

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2002-015154

12/10/2003

HONORABLE MARK R. SANTANA
FOR HONORABLE KENNETH L. FIELDS

CLERK OF THE COURT
J. Pinter
Deputy

FILED: 12/11/2003

KEITH BLACK ROOFING INC

TRACEY FLEXTER

v.

WILLIAM M KRYGER, et al.

WILLIAM J SIMON

MINUTE ENTRY

The court has considered the cross-motions for summary judgment, the responses and defendant Sever Design Group Architects Inc.'s (SDG) reply. The court has also reviewed statement of facts filed by the parties, the plaintiff's declaration of counsel in support of plaintiff's opposition to SDG's motion for summary judgment and SDG's objection thereto.

The court has also considered oral argument of counsel.

As to the various legal and factual issues presented, the court decides:

- (1) After reviewing the record, the court determines that the contract is between the Sever Group Inc (SG) and plaintiff. The contractor, for purposes of A.R.S. § 33-995 is SG.
- (2) SDG has consented to the jurisdiction of the court and has waived any affirmative defense related to jurisdiction.
- (3) Pursuant to A.R.S. § 33-995, the contractor has the duty and authority to defend a lien action. SDG is not the contractor in this matter. The allegations that plaintiff violated A.R.S. § 33-1002 and is liable for attorney's pursuant to A.R.S. § 33-995(E) and § 33-998(B) must be asserted by the contractor, SG, not SDG.
- (4) Although SG, rather than SDG is the statutorily authorized party to assert whether the Statutory Lien Bond is valid and whether the lien and foreclosure action may be pursued, the plaintiff's motion for summary judgment requests that the court resolve these issues. The court will do so.

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- (5) The Statutory Discharge of Lien Bond, as signed by Mark Server, is valid and enforceable.
- (6) The statutory lien and accompanying foreclosure action should therefore be dismissed.
- (7) SDG's reply states that the setoff in this matter belongs to SG. The setoff, if it may be asserted against plaintiff's bond claim, must be asserted by SG. The court does not resolve whether SG may assert such a setoff with respect to plaintiff's claim against the bond.
- (8) There are issues of material fact which preclude summary judgment on plaintiff's unjust enrichment claim against SDG.

IT IS ORDERED:

- (1) Defendant SDG is granted summary judgment on plaintiff's statutory lien and accompanying foreclosure action;
- (2) Granting summary judgment to SDG on the issue of whether it is a party to the construction contract;
- (3) Granting summary judgment to plaintiff as to whether SDG is a defendant in this matter;
- (4) The motions for summary judgment are otherwise are otherwise denied.