

MAY 05 2005

HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

6 In re:) BAP No. NV-04-1436-BmKMa
7)
8 BILTMORE VACATION VILLAGE,) Bk. Nos. S-01-17904-BAM
9 LLC,) S-01-22392-BAM
10) (Jointly Administered)
11 Debtor.)
12)
13) Adv. No. S-03-1190-BAM
14 In re:)
15)
16 BILTMORE VACATION RESORTS,)
17 INC.,)
18)
19 Debtor.)
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MEMORANDUM¹

Argued and Submitted on March 24, 2005
at Las Vegas, Nevada

Filed - May 5, 2005

Appeal from the United States Bankruptcy Court
for the District of Nevada, Southern Division

Honorable Kathleen Thompson Lax, Bankruptcy Judge, Presiding

Before: BAUM², KLEIN and MARLAR, Bankruptcy Judges.

¹ This disposition is not appropriate for publication and may not be cited except when relevant under the doctrines of law of the case, res judicata or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

² Hon. Redfield T. Baum, Sr., Bankruptcy Judge for the District of Arizona, sitting by designation.

1 Appellant SSL, LLC ("SSL") appeals the bankruptcy court's
2 decision denying SSL's secured claim. We **AFFIRM**.

3 **FACTS**

4 On August 1, 2001, an involuntary petition for relief under
5 Chapter 7 of the Bankruptcy Code³ was filed against debtor
6 Biltmore Vacation Village, LLC⁴ ("Biltmore"). On November 28,
7 2001, Biltmore Vacations Resorts, Inc., filed a Chapter 11 case,
8 which was converted to Chapter 7 on March 27, 2002.

9 SSL provides engineering services and materials used in the
10 construction of retaining walls. SSL submitted a bid for work on
11 a project on Debtor's real property located in Bullhead City,
12 Arizona. Although no written contract was entered into, SSL
13 began working with a subsidiary of Biltmore, Sage Design
14 Builders, Inc. ("Sage"). SSL produced some prefabricated
15 retaining walls offsite, and drafted some engineering and
16 elevation drawings. On December 31, 1999, SSL prepared and sent
17 an invoice to Sage. The invoice⁵ totaled \$126,213.55 of which
18 \$61,309.44 was for professional engineering services and
19 \$64,904.11 for materials and construction. On May 24, 2002, SSL
20 filed a proof of claim ("Claim") totaling \$111,349.49⁶, asserting

21
22 ³ Unless otherwise indicated, all chapter and section references are
23 to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 and all rule references are
24 to the Federal Rules of Bankruptcy Procedure ("Fed. R. Bankr. P."), Rules
1001-9036, which make applicable portions of the Federal Rules of Civil
Procedure ("Fed. R. Civ. P.).

25 ⁴ This entity is also known as Biltmore Vacation Resorts, LLC;
Dynamic Design Architecture, LLC; and Sage Design Builders, Inc.

26 ⁵ The invoice is in a different amount than SSL's proof of claim.

27 ⁶ The Claim is for \$111,349.49 secured by a mechanic's lien for the
28 period November 4, 1999 through December 17, 1999. The Claim is broken
down into principal of \$84,339.80; interest from December 31, 1999,
through October 9, 2001, of \$15,462.30; and attorneys fees and costs of
(continued...)

1 a lien against Debtor's real property based on Arizona's
2 mechanic's lien law.

3 On July 16, 2003, the chapter 7 trustee, Timothy Cory, filed
4 a "Complaint To Determine Validity Or Extent Of Liens"
5 ("Complaint") against multiple creditors who had filed secured
6 claims. The Complaint sought to reduce the amount of certain
7 secured claims and to eliminate other secured claims entirely.
8 Prior to trial, the trustee settled with some of the defendants,
9 and SSL is the only defendant in this appeal.

10 A trial was held on the SSL Claim on May 18-19, 2004. The
11 trustee argued that SSL's lien was not enforceable because SSL
12 did not provide any benefit to the property, or because SSL did
13 not comply with Arizona law in order to properly perfect its
14 mechanic's lien. SSL argued that it properly complied with
15 Arizona law and was entitled to a mechanic's lien in the amount
16 of \$126,213.55, as contained on its invoice.

17 The bankruptcy court disallowed SSL's entire Claim by
18 "Memorandum of Decision on Trial" ("Decision"), on June 24, 2004,
19 and judgment was entered on August 18, 2004.

20 SSL's appeal is timely. The sole issue on appeal is whether
21 the bankruptcy court properly denied a mechanic's lien for
22 professional services.

23 JURISDICTION

24 The bankruptcy court had jurisdiction pursuant to 28
25 U.S.C. § 1334 and 157(b)(2)(A), (B), (K), and (O). This Court has
26 jurisdiction under 28 U.S.C. § 158(a)(1).

27
28 ⁶(...continued)
\$11,424.89. It is noted that the separately stated principal, interest,
fees and costs total \$111,226.99, which is \$122.50 less than the amount
of the Claim.

1 The bankruptcy court properly focused on when SSL first
2 furnished professional services. SSL served its preliminary
3 twenty day notice on the Debtor on December 13, 1999. SSL
4 presented some evidence that the date it first furnished
5 professional services was November 24, 1999. The court heard
6 testimony from Scott Thompson, a principal of SSL, that an oral
7 authorization to proceed with the work was given by Sage on
8 November 24, 1999. If November 24, 1999, is the operative date,
9 then the preliminary notice dated December 13, 1999, is timely
10 because it was given nineteen days after SSL first furnished
11 professional services.

12 However, the bankruptcy court reviewed other documentary
13 evidence indicating that the date SSL first furnished
14 professional services was November 4, 1999. The Debtor's own
15 claim states that the debt was incurred starting on November 4,
16 1999. If November 4, 1999, is the operative date, then the
17 preliminary notice dated December 13, 1999, is untimely because
18 it was given thirty-nine days after SSL first furnished
19 professional services. The bankruptcy court found:

20 Based on a consideration of the testimony and all of
21 the documentary evidence admitted on SSL's claim in
22 this case, this court finds that SSL first furnished
labor, services and materials on the Project no later
than November 4, 1999.

23 Aplt. App. at 47.

24 Arizona law also provides for a mechanic's lien for
25 particular services provided within the preceding twenty days of
26 the filing of the preliminary notice. ARS § 33-992.01E
27 provides:

28 If labor, professional services, ... are furnished to
a jobsite by a person who elects not to give a

1 preliminary twenty day notice as provided in
2 subsection B of this section, that person is not
3 precluded from giving a preliminary twenty day notice
4 not later than twenty days after furnishing other
5 labor, professional services, ... to the jobsite. The
6 person, however, is entitled to claim a lien only for
7 such labor, professional services, ... furnished
8 within twenty days prior to the service of the notice
9 and at any time thereafter.

6 The bankruptcy court considered this, but, based on the
7 evidence presented was unable to allocate any particular services
8 on the Claim to the twenty day period prior to the preliminary
9 notice. The bankruptcy court held:

10 In theory, then, SSL might be able to support a
11 mechanics lien claim for some discrete professional
12 services rendered within the 20 days prior to December
13 13, 1999. They did not do so and the evidence
presented at trial does not support an allocation of
the claim either by timing or by amount incurred
(emphasis added).

14 Aplt. App. at 48.

15 **A.**

16 **The Bankruptcy Court's Decision Denying SSL'S Mechanic's**
17 **Lien Claim Was Not Clearly Erroneous.**

18 This Court will not disturb a lower court's findings of fact
19 unless we are left with the definite and firm conviction that a
20 mistake has been made. See In re Banks, 263 F.3d 862, 869 (9th
21 Cir. 2001). Here, the bankruptcy court held an evidentiary bench
22 trial and made credibility determinations of the witnesses for
23 both parties. Special deference is paid to a trial court's
24 credibility findings. See McClure v. Thompson, 323 F.3d 1233,
25 1241 (9th Cir. 2003); Fed. R. Bankr. P. 8013. Nothing in the
26 record causes this court to believe that the bankruptcy court's
27 factual findings were not plausible based on the evidence
28 presented. The bankruptcy court's findings that 1) November 4,

1 1999, is the date that SSL first furnished professional services
2 and, 2) that the evidence does not support an allocation of
3 services rendered within twenty days of the preliminary notice,
4 do not leave this court with a firm and definite conviction that
5 a mistake has been committed.

6 Even if this court thought another view of the evidence was
7 permissible, "[w]here there are two permissible views of the
8 evidence, the factfinder's choice between them cannot be clearly
9 erroneous." See United States v. Elliott, 322 F.3d 710, 715 (9th
10 Cir. 2003). As has been graphically described, "[t]o be clearly
11 erroneous, a decision must strike us more than just maybe or
12 probably wrong; it must ... strike us as wrong with the force of
13 a five-week-old, unrefrigerated dead fish." See Hayes v.
14 Woodford, 301 F.3d 1054, 1067 n.8 (9th Cir.2002) (internal
15 quotation omitted).

16 The bankruptcy court's decision is entirely plausible and is
17 in accord with the entire record in this matter. SSL failed to
18 timely serve its twenty day notice and failed to provide
19 sufficient evidence to claim a lien for services performed within
20 twenty days of the notice. Therefore, the bankruptcy court
21 correctly disallowed SSL's Claim under Arizona's mechanic's lien
22 law.⁷

26 ⁷ In addition, the record is unclear as to whether SSL timely filed
27 suit to foreclose on the lien as required by ARS § 33-998. If ARS § 33-
28 998 was not complied with, then the lien would also be avoided on these
alternative grounds. When questioned at oral argument, SSL's counsel
advised that a suit was timely filed under ARS § 33-998.

1 B.

2 **The Record Supports Affirming On The Alternative Ground That**
3 **SSL'S Professional Services Did Not Enhance The Value Of Estate**
4 **Property.**

5 In reviewing decisions of the bankruptcy court, we may
6 affirm on any ground supported by the record. See Forest
7 Guardians v. U.S. Forest Serv., 329 F.3d 1089, 1097 (9th Cir.
8 2003). Even if the lower court did not reach the issue, we can
9 affirm on alternative grounds if supported by the record. See
10 Keyser v. Sacramento City Unified Sch. Dist., 265 F.3d 741, 750
11 (9th Cir. 2001).

12 Here, the trustee argues that SSL did not deliver
13 professional services to the Debtor nor did SSL's services bestow
14 a benefit to the property. The trustee cites to Fortune v.
15 Superior Court, 768 P.2d 1194 (Ariz. Ct. App. 1989) and Michael
16 Weller, Inc. v. Aetna Cas. & Sur. Co., 614 P.2d 865 (Ariz. Ct.
17 App. 1980) for the principle that, under Arizona law, a
18 mechanic's lien for services must enhance the value of the
19 property. The Fortune court held that mechanic's liens are:

20 [l]imited to the value of the labor or services
21 actually furnished at the time the lien is filed (and
22 which enhanced the value of the land)... (emphasis
added).

23 Fortune, 768 P.2d at 1197. There is no evidence in the record
24 that SSL provided materials or services which enhanced the value
25 of the property. In determining that no value was added to the
26 property relating to the portion of SSL's invoice for materials
27 and construction, the bankruptcy court noted that:

28 It is undisputed that no retaining walls were built on
the Property, that no construction of retaining walls

1 was commenced on the Property, and that no materials
2 relating to the construction of retaining walls were
delivered to the Property by SSL (emphasis added).

3 Aplt. App. at 47. For professional services, the bankruptcy
4 court determined that:

5 There is no evidence that the engineering calculations
6 were delivered to Biltmore or any agent of Biltmore.
7 (Ex. M) There is some evidence that the elevations
drawings were made available to the general contractor
on the Project. (Ex. M)

8 Aplt. App. at 46. The bankruptcy court also considered evidence
9 from the architect on the project that no engineering drawings or
10 services of SSL were used on the property. Aplt. App. at 91,
11 138. Although some elevation drawings were made available,
12 nowhere in the record does SSL provide evidence that those
13 drawings or any other professional services enhanced the value of
14 the estate property. Therefore, we also affirm on the
15 alternative ground that SSL's mechanic's lien claim fails because
16 there was no enhancement to the value of the estate property.

17 **CONCLUSION**

18 For the foregoing reasons, the judgment of the bankruptcy
19 court is **AFFIRMED**.