

FILED

MAY 16 2007

U.S. BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA**

8 In re:)
 9)
 10 TURNER-DUNN HOMES, INC., and others,)
 11 _____)
 12 Debtors.)
 13)
 14 BCI BEBOUT CONCRETE, INC.,)
 15)
 16 Plaintiff,)
 17 vs.)
 18 TURNER-DUNN HOMES, INC., et al., and John)
 19 Does 1-10,)
 20 _____)
 21 Defendants.)
 22)
 23 ROBERT P. ABELE, Chapter 11 Trustee,)
 24)
 25 Third-Party Plaintiff,)
 26 vs.)
 27 SONORAN CONCRETE, LLC, an Arizona limited)
 28 liability company; GALE CONTRACTOR)
 SERVICES, a Florida corporation; CHAS)
 ROBERTS AIR CONDITIONING, INC., an)
 Arizona corporation; DEL MARTENSON)
 DEVELOPMENT CORP., an Arizona corporation;)
 TRUSSWAY, INC. WEST, an Arizona corporation;)
 TRIPLE S FENCE CO., an Arizona corporation;)
 RIGGS PLUMBING, LLC, an Arizona limited)
 liability company; ALLIANCE LUMBER, LLC, an)
 Arizona limited liability company; KAY)
 CONSTRUCTION, INC., an Arizona corporation,)
 PEAK CONSTRUCTION, INC., an Arizona)
 corporation; DIVERSIFIED ROOFING CORP., an)
 Arizona corporation; INTEGRATED STUCCO,)
 INC., an Arizona corporation; MITCHELL)
 ELECTRIC CO., INC., an Arizona corporation; A)
 COMPANY PORTABLE RESTROOMS INC., an)

Chapter 11
 Case No. 4-06-bk-00961-JMM
 (Jointly Administered With Case Nos.:
 4-06-bk-00962-JMM; 4-06-bk-00963-JMM;
 4-06-bk-00964-JMM; 4-06-bk-00965-JMM)
 Adversary No. 4-06-ap-00106-JMM
**MEMORANDUM DECISION RE:
 SUMMARY JUDGMENT (PARTIAL)
 INVOLVING LIEN CLAIMANT**

<p>GALE CONTRACTOR SERVICES</p>
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1 Idaho corporation; JORDAN COMPANY; PACIFIC)
2 POOLS AND SPAS, LLC, an Arizona limited)
3 liability company; MARICOPA MEADOWS)
4 HOMEOWNERS ASSOCIATION, an Arizona)
5 corporation; SANDVICK EQUIPMENT & SUPPLY)
6 CO.; ESCO ELECTRIC WHOLESALE, INC.; RDC)
7 CONSTRUCTION, INC., an Arizona corporation;)
8 DAYSRING DEVELOPMENT, INC., an Arizona)
9 corporation; OUTDOOR ENVIRONMENTAL)
10 SYSTEMS, INC aka OES, INC. dba RAINDANCE)
11 SYSTEMS, an Arizona corporation; OHIO)
12 SAVINGS BANK, a federal savings bank; WRI)
13 INVESTMENTS III, LLC, a Washington limited)
14 liability company; ANY UNKNOWN PARTIES IN)
15 POSSESSION; UNKNOWN HEIRS AND)
16 DEVISEES OF ANY OF THE FOREGOING WHO)
17 ARE DECEASED; and ABC ENTITIES 1-100,)

18 Third- Party Defendants)

19
20 **INTRODUCTION - PROCEDURE AND METHODOLOGY**

21 The Trustee has filed motions for partial summary judgment against numerous mechanics'
22 and materialmens' lien claimants, challenging on "statutorily deficient" or "facially inadequate" grounds, the
23 preliminary or final recorded lien documents of such lien claimants. In some cases, the lien claimants have
24 also filed for partial summary judgment on the same issues.

25 For administrative convenience, the court has dealt with each lien claimant separately,
26 although many of the same legal issues may affect other lien claimants as well. For that reason, many of the
27 court's discussions and analyses may be repeated in whole or in part in its various decisions. Separating the
28 decisions, as to each lien claimant, will enable both the court and each affected party to focus on
particularized issues or fact differences, and will also facilitate appellate review.

When discussing the motions for summary judgment, the court will consider the points made
against the particular lien claimant, and will include the totality of challenges to the lien, whether made by
the Trustee, Ohio Savings Bank ("OSB"), or WRI Investments III, LLC ("WRI"), alone or in combination
with one another.

1 In the end, the court will have addressed all challenges to the liens presented by the motions,
2 and will rule on each legal point. In some instances, factual issues which were unforeseen at the outset may
3 present themselves, and if so, the court will indicate which issues are to be deferred for future hearings.

4 With one eye open to the appellate process, the court does not intend to combine any ruling
5 with Rule 54(b) language, because, if further proceedings become necessary, the matter may not be ripe for
6 final review until it is finally determined. This will save counsel and any reviewing court the expense and
7 time in taking and deciding interlocutory appeals.

8 Another tool which the court will use is the attachment of an appendix to each decision,
9 which will include each lien claimant's challenged lien documents. In this way, the parties, this court, and
10 any reviewing court will have ready access to the operative documents involving each creditor. The
11 appendix will also include the applicable Arizona statutes.

12 In some instances, a mechanic's lien claimant may have responded to the Trustee's motion
13 and countered with its own summary judgment motion or partial summary judgment motion. When this
14 procedure has occurred, the court will also rule on those issues unless the ruling is subsumed within the main
15 decision.

16 To the extent that this decision requires refinement or further clarification, the court asks that
17 the parties first convene a status hearing with the court prior to filing further pleadings on the decided issues.
18 In that way, all parties can arrive at a unified method to further process the issues.

19 The court also understands that in many instances, the parties have not attached all or each
20 of their claimed liens or notices. This is because all or each are essentially identical and a ruling on a
21 particular legal issue is applicable across the board. Thus, the parties have selected samples for the court's
22 review.

23 As noted from the bench, the court appreciates the excellent quality of the work product and
24 arguments presented by all attorneys in this case. As all parties can appreciate, the issues presented were
25 not simple ones, and the issues are important to the ultimate outcome of this case. For their efforts, the court
26 thanks counsel in clearly focusing the issues.

1 **WHOM THIS DECISION AFFECTS**

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3 This decision involves the allegations made against Gale Contractor Services, Inc. ("Gale")
4 Only OSB has challenged Gale's claim of lien.

5
6 **ARIZONA LAW**

7
8 In a bankruptcy case, property rights are determined by reference to state law. *Butner v.*
9 *United States*, 440 U.S. 48 (1979). Bankruptcy courts have "core" jurisdiction to hear and determine issues
10 involving the extent, validity, and priority of liens against an estate. 28 U.S.C. § 157(b)(2)(K).

11 Mechanics' and materialmen's liens are creatures of statute ARIZ. REV. STAT. § 33-981, *et*
12 *seq.* Such statutes have existed in Arizona since statehood. *See, e.g. Arizona Eastern R.R. Co. v. Globe*
13 *Hardware Co.*, 14 Ariz. 397, 400, 129 P. 1104, 1105 (1913) ("The primary object of our lien law is to insure
14 to the laborer and materialman the payment of their accounts, and incidentally to protect the owner against
15 the filing of liens by such persons against his property for services and material rendered and furnished the
16 original contract."); *see also* CIVIL CODE 1913, § 3639. They exist principally to protect mechanics,
17 materialmen, and those who furnish labor or supplies to another's land, thereby enhancing its value, from
18 the dangers of non-payment. *See United Metro Materials, Inc. v. Pena Blanca Props., L.L.C.*, 197 Ariz. 479,
19 484, 4 P.3d 1022, 1027 (App. 2000); *Hayward Lumber & Inv. Co. v. Graham*, 104 Ariz. 103, 111, 449 P.2d
20 31, 39 (1968). These rights are "jealously protected," *Wylie v. Douglas Lumber Co.*, 39 Ariz. 511, 515, 8
21 P.2d 256, 258 (1932), and when construing them the statutes must be liberally construed to effect their
22 primary purpose. *See In re JWJ Contracting Co.*, 287 B.R. 501, 509-10 (9th Cir. BAP 2002) (construing
23 Arizona's statutes), *aff'd*. 371 F.3d 1079 (9th Cir. 2004); *Ranch House Supply Corp. v. Van Slyke*, 91 Ariz.
24 177, 181, 370 P.2d 661, 664 (1962). While the statutes themselves appear, on the surface, to contain
25 requirements which can be easily followed, the Arizona courts have held that substantial compliance with
26 the statutes is sufficient to perfect a lien, provided that such compliance is not inconsistent with the
27 legislative purpose. *See, e.g., Lewis v. Midway Lumber, Inc.*, 114 Ariz. 426, 431, 561 P.2d 740, 755 (App.
28 1977); *Columbia Group, Inc. v. Jackson*, 151 Ariz. 76, 79, 725 P.2d 1110, 1113 (1986); *MLM Constr. Co. v.*

1 *Pace Corp.*, 172 Ariz. 226, 229, 386 P.2d 439, 442 (App. 1992); *Peterman-Donnelly Eng'rs & Contractors*
2 *Corp. v. First Nat'l Bank*, 2 Ariz. App. 321, 323, 408 P.2d 841, 843 (1965). While Arizona courts will, from
3 time to time, describe the lien perfection process as one to be strictly followed, *see MLM Constr. Co.*, 172
4 Ariz. at 229, 836 P.2d at 442 (citing cases), the law's modern evolution has inevitably trended toward the
5 substantial compliance model.

6 In addition to the protection of mechanics and materialmen, a secondary purpose of the law
7 is to protect the property owner. *See, e.g., Arizona Gunitite Builders, Inc. v. Continental Cas. Co.*, 105 Ariz.
8 99, 101, 459 P.2d 724, 726 (1969). The proper notification and recordation of a mechanic's lien serves to
9 keep invalid or improper clouds on title from impairing an owner's rights to enjoy the benefits of ownership.

10 As for the specific procedure necessary for a lien claimant to perfect a lien, it must, within
11 20 days of first furnishing labor, professional services, materials, machinery, fixtures, or tools to the job site,
12 prepare what is designated as a "preliminary twenty day notice" (hereinafter "preliminary 20-day notice")
13 and serve it. ARIZ. REV. STAT. § 33-992.01. This statute was initially enacted in 1979, and has been
14 amended five times since. Once the job is completed, the lien must be recorded within a specific period of
15 time thereafter. ARIZ. REV. STAT. § 33-993.

16 Within each of these two statutes are contained numerous detailed requirements, some of
17 which are at issue in the instant case. A copy of each of these statutes is included in the appendix to be filed.

18 Appx. 1 Challenged lien documents

19 Appx. 2 Statutes:

- 20 • Lien for labor, services, materials, etc., ARIZ.
21 REV. STAT. § 33-981.
- 22 • Preliminary twenty day notice, ARIZ. REV. STAT. § 33-992.01
- 23 • Proof of mailing, ARIZ. REV. STAT. § 33-992.02
- 24 • Procedure to perfect lien, ARIZ. REV. STAT. § 33-993

25 26 CHALLENGES TO GALE'S LIEN

27
28 The current challenges to Gale's lien fall into several categories:

- 1
2 A. Preliminary 20-day notices failed to comply with font size
3 requirements of ARIZ. REV. STAT. § 33-992.01(D);
4 B. No affidavits of service of some of the preliminary 20-day
5 notices; and some preliminary 20-day notices were not served
6 on OSB.

7 Each will be discussed in turn.

8
9 **OSB's Standing**

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11 OSB's pecuniary standing to challenge Gale's lien is precarious, or non-existent.

12 First, OSB has been or likely will be paid its entire debt as a secured creditor. Ample funds
13 remain in the Trustee's account to accomplish this. 11 U.S.C. § 506. Therefore, OSB has no pecuniary
14 interest in these lien claim issues. *See, e.g., Fondiller v. Robertson (In re Fondiller)*, 707 F.2d 441, 442 (9th
15 Cir. 1983). It should therefore not be incurring unnecessary fees and costs at the expense of others.

16 Second, OSB has no litigation outstanding by which any party has yet formally challenged
17 its lien, with the exception of the discrete parcel of land upon which RDC contends that it holds a senior lien
18 claim.

19
20 **A. Font Size**

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22 OSB contends that the font size of the type, on the Gale preliminary 20-day notices, does not
23 comply with ARIZ. REV. STAT. § 33-992.01(D)(3)'s mandate that certain language "be in type at least as large
24 as the largest type otherwise on the document."

25 A review of the Gale documents reflect that they comply. The warning sections are not in
26 bold nor capitalized typeface, nor does the statute so require. But each is in the same or larger font as the
27 substantive content of the rest of the document. In fact, the challenged font is actually larger than some of
28 the other font sizes found on each of the documents.

1 Therefore, OSB's partial motion for summary judgment on this point will be denied.
2

3 **B. Service of Preliminary 20-Day Notices on OSB**
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5 OSB claims that the Gale preliminary 20-day notices were not mailed to it. Gale concedes
6 that such is the case as to three (3) notices, and waives its lien claim as to those. On those three items, OSB's
7 partial motion for summary judgment will be granted.

8 As for the balance of the preliminary 20-day notices, OSB's partial motion for summary
9 judgment must be denied, for several reasons.

10 First, the balance of the preliminary 20-day notices have a mailing certificate attached, which
11 reflects payment of first class postage, and which reflect service on OSB.

12 Second, OSB has not contended that it never received the lien claims, even though the
13 preliminary 20-day notices may contain no actual certificate of mailing. This remains as a factual issue.

14 Third, the later mechanics' and materialmen's liens contain statements as to the mailing of
15 the attached preliminary 20-day notices, which are signed by Tim Kovacs, Branch Manager, and
16 acknowledged by an Arizona notary public. This satisfies the affidavit proof required by ARIZ. REV. STAT.
17 § 33-992.02(2) since a copy of the required preliminary 20-day notice is attached to each claim of lien.

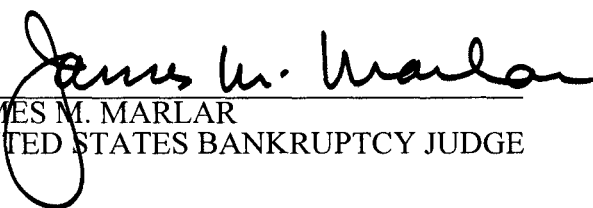
18 OSB's partial motion for summary judgment on this point will be denied, except as to the
19 three notices that Gale concedes were not served or mailed.
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1 RULING

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3 OSB partial motion for summary judgment will be denied, except for the three conceded
4 defects. The motion will be granted as to these.

5 A separate order will be issued simultaneously with the issuance of this Memorandum
6 Decision. FED. R. BANKR. P. 9021.

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8 DATED: May 162007.

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10 
11 JAMES M. MARLAR
12 UNITED STATES BANKRUPTCY JUDGE
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