

The West Half of Lot 1 and all of Lots 2 and 3,)
Section 9, Township 48 North, Range 4 West,)
Boise Meridian, Kootenai County, Idaho, now)
known as THE ESTATES AT BLACK ROCK)
BAY, according to the plat recorded in the)
office of the Court recorder in Book K of Plats)
at Page 115, records of Kootenai County,)
Idaho.)
)
)
Defendants.)

The Plaintiff performed work for Defendant Ridge at Black Rock Bay, Inc., and claims its materialman's lien has priority pursuant to I.C. § 45-506. The Plaintiff wishes to foreclose on its materialman's lien. The Defendants claim that the Plaintiff's lien lost priority when the Plaintiff signed multiple lien waivers. The Plaintiff moves for partial summary judgment on the issue of priority. Defendants Ridge at Black Rock Bay, Inc., Sundance Investments, LLLP, and Black Rock Homeowner's Association, Inc., filed cross-motions for partial summary judgment.

Gregory D. Horne, GREGORY D. HORNE, ESQ., CHTD., for Plaintiff SI Construction, LLC.

Katheryn McKinley, WOLKEY & MCKINLEY, P.S., for Defendants Ridge at Black Rock Bay, Inc., and Black Rock Homeowners Association, Inc.

Corey Rippee, EBERLE, BERLIN, KADING, TURNBOW & MCKLVEEN, CHTD., for Defendant Sundance Investments, LLLP.

Brent Schlotthauer, VASSEUR & SCHLOTTHAUER, PLLC, for Defendant Kootenai Electric Cooperative, Inc.

I. FACTS AND PROCEDURE

The facts of this case are largely undisputed, and concern property known as "The Estates at Black Rock Bay," legally described as:

West ½ of Lot 1 and all of Lots 2 and 3, Section 9, Township 48, North, Range 4 West, Boise Meridian, Kootenai County, Idaho, Book K of Plats, at page 115, Kootenai County Recorder's Office.

("Subject Property"). (Affidavit of Morgan L. Watson, Ex. 4; Complaint, p.3.) On December 29, 2004, a company called Blue Diamond Investments, Inc., sold the

Subject Property by warranty deed to Defendant The Ridge at Black Rock Bay Homes, Inc. ("RBRB Homes"). (Aff. Watson, Ex. 4.) This warranty deed was recorded on December 30, 2004 (Inst. No. 1921870). (Id.)

On May 19, 2006, Defendant Sundance Investments, LLLP ("Sundance") loaned RBRB Homes \$3,000,000 and secured the loan with a "Deed of Trust, Assignment or Rents, and Security Agreement" ("Deed of Trust"). (Affidavit of Tanya Travis, Ex. B.) Defendant RBRB Homes is the grantor, Pioneer Title is listed as the trustee, the Subject Property is the trust estate, and Defendant Sundance is listed as the beneficiary. (Id.) Defendant RBRB Homes also executed a "Deed of Trust Note" in favor of Defendant Sundance in the amount of \$3,000,000. (Affidavit of Christopher L. Anderson, Ex.A.) The May 19, 2006, Deed of Trust Note is not recorded, but the Deed of Trust was recorded on May 19, 2006 (Inst No. 2032434000).

RBRB Homes and Sundance amended the May 19, 2006, Deed of Trust Note on April 9, 2007, and added another company, Defendant Ridge at Black Rock Bay, Inc., ("RBRB Inc.") as an "additional maker." (Aff. Anderson, Ex. A.) The next day, on April 10, 2007, Defendant RBRB Homes transferred ownership of the Subject Property to Defendant RBRB, Inc. by warranty deed, and recorded the deed the same day (Inst. No. 2093295000). (Aff. Watson, Ex. 8.) Defendant RBRB Inc. executed a "Subordinated Real Estate Mortgage" in the amount of \$3,765,861.28 in favor of Defendant RBRB Homes; the Subordinated Real Estate Mortgage specifically states it is subordinate to the May 19, 2006, Deed of Trust and Deed of Trust Note. (Aff. Travis, Ex. C.) The Subordinated Real Estate Mortgage was recorded the same day, April 10, 2007 (Inst.

No. 2093296000). (Id.) RBRB Homes also executed a Promissory Note in the amount of \$3,765,861.28 on the same date. (Aff. Anderson, Ex. C.)

Defendant RBRB Inc. then hired the Plaintiff, a construction company, to perform work on the Subject Property. There is no evidence the parties executed a written contract signed by both parties, though it appears that the parties negotiated a written agreement between April 1, 2007, and June 12, 2007. (Affidavit of Kyle Capps (November 30, 2010), Ex. A; Affidavit of Kyle Capps (November 4, 2010), Ex. A.) The parties did sign a "Conditional Letter of Intent" on May 21, 2007, (Aff. Kyle Capps (November 4, 2010), Ex. A) indicating the intention to enter into a final contract. However, the Plaintiff had already commenced work on May 8, 2007, and installed infrastructure throughout the Subject Property. (Affidavit of Ryder Irvine, ¶¶ 4-6; Second Affidavit of Ryder Irvine, ¶¶ 3-6.)

While the Plaintiff performed the work, Defendant RBRB Inc. paid the Plaintiff on six occasions, and the Plaintiff executed a "Conditional Lien Waiver, Release, and Subordination" ("Conditional Lien Waiver") prior to each payment. (Aff. Rountree, Exs. A, B, C, D, E, F.) The Conditional Lien Waivers were not recorded. Defendant RBRB Inc. withheld 5% of each payment until the work was "substantially completed." (Second Affidavit of Ryder Irvine, ¶ 7; Aff. Capps (November 30, 2010), Ex. B (p. 4 of 15, ¶ 3).)

On September 13, 2007, Defendant RBRB Inc. assigned the April 10, 2007, Subordinated Real Estate Mortgage to Defendant Sundance, and recorded the document the same day (Inst. No. 2121522000). (Aff. Travis, Ex. C.) On September 15, 2007, Sundance also purchased the April 10, 2007, Promissory Note executed by RBRB Homes. (Aff., Travis, Ex. D.)

On October 16, 2007, Sundance amended the May 19, 2006, Deed of Trust Note a second time, to provide that the maximum principle sum is \$3,500,000. (Aff. Anderson, Ex. A.) On November 1, 2007, Sundance loaned RBRB Inc. \$5,000,000, and RBRB Inc. executed a "Deed of Trust Note" that is secured by the May 19, 2006, Deed of Trust. (Aff. Anderson, Ex. B.) On March 24, 2008, RBRB Inc. executed an allonge to the April 10, 2007, Promissory Note, making Sundance the payee. (Aff. Anderson, Ex. C.) A second allonge to the April 10, 2007, Promissory Note was executed on April 3, 2008, changing the interest rate. (Aff. Anderson, Ex. C.)

On August 7, 2008, RBRB Inc. executed in a mortgage in favor of Kootenai Electric Cooperative, Inc. ("Kootenai Electric") in the amount of \$287,100, and recorded the mortgage on August 8, 2008 (Inst. No. 2172886000). On December 10, 2008, the Plaintiff filed a "Lien Statement and Claim," (Instrument No. 2188829000) ("Plaintiff's Lien"). (Aff. Watson, Ex. 13.) On February 19, 2009, RBRB Inc. transferred its ownership interest in the Subject Property to Defendant Sundance by warranty deed. (Aff. Watson, Ex. 14.)

The Plaintiff filed its complaint on June 9, 2009, alleging breach of contract against RBRB Inc. for failure to pay the five percent (5%) retainage to the Plaintiff, as well as a remaining balance of \$14,158.60. The Plaintiff also seeks to foreclose on its Plaintiff's Lien. The Plaintiff claims its Plaintiff's Lien has priority over some of the other liens.¹

¹ The claims against the following defendants have been resolved: Barry E. and Sandra R. Moore; KRE SEP/Property, L.P., Brad L. Williams, Washington Trust Bank. RBRB Homes has not appeared in this action.

II. LEGAL STANDARDS

Idaho Rule of Civil Procedure 56(c) provides for summary judgment where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, based on the “pleadings, depositions, and admissions on file, together with any affidavits.” Zumwalt v. Stephan, Balleisen & Slavin, 113 Idaho 822, 748 P.2d 405 (Ct. App. 1987). In order to make that determination, the court must look to “the pleadings, depositions, and admissions on file, together with the affidavits, if any” (I.R.C.P. 56.) Supporting and opposing affidavits must set forth such facts as would be admissible in evidence. (I.R.C.P. 56.) Once the moving party has properly supported the motion for summary judgment, the non-moving party must come forward with evidence which contradicts the evidence submitted by the moving party and which establishes the existence of a material issue of disputed fact. Zehm v. Associated Logging Contractors, Inc., 116 Idaho 349, 775 P.2d 1191 (1988). If the record contains conflicting inferences or if reasonable minds might reach different conclusions, a summary judgment must be denied. Roell v. City of Boise, 130 Idaho 197, 938 P.2d 1237 (1997); Bonz v. Sudweeks, 119 Idaho 539, 808 P.2d 876 (1991).

The facts in the record are to be liberally construed in favor of the party opposing the motion. The opposing party cannot rest upon mere allegations or denials, but the party’s response, by affidavits or otherwise, must set forth specific facts showing that there is a genuine issue of material fact. (I.R.C.P. 56(e)); Smith v. Meridian Joint School District No. 2, 128 Idaho 714, 918 P.2d 583 (1996); G & M Farms v. Funk Irrigation Co., 119 Idaho 514, 808 P.2d 851 (1991); Edwards v. Conchemco, Inc., 111 Idaho 851, 727 P.2d 1279 (Ct. App. 1986).

III. ANALYSIS

Idaho Code § 45-1302 provides:

In any suit brought to foreclose a mortgage or lien upon real property . . . the plaintiff, [or] cross-complainant . . . may make as party defendant in the same cause of action, any person having, claiming or appearing to have or to claim any title, estate, or interest in or to any part of the real . . . property involved therein, and the court shall, in addition to granting relief in the foreclosure action, determine the title, estate or interest of all parties thereto in the same manner and to the same extent and effect as in the action to quiet title.

(Emphasis added.) The Plaintiff moves for partial summary judgment pursuant to this provision and requests that this Court determine the priority of the Plaintiff's Lien with respect to the interests of Defendants RBRB Inc., RBRB Homes, Sundance, Kootenai Electric, and Black Rock Bay Homeowner's Association. Defendants RBRB Inc. and Sundance have filed cross-motions for partial summary judgment.

A. Defendant Sundance's May 19, 2006, Deed of Trust has Priority Over All Other Liens; Sundance's April 10, 2007 Subordinated Real Estate Mortgage is Second in Priority; Plaintiff's Lien is Third in Priority.

Idaho Code § 45-501 provides that

[e]very person performing labor upon or furnishing materials to be used in the construction, alteration or repair of any . . . building . . . or other structure, or who grades, fills in, levels, surfaces or otherwise improves any land, . . . or who renders any other professional service whatsoever for which he is legally authorized to perform in connection with any land or building development or improvement, . . . has a lien upon the same for the work or labor done or professional services or materials furnished

This "materialman's lien" attaches to the "land upon which or in connection with which any professional services are performed, or any building, improvement, or structure is constructed, together with a convenient space about the same . . . is subject to the lien."

(I.C. § 45-505.) Idaho Code § 45-506 gives a materialman's lien preference of priority

to all other liens that arise after the contractor has commenced work or furnished material:

The liens provided for in this chapter shall be on equal footing with those liens within the same class of liens, without reference to the date of the filing of the lien claim or claims and are preferred to any lien, mortgage or other encumbrance, which may have attached subsequent to the time when the building, improvement or structure was commenced, work done, equipment, materials or fixtures were rented or leased, or materials or professional services were commenced to be furnished; also to any lien, mortgage, or other encumbrance of which the lienholder had no notice, and which was unrecorded at the time the building, improvement or structure was commenced, work done, equipment, materials or fixtures were rented or leased, or materials or professional services were commenced to be furnished.

See, White v. Constitution Min. & Milling Co., 56 Idaho 403, 55 P.2d 152 (1936); Boise-Payette Lumber Co. v. Halloran-Judge Trust Co., 281 F. 818 (9th Cir 1922). Statutes governing materialman's liens are to be liberally construed so as to effect their objects and to promote justice. Metropolitan Life Ins. Co v. First Security Bank, 94 Idaho 489, 491 P.2d 1261 (1971). To claim a lien, a contractor must file a claim for the record with the county recorder in the county where the property is situated. I.C. § 45-507.

The parties do not dispute that the Plaintiff had a valid materialman's lien on the Subject Property the day the Plaintiff commenced work on May 8, 2007. The parties do not raise any challenges under I.C. § 45-507 as to the form of the lien claim filed by the Plaintiff on December 8, 2008. Kootenai Electric agrees that its August 8, 2008, mortgage is subordinate to the Plaintiff's Lien, and all other liens and interests prior to that date. Sundance agrees that it took the Subject Property subject to the Plaintiff's Lien, as well as the other liens, when it acquired the ownership interest by warranty deed on February 19, 2009. Importantly, Sundance and the Plaintiffs agree that the

May 19, 2006, Deed of Trust of which Sundance is the beneficiary is first in priority to all other liens.

The issues before this Court, then, are 1) whether the May 8, 2007, Plaintiff's Lien has priority over the April 10, 2007, Subordinated Real Estate Mortgage Sundance assumed from RBRB Inc. on September 13, 2007; and 2) whether the Plaintiff waived its priority preference by signing the six Conditional Lien Waivers.

1. Sundance's April 10, 2007 Subordinated Real Estate Mortgage Takes Priority Over Plaintiff's Lien.

The Plaintiff argues that when Sundance assumed the April 10, 2007, Subordinated Real Estate Mortgage, the Subordinated Real Estate Mortgage lost its priority date of April 10, 2007, and took a new priority date of September 13, 2007. Sundance disagrees, arguing that Sundance stepped into RBRB Inc.'s shoes and the Subordinated Real Estate Mortgage retains the April 10, 2007, priority date.

The Plaintiff does not provide any case law or statutes that establish that the mere assumption of a mortgage affects the priority of the mortgage. Instead the Plaintiff provides legal argument about whether Sundance had notice of the Plaintiff's Lien and whether Sundance is a bona fide purchaser.² The Defendant Sundance and the Defendant RBRB Inc. rely on Finlayson v. Waller, 64 Idaho 618, 621, 134 P.2d 1069,

² The Plaintiff also provides substantial argument regarding the value of the May 19, 2006, Deed of Trust, and the April 10, 2007, Subordinated Real Estate Mortgage. The Plaintiff acknowledges that the May 19, 2006, Deed of Trust in the amount of \$3,000,000 is first in priority, but challenges whether the October 16, 2007, "Second Amendment to Deed of Trust Note" which increased the principle sum to \$3,500,000, and the November 1, 2007, "Deed of Trust Note" in the additional amount of \$5,000,000, have priority. However any increase in the principle amount affects value, not the priority, of the May 19, 2006, Deed of Trust. Further, the March 24, 2008, allonge to the April 10, 2007, Promissory Note adds a payee and the April 3, 2008, allonge to the April 10, 2007, Promissory Note changes the interest rate, thereby affecting the value, not the priority, of the April 10, 2007, Subordinated Real Estate Mortgage. While this Court believes there is a genuine issue of material fact as to the value of the May 19, 2006, Deed of Trust and April 10, 2007, Subordinated Real Estate Mortgage, this issue is not before the Court on the parties' motions. The only issue before this Court is priority, and therefore this Court declines to address value of the May 19, 2006, Deed of Trust and April 10, 2007, Subordinated Real Estate Mortgage.

1072 (1943), for the proposition that upon assignment of a mortgage, the assignee “becomes vested with all the rights, powers and equities of the original mortgagee, and the mortgage in the hands of the assignee takes precedence over a lien which attached prior to the assignment but subsequent to the execution of the mortgage.” This Court is persuaded that the law as stated in Finlayson is correct, and there is no other Idaho law that establishes that the mere assumption of mortgage affects the priority date of the mortgage lien. Therefore because the Subordinated Real Estate Mortgage was recorded and executed on April 10, 2007, prior to the date the Plaintiff began work on May 8, 2007, the Subordinated Real Estate Mortgage has a priority date of April 10, 2007.

As a result, the May 19, 2006, Deed of Trust is first in priority, and the April 10, 2007, Subordinated Real Estate Mortgage is second in priority, ahead of the May 8, 2007, Plaintiff’s Lien. Fourth in priority is the August 28, 2008, Mortgage in favor of Kootenai Electric. As a result, the Defendant Sundance’s cross-motion for partial summary judgment is granted in part, and the Plaintiff’s motion for partial summary judgment is granted in part.

2. The Defendants Have Failed to Show that the Conditional Lien Waivers are Supported By Independent, Valuable Consideration, or Part of an Implied Contract. Therefore the Plaintiff’s Preferential Priority Date is Not Waived.

Plaintiff argues that the Plaintiff’s Lien has a priority date of May 8, 2007, the date the Plaintiff commenced work on the Subject Property at the behest of Defendant RBRB Inc. because it did not receive independent, valuable consideration for the Conditional Lien Waivers the Plaintiff signed. However, Defendant RBRB Inc. argues that that the Conditional Lien Waivers need not be supported by independent, valuable consideration

because they are part of the parties' agreement, and therefore the Plaintiff waived the preferential priority of date, and May 31, 2008, is now the priority date of the Plaintiff's Lien.

The general rule in Idaho, as well as all other jurisdictions, is that "an express waiver of a [materialman's] lien must be supported by consideration in order to be effective and binding." Pierson v. Sewell, 97 Idaho 38, 42-43, 539 P.2d 590, 594-595 (1975), *citing* McCorkle v. Lawson, 259 S.W.2d 27 (Ky.Ct.App.1953) and Beebe Const. Corp. v. Circle R. Co., 10 Ohio App.2d. 127 226 N.E.2d 573 (1967). Where such consideration fails, the lien waiver is of no effect. Pierson, 97 Idaho at 43, 539 P.2d at 595, *citing* 10 Thompson on Real Property (1957). Idaho courts, however, have only addressed cases where an express contract between the parties provides an express term that the amount due under the terms of the contract is also intended as valuable consideration for a lien waiver.

This case is different because there is no written contract between the parties. Defendant RBRB Inc. provides a draft contract that is unsigned and not dated. (Aff. Capps (November 4, 2010), Ex. A.) Defendant RBRB also produces a "red lined" draft contract. (Aff. Capps. (November 30, 2010), Ex. A.) Defendant RBRB Inc. notes that the Plaintiff did not make any proposed changes the draft contract's payment provisions allowing for a retainage of five percent (5%) or requirement that the Plaintiff sign a lien waiver. (Id.) It appears, then, that the Defendant RBRB Inc. would like this Court to conclude that the parties ratified the unsigned contracts by performing according to the terms the parties negotiated.

However, the record also contains a "Conditional Letter of Intent" dated May 21, 2007, from Defendant RBRB Inc. to the Plaintiff. (Aff. Capps (November 4, 2010), Ex. A.) The Conditional Letter of Intent is signed by both parties. (Id.) Importantly, the Conditional Letter of Intent states "in order to memorialize our understanding, a standard Ridge at Black Rock Bay Development, Inc. Subcontract Agreement will be prepared and issued to your firm for your execution under separate cover." (Id.) It is clear from the Conditional Letter of Intent that Defendant Black Rock Bay and the Plaintiff negotiated and intended to memorialize a separate agreement. However, the parties never memorialized a separate written agreement. Therefore, there is no written agreement evidencing a meeting of the minds of the parties.

Regardless, the record shows, and the parties do not dispute, that the parties formed an implied contract. "A meeting of the minds is evidenced by a manifestation of intent to contract which takes the form of an offer and acceptance." Evco Sound & Electronics, Inc. v. Seaboard Sur. Co., 148 Idaho 357, 365, 223 P.3d 740, 748 (2009), *citing* Barry v. Pacific West Constr., Inc., 140 Idaho 827, 831, 103 P.3d 440, 444 (2004). The acceptance is not complete until it has been communicated to the offeror. Id. Acceptance of an offer must be unequivocal. Justad v. Ward, 147 Idaho 509, 512, 211 P.3d 118, 121 (I2009), *citing* Huyett v. Idaho State Univ., 140 Idaho 904, 909, 104 P.3d 946, 951 (2004). Generally, silence and inaction does not constitute acceptance. Justad, 147 Idaho at 512, 211 P.3d at 121, *citing* 17A Am.Jur.2d Contracts § 98 (2d ed.2008). "A contract implied in fact exists where there is no express agreement but the parties' conduct evidences an agreement." Jorgensen v. Coppedge, 145 Idaho 524,

528, 181 P.3d 450, 454 (2008), citing Barry v. Pacific West Constr., Inc., 140 Idaho 827, 834, 103 P.3d 440, 447 (2004).

The record shows, and the parties do not dispute, that Defendant RBRB Inc. desired that the Plaintiff install infrastructure at the Subject Property, that Defendant RBRB Inc. offered payment for the Plaintiff's labor and materials. The record shows and the parties do not dispute that that the Plaintiff unequivocally accepted RBRB Inc.'s offer by rendering performance beginning on May 8, 2007. According to the undisputed facts regarding the parties' performance, Defendant RBRB Inc. paid the Plaintiff for labor and materials but retained 5% of each payment. This, according to the record, is the whole of the parties implied contract.

The issue, then, is whether the parties intended, as part of the implied contract, that the payments of the amount due to the Plaintiff for materials and labor was also consideration for the six Conditional Lien Waivers the Plaintiff signed. Notably, the parties agree that RBRB Inc. required the Plaintiff to sign the Conditional Lien Waivers in order to be paid, and the parties do not dispute that as of December 8, 2008, the work was substantially complete, or that RBRB Inc. has not paid the Plaintiff \$14,158.60 and the retainage amount.

The Plaintiff, however, argues it did not receive any independent, valuable consideration for the Conditional Lien Waivers, and therefore they are not valid. The Plaintiff offers the Second Affidavit of Ryder Irvine in support. Mr. Irvine, the general manager of the Plaintiff company, attests that

SI Construction did not prepare any of the lien waiver forms, but was absolutely required, each and every time it submitted a periodic invoice, to sign and return a lien waiver to The Ridge at Black Rock Bay, Inc., before it would be paid. SI Construction received no consideration whatsoever

above and beyond that which was owing to it for work completed and materials used in exchange for the lien waivers.

(Second Aff. Irvine, ¶ 6.) The record shows that on December 19, 2007, the Plaintiff executed the first Conditional Lien Waiver, "for work through: November 26, 2007," and referencing "Invoice 1697/1760". The Lien Waiver states as follows:

Upon receipt of payment of the sum of \$697,315.60, the undersigned waives any and all right to any lien whatever and releases all rights to lien or claim any lien against the real property associated with the above project by the undersigned in connection with any and all work or labor performed, materials, equipment, goods, or things supplied or furnished, or any other claims or obligations owed through the date shown above on the above named project.

This waiver and release does not cover rights or obligations that might accrue after the above date for additional work that may be performed. In addition, upon receipt of the payment stated above, the undersigned agrees that any lien that may be filed for work performed after said date will only have lien priority from and after the date stated above and will be subordinate to any liens or encumbrances attaching to the subject property prior to said date.

As an inducement to the above named Owner to make the payment first described above, the undersigned further covenants and represents that it has performed the work and/or furnished the materials pursuant to and in accordance with the plans and specifications or work order in effect up through November 26, 2007. The undersigned further covenants and represents that either all obligations related to labor, equipment, supplies materials, lower tier subcontractors at all levels and consultants through the date first stated above have been fully paid, or all such obligations will be paid first out of the funds to be received before any of said funds will be applied to any other purpose and the payment first described above will be sufficient to fully satisfy all such obligations.

If signed on behalf of a company, the undersigned certifies under penalty of perjury under the laws of the State of Idaho that he or she is authorized to execute the same on behalf of the company to be bound.

The Plaintiff signed five identical Lien Waivers: January 21, 2008, for \$94,695 for work through December 28, 2007 (Invoice No. 1709); May 14, 2008, for \$69,865.94 for work through March 31, 2008 (Invoice No. 8026, Progress Estimate #6 & Change Order #6);

June 17, 2008, for \$203,859.45 for work through May 31, 2008 (Invoice No. 8063, Progress Estimate #10); July 16, 2008, for \$49,602 for work through April 25, 2008 (Invoice No. 8040 Partial, Progress Estimate #9); August 4, 2008, for \$39,999.67, for work through April 25, 2008 (Invoice No. 8040, Progress Estimate #9).

The Plaintiff argues that because Defendant RBRB Inc. did not provide independent, valuable consideration, the Conditional Lien Waivers are invalid as per the case of Beebe Construction Corp v. Circle R Co., 226 N.E.2d 573, 10 Ohio App.2d 127, 226 N.E.2d 573 (1967), which has been adopted in multiple jurisdictions, and cited by the Idaho Supreme Court in Pierson. In Beebe, like this case, the parties did not have a written contract, but the plaintiff performed work for the defendant and the defendant agreed to pay for labor and materials. Beebe, 226 N.E.2d at 577, 10 Ohio App.2d at 132. The plaintiff also signed lien waivers and received payment for work and materials in return. Id. The Beebe court announced that “a waiver of a mechanic’s lien in consideration of payments made by an owner or contractor, which he is legally bound to pay to the claimant, does not constitute valuable consideration so as to make the lien waiver effective and binding.” Id. Later in Steveco, Inc., v. C&G Investments Associates, 1977 WL 20036, the Court of Appeals of Ohio affirmed Beebe, concluding that unless there is a lien waiver provision in the contract between the parties, the lien waiver must be supported by independent consideration.

The Defendant RBRB Inc. argues that no independent consideration is required for the Conditional Lien Waivers, because the Conditional Lien Waivers were executed as part of the performance of the contract terms the parties negotiated, but never ratified in writing. However, as discussed above, the record shows the parties clearly

anticipated entering into a written agreement and therefore the negotiated terms have no bearing on the resulting implied contract. Importantly, Defendant RBRB Inc. does not provide any argument or evidence, even by affidavit, that the parties intended, as part of the resulting implied contract, that the payments of the amount due to the Plaintiff for materials and labor was also consideration for the six Conditional Lien Waivers the Plaintiff signed.

Defendant RBRB Inc., does provide some legal authority however, and relies on G.P. Sponagle & Sons, Inc. v. McKnight Construction Co., 304 A.2d 339, 344 (Penn 1973), but a close reading of this case shows that it supports the Plaintiff's position. In Sponagle, the Pennsylvania Supreme Court summarized the rule as

a waiver of such lien may be by separate agreement or it may be incorporated with other undertakings into one agreement. If it is by separate agreement, it must be supported by separate consideration. If it is incorporated as part of a more comprehensive agreement, the consideration requirement runs to the agreement as a whole.

Sponagle, 304 A.2d at 344. Defendant RBRB Inc. also relies on Metropolitan Federal Bank of Iowa v. ABAS Partnership, 477 N.W.2d 668 (1993), but this case also supports the Plaintiff's position because the parties entered into an underlying contract that provided lien waivers war part of the more comprehensive agreement. The Defendant RBRB Inc. cites to Amfac Dist. Corp. v. J.B. Contractors, Inc., 703 P.2d 566 (Ariz.App. 1985), and Country Service and Supply Company v. Harris Trust and Savings Bank, 103 Ill.App.3d. 161, 430 N.E.2d. 631 (1981), but these cases do not address whether there is valuable, independent consideration for a lien waiver. Instead, Amfac and Country Service address the issue of whether the terms of a lien waiver anticipated by an underlying contract are ambiguous.

This Court concludes the better reasoning and weight of authority supports the rule announced in Beebe and Sponagle, that where a lien waiver is not incorporated as part of a more comprehensive agreement, the lien waiver must be supported by independent valuable consideration. Because the Plaintiff did not receive any independent, valuable consideration for signing the Conditional Lien Waivers in this case, the Conditional Lien Waivers are invalid.

Further, the Plaintiff provided an affidavit from the general manager attesting that the Plaintiff was forced to sign the Conditional Lien Waivers in order to receive payment for labor and materials from the Defendant. However, the Defendant RBRB Inc., has not provided this Court with any legal authority, argument, or evidence that shows the parties intended the payments for materials and labor to be consideration for the six Conditional Lien Waivers. As a result, the Defendant RBRB Inc. has not met its burden to come forward with evidence which contradicts the evidence submitted by the Plaintiff and which establishes the existence of a material issue of disputed fact. Therefore, Defendant RBRB Inc.'s cross-motion for partial summary judgment is denied in part, and the Plaintiff's motion for partial summary judgment is granted in part, and the Plaintiff retains its preferential priority date of May 8, 2007.

B. Other Claims of Priority

On July 31, 2001, a company called Black Rock Development, Inc., recorded the "Coeur d' Alene Black Rock Covenants, Conditions and Restrictions for Black Rock Development, Inc." ("CC&Rs"). (Aff. Watson, Ex. 1.) The CC&Rs were subsequently amended multiple times. (See, Aff. Watson, Exs. 2, 3, 6, 7, and 10.) The Subject Property was not included in the CC&Rs until January 25, 2008. (Aff. Watson, Ex. 9.)

The Plaintiff initially argued that its lien has priority over the CC&Rs and any lien claims by Defendant Black Rock Bay Homeowners Association. The parties agree that the Subject Property is governed by the CC&Rs, and that the Defendant Black Rock Bay Homeowner's Association has not recorded any liens against the Subject Property and does not claim any interest in the Subject Property. Also, the parties agree that the CC&Rs do not allege an interest in the Subject Property, but merely control the development of the Subject Property. As a result, there is no issue of priority for this Court to determine, but the Plaintiff may provide evidence of the impact of the CC&Rs on the value of the property in future proceedings.

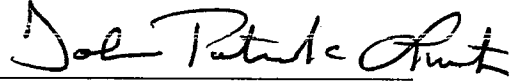
The Plaintiff also initially alleged that the Plaintiff's lien took priority over an "Electric Line Right of Way Easement" granted by Defendant RBRB Homes to Defendant Kootenai Electric. According to the record, the Electric Line Right of Way Easement was recorded on February 25, 2006 (Inst. No. 1929169) and is defective. (Aff. Watson, Ex. 5; Affidavit of Oral Hamilton, Ex. A.) However, at oral argument the Plaintiff withdrew its claim against Defendant Kootenai Electric, acknowledging that while the easement may be deficient, the Electric Line Right of Way Easement grants Defendant Kootenai Electric a right to access and conduct work on the Subject Property, not an interest in the Subject Property. Therefore, the Plaintiff has withdrawn its claim of priority against Defendant Kootenai Electric.

IV. CONCLUSION

Based on the foregoing, it is hereby ORDERED that the Plaintiff's Motion for Partial Summary Judgment is GRANTED in part and DENIED in part, and the

Defendants' RBRB Inc. and Sundance Cross-Motions for Partial Summary Judgment
are GRANTED in part and DENIED in part.

DATED this 3 day of January, 2010



John P. Luster
District Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing MEMORANDUM OPINION RE: PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT; DEFENDANT RIDGE AT BLACK ROCK BAY, INC., CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT; DEFENDANT SUNDANCE INVESTMENTS, LLLP, CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT, was sent by U.S. Mail, postage prepaid, sent by facsimile transmission, or sent by interoffice mail on the 3rd day of January, 2010, to the following:

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DANIEL J. ENGLISH
Clerk of the District Court

By: 
Deputy Clerk