

MAY 30 2008

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP Nos.	AZ-07-1337-JuKPa
)		AZ-07-1355-JuKPa
TURNER-DUNN HOMES, INC.,)		(Cross-Appeals)
et al.,)		
Debtors,)	Bk. No.	06-00961-JMM
)		
_____)	Adv. No.	06-00106-JMM
RDC CONSTRUCTION, INC.,)		
Appellant/Cross-Appellee,)		
v.)		
)		
OHIO SAVINGS BANK,)		
Appellee/Cross-Appellant,)		
)		
ROBERT P. ABELE, Chapter 11)		
Trustee,)		
)		
Appellee.)		
_____)		

M E M O R A N D U M¹

Argued and Submitted on February 21, 2008
at Phoenix, Arizona

Filed - May 30, 2008

Appeal from the United States Bankruptcy Court
for the District of Arizona

Hon. James M. Marlar, Bankruptcy Judge, Presiding.

Before: JURY, KLEIN and PAPPAS, Bankruptcy Judges.

¹ This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

1 This is an appeal and related cross-appeal from the
2 bankruptcy court's judgment finding that Appellant RDC
3 Construction, Inc. ("RDC") had a valid mechanics' lien on certain
4 real property senior to the lien of Appellee and Cross-Appellant,
5 Ohio Savings Bank ("OSB"), in the amount of \$10,974.73, and
6 disallowing the remainder of RDC's claim.²

7 We AFFIRM the bankruptcy court's ruling that RDC had a valid
8 lien, but that the doctrine of equitable estoppel prevented RDC
9 from asserting a lien senior to OSB's lien in an amount more than
10 \$10,974.73. We VACATE the bankruptcy court's decision to
11 disallow the remainder of RDC's claim and REMAND for further
12 proceedings consistent with this Memorandum.

13 I. FACTS

14 Turner-Dunn Homes, Inc. and its related entities
15 (collectively "Turner-Dunn") were involved in developing
16 residential subdivisions located in Pinal County, Arizona. On
17 November 7, 2005, Turner-Dunn contracted with RDC for it to
18 furnish the infrastructure on Parcel FF of the McCartney Center
19 subdivision ("Parcel FF"). RDC commenced its work and on
20 November 22, 2005, timely served³ Turner-Dunn with its
21 Preliminary Twenty-Day Notice of its mechanics' lien under ARIZ.
22 REV. STAT. § 33-992.01.

24 ² Unless otherwise indicated, all chapter, section and rule
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

26 ³ The bankruptcy court's Memorandum Decision stated the
27 preliminary notice was "recorded." This was an apparent error,
28 as preliminary notices under Arizona mechanics' lien law are
served, not recorded. ARIZ. REV. STAT. § 33-992.01.

1 RDC invoiced Turner-Dunn at the end of each month for work
2 it completed during that month. When Turner-Dunn became
3 delinquent on several invoices, RDC threatened to foreclose its
4 mechanics' lien. By March 8, 2006, Turner-Dunn owed RDC
5 approximately \$977,310.19.

6 Turner-Dunn's cash flow problems occurred in part because it
7 could not close its loan with OSB to refinance the existing loan
8 on Parcel FF. OSB would not fund the loan in the amount of
9 \$750,000 until Turner-Dunn had equity of approximately \$1.25
10 million in Parcel FF. Of the \$1.25 million, OSB was holding
11 \$500,000 of Turner-Dunn's cash collateral in a pledge account,
12 but Turner-Dunn was short the remaining amount.

13 In early March 2006, RDC met with Turner-Dunn regarding the
14 outstanding progress payments. To facilitate the loan from OSB
15 and provide Turner-Dunn with the needed equity, RDC agreed to
16 release its mechanics' lien against Parcel FF in the amount of
17 \$778,377.90. Turner-Dunn agreed to pay RDC the full amount
18 released.

19 Discussions and negotiations between the parties regarding
20 how payment was to occur, however, were never formalized. At one
21 point, Turner-Dunn offered repayment as money became available
22 through future home sales, but RDC never expressly agreed to this
23 payment arrangement. In the end, repayment was based only on a
24 verbal agreement.⁴

25
26 ⁴ Turner-Dunn allegedly gave RDC a payment agreement (the
27 "Note TD") in the amount of \$652,553.91. Apparently, RDC
28 recorded the note on its books based only on Marc Dunn's ("Dunn")
personal guarantee that he would pay. George Anderson

(continued...)

1 On April 3, 2006, RDC executed an Unconditional Waiver and
2 Release on Progress Payment (the "Release"). The Release
3 acknowledged that RDC had received a progress payment in the sum
4 of \$778,377.90 for work done on Parcel FF and stated that RDC
5 "does hereby release any mechanic's lien [and] . . . any claim
6 for payment . . . that [RDC] has on the [project]" and that the
7 release "covers a progress payment for all labor, services,
8 equipment or materials furnished to the jobsite . . . through
9 February 28, 2006." Below the signature line in capital letters
10 was the following:

11 NOTICE: THIS DOCUMENT WAIVES RIGHTS UNCONDITIONALLY
12 AND STATES THAT YOU HAVE BEEN PAID FOR GIVING UP THOSE
13 RIGHTS. THIS DOCUMENT IS ENFORCEABLE AGAINST YOU IF
14 YOU SIGN IT, EVEN IF YOU HAVE NOT BEEN PAID. IF YOU
15 HAVE NOT BEEN PAID, USE A CONDITIONAL RELEASE FORM.

16 On April 19, 2006, OSB advanced \$741,000 to Turner-Dunn.
17 One day later, OSB advanced \$518,000. OSB recorded its lien
18 against Parcel FF around the same time frame.

19 Turner-Dunn made payments to RDC that totaled \$593,807.76,⁵
20 which RDC applied toward the released amount. By August 2006,
21 RDC had not been fully paid. On August 1, 2006, RDC recorded and
22 served its Notice of Claim of Mechanic's and Materialman's Lien

23 ⁴(...continued)
24 ("Anderson"), a principal of RDC, testified that there was no
25 note and the agreement was verbal.

26 ⁵ There is no apparent dispute regarding the amount of the
27 payments made. However, RDC sometimes states it was paid
28 \$593,807.76 but at other times the sum is \$563,922.01. When
making its claim calculation, it used the \$563,922.01 figure.
OSB, the trustee, and the bankruptcy court consistently used the
\$593,807.76 figure. When we calculate the allowed claim amounts
later in this decision, we have based that calculation on the
\$593,807.76 figure.

1 against Parcel FF in the amount of \$819,459.38.

2 On August 14, 2006, Turner-Dunn and its related entities
3 each filed a voluntary chapter 11 petition. The cases were
4 administratively consolidated. On October 3, 2006, the
5 bankruptcy court appointed Robert P. Abele as the chapter 11
6 trustee. In December 2006, the trustee sold, free and clear of
7 liens, all of Turner-Dunn's residential subdivisions, that sale
8 closing in March 2007. Valid liens attached to the proceeds.

9 RDC filed a timely proof of claim in the amount of
10 \$819,459.38, designating it as fully secured against Parcel FF
11 based upon its perfected mechanics' lien.⁶

12 On November 22, 2006, BCI Bebout Concrete filed an adversary
13 proceeding against Turner-Dunn for breach of contract and
14 foreclosure of mechanics' lien. This adversary served as the
15 procedural vehicle for the adjudication of all the mechanics' and
16 materialmen's lien rights against the estate and their relative
17 priorities. The trustee filed an answer to the action along with
18 a third-party complaint against RDC, OSB, and others, which
19

20
21 ⁶ RDC now concedes that its entire claim is not secured.
22 Rather, it contends its claim is secured in the amount of
23 \$605,003.49. RDC calculates the secured portion of its claim by
24 taking the total billed \$1,382,981.39 plus the \$400 lien fee,
25 less the released amount of \$778,377.90. It contends its
26 unsecured claim is in the amount of \$214,455.89. RDC calculates
27 this portion of its claim by applying all payments made by
28 Turner-Dunn in the amount of \$563,922.01 to the released amount
(\$778,377.90 - \$563,922.01 = \$214,455.89). The same number is
arrived at by taking the total billed less the amount paid
(\$1,382,981.39 - \$563,922.01 = \$819,059.38). The \$819,459.38
claim amount was based on the payment of \$563,922.01. Since the
agreed credit sum was \$593,807.76, the actual claim amount should
be \$789,773.63.

1 raised issues primarily about the validity, priority, and extent
2 of each of the liens on Turner-Dunn's various properties.

3 A partial summary judgment procedure was used by the parties
4 to address the facial validity of the various mechanics' liens.
5 In OSB's "Joinder in Trustee's Motion for Partial Summary
6 Judgment and Separate Motion for Summary Judgment," OSB alleged
7 that RDC failed to perfect its lien rights because its
8 Preliminary Twenty-Day Notice contained an inadequate description
9 of work and was not served on OSB or signed under oath by someone
10 with knowledge.

11 The court filed an "Order Re: Summary Judgment (Partial)
12 Involving Lien Claimant" on May 18, 2007, denying OSB's summary
13 judgment, and granting RDC's partial summary judgment motions on
14 the issue, among others, that RDC had a valid lien. The court
15 also found that RDC's lien was senior to OSB's, but the amount of
16 its seniority was still at issue. The trustee also disputed the
17 amount of RDC's secured claim.

18 On August 2, 2007, the court held an evidentiary hearing to
19 determine the amount of RDC's seniority. On September 4, 2007,
20 the court filed its Memorandum Decision finding that RDC had a
21 secured claim in the amount of \$10,974.73 senior to OSB's lien on
22 Parcel FF. The court disallowed the remainder of RDC's claim.

23 RDC and OSB timely appealed.

24 **II. JURISDICTION**

25 The bankruptcy court had subject matter jurisdiction
26 pursuant to 28 U.S.C. § 1334 over this core proceeding under
27 § 157(b)(2)(A), (B), and (K). We have jurisdiction under 28
28 U.S.C. § 158.

1 **III. ISSUES**

2 A. As between OSB and RDC, whether RDC's statement in the
3 Unconditional Waiver and Release of Progress Payment that it had
4 been paid the full lien-release amount estopped it from later
5 denying that it had been paid.

6 B. As between the trustee and RDC, what was the effect of the
7 Unconditional Waiver and Release of Progress Payment on RDC's
8 right to a secured or unsecured claim against property of the
9 estate.

10 C. Whether RDC's Preliminary Twenty-Day Notice contained an
11 adequate description as is required under ARIZ. REV. STAT. § 33-
12 992.01(C)(1).

13 **IV. STANDARDS OF REVIEW**

14 The proper interpretation of a statute is a legal question
15 that we review de novo. Heath v. Am. Express Travel Related
16 Servs. Co. (In re Heath), 331 B.R. 424, 428 (9th Cir. BAP 2005).
17 Whether compliance with a given statute has been established is
18 generally a question of fact, which we review for clear error.
19 Id.

20 Application of equitable estoppel is reviewed for abuse of
21 discretion. Id. at 429. A bankruptcy court necessarily abuses
22 its discretion if it bases its ruling upon an erroneous view of
23 the law or a clearly erroneous assessment of the evidence. We
24 also find an abuse of discretion if we have a definite and firm
25 conviction that the bankruptcy court committed a clear error of
26 judgment in the conclusion it reached. Id.

27 State law controls the construction of a contract. Flavor
28 Dry, Inc. v. Lines (In re James E. O'Connell Co., Inc.), 799 F.2d

1 1258, 1260 (9th Cir. 1986). Although contract interpretation
2 involves mixed questions of law and fact, the application of
3 contractual principles is a matter of law. Circle K Corp. v.
4 Collins (In re Circle K Corp.), 98 F.3d 484, 486 (9th Cir. 1996).
5 We review a bankruptcy court's legal conclusions and application
6 of state law de novo. Id.

7 **V. DISCUSSION**

8 The validity and priority of RDC's mechanics' lien, as well
9 as its amount, are determined under Arizona law. Butner v.
10 United States, 440 U.S. 48, 54-55 (1979).

11 Arizona lien law provides laborers and materialmen such as
12 RDC a lien on real property for the amount of materials or labor
13 furnished when they enhance the value of another's property.
14 United Metro Materials, Inc. v. Pena Blanca Props., L.L.C., 197
15 Ariz. 479, 484, 4 P.3d 1022, 1027 (2000). Lien claimants can
16 enforce these rights and pursue remedies directly against the
17 owner of the property. Id. However, they can lose their lien by
18 an intentional waiver⁷ or by estoppel, which is applicable when a
19 lienholder, by its acts or conduct, precludes itself from
20 asserting the lien. See 51 Am. Jur. 2d Liens § 59 (2008).

21 For the waiver and release of a mechanics' lien to be valid
22 in Arizona, it must substantially conform to the forms set forth
23 in ARIZ. REV. STAT. § 33-1008 and be signed by a claimant or its
24 authorized agent. ARIZ. REV. STAT. § 33-1008(A). If the waiver
25 and release comply with the statute, or the claimant was paid in
26

27
28 ⁷ They also may lose other rights, depending on the
language of the waiver.

1 full on its claim, the claimant may be estopped from asserting
2 its lien. ARIZ. REV. STAT. § 33-1008(B).

3 There are two forms of release under the statute:
4 conditional and unconditional. ARIZ. REV. STAT. § 33-1008(D) (1)
5 and (2). A conditional release becomes effective only after
6 payment is received by the claimant, whereas an unconditional
7 release is effective immediately even if the claimant has not
8 been paid. Janas v. Endo Steel, Inc. (In re JWJ Contracting Co.,
9 Inc.), 287 B.R. 501, 510 (9th Cir. BAP 2002).

10 The bankruptcy court found that the Release signed by RDC
11 followed the statutory format and contained the requisite
12 language for an unconditional waiver and release under ARIZ. REV.
13 STAT. § 33-1008(D) (2).

14 **A. The Amount of RDC's Lien Senior to OSB's Lien**

15 Between OSB and RDC, the issue was whether the Release
16 estopped RDC from denying that it was paid the full lien-release
17 amount. The bankruptcy court found an estoppel because, in the
18 Release, RDC represented that it had been paid the full lien-
19 release amount to induce OSB, an unsuspecting lender, to disburse
20 funds to Turner-Dunn. The court found the Release unambiguously
21 stated that RDC had been paid in full the lien-release amount.
22 Accordingly, in determining whether RDC had a lien claim senior
23 to OSB's lien, the court subtracted the released amount from the
24 total amount due to RDC and applied all payments made by Turner-
25 Dunn to RDC to invoices for work done after February 28, 2006.

26 The bankruptcy court's finding that RDC's statement that it
27 had been paid the full lien-release amount created an estoppel is
28 reviewed for abuse of discretion. To find equitable estoppel,

1 three elements must be met: (1) the party to be estopped commits
2 acts inconsistent with a position it later adopts, (2) reliance
3 by the other party, and (3) injury to the latter resulting from
4 the former's repudiation of its prior conduct. Valencia Energy
5 Co. v. Ariz. Dep't of Revenue, 191 Ariz. 565, 575-76, 959 P.2d
6 1256, 1267-68 (1998).

7 Regarding the first element, we agree with the bankruptcy
8 court's finding that the Release unambiguously stated that RDC
9 had been paid. See Amfac Distrib. Corp. v. J.B. Contractors,
10 Inc., 146 Ariz. 19, 23, 703 P.2d 566, 570 (1985) (noting that the
11 scope and effect of a lien waiver is determined from the language
12 of the document when it is unambiguous). Thus, RDC was estopped
13 from denying that it had been paid the full lien-release amount
14 after OSB funded its loan, assuming the other two elements for
15 estoppel were met.

16 Regarding the second element of reliance, OSB, the party
17 claiming estoppel, had the burden of demonstrating that it
18 actually relied on the Release before funding Turner-Dunn's loan
19 and that its reliance was reasonable. Valencia Energy Co., 191
20 Ariz. at 576. Reasonable reliance required a showing that OSB
21 acted in good faith and that it was not on notice to make further
22 inquiries. Id.; Suburban Pump & Water Co. v. Linville, 60 Ariz.
23 274, 283, 135 P.2d 210, 214 (1943) (noting that one who acts
24 "with a careless indifference to information reasonably at hand
25 or ignores highly suspicious circumstances which should warn him
26 of danger or loss cannot invoke the doctrine of estoppel").

27 RDC contends that the record establishes that OSB could not
28 have relied on any release of RDC's claim beyond the \$778,377.90

1 amount because OSB never contacted RDC at any time to find out
2 what RDC had been paid or was being paid. Yet, RDC points to no
3 evidence in the record that would have put OSB on notice to make
4 these inquiries when the plain language in the Release, which
5 followed the statutory format, stated that RDC had already been
6 paid.

7 RDC also maintains that OSB could not have relied on the
8 Release in connection with the funding of Turner-Dunn's second
9 draw request in the amount of \$518,000. However, the record
10 shows that RDC gave OSB its monthly progress invoice dated March
11 31, 2006, showing the lien-release amount paid in full. Jim
12 Sawitzke, the bank's representative, testified that the invoice
13 was "important" for OSB in funding the second draw. He also
14 testified that "[w]e would never fund a draw request if we hadn't
15 had evidence that the previous draw request - that trades for the
16 previous request had been made." RDC has cited no evidence in
17 the record that refutes this testimony.

18 Regarding the third element of equitable estoppel, RDC's
19 repudiation of its statement in the Release that it had been paid
20 would result in a mechanics' lien senior to OSB's lien, which OSB
21 secured while relying on RDC's statement. This result is
22 injurious. The bankruptcy court's decision to apply all post-
23 release payments to post-release invoices vitiates this injury
24 and applies the elements of estoppel without clear error.
25 Accordingly, we agree with the bankruptcy court's accounting set
26 forth in its Memorandum Decision, which leaves RDC with a secured
27 claim senior to OSB's lien in the sum of \$10,974.13 and nothing

28

1 more.⁸

2 **B. The Amount and Nature of RDC's Claim Against the Estate**⁹

3 At the outset, we note that the trustee's avoidance rights
4 under § 544 are not implicated in this appeal. In its Memorandum
5 Decision the court referred to the trustee's avoidance powers
6 under § 544 in relation to RDC's claim.¹⁰ At oral argument,
7 however, the trustee clarified that he was contesting allowance
8 of RDC's claim in his status as the representative of the
9 bankruptcy estate.¹¹

10 _____
11 ⁸ RDC also assigns error to the court's failure to credit
12 against the pre-Release invoices the payments of \$193,807.76 paid
13 prior to the Release date of April 13, 2006. The bankruptcy
14 court, however, found that RDC's books and records were
15 inconsistent with its assertion that the payments of \$193,807.76
16 were payments received before the date the Release was signed.
17 On this record, we perceive no error in the court's review of the
18 documentary evidence.

19 ⁹ In the Joint Pretrial Statement, filed by the trustee and
20 RDC only, the parties characterized the nature of the action as
21 one to determine the amount of RDC's claim and whether it was
22 secured or unsecured. The parties represented that there were no
23 contested factual issues and set forth the issues of law as
24 follows: (1) whether the Release waived any mechanics' lien
25 claim against Turner-Dunn for \$778,377.90; (2) whether RDC is
26 estopped from asserting a secured claim in the amount of
27 \$778,377.90; and (3) whether RDC accepted the "Note TD" in
28 partial payment for its services, and, therefore, its lien must
reduced by the amount of the "Note TD".

¹⁰ The court, in passing, mentions the trustee's rights
under § 544. See Memorandum Decision 8:18-19; 10:4-5. Moreover,
to compound the confusion, both the Appellee and Appellant make
cursory reference to the trustee's rights under § 544. See
Appellee's Opening Br. at p. 15; Appellant's Reply Br. at p. 11.

¹¹ Section 544(a) grants the trustee "the rights and powers
of a hypothetical creditor who obtained a judicial lien on all
the property in the estate at the date the petition in bankruptcy
(continued...)

1 Under § 541(a),¹² the trustee succeeds to the debtor's
2 rights at the time of its filing and is subject to such claims
3 and defenses as might have been asserted against the debtor but
4 for the filing. Equitable Bank of Littleton, N.A. v. Jobin (In
5 re Twenty-Four Hour Nautilus Swim & Fitness Ctr., Inc.), 81 B.R.
6 71, 74 (D. Col. 1987). See also Carroll v. Tri-Growth Centre
7 City, Ltd. (In re Carroll), 903 F.2d 1266, 1271 (9th Cir. 1990)
8 (noting that a debtor's rights under a contract are not enlarged
9 under the Code).

10 While OSB could rely upon the doctrine of equitable estoppel
11 to enforce the Release, the trustee does not seek application of
12 the doctrine, nor could he because Turner-Dunn was not misled to
13 its detriment. In reality, Turner-Dunn benefitted from the
14 Release because without it Parcel FF could not have been
15 refinanced.

16 The trustee maintained in his brief that Turner-Dunn and RDC
17 agreed that payment of the released amount would come from future
18 home sales, as evidenced by the "Note TD." The trustee asserted
19 that this agreement was binding. Sec. Trust & Sav. Bank v. June,
20 38 Ariz. 513, 517, 1 P.2d 970, 971 (1931). Accordingly, the
21 trustee argued that payments made to RDC after the issuance of
22 the "Note TD" and Release from sources other than home sales
23

24 ¹¹(...continued)
25 was filed." Neilson v. Chang (In re First T.D. & Inv., Inc.),
26 253 F.3d 520, 526 (9th Cir. 2001). Under § 544(a), the trustee
27 steps into the shoes of a lien creditor, with all its rights and
28 powers under state law, and not into the shoes of the debtor.

¹² Section § 541(a) provides that all legal or equitable
interests of the debtor become property of the estate.

1 could not be applied to RDC's unsecured claim and must instead
2 reduce its secured claim. The trustee asserts that he is
3 entitled to the same effect of the lien release as the lender
4 because, in pertinent part, ARIZ. REV. STAT. § 33-1008(A) provides
5 "[a]ny written consent given by any claimant pursuant to this
6 section is unenforceable unless the claimant executes and
7 delivers a waiver and release. This waiver and release is
8 effective to release the property for the benefit of the owner .
9 . . ." ARIZ. REV. STAT. § 33-1008(A) (emphasis added).

10 We agree that the trustee is entitled to the same benefit of
11 the lien release as OSB: any payments made on the total sums due
12 RDC after the release date should be applied against the new
13 accruing lien rights of RDC as to TD, the owner, same as to OSB,
14 the lender. Using the bankruptcy court's accounting, this leaves
15 RDC with the same \$10,974.73 priority secured claim against the
16 estate as against OSB.

17 Here our analysis, however, parts from that of the
18 bankruptcy court, which concluded, without adequate findings,
19 that as a result of the Release RDC was not entitled to any claim
20 at all.¹³ As discussed above, under § 541 the trustee succeeds
21 to the position of the debtor. The undisputed testimony of both
22

23 ¹³ The bankruptcy court appeared to base this conclusion on
24 an undeveloped § 544 theory, a theory neither asserted now by the
25 trustee nor supported by the factual findings made by the court.
26 In the discussion section of the Memorandum Decision, the court
27 used such terms as "hold out to the world" and "held out to
28 others" when referring to RDC's assertion in the Release that it
had been paid the lien Release amount. The evidence in the
record shows the Release was not a recorded document and was seen
only by OSB and TD.

1 RDC and TD witnesses at trial supports an outcome that would
2 leave RDC with an unsecured claim for its unpaid balance. This
3 outcome also finds support under JWJ Contracting, 287 B.R. at
4 508-509, (which rejected the new value theory of the preference
5 defendant only because it was based on a secured claim which had
6 been released, not an unsecured claim which the contractor
7 continued to hold), by the undisputed facts in the pretrial
8 order, and by analysis under Arizona contract law.

9 The record reflects discussions regarding payment from
10 future home sales, but those discussions never resulted in an
11 agreement. On that point the parties and the bankruptcy court
12 agree.¹⁴ That those discussions did not result in a further
13 writing is not fatal to the parties' agreement for repayment.
14 Phoenix Orthopaedic Surgeons v. Peairs, 164 Ariz. 54, 57-58, 790
15 P.2d 752 (Ariz. Ct. App. 1989) (stating that there can be a
16 modification of a written agreement without a further writing).
17 The testimony shows that RDC also relied on Dunn's personal
18 assets to pay at least a portion of the lien-release amount.
19 This agreement was partially performed because Dunn testified
20 that a portion of the money paid to RDC came from personal funds
21 that he borrowed on his house and his mother's house. The
22 bankruptcy court's accounting, which we will not disturb, applied
23 those payments to the unreleased lien amounts. That done, the
24 oral agreement of the parties would leave RDC with an unsecured
25 claim for the unpaid balance (total billings of \$1,382,981.39
26 minus the stipulated credits of \$593,807.76 would leave an unpaid

27
28 ¹⁴ See Memorandum Decision 4:24-25.

1 amount of \$789,173.63).

2 We are mindful of the strong language in the bankruptcy
3 court's Memorandum Decision which expresses a finding of the
4 court that the joinder of RDC with the debtor in creating a
5 subterfuge to OSB was a wrong-doing that should be "punished" by
6 the court's decision. The record and law do not support that
7 "punishment" being total loss of RDC's unsecured claim. However,
8 the Code¹⁵, under appropriate circumstances, gives the court the
9 authority to treat even an unsecured claim differently than
10 others. For this reason, we vacate that portion of the
11 bankruptcy court's Judgment that allows RDC no claim beyond its
12 priority lien of \$10,971.73 and remand this issue to the
13 bankruptcy court for further proceedings, including, if the court
14 deems appropriate, the entry of additional findings to support
15 the treatment of the remainder of RDC's claim.

16 **C. Interest and Attorney Fees**

17 RDC contends the bankruptcy court erred by not awarding it
18 prejudgment interest and legal fees and costs pursuant to ARIZ.
19 REV. STAT. § 32-1129.01(K) and (M).

20 Subsection (K) provides that if the owner does not make
21 timely progress payments, "the owner shall pay the contractor
22 interest at the rate of one and one-half per cent a month . . .
23 on the unpaid balance, or at a higher rate as the parties to the
24 construction contract agree." ARIZ. REV. STAT. § 32-1129.01(K).
25 Section 4.1.3 of the contract between Turner-Dunn and RDC

27 ¹⁵ See, for example, § 510(c), which provides for equitable
28 subordination in a proper circumstance.

1 provides that payments due and unpaid shall bear interest from
2 the date the payment is due at the legal rate prevailing from
3 time to time at the place where the project is located. RDC
4 asserts that it is entitled to 18% interest.

5 OSB contends that the statute applies only in an action
6 against the owner, Turner-Dunn, to collect payments, not in an
7 action to foreclose a mechanics' lien. However, prejudgment
8 interest is a lienable item and we can discern no bar to an award
9 of interest on RDC's claim here. See 53 Am. Jur. 2d Mechanics'
10 Liens § 249 (2008). Accordingly, we hold that RDC is entitled to
11 interest on its claim, but leave it to the bankruptcy court to
12 determine when interest began to accrue and the amount.¹⁶

13 Subsection (M) provides for an award of attorneys' fees only
14 to the "successful party." The trial court has discretion to
15 determine who is the successful party. Schwartz v. Farmers Ins.
16 Co. of Az., 166 Ariz. 33, 38, 800 P.2d 20, 25 (1990). "The use
17 of a 'percentage of success factor' test to determine the
18 relative success of the parties with regard to the various claims
19 has been held to be appropriate . . . as has a 'totality of the
20 litigation' test." Id. The record does not reflect any
21 consideration of whether RDC was a successful party. Moreover,
22 our decision here grants RDC a greater degree of success than
23 under the bankruptcy court's ruling. Therefore, on remand, the
24 bankruptcy court should determine whether RDC has any right to

26 ¹⁶ The interest should be separately calculated on the
27 senior secured claim and the junior secured claim. It should
28 also be calculated to the date of the petition on the unsecured
claim and as appropriate thereafter.

1 its attorneys' fees and costs and, if so, determine the
2 appropriate amount.

3 **D. The Cross-Appeal**

4 **1. The Substitution Motion**

5 While this appeal was pending, OSB and WRI Investments III,
6 L.L.C. ("WRI") filed a motion to substitute WRI in place of OSB
7 as the real party in interest on the grounds that all of the
8 parties in the adversary proceeding, except RDC, entered into a
9 settlement agreement. The settlement provided that OSB would
10 immediately receive certain funds which would not be subject to
11 disgorgement. WRI and the other approximately fourteen
12 mechanics' lien claimants, except RDC, would receive funds that
13 included the amount of RDC's claim and would be distributed under
14 a formula only after a final judgment determining the amount of
15 RDC's claim was entered. Therefore, WRI and the other claimants
16 bear the risk of any modification to RDC's judgment that was
17 entered in the bankruptcy court. The motion was premised on Fed.
18 R. Civ. P. 25(c).

19 Fed. R. Civ. P. 25(c) provides that "[i]n the case of a
20 transfer of interest the action may be continued by or against
21 the original party, unless the court upon motion directs the
22 person to whom the interest is transferred to be substituted in
23 the action or joined with the original party." Fed. R. Civ. P.
24 25(c). "Rule 25(c) is not designed to create new relationships
25 among parties to a suit but is designed to allow the action to
26 continue unabated when an interest in the lawsuit changes hands."
27 Educ. Credit Mgmt. Corp. v. Bernal (In re Bernal), 207 F.3d 595,
28 598 (9th Cir. 2000).

1 An order of joinder is merely a discretionary determination
2 by the court that the transferee's presence would facilitate the
3 conduct of the litigation. Id.; See Minn. Mining & Mfg. Co. v.
4 Eco Chem, Inc., 757 F.2d 1256, 1263 (Fed. Cir. 1985) (noting that
5 substitution under Rule 25(c) is purely a matter of convenience).
6 Because it makes no practical difference whether WRI is joined in
7 this appeal, we deny the motion.

8 **2. The Merits of the Cross-Appeal**

9 Under ARIZ. REV. STAT. § 33-992.01(C)(1), the Preliminary
10 Twenty-Day Notice required to be attached to a mechanics' lien
11 must provide "[a] general description of the labor, professional
12 services, materials, machinery, fixtures or tools furnished or to
13 be furnished." OSB asserts in its cross-appeal that RDC's
14 Preliminary Twenty-Day Notice contained an inadequate description
15 of the work because it merely stated "materials and/or labor."
16 OSB contends the statutory requirements for mechanics' liens must
17 be strictly followed to perfect a lien. MLM Constr. Co., Inc. v.
18 Pace Corp., 172 Ariz. 226, 229, 836 P.2d 439 (1992).

19 In deciding whether the statutory requirements should be
20 strictly enforced, the MLM court acknowledged that the underlying
21 purpose of the mechanics' lien statutes was to protect laborers
22 and materialmen who enhance the value of another person's
23 property and, therefore, they must be liberally construed. To
24 harmonize the two principles, one of strictness and the other of
25 liberality, the court found that "substantial compliance not
26 inconsistent with the legislative purpose is sufficient." Id. at
27 228.

28 While we acknowledge the description in RDC's preliminary

1 notice is cursory, we do not disagree with the bankruptcy court's
2 finding that RDC's lien was valid and therefore met the
3 requirements for substantial compliance. See also Ray Heating
4 Prods. Inc. v. Miller, 74 Nev. 124, 125, 324 P.2d 237, 238 (1958)
5 (finding that deficiencies in the description of the work does
6 not render a mechanics' lien fatally defective).

7 **VI. CONCLUSION**

8 For the reasons stated herein, we AFFIRM the bankruptcy
9 court's ruling that RDC had a valid lien on Parcel FF and that
10 the doctrine of equitable estoppel prevented RDC from asserting a
11 lien senior to OSB's lien in any amount over \$10,974.73. We
12 VACATE the bankruptcy court's decision to disallow the remainder
13 of RDC's claim and REMAND for further proceedings consistent with
14 this Memorandum.