

**FILED**

MAY 1 6 2007

U.S. BANKRUPTCY COURT  
FOR THE DISTRICT OF ARIZONA

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

In re:

TURNER-DUNN HOMES, INC., and others,

Debtors.

BCI BEBOUT CONCRETE, INC.,

Plaintiff,

vs.

TURNER-DUNN HOMES, INC., et al., and John  
Does 1-10,

Defendants.

ROBERT P. ABELE, Chapter 11 Trustee,

Third-Party Plaintiff,

vs.

SONORAN CONCRETE, LLC, an Arizona limited 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**

**MITCHELL  
ELECTRIC CO., INC.**

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 DAYSPRING 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 **INTRODUCTION - PROCEDURE AND METHODOLOGY**

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

24 For administrative convenience, the court has dealt with each lien claimant separately,  
25 although many of the same legal issues may affect other lien claimants as well. For that reason, many of the  
26 court's discussions and analyses may be repeated in whole or in part in its various decisions. Separating the  
27 decisions, as to each lien claimant, will enable both the court and each affected party to focus on  
28 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 Mitchell Electric Co., Inc.  
4

5 ARIZONA LAW

6  
7 In a bankruptcy case, property rights are determined by reference to state law. *Butner v.*  
8 *United States*, 440 U.S. 48 (1979). Bankruptcy courts have "core" jurisdiction to hear and determine issues  
9 involving the extent, validity, and priority of liens against an estate. 28 U.S.C. § 157(b)(2)(K).

10 Mechanics' and materialmen's liens are creatures of statute ARIZ. REV. STAT. § 33-981, *et*  
11 *seq.* Such statutes have existed in Arizona since statehood. *See, e.g. Arizona Eastern R.R. Co. v. Globe*  
12 *Hardware Co.*, 14 Ariz. 397, 400, 129 P. 1104, 1105 (1913) ("The primary object of our lien law is to insure  
13 to the laborer and materialman the payment of their accounts, and incidentally to protect the owner against  
14 the filing of liens by such persons against his property for services and material rendered and furnished the  
15 original contract."); *see also* CIVIL CODE 1913, § 3639. They exist principally to protect mechanics,  
16 materialmen, and those who furnish labor or supplies to another's land, thereby enhancing its value, from  
17 the dangers of non-payment. *See United Metro Materials, Inc. v. Pena Blanca Props., L.L.C.*, 197 Ariz. 479,  
18 484, 4 P.3d 1022, 1027 (App. 2000); *Hayward Lumber & Inv. Co. v. Graham*, 104 Ariz. 103, 111, 449 P.2d  
19 31, 39 (1968). These rights are "jealously protected," *Wylie v. Douglas Lumber Co.*, 39 Ariz. 511, 515, 8  
20 P.2d 256, 258 (1932), and when construing them the statutes must be liberally construed to effect their  
21 primary purpose. *See In re JWW Contracting Co.*, 287 B.R. 501, 509-10 (9th Cir. BAP 2002) (construing  
22 Arizona's statutes), *aff'd.* 371 F.3d 1079 (9th Cir. 2004); *Ranch House Supply Corp. v. Van Slyke*, 91 Ariz.  
23 177, 181, 370 P.2d 661, 664 (1962). While the statutes themselves appear, on the surface, to contain  
24 requirements which can be easily followed, the Arizona courts have held that substantial compliance with  
25 the statutes is sufficient to perfect a lien, provided that such compliance is not inconsistent with the  
26 legislative purpose. *See, e.g., Lewis v. Midway Lumber, Inc.*, 114 Ariz. 426, 431, 561 P.2d 740, 755 (App.  
27 1977); *Columbia Group, Inc. v. Jackson*, 151 Ariz. 76, 79, 725 P.2d 1110, 1113 (1986); *MLM Constr. Co. v.*  
28 *Pace Corp.*, 172 Ariz. 226, 229, 386 P.2d 439, 442 (App. 1992); *Peterman-Donnelly Eng'rs & Contractors*

1 *Corp. v. First Nat'l Bank*, 2 Ariz. App. 321, 323-24, 408 P.2d 841 (1966). While Arizona courts will, from  
2 time to time, describe the lien perfection process as one to be strictly followed, *see MLM Constr. Co.*, 172  
3 Ariz. at 229, 836 P.2d at 442 (citing cases), the law's modern evolution has inevitably trended toward the  
4 substantial compliance model.

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

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

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

17 Appx. 1 Challenged lien documents

18 Appx. 2 Statutes:

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



1 **B. Failure to Serve Preliminary 20-day Notices on OSB**

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3 This portion of the instant motions was brought by OSB, only.

4 OSB contends that Mitchell Electric failed to serve the preliminary 20-day notice upon it.  
5 This argument fails the summary judgment test for several reasons.

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

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

14 Third, OSB has acknowledged that it has misplaced, lost, or destroyed any such documents  
15 that might have been sent to it, such as the instant preliminary 20-day notice. Therefore, it cannot claim that  
16 it never received notice. It cannot prove that fact one way or the other.

17 Fourth, OSB has apparently neglected to monitor its multi-million dollar loan, even though  
18 its loan documents impose a duty of cooperation and information-sharing between it and its borrowers, the  
19 Debtors. Thus, again, OSB cannot definitely state whether it did or did not know of the Mitchell Electric  
20 lien.

21 Fifth, OSB has provided no affidavits of non-receipt. Nor, without paperwork in its files,  
22 could it. Even if OSB were to make such a claim, Mitchell Electric could attempt to rebut it by affidavit.  
23 ARIZ. REV. STAT. § 33-992.02.

24 Mitchell Electric properly served its preliminary 20-day notices on the Debtors. However,  
25 the Debtors did not apparently notify Mitchell Electric of any inaccuracies in the lien notices. This duty  
26 would have included the information relating to the Debtors' construction lenders, if any. ARIZ. REV. STAT.  
27 § 33-992.01(I) and (J).

28 It is doubtful that the statutory purpose would be served by then depriving a mechanic or

1 materialman of its entire lien simply because a lender's borrower (the Debtor) failed in its statutory duty to  
2 correct misinformation or furnish necessary information to a lien claimant. The statute was not intended to  
3 trap materialmen, when the party with whom they are in privity, and upon an information duty rests, utterly  
4 fails in its statutory duty. The statute is not entitled "Construction Lenders' Liens," but rather "Mechanic's  
5 and Materialmen's Liens" Construction lenders liens are covered by other statutes, such as those dealing  
6 with deeds of trust, ARIZ. REV. STAT. § 33-801, *et seq.* The issue here is priority.

7 Lenders have, and often utilize, many ways in which to police their loans, especially when  
8 those loans involve multi-million dollar construction developments. They can place personnel on site; they  
9 can have local personnel make periodic and regular visits; they can hire professionals to do the same things;  
10 they can have title companies continually update the public records with informal "bring down" reports;  
11 and/or they can enforce their loan agreements by compelling their borrowers to either comply, or declare a  
12 default under the loan agreements.

13 What lenders cannot do is to turn their corporate back on a major loan, and then cry "foul"  
14 when they find that their borrower has not been completely candid with them.

15 More briefing is required on the legal issues involved in this unusually complex arena, and  
16 there are multiple fact issues to be explored, including, but not limited to prejudice to OSB.

17 Too much remains to be uncovered, factually and as a matter of law as well as the intent of  
18 the legislature, for summary judgment to be granted on this issue. These matters must be fleshed out in the  
19 crucible of an actual trial on the merits.

20 OSB's motion on this point will be denied.  
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**RULING**

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

DATED: May 16 2007.

  
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JAMES M. MARLAR  
UNITED STATES BANKRUPTCY JUDGE

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