

SIGNED.



Dated: September 21, 2007

James M. Marlara
JAMES M. MARLAR
U.S. Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

<p>1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28</p>	<p>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)</p>	<p>) 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:) RDC CONSTRUCTION, INC.'S) MOTION FOR STAY PENDING) APPEAL</p>
---	--	--

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 &)
6 SUPPLY CO.; ESCO ELECTRIC WHOLESALE,)
7 INC.; RDC CONSTRUCTION, INC., an Arizona)
8 corporation; DAYSPRING DEVELOPMENT, INC.,)
9 an Arizona corporation; OUTDOOR)
10 ENVIRONMENTAL SYSTEMS, INC aka OES,)
11 INC. dba RAINDANCE SYSTEMS, an Arizona)
12 corporation; OHIO SAVINGS BANK, a federal)
13 savings bank; WRI INVESTMENTS III, LLC, a)
14 Washington limited liability company; ANY)
15 UNKNOWN PARTIES IN POSSESSION;)
16 UNKNOWN HEIRS AND DEVISEES OF ANY OF)
17 THE FOREGOING WHO ARE DECEASED; and)
18 ABC ENTITIES 1-100,)

19 _____
20 Third- Party Defendants.

21 Before the court is RDC Construction, Inc.'s ("RDC") motion for stay pending appeal of this
22 court's judgment. The judgment was entered on or about September 10, 2007, and timely appealed.

23 In order for this court to grant such a stay, it must abide by FED. R. BANKR. P. 8005. It also
24 follows the four standards enunciated in *In re Wymer*, 5 B.R. 802 (9th Cir. BAP 1980). Those standards
25 are:

- 26 (1) Appellant is likely to succeed on the merits of the cross-appeal;
- 27 (2) There will be irreparable injury suffered if no stay is granted;
- 28 (3) the cross-appellee will not suffer substantial harm because of the stay;
- and
- (4) The public interest will not be harmed by reason of the stay.

Id.

Relative to the first issue, the motion fails to address the error or errors inherent in this court's
decision, and/or how the court misapprehended the facts, or misconstrued the law. To date, RDC has not
yet filed its statement of issues on appeal, which would more precisely focus the court on this element. *See*
FED. R. BANKR. P. 8006. At oral argument, counsel for RDC appeared to maintain that the court failed to
consider certain evidence, or did not weigh it properly, resulting in some type of accounting error. This
argument was unpersuasive. Thus, RDC failed to meet the first *Wymer* element.

1 Second, the court is unaware of any irreparable damage that might be suffered by RDC. The
2 issue in the case was not which creditor enjoyed the senior lien position, but whether RDC was able to prove
3 entitlement to proceeds of its collateral ahead of Ohio Savings Bank ("OSB"), and if so, in what amount.
4 If this court is reversed on appeal, RDC may simply follow the disbursements and seek a recovery. This
5 does not constitute an irreparable harm. Thus, RDC failed to satisfy this second element.

6 Third, OSB will probably not suffer substantial harm, so this element favors RDC.

7 Fourth, this "public interest" element is not applicable.

8 Accordingly, the court will rule that RDC failed to satisfy two of the three applicable *Wymer*
9 issues, and is therefore not entitled to a stay pending appeal.

10 A separate order will be entered. FED. R. BANKR. P. 9021.

11 DATED AND SIGNED ABOVE.

12
13
14 COPIES served as indicated below on the
15 date signed above:

16 Adam B. Nach, Allison M. Lauritson and Lisa Banen Lane & Nach, P.C. 2025 N. Third St., #157 Phoenix, AZ 85004 Email: adam.nach@azbar.org Email: allison.lauritson@lane-nach.com Email: lisa.banen@lane-nach.com Attorneys for A Company Portable Restrooms	17 Daniel P. Collins and Margaret A. Gillespie Collins, May, Potenza, Baran & Gillespie 2210 Chase Tower, 201 N. Central Ave. Phoenix, AZ 85004-0022 Email: dcollins@cmpbglaw.com Email: mgillespie@cmpbglaw.com Attorneys for Robert P. Abele, Trustee
18 William J. Simon Tiffany & Bosco 2525 E Camelback Rd., #300 Phoenix, AZ 85016-4237 Email: jal@tblaw.com Attorneys for Alliance Lumber and Kay Construction	19 Don C. Fletcher The Cavanagh Law Firm 1850 N. Central Ave., #2400 Phoenix, AZ 85004 Email: dfletcher@cavanaghlaw.com Attorneys for Plaintiff BCI Bebout Concrete
20 James F. Wees Wees Law Firm 2600 N. Central Ave., # 635 Phoenix, AZ 85004 Email: james@weeslawfirm.com Attorneys for Chas Roberts Air Conditioning	21 Carolyn J. Johnsen Jennings, Strouss & Salmon, P.L.C. The Collier Center, 11th Floor 201 E. Washington St. Phoenix, AZ 85004-2385 Email: cjjohnsen@jsslaw.com Attorneys for Del Martenson Development

<p>1 Michael C. Zukowski and Ernest Collins, Jr. 2 Beaugureau, Zukowski & Hancock, P.C. 3 2111 E. Highland Ave., #255 4 Phoenix, AZ 85016 5 Email: mzukowski@bzhlaw.com 6 Email: ecolins@bzhlaw.com 7 Attorneys for Diversified Roofing</p>	<p>Rodger A. Golston Golston Keister & Steen, P.C. 4500 S. Lakeshore Dr., #570 Tempe, AZ 85282-7057 Email: rag@gkshlaw.com Attorneys for Gale Contractor Services</p>
<p>5 William Novotny and Robert A. Shull 6 Mariscal, Weeks, McIntyre & Friedlander 7 2901 N. Central Ave., #200 8 Phoenix, AZ 85012-2705 9 Email: william.novotny@mwmf.com 10 Email: rob.shull@mwmf.com 11 Attorneys for Integrated Stucco</p>	<p>John D. Parker, II Parker Law Firm, PLC 141 E. Palm Ln., #111 Phoenix, AZ 85004 Email: jparker@ptlaw.net Attorneys for Jordan Company</p>
<p>9 James H. Hazlewood 10 Carpenter, Hazlewood, Delgado & Wood PLC 11 1400 E. Southern Ave., #640 12 Tempe, AZ 85282 13 Email james.hazlewood@carpenterhazlewood.com 14 Attorneys for Maricopa Meadows Homeowners 15 Association</p>	<p>Robert P. Harris Quarles & Brady LLP Two N. Central Ave., #200 Phoenix, AZ 85004 Email: rharris@quarles.com Attorneys for Mitchell Electric</p>
<p>13 Joshua W. Wolfshohl 14 Porter & Hedges LLP 15 1000 Main St., 36th Floor 16 Houston, TX 77002 17 Email: jwolfshohl@porterhedges.com 18 Attorneys for Mitchell Electric</p>	<p>Howard C. Meyers Butch & Craicholo, P.A. 702 E. Osborn, #200 Phoenix, AZ 85014 Email: hmeyers@bcattorneys.com Attorneys for New Century Holdings</p>
<p>16 Gregory P. Gillis 17 Jaburg & Wilk PC 18 14500 N. Northsight Blvd., #116 19 Scottsdale, AZ 85260 20 Email: gpg@jaburgwilk.com 21 Attorneys for Pacific Pools and Spas</p>	<p>Steven M. Cox Waterfall Economidis Caldwell Hanshaw & Villamana, P.C. 5210 E. Williams Cir., #800 Tucson, AZ 85711 Email smcox@wechv.com Attorneys for RDC Construction</p>
<p>20 Christopher J. Berry 21 Berry and Associates 22 101 N. First Ave., #1800 23 Phoenix, AZ 85003 24 Email: cberry@berryandassoc.com 25 Attorneys for Riggs Plumbing</p>	
<p>24 Ryan Christopher Skiver 25 Britt Law Group PC 26 2525 E. Camelback Rd., #900 27 Phoenix, AZ 85016 28 Email: rskiver@brittlawgroup.com Attorneys for Triple S Fence Co.</p>	<p>Gary V. Ringler 7303 W. Boston St. Chandler, AZ 85226 Email: garyvringler@earthlink.net Attorneys for Trussway, Inc. West</p>

<p>1 Steve A. McQueen 2 Pagel, Davis & Hill, P.C. 3 1415 Louisiana, 22nd Floor 4 Houston, TX 77002 5 Email: dam@pdhlaw.com 6 Attorneys for Trussway, Inc. West</p>	<p>Ari Ramras Ramras Law Office, P.C. 5060 N. 40th St., #103 Phoenix, AZ 85018 Email ari@ramraslaw.com Attorneys for WRI Investments and Ohio Savings Bank</p>
<p>5 Joseph E. Cotterman and Jaclyn D. Malka 6 Gallagher & Kennedy, P.A. 7 2575 E. Camelback Rd. 8 Phoenix, AZ 85016-9225 9 Email: jec@gknet.com 10 Email jaclyn.malka@gknet.com 11 Attorneys for WRI Investments, Ohio Savings Bank</p>	<p>Scott B. Cohen Sacks Tierney P.A. 4250 N. Drinkwater Blvd., 4th Flr. Scottsdale, AZ 85251 Email: Scott.Cohen@SacksTierney.com Attorneys for WRI Investments III</p>
<p>9 Kevin J. Blakley 10 Gammage & Burnham, P.L.C. 11 Two N. Central Ave., 18th Floor 12 Phoenix, AZ 85004 13 Email: kblakley@gblaw.com 14 Attorneys for Ohio Savings Bank</p>	<p>Office of the United States Trustee 230 North First Avenue, Suite 204 Phoenix, AZ 85003-1706 U.S. Mail</p>

13 By /s/ M. B. Thompson
14 Judicial Assistant

SIGNED