dismiss that lien lawsuit and file this lawsuit against LienData. Had LienData followed the language of Idaho's statute, Bighorn would not be faced with this dilemma. If Idaho law were more clearly settled, the situation presented might be different. However, the decision between substantial compliance and specific compliance with the statute, while a matter of law for this Court, is a matter of first impression in the State of Idaho. Even though this Court has decided the issue in this case, an Idaho appellate court could later disagree with this Court's interpretation that substantial compliance is what is required. The fact remains, LienData created this controversy by not following the exact wording of the Idaho statute.

As to both the standard of care and damages, it seems that LienData should be charged with

at least some knowledge of Idaho law. If LienData were knowledgeable about Idaho law, they would know that the distinction between “substantial compliance” and “strict compliance” is not firmly decided in Idaho, at least as to the language required in a lien. Accordingly, if LienData then chooses to prepare a lien which will obviously be used in Idaho, and if they fail to track the Idaho statute, they should know they are setting their client up for the possibility of an invalid lien, and the probability of a trip to the Idaho Supreme Court or Court of Appeals to determine this issue of the type of compliance needed as to the language of the lien. If the lien foreclosure were litigated to its conclusion, an appeal would certainly not be unexpected, given the language of the lien. Given the lack of an appellate court decision on the issue decided in this Court’s decision, it would not be unexpected if an appeal is taken in the present case. The uncertainty is caused by LienData.

III. CONCLUSION.

LienData has “substantially complied” with I.C. § 45-507. The issue of “substantial compliance” versus “strict compliance” as to the language used in a lien is an issue of first impression in this state. Accordingly, summary judgment cannot be granted to LienData as to Bighorn’s negligence claim. The fact that this is an issue of first impression also causes this Court to not be persuaded by Lien Data’s claims of estoppel, mootness or ripeness as a ground for granting summary judgment. Without the contract, the Court is unable to decide the breach of contract claim at the summary judgment level.

III. ORDER.

IT IS HEREBY ORDERED LienData’s motion for summary judgment is **DENIED**. While there is no issue of material fact as to the language used in the lien, and while this Court finds as a matter of law that LienData substantially complied with Idaho Code § 45-507, this Court cannot

grant summary judgment in favor of LienData against Bighorn on their breach of contract and negligence claims, for the reasons set forth above.

Entered this 25th day of October, 2006.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of October, 2006, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Paul W. Daugherty 208 666-0550

Scot D. Nass 208 664-6338

Deputy Clerk