

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2010-000707

06/14/2018

HONORABLE DAWN M. BERGIN

CLERK OF THE COURT
S. Ortega
Deputy

MARKHAM CONTRACTING CO INC

KAREN A PALECEK

v.

PINNACLE POINT DEVELOPERS L L C, et al.

THOMAS L HUDSON
RICHARD Q NYE
FRANK S TOMKINS

MINUTE ENTRY

The Court has reviewed: (1) Markham Contracting Company, Inc.'s ("Markham") Response to Defendant's April 16, 2018 Motion for Reconsideration; (2) Markham's Notice of Lodging Revised Proposed Form of Judgment filed on April 24, 2018; (3) FDIC's Objection to the Revised Proposed Form of Judgment filed on May 14, 2018; (4) PrimeAZ/Libra's ("PrimeAZ") Objection and Joinder in FDIC's Objection filed on May 14, 2018; (5) Markham's Reply in Support of its Notice of Lodging Revised Proposed Form of Judgment filed on May 18, 2018; and (6) PrimeAZ's Reply in Support of Objection to Revised Proposed Form of Judgment filed on June 5, 2018. It now makes the following findings and orders.

In its Response to the Motion for Reconsideration, Markham states that it agrees with the analysis set forth in the Court's April 16, 2018 minute entry – that "Defendants no longer have a lien on the subject property . . . , but rather only a subrogation right." But that was not the Court's analysis. The Court concluded that Defendants no longer have any lien or subrogation rights as to the subject property. The situation that the parties find themselves in at this point in time is quite simple. FDIC and PrimeAZ own the subject property and Markham holds a first position lien. That's it.

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Defendants' objections track their continued argument that they have subrogation rights. For example, they ask the Court to add the following provision to the Judgment:

If the Real Property is sold in its entirety, then, after paying the required costs and expenses, Defendants shall first be paid the sale proceeds up to Defendants' Total Subrogation Amount in proportion to their respective interests in the Real Property.

Defendants also object to the following statement in paragraph 10 of Markham's Revised Proposed Form of Judgment: "Markham's Lien shall remain on the Real Property until Markham's Total Lien Amount is paid in full," arguing that it is an inaccurate statement of the law. The Court makes no determination whether it is or is not an accurate statement of the law because the statement is not necessary for the Judgment. Foreclosure sales, payments of liens and extinguishment of liens are governed by Arizona statutes and case law. There is no need for the Court to make a categorical statement of law in the Judgment.

The FDIC also objects to the language in paragraph 5 regarding the need for its consent before any sale of its interest in the property can occur. The Court has revised the language to clarify that no sale affecting FDIC's interest can occur without its consent pursuant to federal law.

Finally, PrimeAZ objects to any provision in the Judgment that would allow Markham to foreclose on its undivided 37.5% interest in the property. Markham does not need consent from PrimeAZ to foreclose on its interest in the property. PrimeAZ argues, however, that the law precludes a separate sale of its interest and that the Court should exercise its equitable powers to preclude it.

As best the Court can understand, PrimeAZ's legal argument is premised on a distinction between a mechanics lien, which is involuntary, and a creature of statute, and other liens. In its initial objection, PrimeAZ cites to two mechanics lien statutes. First, it relies on a statement in A.R.S. §33-983(A) that the holder of the mechanic's lien "shall have a lien on the lot or parcel of contiguous land . . ." PrimeAZ argues that this section "speaks in terms of a unitary property," from which the Court is to infer that no serial or partial sales of property can occur when there is more than one owner of the property. Obj. at 2. The Court would have to rewrite the statute in order to draw this inference.

It also relies on a provision in A.R.S. §33.992.01(A)(3), which sets forth the definition of "owner:"

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Where an interest or estate is held by two or more persons as community property, joint tenants or tenants in common, any one or more of the persons may be deemed the owner.

But this statute addresses the preliminary twenty day notice applicable to mechanic's liens, under which the contractor who provided the services must serve the notice on "the owner or reputed owner" of the property. *See* A.R.S. §33.992.01(B). The Court reads these statutory sections together as deeming each tenant in common as "the owner," thereby making service on any one of them effective under the statute.

PrimeAZ also cites to *S.K. Drywall, Inc. v. Developers Financial Group, Inc.* 169 Ariz. 345 (1991) to support its argument, but the Court fails to see how this case is relevant to the issue before it.

In its Reply, PrimeAZ cites A.R.S. §12-1622(G) and (H), which provide as follows:

When the sale is of real property, consisting of lands that may be sold in parcels, it may be sold separately at direction of the judgment debtor, who shall have the option of designating the order in which parcels shall be sold.

When property is held in common, the interest of the judgment debtor shall be sold as a whole.

But this statute does not say that when there are two judgment debtors with specified interests in the property that the interests of both judgment debtors must be sold as a whole. Rather, it says that each judgment debtor's interest must be sold as a whole. PrimeAZ is a judgment debtor; therefore its 37.5% interest must be sold as a whole.

Finally, PrimeAZ argues that allowing the sale would be inequitable because it would result in a depressed price for its interest since buyers would not be keen on owning property as a tenant in common with the FDIC, and a sale of the entire property would bring in more money. But the Court agrees with Markham that these scenarios are speculative at best. Furthermore, equity favors Markham here because "Arizona's lien statutes are remedial in nature and should be liberally construed to primarily protect laborers and materialmen who enhance the value of another's property." *Fagerlie v. Markham Contracting Co., Inc.*, 227 Ariz. 367, 371 (App. 2011).

On page four of its initial Objection, PrimeAZ requests various forms of alternative relief, such as reopening the case to allow the parties to conduct expert discovery to obtain opinions on the impact of serial sales.

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For the reasons set forth above,

IT IS ORDERED denying all of PrimeAZ's requests for alternative relief.

A separate final judgment shall issue.