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

In Re
**CA-TEL TELECOMMUNICATIONS,
INC.,**
Debtor.

Chapter 11 Proceedings
Case No. 08-BK-01089-PHX-RTBP
Adv. No. 08-00837-RTBP

**CA-TEL TELECOMMUNICATIONS,
INC.,**
Plaintiff,
v.
QWEST CORPORATION, et al.,
Defendants.

**UNDER ADVISEMENT
DECISION RE: DEFAULT JUDGMENT
AGAINST JEDINAK**

I. Background

The Debtor and Qwest Corporation (“Qwest”) are parties to a General Maintenance and
Contraction Agreement, Buried Service Agreement, and Specific Bid General Construction and
Maintenance Agreement (collectively “Contracts”) whereby the Debtor served as a general
contractor for Qwest on installation projects in Tucson and Phoenix. Qwest alleges that the
Debtor defaulted on the Contracts by, among other things, negligently severing one of Qwest’s
cables in Tucson.

Qwest also alleges that the Debtor failed to pay many of its subcontractors and suppliers,
thereby exposing Qwest to lawsuits, mechanic’s liens and other claims of liability by the
subcontractors. Using this as a basis, Qwest filed a motion for relief from stay requesting

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1 authority to pay the subcontractors directly. Further, Qwest acknowledges that it owes the
2 Debtor money under the Contracts, but has, until recently, refused to pay the Debtor due to the
3 potential claims of the subcontractors and as an offset of the damage caused by the Debtor's
4 severing of cables in Tucson.

5 Judge Baum directed that the matter be addressed in an adversary proceeding and
6 thereafter, the Debtor filed a complaint seeking turnover of \$320,000 from Qwest and
7 declaratory relief against the subcontractors regarding their lien rights against Qwest. In the
8 complaint the Debtor claims that Qwest has no basis to withhold payment because: 1) the
9 severing of cable in Tucson was an insured loss; and 2) the subcontractors are not entitled to
10 mechanic's liens because their work was performed on public property which is not susceptible
11 to mechanic's liens.

12 Jedinak, which performed work on the Tucson project, is one of the Debtor's
13 subcontractors named in the adversary proceeding. Jedinak did not timely file an answer. The
14 Court therefore entered a default judgment against Jedinak. One day after the entry of default,
15 Jedinak moved for relief from the Order claiming that the complaint was served to the wrong
16 address and that it has a meritorious defense.

17 The Court held a hearing to determine if the default should be set aside. The Court
18 concluded that Jedinak showed excusable neglect in not timely answering the complaint. But,
19 the Court could not determine if a meritorious defense exists. Accordingly, the Court allowed
20 further briefing on the issue. Both Jedinak and the Debtor filed post-hearing briefs.

21 Jedinak acknowledges that it did nothing to preserve or perfect a mechanics lien against
22 Qwest but claims that it has a restitution claim against Qwest that provides a meritorious
23 defense. Relying on *Commercial Cornice & Millwork Inc. v. Camel Construction Services Corp.*
24 739 P.2d 1351, 154 Ariz. 34 (App.Div.1 1987) and *Murdock-Bryant Construction v. Pearson,*
25 703 P.2d 1197, 146 Ariz. 48 (1985), Jedinak argues that restitution is available to a subcontractor
26 against an owner notwithstanding that no lien has been filed. Jedinak also argues that because
27 construction occurred on public property it did not have the option to file a lien under Arizona
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1 law. Therefore, Jedinak's position is that it was precluded from filing a mechanic's lien on the
2 property.

3 The Debtor argues that Jedinak's theory of recovery is an equitable remedy that is only
4 available if there is no remedy available under the law. Switching gears from the theory
5 advanced in the adversary complaint, the Debtor now argues that it does not matter if the work
6 occurred on private or public property. If the work occurred on private property, Jedinak did not
7 timely file a mechanic's lien; if on public property, Jedinak's right to recover under the Little
8 Miller Act would have nevertheless required sending a 20 day notice of lien which Jedinak
9 admittedly did not do.

10 **II. Analysis**

11 Jedinak's restitution claim must necessarily be premised upon a claim that Qwest has
12 been unjustly enriched because it has received the benefit of Jedinak's labor but has not paid for
13 it. *Camel Construction* makes this clear. Here, however, Jedinak's claim, if one exists, will soon
14 be moot. Once the third party pays the contractor, recovery by the subcontractor against the third
15 party necessarily fails. As made clear during the March 3, 2009 hearing in the administrative
16 case, Qwest is holding all outstanding funds pending resolution of subcontractor claims and has
17 agreed to pay the Debtor all owed amounts immediately after such resolution. This is therefore
18 not a case where the owner will be unjustly enriched at the expense of its contractor's
19 subcontractor. Thus, Jedinak does not have a meritorious defense.

20 Having found Jedinak's theory of restitution moot, the Court need not resolve questions
21 surrounding whether or not construction took place on private or public property.

22 This ruling is applicable only to Jedinak and is without prejudice to the rights of any
23 other party to argue the same or similar defense or counter-claim.

24 The motion to set aside default will be denied. Counsel for Debtor is to submit a form of
25 order.

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28 DATED: March 9, 2009

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Charles G. Case II
UNITED STATES BANKRUPTCY JUDGE

COPY of the foregoing mailed by the BNC and/or sent by auto-generated mail to:

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