

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2010-000707

05/14/2012

HONORABLE MARIA DEL MAR VERDIN

CLERK OF THE COURT
L. Firriello
Deputy

MARKHAM CONTRACTING CO INC

KAREN A PALECEK

v.

PINNACLE POINT DEVELOPERS L L C, et al.

NATHANIEL ROSE

MINUTE ENTRY

The Plaintiff filed a Motion to Reconsider on December 23, 2011. The Court directed pursuant to a minute entry of February 16, 2012 that a Response and Reply be filed.

The Defendant failed to file a Response by March 9, 2012 as directed to do so. The Plaintiff filed a Request for Summary Decision on March 14, 2012. The Plaintiff's request prompted the Defendant to file an Emergency Motion to Enlarge the Time for Response on March 16, 2012 and subsequent Response on March 20, 2012.

The Plaintiff filed an Opposition on March 20, 2012 and a Reply on April 2, 2012.

The Defendant filed a Supplemental Response on April 13, 2012 and the Plaintiff a Sur Reply on April 23, 2012.

The Court has considered the matters presented.

Even if the Defendant would have not gotten a copy of the Plaintiff's Motion filed December 23, 2011, the Court's minute entry of February 16, 2012 would have put them on notice of the need to file a response. An internal change in the staff responsibilities of the

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Defendant's counsel is not good cause to overlook a deadline set by the Court. Ultimately, Counsel is responsible for all aspects of the case. Nevertheless, in the interest of justice, the Court considers the Defendant's Response filed March 20, 2012 and the Plaintiff's subsequent Reply filed April 2, 2012, as well as the Supplemental Response filed on April 13, 2012 and the Sur Reply filed on April 23, 2012.

In its ruling of September 12, 2011, the Court found that the Plaintiff has a valid lien. The Court determined that the priority of the lien was a question for the trier of fact; specifically, whether or not equitable subrogation should apply.

The Court found that **at the time of Oral Argument** the Defendant failed to show the requisite implied or express intent between the lenders. The Court determined that intent should be an issue for the trier of fact. An additional issue remaining for the trier of fact was how equitable subrogation would result in prejudice to the Plaintiff.

In its Motion to Reconsider, Plaintiff argues that under new case law, *Mortgages Ltd.*, - B.R.- 2011 WL 5022681 (Bkrcty. D. Ariz.), the lack of requisite intent, either expressed or implied, is sufficient to deny equitable subrogation. The Plaintiff points out as previously argued and supported by *Lamb Ex. Inc. v Chase Manhattan Mortg. Corp.*, 208 Ariz. 478, 95 P.3^d 542 (Ariz. App. 2004), that before subrogation can apply there must be an intent to do so.

The Defendant in their Supplemental Response filed April 13, 2012 also cites recent case, *Sourcecorp, Inc. v Northcutt*, 2012 WL 1138251 (Ariz. 2012), claiming its finding to be applicable and dispositive of the issue. *Sourcecorp* holds that when a party satisfies a senior lien, the party is not required to show an express or implied agreement to subrogate to be entitled to equitable subrogation and that a party is entitled to equitable subrogation even when there was notice of an intervening lien. Further, the Defendant argues that under *Sourcecorp*, prejudice is longer a factor used in determining whether to apply equitable subrogation. The Defendant is now requesting the Court reconsider its previous ruling and find in its favor.

The Court agrees in part with the position presented by the Defendant that equitable subrogation does apply in this case. The Court agrees with the Plaintiff that prejudice remains a factor to be considered when applying any equitable subrogation.

There is no dispute between the Parties that the lender payoff occurred. In question at the time of the Oral Argument was the amount of the payoff of the first position lien. The Court believes the Parties have this information. The Plaintiff argues that since the specific amount was not made known at the time of the Oral Argument that this is fatal to the Defendant's argument. On this point, the Court disagrees with the Plaintiff.

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Based on the recent case law presented and additional argument of Counsel,

THE COURT FINDS that an agreement, express or implied, is not necessary for equitable subrogation to apply. However, equitable subrogation is applicable only to the extent of the amount of the first DOT in 2006. Allowing it to apply to anything more than that amount would result in significant prejudice to the Plaintiff. Equitable subrogation up to and only to the extent of the payoff amount will allow the Plaintiff to be in the same position he was in prior to the new lender stepping in.

IT IS ORDERED setting this matter for telephonic Status Conference. The Parties are to together call the Court Division to find a time mutually convenient to all, to occur prior to the time of the scheduled trial.

A copy of the minute entry is provided electronically by the Division to Counsel.

ALERT: The Arizona Supreme Court Administrative Order 2011-140 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.