

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

DIVERSIFIED ROOFING, INC.

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

1 **WHOM THIS DECISION AFFECTS**

2
3 This decision involves the allegations made against both Diversified Roofing, Inc., and Peak
4 Construction, Inc. These entities filed joint pleadings and therefore the court will include both entities in
5 this Memorandum Decision.
6

7 **ARIZONA LAW**

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

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

1 1977); *Columbia Group, Inc. v. Jackson*, 151 Ariz. 76, 79, 725 P.2d 1110, 1113 (1986); *MLM Constr. Co. v.*
2 *Pace Corp.*, 172 Ariz. 226, 229, 386 P.2d 439, 442 (App. 1992); *Peterman-Donnelly Eng'rs & Contractors*
3 *Corp. v. First Nat'l Bank*, 2 Ariz. App. 321, 323, 408 P.2d 841, 843 (1966). While Arizona courts will, from
4 time to time, describe the lien perfection process as one to be strictly followed, *see MLM Constr. Co.*, 172
5 Ariz. at 229, 836 P.2d at 442 (citing cases), the law's modern evolution has inevitably trended toward the
6 substantial compliance model.

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

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

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

19 Appx. 1 Challenged lien documents

20 Appx. 2 Statutes:

- 21 • Lien for labor, ARIZ. REV. STAT. § 33-981.
- 22 • Preliminary twenty day notice, ARIZ. REV. STAT. § 33-992.01
- 23 • Procedure to perfect lien, ARIZ. REV. STAT. § 33-993

24 **CHALLENGES TO PEAK CONSTRUCTION'S LIEN**

25
26
27 The current challenges to Peak Construction's lien fall into several categories:

- 28 A. Failure to provide legal description in one lien claim; and

1 B. Preliminary 20-day notices failed to comply with font size
2 requirements of ARIZ. REV. STAT. § 33-992.01(D);
3

4 **CHALLENGES TO DIVERSIFIED ROOFING'S LIEN**

5
6 The current challenges to Diversified Roofing's lien also fall into two categories:

- 7 A. Failure to provide legal description in two preliminary 20-day
8 notices; and
9 B. Preliminary 20-day notices failed to comply with font size
10 requirements of ARIZ. REV. STAT. § 33-992.01(D).
11

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

13
14 The legal issue to be addressed here is whether certain of the claimants' liens provided "the
15 legal description of the lands and improvements to be charged with a lien." ARIZ. REV. STAT.
16 § 33-993(A)(1).

17 At the outset, it is important to note that the preliminary 20-day notice statute contains
18 language that is broader and more forgiving. It states, at ARIZ. REV. STAT. § 33-992.01(C)(4), that the lien
19 claimant provide to the owner and others:

20 A legal description, subdivision plat, street address, location with
21 respect to commonly known roads and other landmarks in the area or
22 any other description of the jobsite sufficient for identification.

23 By the same token, if the owner is required to furnish information to a potential lien claimant, all that is
24 required of it is to furnish information of the same type. ARIZ. REV. STAT. § 33-992.01(I)(1).

25 Then, when and if a lien is later filed, the lien claimant is charged with placing, in the
26 recorded notice, "the legal description of the lands and improvements to be charged with a lien." ARIZ. REV.
27 STAT. § 33-993(A)(1).
28

1 As a general rule, Arizona courts have construed the mechanic's lien statutes liberally, in
2 order to accomplish their remedial purpose. *Gene McVety, Inc. v. Don Grady Homes, Inc.*, 119 Ariz. 482,
3 486, 581 P.2d 1132, 1136 (1978). All that is required, with respect to a legal description is substantial
4 compliance. *Smith Pipe & Steel Co. v. Mead*, 130 Ariz. 150, 151, 634 P.2d 962, 963 (1981). This principle
5 will not assist one who completely misses the mark, *see, e.g., id.*, but it will not penalize a party who,
6 through another creative description, can direct an owner or interested party to the affected parcel. *See id.*;
7 *see also James Weller, Inc. v. Hansen*, 21 Ariz. App. 217, 517 P.2d 1110 (1973); *Adams Tree Service, Inc.*
8 *v. Transamerica Title Ins. Co.*, 20 Ariz. App. 214, 511 P.2d 658 (1973). These flexible principles do not
9 offend the statute's purpose, which is to give notice and other information sufficient to locate and identify
10 the affected parcel.

11 This premise is not altogether, nor entirely, subject to the precision focus needed to sustain
12 a summary judgment motion. Instead, each case and description inherently lends itself to factual inquiry.

13 Boiled to its essence, the Trustee and OSB maintain that the term "legal description" in ARIZ.
14 REV. STAT. § 33-993(A)(1)'s lien requirement lends itself but to a single, exact, precise and matching,
15 perfectly correct legal description. And, if it does not do so, the lien fails.

16 That argument might, to some circles, have appeal, were it not for the entire body of case law
17 surrounding the interpretation of the mechanic's lien laws, as best summed up by Judge Howard in *Lewis*
18 *v. Midway Lumber*, 114 Ariz. at 431, 561 P.2d 755:

19
20 . . . the steps required by A.R.S. § 33-993 to impose the lien must be
21 followed but in determining what these steps are the court will give
22 the words a meaning which is reasonable, consistent with all the
23 language used, and conducive to the purpose to be accomplished by
24 the enactment of the statute. Thus, substantial compliance not
25 inconsistent with the legislative purpose is sufficient. *Leeson v.*
26 *Bartol, supra.*

27 This court must also consider the most basic of the general rules of statutory construction,
28 codified by Arizona's legislature:

Statutes shall be liberally construed to effect their outcomes and to
promote justice.

ARIZ. REV. STAT. § 1-211(B).

1 Within this construct, then, a court is not imbued with a roving commission to do equity, but
2 it is required to consider the totality of the circumstances surrounding any claim of lien, always mindful of
3 the specifics required, and the purposes to be accomplished thereby.

4 In short, issues such as what constitutes a proper legal description, for lien perfection
5 purposes, is a mixed question of fact and law. Therefore, summary judgment on such an issue is
6 inappropriate. A trial must be had so that all relevant and material information may be fully presented by
7 the parties and considered by the court.

8 Accordingly, the partial motions for summary judgment on this issue will be denied.
9

10 **B. Font Size**
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12 The Trustee and OSB contend that the font size of the type, on both the Diversified Roofing
13 and Peak Construction preliminary 20-day notices, does not comply with ARIZ. REV. STAT. § § 33-
14 992.01(D)'s mandate that certain language "be in type at least as large as the largest type otherwise on the
15 document."

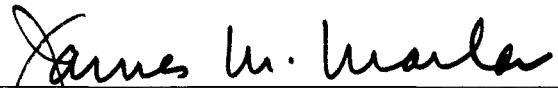
16 A review of the documents prepared by both lien claimants reflects that they have complied.
17 The warning section is not in bold typeface, nor does the statute so require. But it is in the same font as the
18 substantive content of the rest of the document. Simply because some letters are capitalized, and some are
19 in lower case does not offend the statutory language. The type size is consistent throughout the documents,
20 and thus satisfies both the statute's letter and purpose.

21 For this reason, the partial motions for summary judgment filed by the Trustee and OSB will
22 also be denied on this issue.
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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 this 17 day of May, 2007.



JAMES M. MARLAR
UNITED STATES BANKRUPTCY JUDGE

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