

FILED

MAY 17 2007

U.S. BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

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

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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**

**TRIPLE S FENCE
COMPANY**

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

10 Third- Party Defendants)

11
 12 **INTRODUCTION - PROCEDURE AND METHODOLOGY**

13
 14 The Trustee has filed motions for partial summary judgment against numerous mechanics'
 15 and materialmens' lien claimants, challenging on "statutorily deficient" or "facially inadequate" grounds, the
 16 preliminary or final recorded lien documents of such lien claimants. In some cases, the lien claimants have
 17 also filed for partial summary judgment on the same issues.

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

23 When discussing the motions for summary judgment, the court will consider the points made
 24 against the particular lien claimant, and will include the totality of challenges to the lien, whether made by
 25 the Trustee, Ohio Savings Bank ("OSB"), or WRI Investments III, LLC ("WRI"), alone or in combination
 26 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

2
3 This decision involves the allegations made against Triple S Fence Company ("Triple S").

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 JWJ 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, 408 P.2d 841, 843 (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 • Description of trust property; mailing address ARIZ.
20 REV. STAT. § 33-802.
- 21 • Lien for labor, services, materials, etc., ARIZ.
22 REV. STAT. § 33-981.
- 23 • Preliminary twenty day notice, ARIZ. REV.
24 STAT. § 33-992.01
- 25 • Procedure to perfect lien, ARIZ. REV. STAT. § 33-993

26
27 **CHALLENGES TO TRIPLE S' LIENS**

1 The current challenges to Triple S' liens fall into several categories:

- 2 A. Failure to provide legal description in the preliminary 20-day
3 notices or liens themselves;
4 B. Failure to attach contract;
5 C. Preliminary 20-day notices failed to comply with font size
6 requirements of ARIZ. REV. STAT. § 33-992.01(D);
7 D. Preliminary 20-day notices were not served on OSB.
8

9 Each will be discussed in turn.

10
11 **A. Failure to Provide Legal Description**
12

13 The Trustee (this term includes the challenges also made by OSB and WRI) has stated that
14 Triple S' mechanic's lien and preliminary 20-day notices failed to provide proper legal descriptions. In each
15 of the exemplars, the properties to which Triple S furnished labor or materials is referred to as:

16 Preliminary Notice: McCartney Center Fiesta, 2859 N. Taylor Ln.,
17 Casa Grande, AZ, Inv. #97076, Lot 108, Pinal
18 County

19 Mechanic's Lien: Parcel AA at McCartney Center, Lot 108, Sec
20 35-5S-6E, 6313 square feet 0.14 acres,
21 McCartney Center Fiesta, 2859 N. Taylor Ln.,
22 Casa Grande, AZ, Lot 108, County of Pinal

23 Preliminary Notice: Maricopa County, Arizona, Meadows Ln and
24 Sky Ln, Maricopa, AZ, Inv. No. 95480,
25 "Celebration Series Maricopa Meadows" Lot
26 44
27
28

1 Mechanic's Lien: County of Pinal "Maricopa Meadows" 45617
2 W. Sky Ln, Maricopa, AZ 85239 Lot 44

3 Legal Description: Maricopa Meadows Parcel
4 7, Sec. 28-04S-03E Lot 44, 5382 square feet
5 .12 acres

6 Moreover, the preliminary 20-day notice was attached to the mechanic's lien.

7 The Trustee's challenge merely states, as a conclusion of law or perhaps a statement of fact,
8 that the liens failed to attach proper legal descriptions. However, the Trustee does not indicate the manner
9 in which the lien's description is misleading, other than noting that the description of the liened property is
10 inconsistent with the actual, "true" legal description. (Trustee's SOF para. F.) This argument may have
11 some validity with regard to the second lien, above, but the issue is a factual one concerning notice.
12 However, neither does OSB's motion contain a reference point for the court to measure the sufficiency of
13 Triple S' lien.

14 The purpose of the statute's requirement for a "legal description," ARIZ. REV. STAT.
15 § 33-993(A)(1) is for the owner of the affected property to know which parcel(s) are impacted by the claim
16 of lien. This information can be conveyed in a variety of non-exclusive ways. *See, e.g., Ten Z's Inc. v.*
17 *Perry*, 166 Ariz. 203, 801 P.2d 438, *rev. denied* (App. 1990); *S.K. Drywall, Inc. v. Developers Fin. Group,*
18 *Inc.*, 165 Ariz. 588, 595-96, 799 P.2d 1362, 1368-69 (App. 1990) *vacated in part on other grounds*, 169
19 Ariz. 345, 819 P.2d 931 (1991); ARIZ. REV. STAT. § 33-802. Unfortunately, for purposes of summary
20 judgment, there is no affidavit from any party which states that the location of the liened property cannot
21 be found by reference to the descriptions contained in Triple S' lien notices, nor of the degree of difficulty,
22 if any, in matching to the given descriptive choices to the affected parcel(s). (Compare, e.g., the same issues
23 discussed in the BCI matter.) This issue requires more factual exploration and evidence. If notice is the key,
24 the issue becomes whether the descriptions given match to the affected parcel. The title company obviously
25 found the claimed liens. Is this adequate?

26 Therefore, neither side is entitled to summary judgment on this issue, and it remains for trial.
27
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1 **B. Failure to Attach Contract**

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3 ARIZ. REV. STAT. § 33-993(A)(3) requires that, in order to perfect a lien, the notice and claim
4 of lien "shall contain . . . [a] statement of the terms, time given and conditions of the contract, if it is oral,
5 or a copy of the contract, if it is written."

6 In this case, Triple S attached copies of invoices for block fence/gate. They were dated April
7 and June, 2006. (Ex. 11.) The contract itself (Tee Ex. P) is a standard contract prepared by the Debtors, and
8 it contains no specific details as to the work to be done except in general terms. There is no total price, no
9 unit price, no dates of performance, nor other specifics as to the work to be performed by a contractor. In
10 short, the invoices attached to the mechanic's lien in this instance are complete enough to withstand
11 summary judgment, and they certainly give more information than the boilerplate standard form contract.
12 *Peterman-Donnelly Eng'rs & Contractors Corp. v. First Nat'l Bank*, 2 Ariz. App. 321, 323, 408 P.2d 841,
13 843 (1966). A trial is required on whether any party was misled.

14 Therefore, the Trustee's motion on this issue will be denied.

15
16 **C. Font Size**

17
18 The Trustee and OSB maintain that Triple S' preliminary 20-day notices failed to conform
19 to the statutory requirement that certain required warning language "be in type at least as large as the largest
20 type otherwise on the document." ARIZ. REV. STAT. § 33-992.01(D).

21 An unaided view of the preliminary 20-day notices in this case reveal actual compliance. The
22 font size is as large as the largest pre-printed type font on the form. This constitutes substantial compliance
23 with the statute. How the objecting parties can contend otherwise is a mystery.

24 Accordingly, OSB's motion for summary judgment on this point will be denied.

1 **D. Preliminary 20-day Notices Were Not Served on OSB**

2
3 OSB contends that it did not receive copies of the preliminary 20-day notices. From the
4 exhibits submitted, this would appear to be the case, at least on the surface.

5 But whether OSB actually received them, or notice of them, is apparently unknown, because
6 OSB has conceded that its records in this regard have been misplaced, lost or destroyed, and are unavailable.
7 Whether OSB properly monitored its loan, or turned a blind eye toward its Arizona customer, remains an
8 issue for trial.

9 And if, ultimately, it is indeed true that the liens were never served on OSB, the parties will
10 need to brief the court on the legal effect of such omission. The parties will be required to address the
11 statute's silence on the point, as it affects the actual lien. Prejudice is also an issue.

12 Additionally, the parties will have to explore the impact of the Debtor's failure to correct the
13 clear inaccuracies in the Triple S preliminary 20-day notices, when Triple S wrote the word "None" in
14 answer to the question of who the lender or reputed lender was. At that point, the duty to correct the
15 inaccuracy immediately shifted to the Debtors, pursuant to ARIZ. REV. STAT. § 33-992.01(I) and (J). Can
16 a borrower and a lender collude to ignore duties imposed by statutes, and thereby deprive an innocent
17 materialman of a lien, simply by failing to correct an inaccuracy? Can an owner do so singly, without
18 collusion? Does a lender, with whom a materialman has no privity of contract, benefit from a bankrupt
19 borrower's failure to follow the statute's requirement to correct inaccuracies? Did the Arizona legislature
20 intend to deprive materialmen of valid liens in such an instance? Must the value of the property's
21 enhancement be considered?

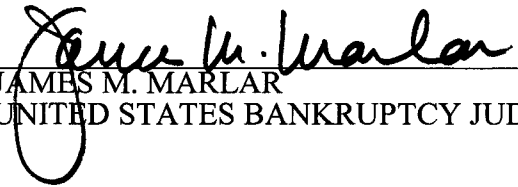
22 These questions, and many more are deserving of substantially more legal thought than has
23 heretofore been given to these interesting statutes. As a result, the court would not be dispensing substantial
24 justice unless it denied the current fairly superficial motion for summary judgment on this point, and
25 required the parties and itself to delve far deeper into these issues.

26 Therefore, OSB's partial motion for summary judgment on the point at issue must, and will
27 be denied.

RULING

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

DATED: May 17 2007.



JAMES M. MARLAR
UNITED STATES BANKRUPTCY JUDGE

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