

STATE OF IDAHO } ss
 COUNTY OF KOOTENAI }
 FILED: 4/15/11
 AT 230 O'CLOCK PM
 CLERK, DISTRICT COURT
Wanda Butler
 DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE
 OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

AMERICAN BANK, a Montana banking corporation,)
)
 Plaintiff,)

vs.)

BRN DEVELOPMENT, INC., an Idaho corporation; BRN INVESTMENTS, LLC, an Idaho limited liability company; LAKE VIEW AG, a Lichtenstein company; BRN-LAKE VIEW JOINT VENTURE, an Idaho general partnership; ROBERT LEVIN, Trustee for the ROLAND M. CASATI FAMILY TRUST, dated June 5, 2008; E. RYKER YOUNG, Trustee for the E. RYKER YOUNG REVOCABLE TRUST; MARSHALL CHESROWN, a single man; IDAHO ROOFING SPECIALIST, LLC, an Idaho limited liability company; THORCO, INC., an Idaho corporation; CONSOLIDATED SUPPLY COMPANY, an Oregon corporation; INTERSTATE CONCRETE & ASPHALT COMPANY, an Idaho corporation; CONCRETE FINISHING, INC., an Arizona corporation; THE TURF CORPORATION, an Idaho corporation; WADSWORTH GOLF CONSTRUCTION COMPANY OF THE SOUTHWEST, a Delaware corporation; POLIN & YOUNG CONSTRUCTION, INC., an Idaho corporation; TAYLOR ENGINEERING, INC., a Washington corporation; PRECISION IRRIGATION, INC., an Arizona corporation; and SPOKANE WILBERT VAULT CO., a Washington corporation, d/b/a WILBERT)

CASE NO. CV-09-2619

MEMORANDUM DECISION AND ORDER RE: SUNDANCE INVESTMENTS, LLLP'S MOTION FOR SUMMARY JUDGMENT

PRECAST,)
)
 Defendants.)
)
 And)
)
 TAYLOR ENGINEERING, INC., a)
 Washington corporation,)
)
 Third-Party Plaintiff,)
)
 vs.)
)
 ACI NORTHWEST, INC., an Idaho)
 corporation; STRATA, INC., an Idaho)
 corporation; and SUNDANCE)
 INVESTMENTS, LLLP, a limited liability)
 partnership,)
)
 Third-Party Defendants.)
)
 And)
)
 ACI NORTHWEST, INC., an Idaho)
 corporation,)
)
 Cross-Claimant,)
)
 vs.)
)
 AMERICAN BANK, a Montana banking)
 corporation; BRN DEVELOPMENT, INC., an)
 Idaho corporation; BRN INVESTMENTS, LLC,)
 an Idaho limited liability company; LAKE VIEW)
 AG, a Lichtenstein company; BRN-LAKE VIEW)
 JOINT VENTURE, an Idaho general partnership;)
 ROBERT LEVIN, Trustee for the ROLAND M.)
 CASATI FAMILY TRUST, dated June 5, 2008;)
 E. RYKER YOUNG, Trustee for the E. RYKER)
 YOUNG REVOCABLE TRUST; MARSHALL)
 CHESROWN, a single man; THORCO, INC., an)
 Idaho corporation; CONSOLIDATED SUPPLY)
 COMPANY, an Oregon corporation; THE TURF)
 CORPORATION, an Idaho corporation;)
 WADSWORTH GOLF CONSTRUCTION)
 COMPANY OF THE SOUTHWEST, a Delaware)
 corporation; POLIN & YOUNG)
 CONSTRUCTION, INC., an Idaho corporation,)
)

TAYLOR ENGINEERING, INC., a Washington)
corporation; PRECISION IRRIGATION, INC.,)
an Arizona corporation,)

Cross Claim Defendants.)
)
)
)
)
)

This case involves a sizable foreclosure action of a premier golf course community on Lake Coeur d'Alene. Third-Party Defendant lot owner requests that this Court equitably apportion Defendant/Third-Party Plaintiff contractor's lien pro rata based upon the entire land area encumbered by contractor's lien. In addition Third-Party Defendant requests that this Court order that after equitable apportionment is applied to the lien, Third-Party Defendant is liable to Defendant/Third-Party Plaintiff for \$2,772.07, rather than \$150,938.77. This Court grants Third-Party Defendant's motion for summary judgment.

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

M. Gregory Embrey, WITHERSPOON, KELLEY, DAVENPORT & TOOLE, P.S., for
Defendant/Third-Party Plaintiff Taylor Engineering, Inc.

I. FACTUAL AND PROCEDURAL HISTORY

Defendant BRN Development, Inc. ("BRN Development"), and related entities, desired to create a high end residential golf course community, known as Black Rock North (the "Project"). The Project includes approximately one thousand acres located to the north and east of the original Club at Black Rock development. The plan was to eventually construct hundreds of homes, town homes and condominiums on hundreds of lots. A two hundred acre golf course was also constructed at the Project. *Wadsworth Golf Construction Company of the Southwest's Statement of Uncontested Material Facts at p. 2, filed November 12, 2010.*

On or about February 2, 2007, Plaintiff/Counterdefendant American Bank and Defendant Marshall Chesrown ("Chesrown"), on behalf of Defendant BRN Development executed various loan documents relating to American Bank's loan of \$15,000,000 to

BRN Development. *American Bank's First Amended Complaint at p. 4.* American Bank recorded its mortgage in the Kootenai County Assessor's on February 6, 2007, as Instrument No. 2081643000. American Bank filed its First Amended Complaint in this action on April 2, 2009, alleging that BRN Development had defaulted on its payments and requested that this Court determine that American Bank's mortgage has priority over all other liens, and issue a decree of foreclosure.

BRN Development and its related entities, executed various agreements with numerous contractors and subcontractors to perform the construction of the golf course and lots. Many of these contractors and subcontractors have filed workman/mechanic's liens.

American Bank named Defendant/Third-Party Plaintiff Taylor Engineering, Inc. ("Taylor") as a defendant due to Taylor claiming an interest in the Project by virtue of a mechanic's lien Taylor filed on January 26, 2009, and an amended lien on April 10, 2009. *American Bank's First Amended Complaint at p. 9.*

On July 22, 2009, Taylor filed its Amended Answer, Counterclaim, Cross-Claim and Third-Party Complaint. In its Third-Party Complaint, Taylor named Sundance Investments, LLLP ("Sundance") as a Third-Party Defendant by virtue of Sundance claiming an interest in a portion of the property encumbered by Taylor's lien and amended lien. *Taylor Engineering, Inc.'s Amended Answer, Counterclaim, Cross-Claim and Third Party Complaint at p. 18.* It does not appear that Sundance has filed an Answer to the Third-Party Complaint.

On January 20, 2011, Sundance filed its Motion for Summary Judgment, a Memorandum in Support and the Affidavits of Christopher L. Anderson and Corey J.

Rippee. On February 14, 2011, Taylor filed its Memorandum in Opposition along with Affidavits of M. Gregory Embrey and Ronald G. Pace. On February 18, 2011, Sundance filed its Reply brief.

Oral Argument was heard on Sundance's Motion for Summary Judgment on February 24, 2011, and this Court took the matter under advisement.

II. STANDARDS FOR SUMMARY JUDGMENT

Summary judgment is appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c); *Bonz v. Sudweeks*, 119 Idaho 539, 541, 808 P.2d 876, 878 (1991). In ruling upon a motion for summary judgment, all disputed facts are to be construed liberally in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the nonmoving party. *Bonz*, 119 Idaho at 541, 808 P.2d at 878. The burden of proving the absence of material facts is upon the moving party. *Petricevich v. Salmon River Canal Co.*, 92 Idaho 865, 868, 452 P.2d 362, 365 (1969).

Once the moving party has properly supported the motion for summary judgment with affidavits, admissions or depositions, it is incumbent on the nonmoving party to present opposing evidence through depositions, discovery responses and affidavits sufficient to create a genuine issue for trial. I.R.C.P. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); *Petricevich*, 92 Idaho at 868, 452 P.2d at 365.

To withstand a motion for summary judgment, the nonmoving party's case must consist of more than speculation; it must create a genuine issue regarding a material fact. *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 517, 808 P.2d 851, 854 (1991). A mere scintilla of evidence is not enough to create a genuine issue. *Id.* If the evidence presented by the nonmoving party fails to raise a genuine issue for trial, summary judgment shall be entered against that party. I.R.C.P. 56(e).

In considering the evidence presented in support of or in opposition to a motion for summary judgment "a court will consider only that material contained in affidavits or depositions which is based upon personal knowledge and which would be admissible at trial." *Petricevich*, at 869, 452 P.2d (1969); I.R.C.P. 56(e). When there is a conflict in the evidence which is presented, a determination should not be made on summary judgment if the credibility can be tested by testimony in court before the trier of fact. *Argyle v. Slemaker*, 107 Idaho 668, 691 P.2d 1283 (Ct.App. 1984).

The purpose of summary judgment proceedings is to eliminate the necessity of trial where facts are not in dispute and where existent and undisputed facts lead to a conclusion of law which is certain. *Berg v. Fairman*, 107 Idaho 441, 444, 690 P.2d 896 (1984).

In *Lipe v. Javelin Tire Company, Inc.*, 97 Idaho 805, 554 P.2d 1302 (1976), the Idaho Supreme Court provided that "[t]he purpose of summary judgment is to eliminate groundless claims and paper issues in cases which would end in directed verdict or other rulings of law." In *Moore v. Bastian*, 98 Idaho 888, 575 P.2d 486 (1978), the Idaho Supreme Court held that summary judgment deciding a pure question of law was not inappropriate.

III. ANALYSIS

A. Undisputed Facts

Sundance provides in its briefing, and Sundance's counsel stated at oral argument, that for the purpose of summary judgment, Sundance accepts all of the facts submitted by Taylor. The record before this Court shows the following facts for the purposes of summary judgment:

1. Taylor commenced performance of its services on the Project on July 26, 2005. At that time, the Project was owned by BRN Development. The entire Project is approximately 965.885 acres.¹

2. Taylor's scope of work on the Project included civil engineering, utility design, boundary surveying, topographic surveying, construction staking and construction observation. *Affidavit of Ronald G. Pace at p. 3.*

3. On October 10, 2008, BRN Development conveyed a portion of the Project, specifically, four lots comprising of approximately 17.739 acres, to BRN-Lake View Joint Venture via warranty deed, which was subsequently recorded on October 10, 2008, in the Kootenai County Recorder's Office as Inst. No. 2181416000. *Affidavit of Corey J. Rippee, Ex. C.* BRN-Lake View Joint Venture conveyed the lots to Chesrown via warranty deed, which was recorded in the Kootenai County Recorder's Office on October 10, 2008, as Inst. No. 2181417000. *Id., Ex. D.*

¹ In written discovery, Sundance asked Taylor to admit that its lien "encumbers approximately 965.885 acres." *Affidavit of Corey J. Rippee, Ex. B.* Taylor did not admit or deny this request and responded that "Taylor admits only that Taylor's Notice of Claim of Lien and Amended Notice of Claim of Lien ... encumber the property described therein." *Id.* Therefore, for the purposes of summary judgment and pursuant to I.R.C.P. 36(a) the property described in Taylor's lien and amended lien encumbers 965.885 acres. This Court notes that the PUD Approval for the Project states that the Project "consists of approximately 1,000 acres." *Id., Ex. E.*

4. On October 10, 2008, Chesrown made, executed and delivered a Deed of Trust Note in the principal amount of \$3,000,000.00 to Sundance. *Affidavit of Christopher L. Anderson, Ex. A.* As security for payment of the Deed of Trust Note, Chesrown, as Grantor, executed and delivered a Deed of Trust, Assignment of Rents and Security Agreement to Sundance, as Beneficiary, whereby Chesrown granted, bargained, sold and conveyed the Chesrown-owned lots, together with all tenements, hereditaments and appurtenances thereto, to Sundance (the "Sundance Lots"). The Deed of Trust was subsequently recorded in the Kootenai County Recorder's Office on October 10, 2008, as Inst. No. 2181418000. *Id., Ex. B.*

5. On or about October 14, 2008, American Bank released its security interest (mortgage) in the Sundance Lots in consideration for a payment made by Chesrown of \$400,000.00, reducing the principal amount due under the loan to \$14,600,000.00. *Affidavit of M. Gregory Embrey, ¶¶2 and 3, Exs. A and B.*

6. BRN Development terminated the employment of Taylor on the Project on June 2, 2009, which at that time BRN Development owed Taylor \$150,938.77. *Affidavit of Ronald G. Pace at p. 4.*

7. On January 26, 2009, Defendant Taylor Engineering, Inc. recorded a Notice of Claim of Lien in the Kootenai County Recorder's Office as Inst. No. 2193959000 against the Project. An Amended Notice of Claim of Lien was recorded on April 10, 2009, as Inst. No. 2205324000.² *Taylor Engineering's Answer, Counterclaim and Cross Claims, Exs. 3 and 4.*

² The January 26, 2009, lien and the April 10, 2009, amended lien are hereafter referred to as the "Taylor Lien."

8. As of June 2, 2009, the total amount Taylor claims is owed, and the total amount of the Taylor Lien, is \$150,938.77, plus interest.

B. Equitable Apportionment

As there are no genuine issues of material fact, Sundance requests that this Court determine, as a matter of law, that the Taylor Lien be equitably apportioned pro rata based upon the amount Taylor claims it is owed and the size of the land encumbered by the Taylor Lien. Sundance argues that if this Court does not equitably apportion the Taylor Lien, it would be inequitable to Sundance because Sundance would be required to pay for labor and materials which were not actually furnished to the property in which Sundance owns an interest.

Both Sundance and Taylor agree that equitable apportionment of a mechanic's lien has never been addressed by the Idaho appellate courts.

Sundance cites this Court to approximately eleven jurisdictions that have adopted equitable apportionment and specifically discusses the following cases where the courts equitably apportioned a blanket lien placed on property: *Associated Sand & Gravel Co., Inc. v. Dipietro, et al.*, 8 Wash.App. 938, 509 P.2d 1020 (Wash. Ct. App. 1973); *Brunzell v. Lawyers Title Ins. Corp.*, 101 Nev. 395, 705 P.2d 642 (1985); *CS & W Contractors, Inc. v. Southwest Savings & Loan Assoc.*, 180 Ariz. 167, 883 P.2d 404 (1994); *Premier Bank v. Becker Development, LLC*, 785 N.W.2d 753 (Minn. 2010).

Sundance argues that if this Court equitably apportions the Taylor Lien per acre based upon total size of the property encumbered by the Taylor Lien, Sundance would owe Taylor \$2,772.07, plus a pro rata share of accrued interest.

Taylor argues that the facts of this case do not support Sundance's equitable argument because any foreclosure and satisfaction of the Taylor Lien from the Sundance Lots is occasioned not by Taylor's conduct but instead by BRN Development's default on the American Bank loan. Moreover, apportionment of the Taylor Lien will most likely result in Taylor receiving no payment, as Taylor is unlikely to collect on its lien against Chesrown and/or BRN Development due to the amount owed to American Bank and the other lien holders. Therefore, it would be equitable **for Taylor** to collect on its lien against Sundance.

Taylor provides that it engineered the roads, sanitary sewer, potable water, and fire plans for the Project as a single development with a common development purpose, and BRN Development and Taylor had a verbal agreement to perform work on the entire Project. Taylor explains that it never apportioned its costs between Black Rock North and the Sundance Lots because it always believed that that the project was a single development.

Taylor argues that courts in other jurisdictions have deemed apportionment inequitable in certain circumstances, but only cites this Court to one case, *Badger Lumber Co. v. Homes*, 55 Neb 473 (1898), where the court found it inequitable to apportion a blanket lien.

I.C. § 45-501 provides that professional engineers who render professional services to improve land are entitled to place a lien upon the land. This Court concludes, as a matter of law and for summary judgment, (1) that Taylor rendered professional engineering services to the entire Project, (2) the Taylor Lien has priority over Sundance's interest and is valid, and (3) Taylor is owed \$150,938.77.

In *Hostetter v. Inland Development Corp. of Montana*, 172 Mont. 167, 561 P.2d 1323 (1977)(internal citations omitted), the Montana Supreme Court provided “[t]he foreclosure of a mechanic's lien is governed by the rules of equity. The general rule is that a blanket construction lien against an entire property consisting of several parcels cannot be enforced in toto against less than all of such parcels. The reason is that it would be inequitable to burden some lesser portion of the liened premises with charges for labor and materials which were not actually furnished to that particular parcel. Consequently, this single lien, proportionately effective against each unit, would only be enforceable against each unit proportionately.”

This Court is persuaded by the case law cited by Sundance, more so than the lone case cited by Taylor. This Court also does not read *Badger Lumber* to stand for the proposition that Taylor argues. Equity leans in favor of Sundance because: (1) Taylor contracted with BRN Development, not Sundance; (2) Sundance has not defaulted on any of its obligations; (3) Sundance only owns 17.739 acres (1.77 percent) out of the 965.885 acres. What Taylor is arguing, essentially, is that it will likely not collect its monies owed to it for work it performed on the Project from BRN Development or Chesrown, and there will be nothing left to distribute after the sheriff's sale. Therefore, in Taylor's opinion, Sundance should pay the entire amount of the lien. This Court concludes that this would create an inequitable result for Sundance.

Therefore, this Court exercises its equitable discretion and adopts and applies equitable apportionment in this case. By so doing now, this Court will eliminate the necessity of trial where the facts are not in dispute and where existent and undisputed facts lead to a conclusion of law which is certain.

This Court concludes that, as a matter of law, the Taylor Lien should be equitably apportioned per acre based upon the total size of the property encumbered by the Taylor Lien, with Sundance owing Taylor \$2,772.07, plus pro rata interest.³

IV. CONCLUSION AND ORDER

There are no genuine issues of material fact in dispute in this matter and as a matter of law this Court exercises its discretion and equitably apportions pro rata the Taylor Lien based upon the entire land area encumbered by the Taylor Lien. The property in which Sundance claims an interest is liable to Taylor for \$2,772.07, plus a pro rata share of accrued interest.

NOW, THEREFORE, IT IS HEREBY ORDERED that Sundance's Motion for Summary Judgment is granted.

IT IS FURTHER ORDERED that Sundance is liable to Taylor in the amount of \$2,772.07, plus a pro rata share of accrued interest.

IT IS FURTHER ORDERED that if Sundance tenders to Taylor \$2,772.07, plus a pro rata share of accrued interest, that Taylor must release all liens against the property in which Sundance owns an interest, to wit: the four Sundance Lots.

DATED this 15th day of April, 2011.



John P. Luster
District Judge

³ \$156.27/acre (\$150,938.77 divided by 965.885 acres) times 17.739 acres = \$2,772.07.

CERTIFICATE OF MAILING

I hereby certify that on the 15th day of April, 2011 a true and correct copy of the MEMORANDUM DECISION AND ORDER was mailed, postage prepaid, faxed or sent by interoffice mail to:

Nancy Isserlis
Elizabeth A. Tellessen
Winston & Cashatt
Bank of America Financial Center
601 W. Riverside, Ste. 1900
Spokane, WA 99201-0695

US Mail
 Hand Delivered
 Overnight Mail
 Via Fax: 509-838-1416

Randall A. Peterman, C. Clayton Gill
Tyler Anderson
Moffatt Thomas Barrett Rock & Fields, Chtd.
101 S. Capitol Blvd., 10th Floor
Boise, ID 83702

US Mail
 Hand Delivered
 Overnight Mail
 Via Fax: 208-385-5384

Richard D. Campbell
Campbell, Bissell & Kirby, PLLC
7 South Howard Street, Ste. 416
Spokane, WA 99201

US Mail
 Hand Delivered
 Overnight Mail
 Via Fax: 509-455-7111

Charles B. Lempesis
Attorney at Law
W 201 7th Ave.
Post Falls, ID 83854

US Mail
 Hand Delivered
 Overnight Mail
 Via Fax: 208-773-1044

Robert J. Fasnacht
850 W. Ironwood Dr., Ste. 101
Coeur d'Alene, ID 83814

US Mail
 Hand Delivered
 Overnight Mail
 Via Fax: 208-664-4789

Cory J. Rippee
Eberle, Berline, Kading, Turnbow & McKlveen
PO BOX 1368
Boise, ID 83701-1368

US Mail
 Hand Delivered
 Overnight Mail
 Via Fax: 208-334-8542

John R. Layman
Layman, Layman & Robinson, PLLP
601 S. Division St.
Spokane, WA 99202

US Mail
 Hand Delivered
 Overnight Mail
 Via Fax: 509-624-2902

Barry W. Davidson
Davidson Backman Medeiros, PLLC
1550 Bank of America Center
601 W. Riverside Ave.
Spokane, WA 99201

US Mail
 Hand Delivered
 Overnight Mail
 Via Fax: 208-667-8470

Edward J. Anson
Witherspoon Kelley
608 Northwest Blvd., Ste. 300
Coeur d'Alene, ID 83814

- US Mail
- Hand Delivered
- Overnight Mail
- Via Fax: 509-458-2728

Terrance R. Harris for Maggie Lyons, Receiver
Ramsden & Lyons, LLP
PO BOX 1336
Coeur d'Alene, ID 83816-1336

- US Mail
- Hand Delivered
- Overnight Mail
- Via Fax: 208-664-5884

Steven C. Wetzel & Kevin P. Holt
Wetzel Wetzel & Holt, PLLC
616 N. 4th St., Ste. 3
Coeur d'Alene, ID 83814

- US Mail
- Hand Delivered
- Overnight Mail
- Via Fax: 208-664-6741

Douglas Marfice
Ramsden & Lyons, LLP
PO BOX 1336
Coeur d'Alene, ID 83816-1336

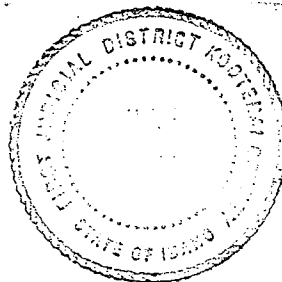
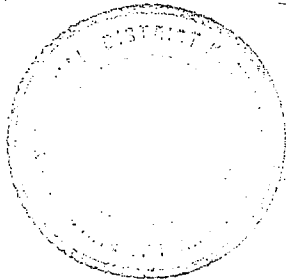
- US Mail
- Hand Delivered
- Overnight Mail
- Via Fax: 208-664-5884

Timothy M. Lawlor
M. Gregory Embrey
Witherspoon, Kelly, Davenport & Toole, PS
The Spokesman Review Bldg.
608 Northwest Blvd., Ste. 300
Coeur d'Alene, ID 83814

- US Mail
- Hand Delivered
- Overnight Mail
- Via Fax: 208-667-8470

Clifford T. Hayes
Clerk of the District Court

By Wanda Butler
Deputy Clerk



#73