

STATE OF IDAHO
COUNTY OF KOOTENAI
FILED;
AT 3:34 O'CLOCK PM
CLERK, DISTRICT COURT
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

CASE NO. CV-09-2619
MEMORANDUM DECISION AND ORDER RE: AMERICAN BANK'S MOTION FOR SUMMARY JUDGMENT AGAINST ACI NORTHWEST, INC. ON INVALIDITY OF ACI'S CLAIM OF LIEN (COUNT 3 OF ACI'S CROSS-CLAIM); ACI NORTHWEST, INC.'S MOTION TO DISMISS; ACI NORTHWEST, INC.'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Washington corporation, d/b/a WILBERT
PRECAST,

Defendants.

TAYLOR ENGINEERING, INC., a
Washington corporation,

Third Party Plaintiff,

vs.

ACI NORTHWEST, INC., an Idaho
corporation; STRATA, INC., an Idaho
corporation; and SUNDANCE
INVESTMENTS, LLP, a limited liability
partnership,

Third Party Defendant.

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)

ACI Northwest, Inc. and American Bank dispute whether ACI Northwest has a valid claim of lien. The parties have moved for summary judgment on the issue, as well as other issues.

C. Clayton Gill, MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHTD., and Elizabeth A. Tellessen, WINSTON & CASHATT, for Plaintiff/Counterclaim Defendant American Bank.

Steven C. Wetzel and Kenneth Huitt, JAMES VERNON & WEEKS, P.A., for Defendant/Counter Claimant ACI Northwest, Inc.

I. COURSE OF PROCEDURE

Over two years after the commencement of this action, on August 24, 2011, in accordance with the practice of liberally allowing the amendment of pleadings, ACI Northwest, Inc. (“ACI”) filed an “Amended Answer to Taylor Engineering, Inc.’s Third Party Complaint and Defendant ACI Northwest Inc.’s Amended Cross Claims and Demand for Jury Trial” (“Amended Cross-Claim”). The document contained four claims, three of which are against American Bank as a cross-defendant.¹

Shortly thereafter, American Bank filed two motions: “Motion for Partial Summary Judgment Re: Count [4] of ACI’s First Amended Cross-Claim” and “Motion for Summary Judgment Against ACI Northwest, Inc. on Invalidity of ACI’s Claim of Lien (Count Three of ACI’s Cross-Claim)” (“American Bank’s Motion”). American

¹ Count 2 is a breach of contract claim against BRN Development, Inc. At the November 29, 2011, hearing in this matter, counsel for ACI stated that this Count is currently “dormant.”

Bank supported the motions with voluminous affidavits and memoranda. ACI responded with similarly extensive supporting affidavits and memoranda. ACI also filed two motions: “Motion for Partial Summary Judgment” (“ACI’s Motion”) and a “Motion to Dismiss” (“ACI’s Motion to Dismiss”). ACI supported the motions with supporting affidavits and memoranda, and American Bank responded in turn.

After some delay at the request of ACI, this Court held a hearing on all the motions on November 29, 2011. After hearing from the parties, this Court entered an oral order granting American Bank’s Motion for Partial Summary Judgment Re: Count 4 of ACI’s First Amended Cross-Claim, and dismissed Count 4.² This Court then took the remaining motions under advisement, and now enters this order.

II. LEGAL STANDARDS FOR MOTIONS FOR SUMMARY JUDGMENT

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). 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,

² This Court also denied ACI’s “Motion to Strike Affidavit of Kyle Capps,” and informed the parties that this Court would evaluate the objections set forth in the following motions and base its opinion here on evidence admissible as per the Idaho Rules of Evidence and I.R.C.P. 56: American Bank’s “Motion to Strike Portions of the Affidavits Submitted by ACI in Support of its Motion for Summary Judgment,” ACI’s “Motion to Strike Affidavit of Bryan Klein,” and American Bank’s “Objection to the Affidavit of Steven C. Wetzel Dated November 15, 2011.”

775 P.2d 1191 (1988). “If the adverse party desires to serve opposing affidavits the party must do so at least 14 days prior to the date of the hearing. The adverse party shall also serve an answering brief at least (14) days prior to the date of the hearing.” I.R.C.P. 56(c). 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. FINDINGS OF FACT

This Court has reviewed the pleadings from the parties and makes the following factual findings. Additionally, the course of proceedings and some of the facts applicable to this Order are included in this Court’s February 2, 2011, “Memorandum Decision, Findings of Fact, Conclusions of Law and Order Re: American Bank’s and Wadsworth Golf Construction Company of the Southwest’s Cross-Motions for Summary Judgment” (February 2, 2011 Decision). This Court hereby finds as follows:

1. BRN Development, Inc. ("BRN") contracted with multiple parties to design and construct a golf course and residential housing project on approximately 1000 acres called the "Black Rock North" project, in Kootenai County, Idaho. February 2, 2006, Decision, pp.3-4.
2. On or about February 2, 2007, BRN and American Bank executed loan documents whereby American Bank loaned BRN \$15 million dollars. American Bank recorded its mortgage against the property on February 6, 2011. February 2, 2011, Decision, pp.3-4.
3. ACI began performing work on the Black Rock North Project on August 26, 2006. ACI 30(b)(6) Deposition taken on 3/8/11 ("1st ACI Depo."), 39:25 – 40:2.
4. Between August 26, 2006 and September 25, 2008, BRN and ACI entered into thirteen separate contracts requiring ACI to perform different kinds of work on the Black Rock North Project and BRN to pay ACI for that work. Some of the contracts are oral, some written, and the scope of work for each contract varies, but each contract is individually numbered by ACI and separately invoiced by ACI, and pertains to specific work performed during specific periods.
5. The first contract between BRN and ACI is a written contract dated effective January 5, 2007, identified as "6416" ("6416 Contract"). See Depo. Ex. 803, attached as Ex. D to the Affidavit of C. Clayton Gill Filed in Support of American Bank's Motion for Summary Judgment on Invalidity of ACI's Claim of Lien ("Gill Aff."); 2nd ACI Depo.

10:20 – 11:2; ACI 30(b)(6) 1st ACI Depo., 36:23 – 37:3.³ The 6416 Contract contains a cost savings component. *Id.* The scope of work for the 6416 Contract consisted of preliminary site work, mass excavation, storm water and drainage, erosion control, road construction, and other expense items related to work on the construction of the Black Rock North Golf Course. *See* 2nd ACI Depo. 72:2-7. ACI's scope of work under such contract was reduced via change orders. *See* 2nd ACI Depo. 12:24 – 17:20. ACI last provided labor, services, or materials to the Project under the 6416 Contract until May 15, 2008. *See* 1st ACI Depo. 37:16 – 39:24. ACI's last invoice issued for the 6416 Contract is dated June 12, 2008, and was paid in full on July 25, 2008, along with all of ACI's other open invoices issued under the 6416 Contract. *See* Depo. Ex. 837, attached as Ex. E to Gill Aff. ACI has never invoiced BRN for this costs savings component of the 6416 Contract. *See* 1st ACI Depo. 45:7-17; Depo. Ex. 837, attached as Ex. E to Gill Aff.⁴

6. The second contract between BRN and ACI is a written contract dated effective February 26, 2008, identified as 8027 ("8027 Contract"). *See* Depo. Ex. 804, attached as Ex. F to Gill Aff.; 1st ACI Depo. 62:23 – 63:7. The scope of work for the 8027 Contract consisted of "building roads with pavement you can drive on and installing sewer lines and water lines that carry sewage and water to the residential lots and parts of the golf course irrigation system." *See* 2nd ACI Depo. 80:12 – 81:3 and 82:8-14. ACI's scope of

³ The excerpts from the 1st ACI Depo. were offered as Ex. C to the Gill Aff. and the excerpts from the 2nd ACI Depo. were offered as Ex. B to the Gill Aff.

⁴ ACI states in its claim of lien that the amount owing for the "Bonus Per Contract for Cost Savings" is \$1,045,752.57. *See* Ex. A to Gill Aff. At the 30(b)(6) deposition of ACI taken on March 8, 2011, ACI claimed that the amount owing under the 6416 Contract for the cost savings component is \$1,130,711.31. *See* 1st ACI Depo. at 23:13 – 24:10.

work on the 8027 Contract increased via change orders. *See* 2nd ACI Depo. 54:21 – 55:7. ACI first started performing work on the Project under the 8027 Contract on January 24, 2008. *See* 1st ACI Depo. 72:5-11. ACI last provided labor, services, or materials to the Project under the 8027 Contract on January 10, 2009. *Id.* 6.

7. The third contract between BRN and ACI is a written contract dated effective May 23, 2008, and is identified as 8097 (“8097 Contract”). *See* Depo. Ex. 805, attached as Ex. G to Gill Aff.; 1st ACI Depo. 64:16 – 65:7. The scope of work for the 8097 Contract consisted of the provision of materials and labor necessary to install utility services, including septic, sewer and domestic water lines, to a comfort station on hole number five of the golf course, described as a restaurant with restroom facilities, on the Black Rock North Golf Course. *See* Depo. Ex. 805 at Bates No. ACI 000067; 1st ACI Depo. 64:16-23; 2nd ACI Depo. 87:8-13 and 88:3 – 90:13. ACI’s scope of work on the 8097 Contract increased via change orders. *See* 2nd ACI Depo. 91:14-24. ACI first started performing work on the Project under the 8097 Contract on May 16, 2008. *See* 1st ACI Depo. 77:13-15. ACI last provided labor, services, or materials to the Project under the 8097 Contract on October 27, 2008. *See* 1st ACI Depo. 77:16-18. 7.

8. The fourth contract between BRN and ACI is a written contract dated effective August 13, 2008, and is identified as 8101 (“8101 Contract”). *See* Depo. Ex. 806, attached as Ex. H to Gill Aff.; 1st ACI Depo. 65:22 – 66:13. The scope of work for the 8101 Contract consisted of the provision of materials and labor necessary to install utility services, including sewer and potable water and dry utility conduit for cable television, telephone, and gas lines, to the portion of the golf course and residential development

located south of Loffs Bay Road, or more commonly referred to as the “Panhandle.” *See* Depo. Ex. 806 at Bates No. ACI 000086; 2nd ACI Depo. 92:8 – 95:14. The scope of work for the 8101 Contract also included erosion control for any areas disturbed as part of the scope of work completed under the 8101 Contract. *Id.* ACI’s scope of work on the 8101 Contract increased via change orders. *See* 2nd ACI Depo. 95:18 – 96:13. ACI first started performing work on the Project under the 8101 Contract on June 10, 2008. *See* 1st ACI Depo. 79:21-24. ACI last furnished labor, services, or materials to the Project under the 8101 Contract on January 10, 2009. *Id.* 79:25 – 80:2.

9. The fifth contract between BRN and ACI is a written contract dated effective May 23, 2008, and is identified as 8104 (“8104 Contract”). *See* Depo. Ex. 807, attached as Ex. I to Gill Aff.; 1st ACI Depo. 66:20 – 67:10. The scope of work for the 8104 Contract included the installation of sewage pipe and erosion control and remediation for the areas disturbed during the installation of such sewage pipe. *See* Depo. Ex. 807 at ACI 000107; 2nd ACI Depo. 100:9 – 101:7. ACI first started work under the 8104 Contract on June 13, 2008. *See* 1st ACI Depo. 81:24 – 82:2. ACI last provided labor, services, or materials to the Project under the 8104 Contract on October 7, 2008. *Id.*, 82:3-6.

10. The sixth contract between BRN and ACI is an oral contract referred to as 8058 (“8058 Contract”). *See* 2nd ACI Depo. 83:2 – 85:3. The scope of work for the 8058 Contract was for the demolition of an existing building and asbestos removal. *Id.*, 82:19 – 84:5. ACI first started work on the Project under the 8058 Contract on March 31, 2008. *See* 1st ACI Depo. 74:19-22. ACI last provided labor, services, or materials to the Project under the 8058 Contract on July 16, 2008. *Id.*, 74:23-25.

11. The seventh contract between BRN and ACI is an oral contract referred to as 8186 (“8186 Contract”). *See* 2nd ACI Depo. 103:7-16. The 8186 Contract was a time and materials contract “for erosion control, which would include, but not be limited to the installation of silt fencing, straw bales, straw waddles, ditch and swale excavation, hauling in some three-quarter-inch rock bringing in ballast, which is large size rock, on the road to hole No. 9.” *Id.*, 103:7 – 104:2. The 8186 Contract included work on the golf course. *Id.*, 104:3-8. ACI first started work under the 8186 Contract on September 15, 2008. ACI’s last work for the Project under the 8186 Contract was on January 10, 2009.

12. The eighth contract between BRN and ACI is an oral contract identified as 8187 (“8187 Contract”). *See* Depo. Ex. 835, attached as Ex. K to Gill Aff.; 1st ACI Depo. 38:10 – 39:10; 2nd ACI Depo. 105:18 – 106:1. The scope of work for the 8187 Contract included excavation and grading and the installation of a culvert for a new clubhouse to be built on the Black Rock North Golf Course. *See* 2nd ACI Depo. 105:18 – 107:2. ACI first started work on the Project under the 8187 Contract on September 8, 2008. *See* Depo. Ex. 835, attached as Ex. K to Gill Aff.; 1st ACI Depo. 38:10 – 39:10. ACI last provided labor, services, or materials to the Project under the 8187 Contract on October 7, 2008. *Id.*; *see also* 2nd ACI Depo. 107:7-10.

13. The ninth contract between BRN and ACI is an oral contract identified as 8503 (“8503 Contract”). *See* Depo. Ex. 835, attached as Ex. K to Gill Aff.; 2nd ACI Depo. 107:15-19. The scope of work for the 8503 Contract included the installation of conduit for electrical wiring, closed circuit TV, cabling, cable TV, and satellite underneath the main gate entrance to the Black Rock North Golf Course. *See* 2nd ACI Depo. 107:20 –

108:8. ACI first started work on the Project under the 8503 Contract on June 2, 2008. *See* Depo. Ex. 835, attached as Ex. K to Gill Aff. ACI last provided labor, services, or materials to the Project under the 8503 Contract on November 6, 2008. *Id.*

14. The tenth contract between BRN and ACI is an oral contract identified as 8964 (“8964 Contract”). *See* Depo. Ex. 835, attached as Ex. K to Gill Aff.; 2nd ACI Depo. 109:11-16. The scope of work for the 8964 Contract included “the placement of ballast, which again is a large size rock for detours, a ditch line under a cart path, three-quarter inch rock that was hauled in for a pipe run . . . [,] a tie-in to eight-inch purple pipe . . . used for irrigating the golf course.” *See* 2nd ACI Depo. 109:17-25. ACI first started work on the Project under the 8964 Contract on August 28, 2008. *See* Depo. Ex. 835, attached as Ex. K to Gill Aff. ACI last provided labor, services, or materials to the Project under the 8964 Contract on October 21, 2008. *Id.*

15. The eleventh contract between BRN and ACI is an oral contract referred to as 8970 (“8970 Contract”). *See* Depo. Ex. 835, attached as Ex. K to Gill Aff.; 2nd ACI Depo. 111:4-9. The scope of work for the 8970 Contract included “cart path work on holes No. 5 and 6,” such as “some sleeving of a water pipe, installation of a 24-inch storm drain, some minor excavation, hauling in of crushed rock, placing of ballast underneath the cart path.” *See* 2nd ACI Depo. 111:4-18. ACI first started work on the Project under the 8970 Contract on September 4, 2008. *See* Depo. Ex. 835, attached as Ex. K to Gill Aff. ACI last provided labor, services, or materials to the Project under the 8970 Contract on September 25, 2008. *Id.*

16. The twelfth contract between BRN and ACI is an oral contract identified as job number 8974 (“8974 Contract”). *See* Depo. Ex. 835, attached as Ex. K to Gill Aff.; 2nd ACI Depo. 112:25 – 113:4. The scope of work for the 8974 Contract included the hauling and placement of topsoil at the Kootenai Camp for kids at Black Rock North. *See* 2nd ACI Depo. 113:5 – 114:16. ACI first started work on the Project under the 8974 Contract on September 24, 2008. *See* Depo. Ex. 835, attached as Ex. K to Gill Aff. ACI last provided labor, services, or materials to the Project under the 8974 Contract on September 25, 2008. *Id.*

17. ACI alleges that it entered into a thirteenth contract with BRN. This thirteenth contract was an oral contract that ACI internally referred to as its job number 9914 (“9914 Contract”). *See* Depo. Ex. 835, attached as Ex. K to Gill Aff.; 2nd ACI Depo. 17:21 – 19:7.⁵ The scope of work for the 9914 Contract included erosion control work performed at an unknown location on the Project. *See* 2nd ACI Depo. 18:5 – 22:9 and 32:12-20. ACI first started work on the Project under the 9914 Contract on March 5, 2009. *See* Depo. Ex. 835, attached as Ex. K to Gill Aff. ACI last provided labor, services, or materials to the Project under the 9914 Contract on March 30, 2009. *Id.*

18. ACI invoiced BRN separately. *See* Depo. Exs. 802B and 837, attached as Exs. J and E to Gill Aff.

19. American Bank filed a complaint with this Court on April 2, 2009, initiating foreclosure proceedings on its mortgage.

⁵ Of note, ACI invoiced Black Rock Development, Inc. and not BRN Development, Inc. for its work performed under the 9914 Contract. *See* Ex. N to Gill Aff. For summary judgment purposes only, American Bank admits that ACI and BRN entered into a thirteenth contract.

20. On June 15, 2009, ACI recorded its "Claim of Lien." *See* Ex. C to ACI's Cross-Claim, attached as Ex. A to Gill Aff. Attached to this Claim of Lien is a document titled "ACI Northwest, Inc., Schedule of Current Amounts Due from Black Rock Entities" ("Schedule"). *Id.* This Schedule does not include work performed on the 9914 Contract between March 5, 2009 and March 30, 2009. *Id.* However, the Claim of Lien's first page, paragraph 6 states that the Claim of Lien is for "performance of the related labor and furnishing of the related materials commenced on October 1, 2006, and ended on March 17, 2009." *Id.* The Schedule does not identify any "due date" for any "invoice number" after December 12, 2008.

21. On December 11, 2009, BRN paid \$1,000.00 to ACI, which ACI applied to the balance owing for work performed under the 8964 Contract. *See* Depo. Ex. 839, attached as Ex. L to Gill Aff.; 1st ACI Depo. 112:23 – 114:5; Depo. Ex. 802B at ACI 000291.

22. ACI filed an action to foreclose its claim of lien on June 7, 2010. *See* ACI Northwest, Inc.'s Answer to Taylor Engineering, Inc.'s Third Party Complaint, and Defendant ACI Northwest, Inc.'s Cross-Claim and Demand for Jury Trial.

IV. ANALYSIS

A. AMERICAN BANK'S MOTION FOR SUMMARY JUDGMENT AGAINST ACI ON COUNT THREE IS GRANTED BECAUSE ACI DOES NOT HAVE A VALID LIEN CLAIM; ACI'S MOTION FOR PARTIAL SUMMARY JUDGMENT IS DENIED.

1. Count 3

The following is Count 3 as it appears in the Amended Cross-Claim filed by ACI on August 24, 2011:

17. ACI, as a registered Idaho contractor, performed labor, supplied equipment and furnished materials for various construction work, including but not limited to construction design, construction management and physical construction of streets, golf course, golf cart paths, culverts, ditches, swales, wet and dry utilities, along with demolition, excavation, and piping on the improved property. The first materials were delivered to the project on August 22, 2006. The first labor on the job commenced on August 26, 2006. The major work was commenced on October 1, 2006, which has continued in various degrees of performance until March 30, 2009, at the express and implied request of BRN and with the full knowledge of BRN and American Bank.

18. As of June 15, 2009, the amount due and owing to ACI from BRN for labor performed, equipment supplied and materials furnished was \$1,499,827.63, which included various labor and material, excluding interest owed pursuant to the terms of the contracts. As a result, on that same date, ACI recorded a Claim of Lien against the Improved Property for the principal amount due, interest thereon and costs and attorney's fees pursuant to Idaho Code 45-513.

19. BRN later made a partial payment on account on December 9, 2009, for which ACI recorded an Endorsement to Claim of Lien for Payment on Account.

20. Pursuant to the Contracts, the amount currently due and owing to ACI, excluding interest, is \$1,501,590.50 . . .

21. ACI recorded a claim of lien on the Subject Property [(Attached as Exhibit C)]. The claim of lien was extended by an "Endorsement to Claim of Lien for Payment on Account," [Attached as Exhibit D)]. ACI's lien was entitled to foreclosure, priority and/or a determination of the title, estate or interest of all parties hereto pursuant to Idaho Code §§ 45-506, 45-507, 45-510, 45-512 and 45-1302; however American Bank and ACI stipulated to release the lien of ACI. An Order releasing the ACI lien was entered on July 27, 2010, and a "Release of Mechanic's Lien Bond" from International Fidelity Insurance Company was posted. International Fidelity Insurance Company is obligated to pay ACI such amounts as this Court may adjudge to have be owing with interest, cost, and attorney fees [(Attached as Exhibit E)]. Due to the posting of the bond, no priority is relevant, but if deemed to be relevant, then ACI's lien priority would be superior to American Bank.

ACI requests the following relief:

MEMORANDUM DECISION AND ORDER RE: AMERICAN BANK'S MOTION FOR SUMMARY JUDGMENT AGAINST ACI ON INVALIDITY OF ACI'S CLAIM OF LIEN (COUNT THREE OF ACI'S CROSS-CLAIM); ACI NORTHWEST, INC.'S MOTION TO DISMISS; ACI NORTHWEST, INC.'S MOTION FOR PARTIAL SUMMARY JUDGMENT

1. For Judgment in favor of ACI declaring that the lien recorded by ACI against the Subject Property and as extended through partial payment by BRN and recorded endorsement is valid and has fulfilled all statutory requirements.

2. For judgment declaring that the sum, as proven in trial, is owed by the lien claimant's debtor to have been secured by the Subject Lien along with interest (highest rate allowed by Idaho law), and reasonable cost and attorney fees as determined by this court.

3. For any other relief that the Court deems just and proper.

More specifically, ACI seeks to recover the following amounts as per its Claim of Lien, set forth in Ex. C to ACI Cross-Claim, attached as Ex. A to Gill Aff.:

Contract #	Principle Amount Claimed (including Cost Savings)
6416	\$1,045,752.57
8027	\$35,680.64
8097	\$2,078.95
8101	\$294,878.85
8104	\$59,187.49
8058	\$2,312.20
8186	\$22,581.65
8187	\$20,496.56
8503	\$4,240.00
8964	\$36.93
8970	\$7135.36
8974	\$1,462.73
9914	\$3,818.45

2. ACI Failed to Timely File Its Claim of Lien on Twelve of the Thirteen Contracts. ACI Failed to Timely Foreclose on the Claim of Lien as to the 9914 Contract.

American Bank moves for partial summary judgment on Count 3, arguing that ACI does not have a valid lien claim because ACI failed to timely file and/or foreclose its Claim of Lien. As matter of law ACI failed to timely file its Claim of Lien as to twelve of the thirteen contracts, and failed to timely foreclose on its Claim of Lien in regards to the thirteenth contract. As a result, Count 3 must be dismissed.

a. ACI Failed to Timely File its Claim of Lien as to Twelve of the Contracts.

Idaho Code Section 45-507 establishes the requirements for a valid lien, and importantly subsection (2) provides that “the claim shall be filed within ninety (90) days after the completion of the labor or services, or furnishing of materials.” Of course, whether the work performed is under a single contract or multiple contracts effects the time for filing a claim of lien. In Terra-West, Inc. v. Idaho Mutual Trust, LLC, the Idaho Supreme Court relied on White v. Constitution Mining & Mill Co., 56 Idaho 403, 420, 55 P.2d 152, 160 (1936), where the Idaho Supreme Court held that a mechanic’s lien, “if any exists at all, relates back to the date of the commencement of the work or improvement or the commencement to furnish the material.” 150 Idaho 393, 400-401, 247 P.3d 620, 627-28 (2010). The Court in Terra-West held that

so long as a lien is filed within ninety days after the completion of the labor or services, the lien may encompass the entirety of the work performed under a single contract . . . In other words, the lien attaches at the time that work is commenced under a contract, and if all work is completed pursuant to that same contract, a lien claimant may file a mechanic’s lien encompassing all such work so long as the statutory guidelines are fulfilled.”

Terra-West, Inc., 150 Idaho at 400, 247 P.3d at 627; *see also* Valley Lumber & Mfg. Co. v. Driessel, 13 Idaho 662, 669, 93 P. 765, 772 (1907) (holding that a party can establish that it furnished material under one continuous contract or two distinct contracts).

Most recently the district court in In Re Tamarack Resort Foreclosure and Related Proceedings, Valley County Case No. 08-114C, considered the question of whether separate written agreements for 2005, 2006, and 2007, were “renewals” of an original contract entered into by Tamarack and Teufel Nursery Inc., or if each contract was a

separate contract. Looking at the “plain and unambiguous” language of the contract, the district court concluded that the 2004 contract between Tamarack and Teufel Nursery, Inc. outlined the tasks and scope for a one year period in a project schedule, and did “not provide that Teufel was awarded all of the landscaping work for the entire Tamarack project.” In Re Tamarack, CV-08-114C, pp.18-19 (*citing* Page v. Pasquali, 150 Idaho 152, 244 P.3d 1236, 1238 (2010)). As a result, the district court held that the contracts were separate agreements, not one continuous contract, and that the “priority of Teufel’s lien relates back to when Teufel first provided labor or materials for the work specified in the 2007 contract.” Id. at 20.

Similarly, all of the contracts between ACI and BRN are separate contracts. It is undisputed that ACI began work on the Black Rock North project on August 26, 2006, and entered into the first contract on January 5, 2007. The plain and unambiguous terms of the contract and exhibits to the contract shows that the contract was for a specified scope of work and that the completion date of the contract was also specified (“September 1, 2007”). ACI invoiced BRN one time for this contract and did not invoice ACI later for the “cost savings provision.” This contract does not have any language showing that BRN intended that ACI be the only contractor on the project, and there is no language showing that ACI would have continued to work on the Black Rock North project after the completion date of the contract.

Each subsequent written contract is identified by ACI by a different number, ACI invoiced BRN separately for each contract, each contract has a different completion date, and defined a different scope of work. The oral contracts were similarly identified by

ACI by a different number, ACI invoiced BRN separately for each contract, each contract has a different completion date, and a different defined scope of work. Importantly while BRN may have desired to use ACI as a contractor throughout the duration of the project, there is no evidence that either BRN or ACI had an agreement that ACI's work was under one contract for the duration of the project.

Because twelve of the contracts between ACI and BRN were separate contracts, ACI was required to file a Claim of Lien within ninety (90) days of the completion of the work on each contract. However, ACI did not file twelve claims of lien; instead ACI filed only one Claim of Lien on June 15, 2009, identifying twelve contracts between ACI and BRN by number and invoice. Because the work on the last of the twelve contracts between ACI and BRN was completed on September 25, 2008, ACI failed to timely file its Claim of Lien as required by I.C. § 45-507. As a result, ACI's Claim of Lien is not valid as to contract numbers 6416, 8027, 8097, 8191, 8194, 8058, 8186, 8187, 8503, 8964, 8970, and 8974.

However, the Claim of Lien is valid as to the 9914 Contract. The purpose of filing a claim of lien is to provide notice to other persons that there is a lien on the subject property. The 9914 contract commenced on March 5, 2009, and was completed by ACI on March 30, 2009. While American Bank is correct that ACI did not include the 9914 Contract on the list of contracts attached to the Claim of Lien, ACI did indicate in paragraph six on the Claim of Lien that the Claim of Lien was for work performed "through March 17, 2009." Therefore, other persons had notice that ACI performed work performed through that date. Because ACI completed the work on the project on March

30, 2009, was not paid, and filed the Claim of Lien within ninety (90) days of that date, the Claim of Lien is valid as to the 9914 Contract. Thus, ACI has a valid lien claim for \$3818.45.

b. ACI Failed to Timely Foreclose its Claim of Lien as to Contracts 8964 and 9914.

However, ACI failed to timely foreclose its Claim of Lien. ACI does have a valid lien claim as to the 9914 Contract. As noted above, ACI does not have a valid lien as to the 8964 Contract because the Claim of Lien was not filed within ninety (90) days of the completion of work on that project, October 21, 2008. However, BRN did pay ACI \$1,000 on December 11, 2009, after the Claim of Lien was filed, and ACI applied the payment to the 8964 Contract. This Contract was for work performed between August 28, 2008, and October 21, 2008. ACI recorded an endorsement on its Claim of Lien indicating the payment.

A lien claimant must “commence proceedings” to foreclose its lien within six (6) months, “unless a payment on account is made, or extension of credit given with expiration date thereof, and such payment or credit and expiration date, is endorsed on the record of the lien, then six (6) months after the date of such payment or expiration of extension.” I.C. § 45-510. “The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition acted to the right to sue at all.” Western Loan & Building Co. v. Gem State Lumber Co., 32 Idaho 497, 185 P. 554 (1919).

It is undisputed that ACI filed its “ACI Northwest, Inc.’s Answer to Taylor Engineering, Inc.’s Third Party Complaint, and Defendant ACI Northwest, Inc.’s Cross-

Claim and Demand for Jury Trial” on June 7, 2010, and then amended the pleading over a year later in August 2011. Clearly, ACI did not file an action to foreclose its lien until the six month period had passed. In regards to the 9914 Contract, ACI’s Claim of Lien “ceased to exist.” See Palmer v. Bradford, 86 Idaho 395, 401, 388 P.2d 96, at 99. ACI, then, cannot recover.

In regards to the 8964 Contract, the payment from BRN to ACI extended the period for foreclosing the Claim of Lien to June 10, 2010, if that Claim of Lien was in fact valid. However, this Court has already found and concluded that the Claim of Lien is not valid because it was not filed within ninety (90) days of the completion of work on the 8964 Contract. As a result, ACI cannot recover on the 8964 Contract.

c. American Bank’s Motion for Summary Judgment Against ACI on the Invalidity of ACI’s Claim of Lien (Count Three of ACI’s Cross-Claim) is Granted.

ACI and BRN entered into thirteen separate contracts, not one continuous contract. ACI’s Claim of Lien is invalid as to twelve contracts because ACI did not file the Claim of Lien within ninety (90) days of the completion of work on each contract. ACI’s Claim of Lien provides sufficient notice to other persons that ACI performed work through at least March 17, 2009. ACI filed its Claim of Lien within ninety (90) days of March 30, 2009, when it completed work on the 9914 Contract. However, ACI failed to commence proceedings to foreclose on the Claim of Lien within six months of June 15, 2009, when the Claim of Lien was filed. Further, while the \$1,000 payment on the 8964 Contract extended the time to foreclose on the Claim of Lien for that contract to June 15,

2010, the Claim of Lien was not timely filed and therefore not valid as to the 8964 Contract. American Bank's Motion, then is granted and Count 3 is dismissed.

3. ACI's Motion for Summary Judgment on Count 1 Must be Denied Because ACI Does not Have a Valid Lien Claim and Cannot Foreclose.

Count 1 of the Amended Cross-Claim provides in part:

6. *An actual or juduciable (sic) controversy has arisen and now exists between ACI, American Bank and BRN concerning their respective rights, status and legal relationship and interests in the Subject Property and the rights and obligations of the parties between certain documents and agreements executed by ACI, BRN or both ACI and BRN. The real and substantial controversy surrounds the right of ACI to be paid for services and material expended to improve the Subject property.*

...

8. *This action for declaratory judgment is invoked for remedial and/or preventative relief for the purpose of resolving uncertainty and insecurity in regard to the following issues that are ripe for resolution for the benefit of the parties:*

8.1 *Is a subordination valid if contained in a lien release and no consideration was given by the benefitted party for the subordination?*

8.2 *Can American Bank legally rely on a subordination agreement contained in a release of lien as a basis to subordinate ACI's lien priority to Am. Bank's mortgage when Am. Bank was not a party to the release?*

9. *Is a subordination valid if contained in a lien release and no consideration was given by the benefitted party for the subordination?*

9.1 *BRN prepared what has been referred to as a "golden release," [(Exhibit B)].*

9.2 *ACI officers did sign a Golden Release on several occasions as a condition to receiving earned payment for the services rendered and materials already expended on the Subject Property as of the date of signature, excluding the retainage that was retained by BRN. On no occasion was ACI paid any consideration for any subordination, nor was the subordination discussed or pointed out to ACI by BRN.*

10. *Can American Bank legally rely on a subordination agreement contained in a release of lien as a basis to subordinate ACI's lien priority to Am. Bank's mortgage when Am. Bank was not a party to the release?*

10.1 *The ACI officers that did sign the Golden Release did not understand and were not informed that any portion of the release might be claimed to protect the mortgage lender, Am. Bank and to be a legal basis for subordinating the prior lien rights of ACI to the subsequently recorded mortgage of the lender Am. Bank.*

10.2 *Am. Bank claims ACI's lien is not superior to Am. Bank Mortgage because of a subordination clause which existed in a document in which Am. Bank was not a party or a third party beneficiary to the document.*

ACI filed a motion for partial summary judgment on Count 1, seeking a declaration from this Court as follows:

1. ACI's lien is valid
2. Priority of the American Bank's Mortgage is no longer an issue. ACI's lien amount will be paid through the bond posted by American Bank.
3. Should this Court determine that priority is still an issue, ACI argues that American Bank cannot rely upon the wording from the "Conditional Lien Waiver, Release and Subordination" (hereinafter "Conditional Lien Waiver") between BRN and ACI, executed by Berta Bagley and Delores Fletcher, to support any claim or defense.
4. That the uncontested balance owed for the work improving the subject project is \$1,190,691.60.

(ACI Northwest, Inc.'s Motion for Partial Summary Judgment, p.3.) Both parties rely on the affidavits submitted in support of both American Bank's Motion and ACI's Motion in their responses to the respective motions, as well as additional affidavits. Given that Count 1 and Count 3 concern whether ACI has a valid Claim of Lien and were presented at oral argument as cross-motions for summary judgment, this Court will treat the motions as cross motions for summary judgment on Count 1.

The entirety of Count 1 is dependent upon whether ACI's Claim of Lien is valid. In order for ACI to make a claim against the bond posted by American Bank and obtain

the amounts it asserts it is owed, ACI must show its Claim of Lien is not only valid, but that ACI foreclosed its Claim of Lien timely. ACI is attempting to position itself similar to the position of Wadsworth Golf Construction Company of the Southwest in this action. *See* February 12, 2011, Decision. However, as found and concluded above, ACI does not have a valid Claim of Lien and failed to foreclose on the Claim of Lien as to the 9914 Contract. As a result, ACI has no means by which it can recover against the bond. As a result, ACI is not entitled to summary judgment on Count 1. Moreover, because Count 1 seeks a declaratory ruling based on the existence of a valid lien claim, Count 1 cannot be sustained. Count 1, therefore, is dismissed because ACI does not have a valid Claim of Lien and did not timely foreclose on the Claim of Lien as to the 9914 Contract. ACI's motion for partial summary judgment is therefore denied, and Count 1 is dismissed.

B. ACI NORTHWEST, INC.'S MOTION TO DISMISS IS DENIED

While a determination of ACI's Motion to Dismiss is somewhat unnecessary given this Court's decision to dismiss Counts 1 and 3, for purposes of the record this Court must take the opportunity to distinguish the reasons for denial of ACI's Motion to Dismiss from the reasons for dismissal given above.

ACI's Motion to Dismiss is not only confounding because ACI sought summary judgment against American Bank in contemporaneous pleadings, but the Motion to Dismiss is also an epic diversion from Idaho Code provisions and the Idaho Rules of Civil Procedure. According to its Motion to Dismiss, ACI moves to dismiss American Bank because American Bank is not the "real party in interest." More specifically, because American Bank has transferred 1) its interest in American Bank's loan to BRN

and 2) the collateral American Bank recovered as per the sheriff's sale, to Fidelity National Timber Resource, ACI claims that Fidelity National Timber Resource is now the real party in interest.

First, 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." This rule allows a mortgage holder, such as American Bank, to initiate and complete a foreclosure action. American Bank initiated the foreclosure action in this case, and as of February 24, 2011, when this Court issued its "Judgment and Decree of Foreclosure of American Bank's Mortgage Secured by Black Rock North," American Bank has no more affirmative claims against ACI. Thus, American Bank was properly the plaintiff and continued to act as the plaintiff when pursuing its claims against the other defendants.

While ACI ignores I.C. § 45-1302, ACI does cite to Rule 17(a), which provides:

Every action shall be prosecuted in the name of the real party in interest . . . no action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

It is well established that this rule, by use of the term "prosecuted," applies to the substitution of plaintiffs and cross-claimants, not defendants. Damian v. Estate of Pina,

132 Idaho 447, 974 P.2d 93 (Ct. App. 1999); Lowry v. Ireland Bank, 116 Idaho 708, 779 P.2d 22 (Ct. App. 1989).

American Bank has since transferred its interest in the collateral and the loan to another entity, but the only remaining claims between American Bank and ACI are ACI's claims against American Bank. ACI identified American Bank in its Amended Cross-Claim and served American Bank with the Amended Cross-Claim; ACI did not name or serve Fidelity National Timber Resource or any other cross-defendant ACI believes has an interest in the loan or collateral. ACI is, therefore, the claimant responsible for prosecuting its claims, and American Bank is the defendant responsible for asserting defenses.

ACI's attempt to pervert the clear language of Rule 17(a) to substitute a cross-defendant it named and served, with a cross-defendant it did not name or serve is unnecessary when ACI could have simply joined Fidelity National Timber Resource or any other cross-defendant as a party, or crafted its Amended Cross-Claim to include allegations against these other parties.⁶ ACI's motion, then, has no legal merit. ACI's Motion to Dismiss is therefore denied.

V. CONCLUSION


American Bank's "Motion for Summary Judgment Against ACI on Invalidity of ACI's Claim of Lien (Count Three of ACI's Cross-Claim)" is hereby GRANTED. ACI Northwest's "Motion for Partial Summary Judgment" is hereby DENIED. ACI

⁶ It is clear that ACI knew in April 2011 that Fidelity National Timber Resource had an interest in the loan between American Bank and BRN Development. (Exhibit A, Affidavit of C. Clayton Gill in Response to ACI's Motion to Dismiss American Bank.)

Northwest, Inc.'s "Motion to Dismiss" is hereby DENIED. Counts 1 and 3 of ACI Northwest, Inc.'s "Amended Answer to Taylor Engineering, Inc.'s Third Party Complaint and Defendant ACI Northwest Inc.'s Amended Cross-Claims and Demand for Jury Trial" are hereby DISMISSED with prejudice. Trial for Count 2 "Breach of Express or Implied Contract by BRN [Development, Inc.]" remains set for February 13, 2011.

American Bank shall submit a judgment in accordance with applicable Idaho Code Provisions and the Idaho Rules of Civil Procedures. As stated at the hearing on this matter, this Court will entertain the parties' requests for attorney fees and costs which must be filed in accordance with applicable Idaho Code provisions and the Idaho Rules of Civil Procedure.

DATED this 7th day of December, 2011.



John Patrick Luster
District Judge

CERTIFICATE OF SERVICE

I certify that on this 7 day of December 2011, I caused a true and correct copy of to MEMORANDUM DECISION AND ORDER RE: AMERICAN BANK'S MOTION FOR SUMMARY JUDGMENT AGAINST ACI NORTHWEST, INC. ON INVALIDITY OF ACI'S CLAIM OF LIEN (COUNT THREE OF ACI'S CROSS-CLAIM); ACI NORTHWEST, INC.'S MOTION TO DISMISS; ACI NORTHWEST, INC'S MOTION FOR PARTIAL SUMMARY JUDGMENT be forwarded, with all required charges prepaid, by the method(s) indicated below, to the following person(s):

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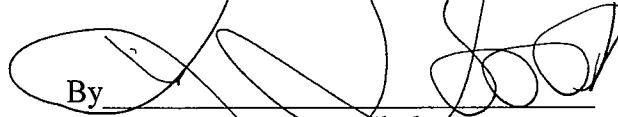
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By 
Deputy Clerk

3/4/11