

FILED

MAY 17 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

ALLIANCE LUMBER, LLC

KAY CONSTRUCTION, INC.

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 materialmen's 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 a appendix to each decision, which will include each
9 lien claimant's challenged lien documents. Due to size, each appendix will be separately filed within a few
10 days subsequent to issuance of each decision. In this way, the parties, this court, and any reviewing court
11 will having ready access to the operative documents involving each creditor. The appendix will also include
12 the applicable Arizona statutes.

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

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

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

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

28

1 WHOM THIS DECISION AFFECTS

2
3 This decision involves the allegations made against both Alliance Lumber, LLC, and Kay
4 Construction, Inc.

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 (1966). 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, ARIZ. 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

24
25 **CHALLENGES TO ALLIANCE LUMBER'S AND KAY CONSTRUCTION'S LIENS**

26
27 The current challenges to Alliance Lumber's and Kay Construction's liens fall into several
28 categories:

- A. Failure to provide legal description in the preliminary 20-day notice or lien itself;
- B. Failure to attach contract;
- C. No affidavit of service of the preliminary 20-day notice was served on OSB; and
- D. Preliminary 20-day notices failed to comply with font size requirements of ARIZ. REV. STAT. § 33-992.01(D);

Alliance and Kay have also filed partial motions for summary judgment on the same issues. Each will be discussed in turn.

CHALLENGES TO THE LIENS

The and OSB Trustee seek partial summary judgment, as do Alliance and Kay, on the following issues:

1. Did the legal description provided in the liens and preliminary 20-day notices satisfy ARIZ. REV. STAT. §§ 33-992.01(C)(4) and 33-993(A)(1)?
2. Was either lien claimant required to attach a copy of a contract as required by ARIZ. REV. STAT. § 33-993(A)(3)?

A. Failure to Provide Legal Description

The Trustee (this term includes the challenges also made by OSB and WRI) has stated that Alliance Lumber's and Kay Construction's mechanic's liens and preliminary 20-day notices failed to provide proper legal descriptions.

Copies of the exemplar (or perhaps the entire) notices are attached as exhibits to Alliance Lumber's and Kay Construction's "Separate Statement of Facts in Support of Their Motion for Partial Summary Judgment." Included within that pleading are also the affidavits of Rick Coleman (Ex. 3, Alliance), Pamela Cullen (Ex. 5, Kay), and Richard Brian (Ex. 10, Great American Title Agency, Inc.).

1 Mr. Coleman and Ms. Cullen state that neither the Debtors, nor either of the construction
2 lenders noted thereon, responded to any inaccuracies found within the liens and preliminary 20-day notices.
3 Therefore, the Trustee and the lenders have lost any right to defend on the issue of whether the property's
4 description substantially complies with the statute's purpose of notification. ARIZ. REV. STAT. § 33-992.01(I)
5 and (J). This is an appropriate finding, as a matter of law.

6 As a matter of fact, neither the Trustee nor the lenders (OSB and WRI) have countered the
7 affidavit of Mr. Brian, or challenged the fact issue, and Mr. Brian concludes that, as a factual matter, the
8 affected parcels can be located.

9 OSB's argument that these affidavits simply "create" an issue of fact is misplaced. Although
10 discovery has, indeed, been suspended, the issue on which summary judgment is sought is not a
11 "discoverable" item. Affidavits have been placed before the court on specific facts. It is up to a respondent
12 to rebut those facts by presenting opposing facts on the same issue.

13 The Trustee's and OSB's partial motions for summary judgment challenged the facial validity
14 of lien claims. One of the arguments was that the property descriptions were inadequate to convey notice.
15 Both Alliance Lumber and Kay Construction rebutted that argument by affidavits, and asked that partial
16 summary judgment be granted in their favor. It was then the responsibility of OSB, WRI, and the Trustee
17 to raise a disputed fact opposing Alliance Lumber's and Kay Construction's points. FED. R. CIV. P. 56(e),
18 made applicable to bankruptcy proceedings by FED. R. BANKR. P. 7056. Neither OSB, WRI, nor the Trustee
19 have asserted that facts are unavailable to them, nor that they are aware of such facts in order to invoke FED.
20 R. CIV. P. 56(f). Thus, simply "disputing" the sworn facts is insufficient. FED. R. CIV. P. 56(c) allows for
21 opposing affidavits to be filed prior to the day of hearing. None were, nor have been since.

22 Therefore, Alliance Lumber's and Kay Construction's partial motions for summary judgment
23 on the issue of the adequacy of the legal descriptions will be granted, and the Trustee, OSB, and WRI's
24 partial motions for summary judgment on the same issue will be denied.

1 **D. Font Size**

2
3 OSB maintains that Alliance Lumber's and Kay Construction's preliminary 20-day notices
4 failed to conform to the statutory requirement that certain required warning language "be in type at least as
5 large as the largest type otherwise on the document." ARIZ. REV. STAT. § 33-992.01(D).

6 An unaided view of the preliminary 20-day notices in this case reveals actual compliance.
7 The font size is as large as the largest pre-printed type font on the form. Even with the aid of a magnifying
8 glass and a ruler, the font appears to be the same throughout the document. It is the use of upper and lower
9 case letters that creates an optical illusion to the contrary.

10 The court incorporates the reasoning set forth in the Del Martenson Memorandum Decision,
11 as the points made by the court in that ruling are exactly the same here.

12 The size of the type in the preliminary 20-day notice satisfies the intent, spirit, and letter
13 (literally and figuratively) of the law.

14 Partial summary judgment on this issue shall be entered in favor of Alliance Lumber and Kay
15 Construction, while the Trustee's and OSB's motions for partial summary judgment on this same issue will
16 be denied.

17
18 **E. Preliminary 20-day Notices Not Served on OSB (Alliance)**

19
20 OSB contends that Alliance Lumber failed to serve the preliminary 20-day notice upon it.
21 This argument fails the summary judgment test for several reasons.

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

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

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

7 Fourth, OSB has apparently neglected to monitor its multi-million dollar loan, even though
8 its loan documents impose a duty of cooperation and information-sharing between it and its borrowers, the
9 Debtors. Thus, again, OSB cannot definitely state whether it did or did not know of the Alliance Lumber's
10 lien.

11 Fifth, OSB has provided no affidavits of non-receipt. Nor, without paperwork in its files,
12 could it. Even if OSB were to make such a claim, Alliance Lumber could attempt to rebut it by affidavit.
13 ARIZ. REV. STAT. § 33-992.02.

14 These factual issues aside, though, brings the inquiry to its real point--what is the true
15 legislative purpose of ARIZ. REV. STAT. § 33-992.01(B)?

16 The statute requires a mechanic or materialman, in order to eventually perfect a statutory lien
17 against another's property, for whose benefit he has labored and/or whose property is otherwise improved,
18 to serve preliminary notices within 20 days after beginning work. ARIZ. REV. STAT. § 33-992.01(C). The
19 preliminary 20-day notice must contain certain information, and be served in some manner upon the owner,
20 reputed owner, original contractor or reputed contractor, the construction lender, if any, or reputed
21 construction lender, if any, and the person with whom the claimant has contracted. ARIZ. REV. STAT.
22 § 33-992.01(B). "Construction lender" includes the beneficiary under a deed of trust, such as OSB, whose
23 loan has been used to defray the construction costs. ARIZ. REV. STAT. § 33-992.01(A)(1).

24 Now comes the rub. If there are inaccuracies contained within the preliminary 20-day notice,
25 the "owner or other interested party" which did receive the preliminary 20-day notice is required to inform
26 the lien claimant with "all information necessary to correct any inaccuracies in the notice . . . or lose as a
27 defense any inaccuracy. . . ." ARIZ. REV. STAT. § 33-992.01(D).

28

1 Sections I and J of the same statute impose a duty on those receiving the information to
2 communicate with the lien claimant. But if, as here, the owner ignores this duty, and if the claimant has
3 listed the wrong construction lender, what is the legal effect? According to OSB, the lien which is
4 eventually recorded is invalid as to it. However, there is no statute to support OSB's argument on the effect
5 of such an omission. When one considers that the purpose of the statute is to protect the lien rights of
6 mechanics and materialmen, then what legislative purpose is served by setting traps for giving notice to
7 those with whom the claimant has never dealt, who may be many states away, be faceless on the project, and
8 whose owner (who rightly did receive notice) ignores the duty to convey to the lien claimant the accurate
9 information? This statute was not written to benefit construction lenders. It was written to benefit lien
10 claimants and owners. No Arizona case or statute has been written to deny a lien claimant of his/her/its
11 lawful rights to the substantial benefit of a lender, in a circumstance similar to that presented here.

12 In the instant case, Alliance Lumber made a good faith effort to list the construction lender
13 which it believed was the proper party, and so noted it on the preliminary 20-day notice. It listed "W.R.I.
14 Investments III LLC." Even if it is wrong (about which no one advised it), it did its best to comply with the
15 statute. The failure of others in their duties to keep the lien claimant properly advised, under the statute, does
16 not have the legal effect of invalidating an otherwise effective mechanic's and materialmen's lien claim.

17 Here, Alliance Lumber did what the statute required of it. Neither the owner, nor WRI,
18 apparently made any effort to correct the inaccuracies concerning who the construction lender was, despite
19 the statutory duty to do so. Now, OSB seeks to benefit from another's failure to do what it was required to
20 do. Considering the statute's overall purpose, this court agrees with the reasoning of California's Appellate
21 court, in *Industrial Asphalt, Inc. v. Garrett Corp.* 180 Cal.App. 3d, 1001, 226 Cal. Rptr. 17 (1986). There,
22 the affected owner was properly served with a preliminary twenty day notice, but the bankruptcy contractor
23 to whom the claimant has supplied the material was not. The court held the lien claimant's failure to serve
24 the contractor did not invalidate the lien. It stated:

25
26 We see no reason, in the absence of prejudice to the property
27 owner ... why the subcontractor's failure to serve notice upon
an original contractor should render unenforceable a lien
against an owner who *did* receive proper notice.

28 *Id.* 180 Cal. at 1007, 226 Cal. Rptr. at 20 (emphasis supplied).

