

MAY 11 2011

SUSAN M SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP No. AZ-10-1187-MkPaJu
)
 BRYAN L. FUNK and TINA R.) Bk. No. 08-18920-RJH
 FUNK,)
) Adv. No. 09-00345-RJH
 Debtors.)
)
 BRYAN L. FUNK; TINA R. FUNK,)
)
 Appellants,)
)
 v.) M E M O R A N D U M *
)
 G.W. CUSTOM HOMES, LLC,)
)
 Appellee.)

Argued and Submitted on February 18, 2011
at Phoenix, Arizona

Filed - May 11, 2011

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

Honorable Randolph J. Haines, Bankruptcy Judge, Presiding

Appearances: Carlos. M. Arboleda, Esq., Arboleda Brechner
argued for Appellants Bryan L. Funk, Tina R. Funk.
Theodore P. Witthoft, Esq., Collins, May, Potenza,
Baran & Gillespie, P.C. argued for Appellee G.W.
Custom Homes, LLC.

Before: MARKELL, PAPPAS and JURY, Bankruptcy Judges.

*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 **INTRODUCTION**

2 Appellants, Bryan and Tina Funk ("Funks" or "Appellants"),
3 appeal from the bankruptcy court's judgment granting summary
4 judgment for Appellee, G.W. Custom Homes, LLC ("G.W. Homes" or
5 "Appellee"), on G.W. Homes' adversary complaint to determine
6 dischargeability of certain debt under Section 523(a)(6).¹ We
7 REVERSE and REMAND.

8 **I. FACTS**

9 On August 14, 2006, the Funks entered into a contract
10 ("Original Agreement") with G.W. Homes that required G.W. Homes
11 to construct three homes (referred to collectively as the
12 "Properties" or individually as "Lot A," "Lot B" and "Lot C") in
13 Phoenix, Arizona. G.W. Homes began work on the Properties. It
14 did not, however, send a twenty-day preliminary lien notice
15 pursuant to Arizona Revised Statute ("ARS") § 33-992.01. The
16 consequence of this failure was that G.W. Homes did not obtain an
17 enforceable statutory mechanics' and materialmen's lien
18 encumbering the Properties.²

19
20 ¹All references to "Section" shall be to provisions of the
21 Bankruptcy Code, 11 U.S.C. section 101 et seq., unless otherwise
22 indicated. All references of "Rule" are to the Federal Rules of
23 Bankruptcy Procedure. All references to "FRCP" shall be to the
24 Federal Rules of Civil Procedure.

25 Section 523(a)(6) provides that "[a] discharge under section
26 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not
discharge an individual debtor from any debt . . . for willful
and malicious injury by the debtor to another entity or to the
property of another entity."

²Notwithstanding G.W. Homes' failure to send a preliminary
(continued...)

1 On September 25, 2006, however, G.W. Homes sent the Funks a
2 letter ("Modification Letter"). The Modification Letter sought
3 to modify the Original Agreement by reducing the cost of
4 construction and granting a second-in-position consensual lien on
5 the Properties in favor of G.W. Homes. Bryan Funk, but not Tina
6 Funk, acknowledged and accepted the modification and lien by
7 placing his initials at the bottom of the Modification Letter as
8 requested by G.W. Homes. Notwithstanding this modification, the
9 Funks never executed and G.W. Homes never filed a deed of trust
10 securing this obligation.

11 Lot C's sale closed on August 1, 2007, and Lot B's sale
12 closed on September 7, 2007. Prior to the sale of Lots B & C,
13 the Funks' attorney sent correspondence to G.W. Homes indicating
14 that the Funks knew of and acknowledged the existence of the
15 consensual second lien upon the Properties, and that the Funks
16 understood they were to pay G.W. Homes out of the escrow related
17 to the sale of the Properties.³ As it turned out, however, the
18
19

20 ²(...continued)
21 notice within twenty days of beginning construction,
22 ARS § 33-992.01 provides that G.W. Homes was not precluded from
23 giving a preliminary notice after expiration of twenty days. ARS
24 § 33-992.01(E). However, G.W. Homes would be entitled to claim a
lien only for such labor or professional services furnished
within twenty days prior to service of the notice and at any time
thereafter. Id.

25 ³In his Rule 2004 examination, Bryan Funk also admitted that
26 it was his understanding that the Modification Letter created a
lien on all the Properties.

1 Funks did not pay G.W. Homes with the proceeds from the sales.⁴
2 G.W. Homes did not attempt to record and follow its lien on Lots
3 B & C to pursue the purchasers of those lots.

4 On December 30, 2008, the Funks filed a voluntary Chapter 7
5 petition. On March 31, 2009, G.W. Homes filed an adversary
6 complaint asserting that the debt owed by the Funks related to
7 the Properties was nondischargeable pursuant to Sections
8 523(a)(2), (4), (6) & (7).

9 G.W. Homes filed its first motion for partial summary
10 judgment on its Section 523(a)(6) claim on July 23, 2009, arguing
11 that the Funks converted property consisting of the sale proceeds
12 which were subject to an equitable lien in its favor. On
13 September 30, 2009, the bankruptcy court ruled that G.W. Homes
14 was entitled to an equitable lien on the proceeds created by the
15 Modification Letter, and that the Funks converted those proceeds,
16 making the debt owed to G.W. Homes nondischargeable under Section
17 523(a)(6).⁵

18 On December 24, 2009, G.W. Homes filed a second motion for
19 partial summary judgment on the issue of attorneys' fees related
20 to the debt. The bankruptcy court heard that motion on April 5,
21

22 ⁴The Funks asserted before the bankruptcy court, and on
23 appeal, that they did not pay G.W. Homes the proceeds from the
24 sales because G.W. Homes did not satisfactorily complete
construction on Lot A. However, the judgment on appeal is
related only to Lots B and C.

25 ⁵In making its decision that the debt owed to G.W. Homes was
26 nondischargeable, the bankruptcy court relied, in part, on
Lockerby v. Sierra, 535 F.3d 1038 (9th Cir. 2008).

1 2010. The bankruptcy court also granted this motion for summary
2 judgment. Thereafter, on May 18, 2010, the bankruptcy court
3 issued a final judgment in favor of G.W. Homes in the amount of
4 \$115,000.

5 The Funks timely appealed.

6 **II. JURISDICTION**

7 The bankruptcy court had jurisdiction under 28 U.S.C.
8 §§ 1334 and 157(b)(2)(I). This panel has jurisdiction to hear
9 this appeal pursuant to 28 U.S.C. § 158(a)(1).

10 **III. ISSUES**

- 11 A. Should the panel consider issues raised by the Funks
12 for the first time on appeal?
- 13 B. Can an equitable lien ever be the basis of a conversion
14 claim?
- 15 C. Is an equitable remedy, such as an equitable lien, only
16 appropriate where there is no adequate remedy available
17 at law?
- 18 D. Is the prevailing party in this appeal entitled to
attorneys' fees and costs pursuant to ARS § 12-341.01?
Related to this point, is G.W. Homes entitled to
attorneys' fees and costs as a sanction for bad faith
conduct?

19 **IV. STANDARD OF REVIEW**

20 We review the bankruptcy court's grant of summary judgment
21 de novo. Woodworking Enters. v. Baird (In re Baird), 114 B.R.
22 198, 201 (9th Cir. BAP 1990). The task of an appellate court in
23 reviewing a summary judgment is the same as a trial court under
24 FRCP 56. Id. Thus, "[v]iewing the evidence in the light most
25 favorable to the non-moving party, the appellate court must
26 determine whether the bankruptcy court correctly found that there

1 was no genuine issue of material fact and that the moving party
2 is entitled to judgment as a matter of law." Id. (citing FRCP
3 56(c)).

4 V. DISCUSSION

5 **A. The panel will consider whether an equitable lien can serve
6 as the basis for a conversion claim, and whether a court can
7 provide an equitable remedy where there is an adequate
8 statutory remedy, even though those issues are raised for
9 the first time on appeal**

8 The Funks raise two issues on appeal. First, the Funks
9 assert that the panel should reverse the bankruptcy court's
10 judgment because an equitable lien can never serve as the basis
11 of a conversion claim. Second, the Funks assert that reversal is
12 appropriate on the basis that a court cannot provide an equitable
13 remedy where there is an adequate remedy at law. G.W. Homes
14 contends, however, that the panel should not consider the issues
15 raised by the Funks as those issues were not raised before the
16 bankruptcy court.

17 Generally, a federal appellate court will not consider an
18 issue raised for the first time on appeal. United States v.
19 Patrin, 575 F.2d 708, 712 (9th Cir. 1978) (citing Singleton v.
20 Wulff, 428 U.S. 106, 120, 96 S. Ct. 2868, 2877, 49 L. Ed. 2d 826
21 (1976)). However, like most rules of law, this general rule is
22 subject to exceptions. Specifically, "[t]hree exceptions to this
23 rule exist: (1) in an 'exceptional' case when review is necessary
24 to prevent a miscarriage of justice or to preserve the integrity
25 of the judicial process, (2) when a new issue arises while appeal
26 is pending because of a change in law, or (3) when the issue is

1 purely one of law and the necessary facts are fully developed."
2 Romain v. Shear, 799 F.2d 1416, 1419 (9th Cir. 1986).

3 With regard to the third exception, the "principle
4 underlying this exception is that the party against whom the
5 issue is raised must not be prejudiced by it." Patrin, 575 F.2d
6 at 712; See also United States v. Shaltry (In re Home Am. T.V.-
7 Appliance Audio, Inc.), 232 F.3d 1046, 1052 (9th Cir. 2000). For
8 instance, a court should not consider an issue raised for the
9 first time on appeal if the party against whom the issue is
10 raised "might have tried his case differently either by
11 developing new facts in response to or advancing distinct legal
12 arguments against the issue." Id.

13 **1. The issues raised by the Funks here on appeal were not**
14 **raised before the bankruptcy court**

15 The Funks initially contend that they did assert before the
16 bankruptcy court that an equitable lien cannot serve as the basis
17 for a conversion claim. Specifically, the Funks contend, in
18 their Reply Brief before this Panel, that "[t]he [Funks] argued
19 below that [G.W. Homes] is merely an unsecured creditor; which is
20 another way of stating that [G.W. Homes] had no legal lien in the
21 subject real estate or its proceeds; which is also another way of
22 saying an 'equitable lien' does not create a sufficient legal
23 right to support the tort of conversion."

24 It is apparent that the reference to G.W. Homes as an
25 unsecured creditor was premised on the Funks' belief that the
26 bankruptcy court should not imply an equitable lien in favor of

1 G.W. Homes due to G.W. Homes' alleged unclean hands with regard
2 to the improvements on Lot A.⁶ This is a different argument than
3 arguing that an otherwise unsecured creditor cannot assert an
4 equitable lien. If the Funks meant to argue that an equitable
5 lien could not serve as the basis for a conversion claim, the
6 Funks would have specifically argued such and provided the
7 bankruptcy court with case law that supports such an assertion.
8 Although the case law the Funks cite on appeal was not difficult
9 to locate, the Funks failed to provide it to the bankruptcy
10 court. As such, the only reasonable conclusion is that the Funks
11 have first raised the issue that an equitable lien cannot serve
12 as the basis for a conversion claim here on appeal.

13 Second, the Funks assert that they proffered to the
14 bankruptcy court the argument that an equitable lien is only
15 appropriate when there is no adequate remedy at law. In
16 particular, the Funks suggest that they asserted such when they
17 argued that G.W. Homes failed to protect its interest with any of
18 a number of available remedies at law, such as a mechanics' and
19 materialmens' statutory lien. However, the Funks' assertion is
20 not convincing.

21 If the Funks raised before the bankruptcy court the issue
22 that a court should not provide an equitable remedy when there is
23 an adequate remedy at law, one would think that the Funks surely

24 ⁶For instance, in the Funks' Response in Opposition to
25 G.W. Homes' Motion for Partial Summary Judgment, the Funks sets
26 forth, "[i]t is an (sic) historical legal maxim that one who
seeks equity must do equity."

1 could point to a specific passage in the record or to an instance
2 where they cited an applicable case. But the Funks have not, and
3 the record shows that the Funks cannot. We thus reject the
4 contention that the issue was raised before the bankruptcy court.

5 The panel must next determine whether there is an applicable
6 exception to the general rule that an appellate court should not
7 consider issues raised for the first time on appeal.

8 **2. As the new issues raised on appeal are purely matters**
9 **of law that do not depend on the record, the panel will**
10 **consider the new issues raised for the first time on**
11 **appeal because G.W. Homes will not be prejudiced**

12 In this case, the first two exceptions to the bar against
13 raising issues for the first time on appeal do not apply. The
14 only applicable exception would seem to be the third exception,
15 which allows a court to consider new issues raised on appeal when
16 the issue is purely a matter of law and does not depend on the
17 factual record.

18 The issues the Funks raise here are purely matters of law
19 and the record is adequately developed. That said, according to
20 Patrin, 575 F.2d at 712, and Home America, 232 F.3d at 1052, the
21 panel should only consider issues raised for the first time on
22 appeal under this exception where the party against whom the
23 issue is raised will not be prejudiced.

24 G.W. Homes suggests that it will be prejudiced if the panel
25 considers the Funks' new arguments. In particular, G.W. Homes
26 suggests that it would not have agreed to allow a final judgment
to be entered regarding its Section 523(a)(6) claim as it would

1 have gone to trial on its other nondischargeability claims under
2 Section 523(a)(2),(4) and (7). Additionally, G.W. Homes asserts
3 that it would have raised distinct legal arguments against the
4 new issues raised on appeal similar to those it asserted in its
5 brief before this panel. G.W. Homes' assertions are not
6 persuasive.

7 The fact that G.W. Homes stipulated to the entry of a final
8 judgment on its Section 523(a)(6) claim will not prejudice G.W.
9 Homes. Specifically, reversal of the bankruptcy court's summary
10 judgment order will allow the bankruptcy court to retain
11 jurisdiction over all matters legitimately raised in the original
12 complaint; it restores the case to where it had been before entry
13 of judgment. Thus, G.W. Homes would be able to pursue each of
14 its additional nondischargeability claims against the Funks.
15 Moreover, although G.W. Homes maintains that, had the Funks
16 raised the arguments they raise on appeal before the bankruptcy
17 court, it would have raised distinct legal arguments and
18 developed additional facts, G.W. Homes failed to specifically
19 articulate what legal arguments it would have raised and what
20 facts it could have developed. As such, it appears that any
21 prejudice is minimal - confined to the actions related to this
22 appeal - and the Panel will consider the two legal issues raised
23 by the Funks on appeal.

24 **B. The bankruptcy court did not err in finding that an**
25 **equitable lien can serve as the basis of a conversion claim**
26 **under Arizona law**

The Funks ask this panel to reverse the bankruptcy court's

1 judgment on the grounds that an equitable lien cannot serve as
2 the basis of a conversion claim. "It is a fundamental bankruptcy
3 concept that property rights are to be determined pursuant to
4 state law." Butner v. United States, 440 U.S. 48, 55, 99 S. Ct.
5 914, 59 L. Ed 2d 136 (1979). As such, to determine the validity,
6 nature and effect of a lien courts must look to state law. In re
7 S. Cal. Plastics, 165 F.3d 1243, 1248 (9th Cir. 1999).

8 Under Arizona law, an equitable lien can arise from "an
9 express contract where the parties indicate an intent to charge
10 or appropriate particular property as security for an
11 obligation." Kalmanoff v. Weitz, 8 Ariz. App. 171, 172, 444 P.2d
12 728, 729 (Ariz. Ct. App. 1968). According to Wolfswinkel v.
13 Super. Ct., 145 Ariz. 154, 700 P.2d 852 (Ariz. Ct. App. 1984):

14 An equitable lien is a right over property
15 constituting an encumbrance, so that the property
16 itself may be proceeded against in an equitable
17 action and either sold or sequestered upon proof
of a contract out of which the lien could grow or
of a duty on the part of the holder so as to give
the other party a charge or lien on it.

18 145 Ariz. at 156, 700 P.2d at 854. An equitable lien "is merely
19 floating equity until the time that a judgment or decree is
20 rendered actually subjecting the property to the payment of the
21 debt or claim." Id.

22 Arizona law defines the tort of conversion "[a]s an act of
23 wrongful dominion or control over personal property in denial of
24 or inconsistent with the rights of another." Warfield v.
25 Gardner, 346 F. Supp. 2d 1033, 1045 (D. Ariz. 2004) (citing Case
26 Corp. v. Gehrke, 208 Ariz. 140, 143, 91 P.3d 362, 365 (Ariz. Ct.

1 App. 2004). "To maintain an action for conversion, a plaintiff
2 must have had the right to immediate possession of the personal
3 property at the time of the alleged conversion." Gehrke, 208
4 Ariz. at 143, 91 P.3d at 365 (citing Sears Consumer Fin. Corp. v.
5 Thunderbird Prods., 166 Ariz. 333, 335, 802 P.2d 1032, 1034
6 (Ariz. Ct. App. 1990); Empire Fire & Marine Ins. Co. v. First
7 Nat'l Bank of Ariz., 26 Ariz. App. 157, 159, 546 P.2d 1166, 1168
8 (App. 1976)). Key to this analysis is that, absent a present
9 possessory right over the personal property, no cause of action
10 for conversion may lie. 208 Ariz at 145, 91 P.3d at 367.
11 Consequently, to determine whether an equitable lien can ever
12 serve as the basis of a conversion claim, the panel must
13 determine if the equitable lien here constituted a present
14 possessory right over the sales proceeds.

15 Here, the bankruptcy court found that the September 25, 2006
16 Modification Letter created an equitable lien by agreement.
17 While the bankruptcy court acknowledged that an equitable lien
18 implied to rectify inequitable conduct attaches to property only
19 when the lien is declared in a judgment or decree, the bankruptcy
20 court asserted that an equitable lien created by agreement
21 attaches at the time of formation of the agreement creating the
22 lien. In support of its position, the bankruptcy court cited In
23 re Farnsworth, 384 B.R. 842 (Bankr. D. Ariz. 2008).

24 Farnsworth held that where an express agreement indicates an
25 intent to charge or appropriate particular property as security
26 for an obligation "courts will likely order the lien to relate

1 back to the time of the agreement." 384 B.R. at 850 (citing In
2 re Aumiller, 168 B.R. 811, 821 (Bankr. D. Col. 1994) ("An
3 equitable lien, although not judicially recognized until judgment
4 is rendered declaring its existence, relates back to the time it
5 was created by the conduct of the parties"). Farnsworth relied
6 on Aumiller, which cited to Illinois and California state law to
7 support the "relate back" proposition, and Arizona state law
8 appears to be in accord.

9 For example, while in Wolfswinkel, 145 Ariz. at 156,
10 700 P.2d at 854, the court described an equitable lien as "a mere
11 floating equity until the time a judgment or decree is rendered,"
12 the court did not foreclose the ability of a court to relate back
13 to the date of the agreement the lien's effective date if equity
14 so demands. In fact, according to American Jurisprudence 2d,
15 while "[a]n equitable lien is a mere floating equity until a
16 judgment or decree subjecting the property to the payment of the
17 debt or claim is rendered, once the judgment is entered, the lien
18 relates back to the time it was created by the conduct of the
19 parties." 51 Am. Jur. 2d Liens § 32 (2010)(footnote omitted).

20 Additionally, Aumiller set forth reasoning similar to that
21 of the Supreme Court of Arizona when the Supreme Court of Arizona
22 was hearing a case as a court of equity. Specifically, in
23 Stephen v. Patterson, 21 Ariz. 308, 188 P. 131 (Ariz. 1920), the
24 court set forth:

25 The form or particular nature of the agreement
26 which shall create a lien is not very material,
for equity looks at the final intent and purpose

1 rather than at the form, and if the intent appears
2 to give, or to charge, or to pledge, property real
3 or personal, as a security for an obligation,
4 . . . the lien follows.

5 21 Ariz. at 311, 188 P. at 132. Similarly, in Aumiller, based
6 upon the equitable maxim that "equity regards as done that which
7 a party has agreed to do," the court held that the equitable lien
8 attached at the time the party promised by agreement to give a
9 lien upon demand. 168 B.R. at 821. Consequently, regardless of
10 whether a court sits in equity in California, Illinois or
11 Arizona, the intent of the parties is dispositive in determining
12 when an equitable lien attaches.⁷

13 Thus, the bankruptcy court appropriately held that, as the
14 equitable lien was created by agreement, the equitable lien
15 ordered by the bankruptcy court on September 29, 2009, related
16 back to September 25, 2006. As the equitable lien attached to
17 the proceeds⁸ on September 25, 2006, when the sale of Lot C

18 ⁷See also Nunez v. Nunez (In re Nunez), 196 B.R. 150, 153 &
19 n.1 (9th Cir. BAP 1996) (holding that where an equitable lien is
20 created either by an express agreement or by the conduct of the
21 parties, equity requires that the lien relate back to when the
22 implied agreement took place).

23 ⁸Under ARS § 47-9315, a security interest in personal
24 property also attaches to the identifiable proceeds of the
25 collateral. However, security interests in real property are
26 governed by common law, not by Article Nine of the Uniform
Commercial Code. According to the Restatement (First) of
Restitution "[w]here the equitable lien is upon other property
the court will ordinarily decree that unless the holder of the
property pays the amount of the lien the property be sold and out
of the proceeds the amount of the lien be paid." Restatement
(First) of Restitution § 161, cmt. b (1937). Moreover, although
Arizona law has not specifically recognized that an equitable

(continued...)

1 closed on August 1, 2007, and the sale of Lot B closed on
2 September 7, 2007, G.W. Homes at the time of each closing had a
3 present possessory right in the proceeds of the sales.

4 Accordingly, there is no analytical error in holding that any
5 equitable lien would have arisen upon each closing. The error,
6 unfortunately, was holding that equitable liens arose in the
7 first place.

8 **C. The bankruptcy court erred in implying an equitable lien
9 where adequate remedies were available**

10 The Funks maintain that this panel should reverse the
11 bankruptcy court's judgment because an equitable remedy, such as
12 an equitable lien, is only appropriate when there is no adequate
13 remedy at law. In Arizona, "[w]here a statutory right is given,
14 with a statutory remedy provided to enforce that right, the
15 parties to whom the right is given are limited to the remedy
16 provided by statute." Nat'l. Sur. Co. v. Conway, 43 Ariz. 480,
17 487, 33 P.2d 276, 278-79 (Ariz. 1933). But where there is a
18 statutory right that provides no specific method of enforcement,

19 _____
20 ⁸(...continued)

21 lien on real property attaches to the proceeds of the real
22 property, the equitable maxims discussed herein and adopted by
23 Arizona courts dictate that it is the intent of the parties that
24 should guide any determination of whether an equitable lien on
25 real property also attaches to identifiable proceeds.

26 Here, the bankruptcy court found that the equitable lien
held by G.W. Homes attached to the proceeds of Lots B and C as
the court found that the Funks converted G.W. Homes' equitable
interest when they failed to pay G.W. Homes from the proceeds of
those sales. Such a finding was supported by the record as the
Funks acknowledged in the letter sent to G.W. Homes by their
attorney that they knew the equitable lien was to be satisfied
from the proceeds held in escrow from the sales of Lots B and C.

1 "[t]he parties may resort to such remedies as are provided by the
2 general principles of law." Id. The Supreme Court of Arizona
3 provided in Sparks v. Douglas & Sparks Realty Co.:

4 A court of equity will strive to get at the
5 intention or general design of the legislature,
6 even though it be against the strictness of its
7 letter; but when the statute is perfectly clear
8 and has determined the matter with all its
9 circumstances, equity cannot intermeddle to supply
10 a supposed deficiency of those things which are
11 required.

12 This would be a determination of what the law
13 ought to be, not what it is, and such a
14 determination must necessarily depend upon views
15 to be varied and fluctuating according to the
16 personal capacity or sense of right and justice
17 possessed by the individual judge. Such is a
18 function of the law-making power, not of the
19 courts.

20 19 Ariz. 123, 129, 166 P. 285, 288 (Ariz. 1917).

21 Here, the Funks contend that the mechanics' and
22 materialmens' statutory lien provisions preclude assertion of an
23 equitable lien. Under ARS § 33-981, a licensed contractor who
24 labors or furnishes professional services, materials, machinery,
25 fixtures or tools in the construction of any building, or other
26 structure or improvement, shall have a lien on such building,
27 structure or improvement. ARS § 33-981(A) & (C) (2011). While
28 some states only provide mechanics' and materialmens' liens to
29 parties that do not have privity of contract with the owner of
30 the property, Arizona's mechanics' and materialmens' lien statute
31 does not make that distinction.

32 Specifically, ARS § 33-981 provides in pertinent part:

33 *[e]very person* who labors or furnishes

1 professional services, materials . . . shall have
2 a lien on such building, structure or improvement
3 . . . *whether the work was done or the articles
were furnished at the instance of the owner of the
building, structure or improvement, or his agent.*

4 ARS § 33-981 (italics added). In fact, when the property is an
5 owner-occupied dwelling, only a party in privity of contract with
6 the owner of the property can obtain a mechanics' and
7 materialmens' lien under Arizona law. In particular, when the
8 subject property is an owner-occupied dwelling:

9 [n]o lien provided for in [ARS § 33.981] shall be
10 allowed or recorded by the person claiming a lien
11 against the dwelling of a person who became an
12 owner-occupant prior to the construction,
alteration, repair or improvement, *except by a
person having executed in writing a contract
directly with the owner-occupant.*

13 ARS § 33-1002(B) (italics added).

14 Moreover, prior to an amendment of ARS § 33-993, it was
15 clear that an "original contractor" could obtain and perfect a
16 mechanics' and materialmens' lien even though it had privity of
17 contract with the owner of the subject property. ARS § 33-993
18 provided that "[i]n order to impress and secure the lien provided
19 for in the article, every original contractor, within ninety
20 days, and every other person claiming the benefits of this
21 article, within sixty days . . . shall [take certain steps to
22 perfect their lien]." Ray Suiter & Son Constr. Co. v. Allied
23 Contract Buyers, 13 Ariz. App. 318, 319, 476 P.2d 524, 525 (Ariz.
24 Ct. App. 1970). After amendment to ARS § 33-993, the Arizona
25 Legislature simply provided one hundred twenty days after
26 completion, or sixty days if a completion notice was recorded,

1 for "every person claiming the benefits of [ARS § 33-981]" to
2 perfect their lien.

3 Of course, to impress, secure and perfect a mechanics' or
4 materialmens' lien, the party claiming the lien must, among other
5 things, provide notice of the purported lien, ARS §§ 33-992.01 &
6 33.992.02, and record the lien with the county recorder of the
7 county in which the property or some part of the property is
8 located pursuant to ARS § 33-993. "The purpose of the
9 requirement of ARS § 33-993 is to give the property owner an
10 opportunity to protect himself and time to investigate the claim
11 to determine whether it is a proper charge." Lewis v. Midway
12 Lumber, 114 Ariz. 426, 431, 561 P.2d 750, 755 (Ariz. Ct. App.
13 1977).

14 Mechanics' and materialmens' liens as provided by
15 ARS §§ 33-981 through 33-1008 "[a]re preferred to all liens,
16 mortgages or other encumbrances upon the property attaching
17 subsequent to the time the labor was commenced or the materials
18 were commenced to be furnished" subject to narrow exceptions.
19 ARS § 33-992(A). Mechanics' and materialmens' liens are also
20 preferred to all liens, mortgages and other encumbrances of which
21 the lienholder had no actual or constructive notice at the time
22 the lienholder commenced labor or began furnishing materials.
23 Id. Upon judgment of foreclosure and order of sale, a mechanics'
24 or materialmens' lien may be satisfied by sale of the property.
25 ARS § 33-997. Consequently, the Funks assert that the equitable
26 maxim that a court should not provide an equitable remedy where

1 there is an adequate remedy at law mandates reversal of the
2 bankruptcy court's judgment.

3 To further support their assertion, the Funks discuss
4 Hunnicut v. Stewart Title & Trust, 187 Ariz. 301,
5 928 P.2d 725 (Ariz. Ct. App. 1996). In Hunnicut, the court set
6 forth the proposition that, "[w]here a legal remedy such as a
7 statutory lien exists, but has not been utilized, a claimant
8 should not be permitted to substitute an equitable remedy."
9 187 Ariz. at 304-05, 928 P.2d at 728-29 (citing Valley Drive-In
10 Theatre Corp. v. Super. Ct., 79 Ariz. 396, 400, 291 P.2d 213, 215
11 (1955); Lewis, 114 Ariz. at 432, 561 P.2d at 756). That said,
12 the court's ruling in Hunnicut was not necessarily based upon
13 that proposition and the court did not expressly void the
14 equitable lien that the lower court implied.

15 More specifically, in Hunnicut, Hunnicutt Construction
16 ("Hunnicut") entered into an agreement with Ultra Membrane
17 International ("Ultra") to construct a warehouse and office
18 facilities on property owed by Ultra. 187 Ariz. at 302, 928 P.2d
19 at 726. Although Hunnicutt finished the project, Ultra was
20 unable to pay the balance due under the agreement. Id. In
21 return for Ultra's promise to borrow money to pay Hunnicutt,
22 Ultra convinced Hunnicutt to refrain from recording a mechanics'
23 lien on the property. 187 Ariz. at 302-03, 928 P.2d at 726-27.

24 Commonwealth Mortgage Company ("Commonwealth") came to an
25 agreement with Ultra to refinance Ultra's debt and to provide
26 Ultra with working capital "in return for a promissory note

1 secured by a first position deed of trust on Ultra's improved
2 real property." 187 Ariz. at 303, 928 P.2d at 727.

3 Nevertheless, Ultra refused to pay Hunnicutt upon close of the
4 loan transaction with Commonwealth. Id. Shortly thereafter,
5 Commonwealth, with no knowledge of the understanding between
6 Ultra and Hunnicutt or of any claim by Hunnicutt against the
7 property, recorded its deed of trust. Id.

8 Consequently, Hunnicutt filed an action against Ultra,
9 alleging that Hunnicutt had an equitable lien on the property due
10 to fraud with priority over all other liens and sought to impose
11 a constructive trust on the property dating back to the time
12 Hunnicutt entered into the original agreement with Ultra. Id. An
13 order was entered on the fraud claim granting Hunnicutt an award
14 for the total amount owed to Hunnicutt. Id. The order imposed a
15 first lien constructive trust in the amount owed to Hunnicutt on
16 Ultra's property relating back to the date the original agreement
17 was entered into and provided that the constructive trust must be
18 considered prior in right and time to all other liens on the real
19 property including Commonwealth's. Id. Before Hunnicutt
20 obtained its judgment, Commonwealth assigned its interest in the
21 note and deed of trust to Stewart Title & Trust ("Trust") with
22 Commonwealth as beneficiary. Id. The Trust noticed a trustee's
23 sale and was the successful bidder at the sale. Id.

24 After obtaining and recording its judgment, Hunnicutt sought
25 to foreclose on the property. Id. The Trust was allowed to
26 intervene in the foreclosure action. Id. On the Trust's motion

1 for summary judgement, the trial court ruled that Hunnicutt had
2 no judgment of constructive trust with priority over
3 Commonwealth, Hunnicutt's constructive trust was junior to
4 Commonwealth's claim and thus extinguished by the trustee's sale,
5 and Commonwealth was entitled to judgment of quiet title against
6 Hunnicutt. 187 Ariz. at 303-04, 928 P.2d at 727-28. Hunnicutt
7 appealed. 187 Ariz. at 304, 928 P.2d at 728.

8 On appeal, the court sought to determine "[w]hether an
9 equitable, unrecorded constructive trust on real property,
10 arising from a party's having been fraudulently induced to
11 furnish material and labor for improvements on the property, has
12 priority over a bona fide purchaser[']s . . . subsequent recorded
13 deed of trust on the property." 187 Ariz. at 302, 928 P.2d at
14 726. While the court recognized that a court should not
15 substitute an equitable remedy where a legal remedy such as a
16 statutory lien exists because "[i]t would allow a contractor who
17 fails to comply with the mechanics' or materialman's lien
18 statutes to nonetheless obtain and prioritize a lien," the court
19 did not expressly invalidate Hunnicutt's equitable lien.⁹
20 187 Ariz. at 305, 928 P.2d at 729. Instead, the court held that

21 ⁹G.W. Homes argues that, because the Hunnicutt court did not
22 expressly invalidate the equitable lien, the assertion that the
23 mere existence of the statutory mechanics' lien precludes
24 imposition of an equitable lien is not supported by Hunnicutt.
25 However, the Hunnicutt court set forth, "[w]e agree with the
26 Trust that where a legal remedy such as a statutory lien exists,
but has not been utilized, a claimant should not be permitted to
substitute an equitable remedy." 187 Ariz at 304-05, 928 P.2d at
728-29. The court simply found other grounds asserted by the
Trust more persuasive and applicable to the case before it.

1 "[t]he recorded interest of a BFP . . . has priority over an
2 unrecorded equitable lien which could have been obtained under
3 Arizona's mechanics' and materialman's lien statutes" because "'a
4 bona fide purchaser's rights have always been held superior to
5 prior equitable interests. . . .'" Id. (quoting Osin v. Johnson,
6 243 F.2d 653, 657 (D.C. Cir. 1957)).

7 The Funks additionally cite to Valley Drive-in. In Valley
8 Drive-in, the Arizona Supreme Court held that "[w]hen a statute
9 creates a right and also provides a complete and valid remedy for
10 the right created, the remedy thereby given is exclusive."
11 79 Ariz. at 400, 291 P.2d at 215. More specifically, in Valley
12 Drive-in, the lower court disregarded an Arizona Statute that
13 required a defendant in a replevin action to post a bond equal to
14 double the value of the property to remain in possession of the
15 property where the plaintiff in the litigation posted a bond to
16 obtain possession of the property. 79 Ariz. at 398-99, 291 P.2d
17 at 214. The lower court disregarded the statute by issuing an
18 injunction, based on equity, that allowed the defendant to retain
19 possession of the property upon posting a \$100 bond instead of
20 the required \$80,000. Id. However, on appeal, the court issued
21 a peremptory writ of prohibition preventing the lower court from
22 enforcing the injunction on the basis that the lower court
23 exceeded its equitable powers by "restrict[ing] the plaintiff's
24 clear statutory right to take possession of the property [under
25 the statute], and thereby enlarg[ing] the defendant's statutory
26 right to repossess the property without requiring compliance with

1 the clear provisions of [the statute]." 79 Ariz. at 400, 291
2 P.2d at 215.

3 Lastly, the Funks cite to Lewis. In Lewis, several
4 contractors provided services and materials in making
5 improvements on real property. 114 Ariz. at 428, 561 P.2d at
6 752. The dispute in Lewis was between several of those
7 contractors who all purportedly obtained mechanics' and
8 materialmens' liens and a mortgagee regarding priority. Id.

9 Several of the alleged lienholders suggested that, even
10 though they failed to comply with the perfection requirements as
11 set forth in ARS § 33-993, the court should hold that their liens
12 were valid because their failure to abide by the statute was not
13 prejudicial. 114 Ariz. at 432, 561 P.2d at 756. The court did
14 not agree. Id. In particular, the court held that:

15 If the default or neglect is material to the
16 perfection of a lien, it is beyond the remedial
17 scope of equity, in the exercise of its usual
18 powers, to protect the lien claimant against the
19 untoward consequences of what may be and probably
20 was his own neglect. The courts cannot read into
21 either the statutes or the claim of lien what is
not there, or take from either what is there. If
the courts may say that the record owner need not
be served, then with equal reason they may hold
that any other requisite of the statute need not
be observed and followed. We do not perceive this
to be the law.

22 Id. Therefore, the court found that the contractor and mortgagee
23 who properly recorded their interests had priority over those
24 that did not fully comply with the statute. Id.

25 Here, G.W. Homes is a licenced contractor that did not
26 perfect a mechanics' and materialmens' lien. G.W. Homes has

1 provided no argument or excuse as to why it did not do so. A
2 review of the mechanics' and materialmens' lien statute reveals
3 no reason why G.W. Homes could not have perfected such a lien.

4 The mechanics' and materialmens' lien statutes provide an
5 adequate remedy which ensures that contractors like G.W. Homes
6 get paid for the services and materials they provide, but also
7 sets forth a process so that owners like the Funks can ensure
8 that the work they contract for is properly completed and that
9 they get what they are paying for. See Columbia Group, Inc. v.
10 Homeowners Ass'n, 151 Ariz. 299, 727 P.2d 352 (Ct. App. 1986).

11 As such, after review of the applicable statutes, it appears that
12 the Arizona legislature has provided adequate rights and remedies
13 for G.W. Homes such that resort to equitable remedies are not
14 necessary to remedy any wrong.

15 In addition to the statutory right to a mechanics' and
16 materialmens' lien, G.W. Homes possessed other remedies at law to
17 protect its interests. In particular, G.W. Homes had a
18 contractual right pursuant to the Modification Letter to obtain a
19 deed of trust. It did not do so. Further, as G.W. Homes'
20 equitable lien ran with the Properties, G.W. Homes could have
21 pursued the purchasers of the Properties. Again, it did not do
22 so. As G.W. Homes failed to utilize any of the avenues available
23 to protect its interest, it is difficult to see how it can claim
24 the court should invoke equity to cure its lack of diligence.

25 Consequently, the Funks' argument that a court cannot
26 provide an equitable remedy where there is an adequate remedy at

1 law is persuasive based on the Arizona cases cited by the Funks
2 as well as secondary sources. For instance, according to Corpus
3 Juris Secundum, "[w]hile equity has the power to pierce rigid
4 statutory rules to prevent injustice, where substantial justice
5 can be accomplished by following the law, and the parties'
6 actions are clearly governed by rules of law, equity follows the
7 law . . . [and] courts of equity cannot modify or ignore an
8 unambiguous statutory principle in an effort to shape relief."
9 30A C.J.S. Equity § 128 (2010). Therefore, the bankruptcy court
10 erred in implying an equitable lien where G.W. Homes failed to
11 exercise its statutory right to obtain a mechanics' and
12 materialmens' lien, its contractual right to obtain a deed of
13 trust, as well as its right to record its lien and pursue the
14 purchasers of the Properties.

15 **D. The award of attorneys' fees and costs by the bankruptcy**
16 **court to G.W. Homes is vacated, an award of attorneys' fees**
17 **in favor of the Funks for this appeal is appropriate, but**
18 **the panel remands to the bankruptcy court the determination**
19 **of reasonable attorneys' fees for this appeal**

20 "It is the filing of a notice of appeal that invokes our
21 jurisdiction and establishes the issues to be addressed."

22 Culinary & Serv. Employees Union, Local 555 v. Hawaii Employee
23 Ben. Admin., Inc., 688 F.2d 1228, 1232 (9th Cir. 1982). In this
24 matter, the bankruptcy court awarded attorneys' fees and costs to
25 G.W. Homes on April 6, 2010. The Funks' notice of appeal
26 indicated that the Funks appealed the May 18, 2010 judgment,
which incorporated both the September 29, 2009 minute order
related to the first motion for partial summary judgment, as well

1 as the April 6, 2010 minute order related to the second motion
2 for partial summary judgment on attorneys' fees and costs.
3 Additionally, the Funks' statement of issues filed with the
4 bankruptcy court asserted a challenge to the award of attorneys'
5 fees and costs in favor of G.W. Homes. As the award of
6 attorneys' fees and costs was entered because G.W. Homes was the
7 prevailing party, that award is vacated because G.W. Homes is no
8 longer the prevailing party.

9 Moreover, G.W. Homes and the Funks request attorneys' fees
10 and costs for this appeal pursuant to ARS § 12-341.01. Arizona
11 law provides that "[i]n any contested action arising out of a
12 contract, express or implied, the court may award the successful
13 party reasonable attorney fees." ARS § 12-341.01. Under this
14 statute, "the prevailing party is also entitled to fees on
15 appeal." In re Holiday Mobile Home Resorts, 803 F.2d 977, 979
16 (9th Cir. 1986) (citing Wenk v. Horizon Moving and Storage Co.,
17 131 Ariz. 131, 133, 639 P.2d 321, 323 (Ariz. 1982)).

18 When exercising discretion to award fees, courts are to
19 consider six pertinent factors: (1) the merits of the claim or
20 defense presented by the unsuccessful party, (2) the novelty of
21 the legal question presented and whether such a claim has
22 previously been decided in the jurisdiction, (3) whether the
23 successful party prevailed with respect to all claims,
24 (4) whether an award of fees would discourage other parties with
25 tenable claims from litigating legitimate contract issues,
26 (5) whether litigation could have been avoided so that successful

1 party's efforts were superfluous, and (6) whether awarding fees
2 would impose an extreme hardship on the unsuccessful party.
3 Associated Indem. Corp. v. Warner, 143 Ariz. 567, 570, 694 P.2d
4 1181, 1184 (Ariz. 1985).

5 After considering the above factors, the Funks attorneys'
6 fees for this appeal are appropriate under Arizona law. In
7 recognition of the bankruptcy court's essential competency in
8 this area and its familiarity with the parties, however, we
9 remand to the bankruptcy court the specific determination of the
10 amount of attorneys' fees to be awarded to the Funks. Such fees
11 should be awarded consistent with the above enumerated factors.

12 Lastly, G.W. Homes requests attorneys' fees and costs on the
13 basis that the Funks brought this appeal in bad faith. An award
14 on that basis is not appropriate because the Funks prevailed on
15 this appeal. Although the Funks raise arguments on appeal that
16 were not raised before the bankruptcy court, an exception to the
17 general rule regarding arguments raised for the first time on
18 appeal is applicable. For those reasons, bringing this appeal
19 was not in bad faith and certainly not like that of the party
20 against whom attorneys' fees and costs were awarded in FEC v.
21 Toledano, 317 F.3d 939, 953 (9th Cir. 2002), in which the party
22 against whom attorneys' fees and costs were awarded was told by
23 the lower court that the claims were clearly frivolous.

24 VI. CONCLUSION

25 For the reasons set forth herein, the judgment of the
26 bankruptcy court in favor of G.W. Homes is REVERSED.

1 Accordingly, the bankruptcy court's award of attorneys' fees and
2 costs in favor of G.W. Homes is VACATED. The panel REMANDS to
3 the bankruptcy court the determination of reasonable attorneys'
4 fees for this appeal under ARS § 12-341.01.

5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26