DIVISION ONE
FILED: 09/04/2012
RUTH A. WILLINGHAM, CLERK
BY: JT

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

PARAMOUNT WINDOWS CORPORATION, an Arizona corporation,	)	1 CA-CV 11-0331
Plaintiff/Appellant,	)	DEPARTMENT D
v.	)	
	)	**MEMORANDUM DECISION**
ONEWEST BANK FSB, FSB fka INDYMAC BANK,	)	(Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)
Defendant/Appellee.	)	
	)	AMENDED PER ORDER FILED 9/19/12

Appeal from the Superior Court of Maricopa County

Cause No. CV2009-028189

The Honorable J. Richard Gama, Judge

AFFIRMED

Kercsmar & Feltus PLLC — Scottsdale
By Todd Feltus
And Christopher M. Goodman
Attorneys for Plaintiff/Appellant

Gust Rosenfeld P.L.C. — Phoenix
By Timothy W. Barton
And Scott A. Malm
Adam L. Wilkesy
Attorneys for Defendant/Appellee

T H O M P S O N, Judge

¶1 Paramount Windows (Paramount) appeals the trial court's summary judgment in favor of OneWest Bank (OneWest) and the subsequent award of attorneys' fees in this lien priority dispute involving the building of a home in Paradise Valley. Finding no unresolved questions of fact and no legal error as to the grant of summary judgments or attorneys' fees, we affirm

FACTUAL AND PROCEDURAL BACKGROUND

¶2 In July 2006, William Lane[1] (Lane) borrowed $980,000 from Joan Sullivan (Sullivan) secured by a recorded deed of trust on his Paradise Valley property (property). In June 2007, OneWest (formerly IndyMac) agreed to loan Lane $3,092,880 for the project. OneWest financed the project and paid off the Sullivan Loan. OneWest received and recorded its deed of trust on July 5, 2007. This first OneWest deed of trust had an inaccurate legal description of the property. OneWest recorded a release and reconveyance of the Sullivan deed of trust shortly thereafter.

¶3 Fox Custom Homes (Fox) was the general contractor on the home and work began on or about May 2008. On or about January 2009, Paramount entered into subcontract with Fox for

[1] The property was purchased by Lane as a married man as his separate property. The property apparently became part of the Valverde Family Trust, and then later reverted back to Lane and/or Lane and his spouse. As none of this is an issue on appeal, we treat Lane as the owner.

windows and doors. Paramount was not paid the $66,000 provided for under the contract.[2] Fox recorded a mechanic's and materialmen's lien pursuant to Arizona Revised Statutes (A.R.S.) § 33-993 (2007) on the subject property on June 17, 2009; the outstanding principal amount was $187,824.89.[3] Paramount likewise recorded its lien on June 26, 2009; the outstanding principal amount was $66,000.[4] Paramount did a title search in August 2009 which did not reveal OneWest's deed of trust. Paramount filed the instant lawsuit against various defendants including Fox and Lane asserting breach of contract and seeking to foreclose its mechanic's lien on September 2, 2009.[5] The

---

[2] We note that the Joint Pre-Trial Statement submitted by Paramount and Fox state as a stipulated material fact that "The Bank and Lane failed to timely pay construction draws, and the project was terminated."

[3] The preliminary twenty-day lien notice and related documents attached as exhibits to Fox's lien from May 2009 show IndyMac listed as the "Lender, surety or Bonding company."

[4] The preliminary twenty-day lien notice and related documents attached as exhibits to Paramount's lien from April 2009 show IndyMac listed in one place as the "Lender[] or Reputed Lender[]" and another spot shows the project as being "owner financed."

[5] In the course of this litigation, Paramount was successful on motions for partial summary judgment against both Lane and Fox and judgments against each were issued, joint and severally, in December 2010. Lane failed to defend the summary judgment motion. Fox did defend the motion and after judgment brought and then abandoned an appeal. Fox is not a party to this appeal.

complaint did not name OneWest or IndyMac. Paramount recorded a lis pendens on September 3, 2009.

¶4 On September 23, 2009 OneWest recorded a notice of trustee's sale intending to foreclose upon its 2007 deed of trust; that sale did not occur. On November 10, 2009, OneWest recorded an amended deed of trust with the correct legal description. Paramount filed its first amended complaint on January 21, 2010. OneWest was not listed as a defendant. OneWest recorded a second notice of trustee's sale on January 26, 2010. Paramount did not receive notice of the first trustee's sale and received notice of the second nearly a month after the notice was recorded but two months prior to the scheduled sale. On March 29, 2010, Paramount filed both a motion to amend the complaint to add OneWest as a defendant and a request for preliminary injunction as to OneWest's trustee's sale.[6]

¶5 Litigation then ensued to determine the priority of the liens. OneWest moved for summary judgment on the issue of equitable subrogation and asserting that it held priority by virtue of succeeding to the 2006 Sullivan position; Paramount filed a cross-motion for summary judgment to determine lien

[6] It is asserted, without reference to the record, that OneWest took the property at the trustee's sale pursuant to a credit bid of $392,548.

priority based on OneWest's failure to include a proper legal description in its deed of trust.[7] While these motions were pending, OneWest filed a motion for summary judgment asserting Paramount failed to timely name OneWest in this lien foreclosure action as required by A.R.S. § 33-998.

¶6 The trial court found in favor of OneWest and granted its motions for summary judgment while denying Paramount and Fox's cross-motions. The trial court denied Paramount's motion for new trial and granted OneWest's attorneys fees, joint and severally, against Paramount and Fox in the amount of $12,000.[8] Paramount filed a timely notice of appeal.

ISSUES

¶7 Paramount raises three essential issues on appeal:

1. The trial court erred in finding equitable subrogation by allowing OneWest to assume Sullivan's priority when the deed filed by OneWest had an erroneous legal description and such finding prejudiced Paramount;

2. Paramount was not required to name OneWest because a lis pendens was filed before OneWest gained its interest; and

---

[7] Fox joined Paramount's motion against OneWest.

[8] Two signed judgments were entered in this matter. One January 5, 2010, the trial court issued a signed minute entry with Rule 58, Arizona Rule of Civil Procedure, language and finding in favor of OneWest on the subrogation matter. Paramount timely appealed from that order. In May 2010, after briefing on attorneys' fees, a second signed judgment was entered. Paramount timely appealed from that as well. No one asserts that Paramount's appeal was untimely.

3. The trial court erred entering two final judgments and in awarding OneWest its fees in the second.

Paramount asserts summary judgment should be entered in its favor on the priority issue.

¶8 OneWest asserts:

1. That the trial court properly determined that OneWest was equitably subrogated to the Sullivan deed of trust;

2. The trial court properly held that Paramount failed to timely name OneWest in its lien foreclosure action as required by A.R.S § 33-998(A); and

3. The trial court was within its discretion to grant OneWest's timely application for attorneys' fees.

DISCUSSION

¶9 On appeal from summary judgment, we must determine whether any material factual disputes exist and, if not, whether the trial court correctly applied the law. *In re Estate of Johnson*, 168 Ariz. 108, 109, 811 P.2d 360, 361 (App. 1991) (citation omitted). We view the evidence in the light most favorable to the party against whom summary judgment was granted. *Estate of Hernandez v. Flavio*, 187 Ariz. 506, 509, 930 P.2d 1309, 1312 (1997). In this matter, therefore, we view the facts in the light most favorable to Paramount. We review whether the trial court correctly applied the law de novo.

Eller Media Co. v. City of Tucson, 198 Ariz. 127, 130, ¶ 4, 7 P.3d 136, 139 (App. 2000).

A. EQUITABLE SUBROGATION

¶10 "Subrogation is the substitution of another person in the place of a creditor, so that the person in whose favor it is exercised succeeds to the rights of the creditor in relation to the debt." *Mosher v. Conway*, 45 Ariz. 463, 468, 46 P.2d 110, 112 (1935). Subrogation substitutes someone who pays off a superior encumbrance into that party's priority position, even where there is recordation of an intervening lien. *Lamb Excavation, Inc. v. Chase Manhattan Mortgage Corp.*, 208 Ariz. 478, 480, ¶ 6, 95 P.3d 542, 544 (App. 2004); Restatement (Third) of Prop.: Mortgages § 7.6 (1997) ("One who fully performs an obligation of another, secured by a mortgage, becomes by subrogation the owner of the obligation and the mortgage to the extent necessary to prevent unjust enrichment. Even though the performance would otherwise discharge the obligation and the mortgage, they are preserved and the mortgage retains its priority in the hands of the subrogee.").

¶11 Equitable subrogation has four elements: (1) the party asserting subrogation has paid the debt; (2) the party asserting subrogation was not a volunteer; (3) the party asserting subrogation was not primarily liable for the debt; and (4) no

injustice will be done to the other party by allowing subrogation. *Lamb*, 208 Ariz. at 480, ¶ 8, 95 P.3d at 544. This court has held

> Further, for equitable subrogation to apply, '[t]here must exist a claim or obligation against the debtor; an original right to that claim on the part of him in whose place substitution is sought, and some right belonging to him who seeks the substitution which will be protected thereby. So when one, being himself a creditor, pays another creditor, whose claim is preferable to his, it is held that the person so paying is subrogated to the rights of the other creditor.

Sourcecorp, Inc. v. Norcutt, 227 Ariz. 463, 466-67, 258 P.3d 281, 284-85 (App. 2011) *citing Mosher*, 45 Ariz. at 468, 46 P.2d at 112. Equitable subrogation applies only to the extent of the prior lien. *Lamb*, 208 Ariz. at 483, ¶ 19, 95 P.3d at 547.

¶12 Paramount argues that the incorrect legal description in OneWest's deed of trust was fatal to any claim of priority.[9] "Our recording statutes are for the protection of persons dealing in real property without actual notice." *Hall v. World Sav. and Loan Ass'n*, 189 Ariz. 495, 503, 943 P.2d 855, 863 (App. 1997) *citing County of Pinal v. Pomeroy*, 60 Ariz. 448, 455, 139 P.2d 451, 454 (1943). Even an unrecorded instrument is fully enforceable between the parties to the transaction. *See* A.R.S § 33-412 (2007); *3502 Lending, LLC v. CTC Real Estate Service*, 224

[9] There is no dispute that all the records had the correct street address.

Ariz. 274, 277, 229 P.3d 1016, 1019 (App. 2010) (action to quiet title involving deed of trust recorded but missing legal description of the property) (*citing Maddox v. Hardy*, 187 P.3d 486, 492 & n. 20 (Alaska 2008) and 14 Richard R. Powell, *Powell on Real Property § 82.01[3]*, at 82-13 (Michael Allan Wolf rev. ed. 2005). An unrecorded instrument is enforceable against a creditor with notice. *See* A.R.S. § 33-412.

¶13 In addressing the priority of liens on cross-motions for summary judgment, the trial court went through the test stated in *Lamb* and determined:

> It is clear from these circumstances that OneWest Bank agreed to advance money to discharge a prior encumbrance on the property with the reasonable expectation of receiving a security interest in the property. Its motivations in facilitating the loan transaction were purely commercial. Secondly, the Lien Claimants will not be prejudiced by this subrogation. They will remain in the same position they occupied before subrogation. . . . In fact, without subrogation, the Lien Claimants would receive a windfall if elevated to a higher priority status, a result this equitable doctrine was designed to negate.

¶14 We find no error on the part of the trial court in determining equitable subrogation here. The preliminary twenty-day notice documents in the record, and attached to the original complaint filed in September 2009, demonstrate that Paramount had actual notice by the end of April 2009 that OneWest provided construction financing on the project and was an interested party as to the property. Fox's documents likewise show

knowledge of OneWest at the time of filing their preliminary notices. Thus, Paramount suffered no additional prejudice as to its priority by this determination. The trial court is affirmed.

B. THE LIEN FORECLOSURE STATUTES

¶15 OneWest further asserts as a basis for affirming on appeal that the trial court properly held that Paramount failed to timely name OneWest in its lien foreclosure action as required by A.R.S § 33-998(A). We agree.

¶16 The mechanic's lien statutes give those who furnish labor or materials to enhance the value of another's property the right to a lien on the property for the value of the improvements if not paid. A.R.S. §§ 33-981 to -1021; *Wahl v. Southwest Sav. & Loan Ass'n*, 106 Ariz. 381, 385, 476 P.2d 836, 840 (1970). Arizona case law has frequently stated the principle that the statutory requirements for mechanic's and materialmen's liens must be strictly followed. *See Irwin v. Murphey*, 81 Ariz. 148, 155, 302 P.2d 534, 538 (1956*); MLM Const. Co., Inc. v. Pace Corp.*, 172 Ariz. 226, 229, 836 P.2d 439, 442 (App. 1992); *Union Rock & Materials Corp. v. Scottsdale Conference Ctr.*, 139 Ariz. 268, 272, 678 P.2d 453, 457 (App. 1983). Our Supreme Court in *Scottsdale Memorial Health Systems, Inc. v. Clark*, stated:

> We hold that the mechanic lienor must sue each party against whom he seeks to assert his lien within the six-month limitations period of A.R.S. § 33-998. Enforcement is barred as to any party not sued within six months. Sound policy reasons support this result. Suing the interested parties within six months after lien recordation promotes judicial efficiency. See A.R.S. § 33-996 (permitting joinder, consolidation and impleading). This case vividly illustrates the vice of any other rule. It is good judicial policy that lien priorities be determined in one promptly filed action, when witnesses and documents are readily available and memories reliable.

157 Ariz. 461, 469-70, 759 P.2d 607, 615-16 (1988).

¶17 The trial court here found

> [t]he facts clearly demonstrate that both Lien Claimants had actual knowledge of the identity of OneWest Bank as the construction lender and its claimed interest in the property at the time they filed their foreclosure actions. . . . Lien Claimants failed to comply with the express terms of A.R.S. §33-998[A]. Both failed to initiate an action against OneWest Bank in a timely manner. Their inaction renders their respective mechanic's liens unenforceable against OneWest Bank.

As stated above, the record on appeal demonstrates Paramount's actual knowledge of OneWest. Paramount was required to notice OneWest under *Scottsdale Memorial,* which found "the mechanic lienor must sue each party against whom he seeks to assert his lien within the six-month limitations period of A.R.S. § 33-998. Enforcement is barred as to any party not sued within six months. Sound policy reasons support this result. Suing the *interested parties* within six months after lien recordation promotes judicial efficiency." 157 Ariz. at 469-70, 759 P.2d at

615-16 (emphasis added). Even if OneWest did not have a deed properly recorded with the correct legal description, Paramount knew it was an interested party by the time it served the preliminary twenty-day notices in late April 2009. Paramount did not name OneWest until March 29, 2010, well past the six-month deadline. The trial court is affirmed.[10]

C. ATTORNEYS' FEES BELOW

¶18 Section 12-2101(B) (2003) vests jurisdiction in this court for an appeal "[f]rom a final judgment." An order is final and appealable under A.R.S. § 12-2101(B) if it "'decides and disposes of the cause on its merits, leaving no question open for judicial determination.'" *Props. Inv. Enters., Ltd. v. Found. for Airborne Relief, Inc.*, 115 Ariz. 52, 54, 563 P.2d 307, 309 (App. 1977), *quoting Decker v. City of Tucson*, 4 Ariz. App. 270, 272, 419 P.2d 400, 402 (1966). The grant or denial of attorneys' fees is within the discretion of the trial court, and this court will not overrule such a decision if it is reasonably supported by the record. *West v. Salt River Agric. Imp. & Power Dist.*, 179 Ariz. 619, 626, 880 P.2d 1165, 1172

[10] Due to the resolution of this matter we need not examine Paramount's claim that even as a foreclosing lien claimant with notice, it should have been allowed to avail itself of Arizona Rule of Civil Procedure 15(c) in order to take advantage of the relation-back doctrine and avoid the six-month limitation of the lien statute. *See Scottsdale Memorial*, 157 Ariz. at 470, 759 P.2d at 616.

(App. 1994) (citation omitted).

¶19 The trial court here issued both the signed minute entries in favor of OneWest on the equitable subrogation claim and the compliance with A.R.S. § 33-998(A) on January 6 and January 13, 2011. On January 24, 2011, Paramount filed a motion for new trial pursuant to Rule 59, Arizona Rules of Civil Procedure; Fox joined the motion. While the motions were pending, OneWest filed a motion for attorneys' fees seeking nearly $30,000 in fees and explaining that OneWest had only recently learned of its success on summary judgment. Paramount and Fox objected stating that such an award was not appropriate here as it was discretionary and that the application was untimely. OneWest replied to the objection. On April 13, 2011, the trial court denied the motion for new trial in a signed minute entry and stated "the Court expressly directs the entry of final judgment and determines that there is no just reason for delay. This Order is a final judgment pursuant to Ariz.R.Civ.P., rule 58." Then, on May 3, 2011 the trial court filed the judgment and granted OneWest $12,000 in fees jointly and severally against Paramount and Fox.

¶20 Paramount makes several arguments regarding the award of attorneys' fees. First, it argues that the trial court abused its discretion in awarding fees here given the novelty of

the issues and that such an award would discourage future claimants. *See, e.g., Associated Indemn. Corp. v. Warner*, 143 Ariz. 567, 694 P.2d 1181 (1985) (discussing discretionary award of fees under A.R.S. § 12-341.01). Second, Paramount argues the application for fees was untimely as it failed to come within twenty days of the January 13 ruling on the merits as required by Rule 54(g)(2), Arizona Rule of Civil Procedure. Finally, Paramount argues that if the trial court had intended to leave the issue of fees open after the April minute entry, that it needed to include Rule 54(b) language and it did not. Paramount asserts essentially that the trial court had lost jurisdiction at that point.

¶21 OneWest asserts the trial court had the discretion to grant fees in the May 3, 2011 judgment because it used Rule 54(b) language in the April 13 judgment despite not specifically referring to the rule. OneWest asserts its fee request is affirmable under Rule 54(g)(2) based on *Aztar Corp. v. U.S. Fire Ins. Co.*, 223 Ariz. 463, 224 P.3d 960 (App. 2010) (where there is no prejudice to other party trial court may grant untimely request for fees) and *Nat'l Brokers Assocs., Inc. v. Marlyn Nutraceuticals, Inc.*, 211 Ariz. 210, 218, 119 P.3d 477, 485 (App. 2005) (trial court has discretion to award fees requested more than twenty days after ruling on the merits without losing

jurisdiction). We agree and find that the trial court had both the jurisdiction and the discretion to grant OneWest its reduced fees under the facts of this matter.

D. ATTORNEYS' FEES ON APPEAL

¶22 Both OneWest and Paramount request fees on appeal pursuant to A.R.S. §§ 33-998. In our discretion, we decline to award fees.

CONCLUSION

¶23 For the foregoing reasons, the trial court is affirmed.

/s/
_____
JON W. THOMPSON, Judge

CONCURRING:

/s/
_____
PETER B. SWANN, Presiding Judge

/s/
_____
MICHAEL J. BROWN, Judge