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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re)	Bankruptcy Case
)	No. 02-31298DM
SHOWPLACE SQUARE LOFT COMPANY, LLC)	Chapter 11
)	
Debtor.)	
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SHOWPLACE SQUARE LOFT COMPANY, LLC,)	Adversary Proceeding
)	No. 02-3157DM
Plaintiff,)	
)	
v.)	
)	
PRIMECORE MORTGAGE TRUST, INC.,)	
PRIMECORE FUNDING GROUP, INC.;)	
PRIMECORE PROPERTIES, INC.; ULF)	
INGMAR KAUFFELDT; GERARD)	
SIMONOWICZ; DAVID INNES WALKER;)	
WILLIAM CRAIG WALKER; BBJ ELECTRIC,)	
INC.; KILLARNEY CONSTRUCTION)	
COMPANY, INC.; RONAN PATRICK)	
MANNING; DONALD RAYMOND FREAS; and)	
ICF ENTERPRISES, INC.,)	
)	
Defendants.)	
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MEMORANDUM DECISION ON MECHANIC'S LIEN CLAIMANT'S
MOTION FOR SUMMARY JUDGMENT

On January 24, 2003, this court held a hearing on the motion for summary judgment ("MSJ") filed by Defendant Killarney Construction Company, Inc. ("Killarney"). Defendant Primecore Mortgage Trust, Inc. ("Primecore") filed an opposition to the MSJ. For the reasons stated below, the court will grant summary judgment in part and deny summary judgment in part.¹

¹The following discussion constitutes the court's findings of fact and conclusions of law. Fed. R. Bankr. P. 7052(a).

1 I. Relevant Undisputed Facts

2 Killarney was the general contractor for the construction of
3 live-work lofts for Showplace Square Loft Company, LLC ("Debtor").
4 Primecore was the initial lender for the project and recorded its
5 deed of trust on March 16, 2000.

6 As of February 29, 2000, trenches had been dug at the
7 construction site and stakes indicated the outline of the building
8 to be constructed there.² In addition, on February 29, 2000, the
9

10 ²Primecore does not dispute that this work was done before
11 March 16, 2000. In fact, Primecore's own witness, Frank Torrente,
12 took photographs of the site on March 13, 2000, which showed the
13 existence of the trenches. As admitted by Primecore on page 5 of
14 its memorandum of points and authorities in opposition to the MSJ,
15 the "photographs evidenced the work at the site that constituted
16 soil compaction." At his deposition, Mr. Torrente testified that
17 on March 13, 2000, he saw "evidence of construction going on" at
18 the site. In particular, he saw people working on the site,
19 equipment being operated on the site, and trenches on the site.
20 Instead of disputing that the trenches had been dug and the
21 soil compaction had been performed prior to March 16, Primecore
22 attempts to argue (1) that construction had not "commenced"
23 because certain computer software showed the start date as March
24 20, 2000, (2) that certain other tasks (such as storage of lumber
25 and paint and the installation of casing) were performed on other
26 phases of the project; and (3) that any work performed prior to
27 that date was not performed pursuant to Killarney's prime contract
28 with Debtor. The first two contentions are irrelevant (for the
reasons discussed later); assuming that Primecore's contentions
are true, they do not change or alter the material fact that soil-
testing, soil-compacting and trench-digging occurred prior to
March 16, 2000. Anderson v. Liberty Lobby, Inc., 477 U.S. 242,
247-48 (1986) (existence of immaterial factual dispute will not
defeat otherwise proper motion for summary judgment). The third
contention is not supported by any specific facts or evidence, but
is merely an insupportable inference drawn from certain ambiguous
deposition testimony of Paraig O'Donoghue ("Paraig"). National
Union Ins. Co. v. Argonaut Ins. Co., 701 F.2d 95, 96 (9th Cir.
1983) (party opposing summary judgment "cannot rely on the mere
possibility of a factual dispute as to intent to avert summary
judgment. Nor can it expect the district court to draw inferences
favorable to it when they are wholly unsupported."). In any
event, the financial schedule appended to the prime contract
specifically contemplates that Killarney will be responsible for
"site work" including excavation, trenching, and backfilling.
Paraig's deposition testimony further indicates that all of this

1 site superintendent (Garrett O'Donoghue) was present when
2 Construction Testing Services performed field inspections, tested
3 the soil, bore holes and took soil samples. Between March 9 and
4 March 14, 2000, the site superintendent oversaw soil compaction
5 work at the construction site.

6 Even though Killarney issued a stop work notice to all
7 subcontractors and suppliers on May 4, 2001, work was performed
8 between May 4, 2001, and July 5, 2001 (when Killarney was paid in
9 full for its work through that date). In particular, one of
10 Killarney's subcontractors -- Anvil Iron Works ("Anvil") --
11 installed ground floor exterior guard rails and interior handrails
12 between May 9, 2001, and May 18, 2001.

13 Debtor recorded a Notice of Completion on December 20, 2001;
14 the Notice indicated that work was completed on November 8, 2001.
15 On February 26, 2002, Killarney recorded its mechanic's lien in
16 the amount of \$488,347.60 plus interest. Killarney filed an
17 amended mechanic's lien on February 27, 2002, to correct the zip
18 code of Debtor.

19 The City and County of San Francisco issued a Certificate of
20 Final Completion and Occupancy for the project on November 8,
21 2001. The certificate stated: "To the best of our knowledge, the
22 construction described above has been completed and, effective as
23 of the date the building permit application was filed, conforms
24 both to the Ordinance of the City and County of San Francisco and
25 to the Laws of the State of California." In addition, Killarney

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27 work "was under the scope of Killarney's prime contract with the
28 owner with respect to preparing the site for full-on
construction."

1 sent memoranda dated November 13 and November 14 to certain
2 subcontractors noting that it "will be off" the site or job on
3 November 16, 2001.

4 On December 18, 2001, Killarney faxed to its primary
5 subcontractors a punch list of items which needed to be completed.
6 While many of these tasks were de minimus (i.e., clean kitchen
7 counter, clean lower bath mirror and glass shelves, etc.), the
8 punch list also directed subcontractors to, inter alia, paint
9 doors, caulk glass into place, finish window frames, adjust
10 drains, and paint other specific spots. Killarney, however, has
11 not introduced evidence that these tasks were actually completed,
12 and has not established the dates such tasks were done and the
13 time required to complete such tasks.

14 II. Procedural History

15 On November 1, 2002, this court held a status conference in
16 the above-captioned adversary proceeding. At that time, counsel
17 for Killarney announced that she would shortly be filing the MSJ.
18 The court and the parties discussed possible hearing dates and the
19 need to take discovery prior to the hearing. The court
20 tentatively scheduled the hearing for December 27, 2002, and
21 counsel for Primecore indicated that he would file a Rule 56(f)
22 declaration if the hearing were held so quickly. Counsel for
23 Primecore requested that the hearing be held on January 17, 2002.

24 The parties agreed to work out an arrangement for
25 rescheduling the hearing and for conducting discovery. On
26 December 27, 2002, Killarney filed its MSJ and set it for hearing
27
28

1 on January 24, 2002.³

2 III. Discussion

3 **A. Standard for Summary Judgment**

4 Federal Rule of Civil Procedure 56(c) ("Rule 56")
5 (incorporated by Federal Rule of Bankruptcy Procedure 7056
6 ("Bankruptcy Rule 7056")), provides that summary judgment "shall
7 be rendered forthwith if the pleadings, depositions, answers to
8 interrogatories, and admissions on file, together with the
9 affidavits, if any, show that there is no genuine issue as to any
10 material fact and that the moving party is entitled to judgment as
11 a matter of law."

12 "The proponent of a summary judgment motion bears a heavy
13 burden to show that there are no disputed facts warranting
14 disposition of the case on the law without trial." Younie v.
15 Gonya (In re Younie), 211 B.R. 367, 373 (9th Cir. BAP 1997),
16 aff'd, 163 F.3d (9th Cir. 1998), (quoting Grzybowski v. Aquaslide
17 'N' Dive Corp (In re Aquaslide 'N' Dive Corp.), 85 B.R. 545, 547
18 (9th Cir. BAP 1987)). If the moving party adequately carries its
19 burden, the party opposing summary judgment must then "set forth
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21 ³In his declaration in opposition to the MSJ, counsel for
22 Primecore indicates that he had reached an agreement with
23 Killarney's counsel to limit discovery to issues pertaining to
24 priority of Killarney's lien. Killarney's counsel disputes this.
25 References in memoranda and declarations to a need for further
26 discovery do not qualify as motions required by Federal Rule of
27 Civil Procedure 56(f). Brae Transportation, Inc. v. Coopers &
28 Lybrand, 790 F.2d 1439, 1443 (9th Cir. 1986). Nonetheless, the
court is denying summary judgment as to the issue on which
Primecore is requesting further discovery, so even if the request
had been in proper form, it is moot. With respect to the priority
issue, the matter is determinable on the papers presented, so
further discovery would be futile. Mullis v. U.S. Bankruptcy
Court, 828 F.2d 1385, 1387 n.6 (9th Cir. 1987), cert. denied, 486
U.S. 1040 (1988).

1 specific facts showing that there is a genuine issue for trial."
2 Kaiser Cement Corp. v. Fischbach & Moore, Inc., 793 F.2d 1100,
3 1103-04 (9th Cir. 1986), cert. denied, 479 U.S. 949 (1986).
4 Significantly, the "burden carried by a summary judgment movant to
5 show lack of factual dispute should not include demonstrably
6 irrelevant or inapposite factual issues." California First Bank
7 v. Griffin (In re Orosco), 93 B.R. 203, 208 (9th Cir. BAP 1988).

8 All reasonable doubt as to the existence of genuine issues of
9 material fact must be resolved against the moving party. Anderson
10 v. Liberty Lobby, Inc., 477 U.S. 242 (1986). Nonetheless,
11 "[d]isputes over irrelevant or unnecessary facts will not preclude
12 a grant of summary judgment." T.W. Electrical Service, Inc. v.
13 Pacific Electrical Contractors Assn., 809 F.2d 626, 630 (citing
14 Liberty Lobby, 477 U.S. at 248). "The nonmoving party must do
15 more than show there is some metaphysical doubt as to a material
16 fact." Kowalski-Schmidt v. Forsch (In re Giordano), 212 B.R. 617,
17 621 (9th Cir. BAP 1997). "A 'material' fact is one that is
18 relevant to an element of a claim or defense and whose existence
19 might affect the outcome of the suit. The materiality of a fact
20 is thus determined by the substantive law governing the claim or
21 defense." T.W. Electrical Service, 809 F.2d at 630.

22 **B. General Principles of California Mechanic's Lien Law**

23 A general contractor is entitled to a lien on a construction
24 project as security for payment of the labor and materials
25 furnished to the project. Cal. Civ. Code § 3110. The mechanic's
26 lien is entitled to "off-record priority;" in other words, it has
27 priority over any lien, mortgage or deed of trust recorded
28 subsequent to commencement of work, even when the mechanic's lien

1 claim is recorded after the other lien, mortgage or deed of trust.
2 Cal. Civ. Code § 3134.

3 A general (or original) contractor, in order to enforce a
4 lien, "must record his claim of lien after he completes his
5 contract and before the expiration of (a) 90 days after the
6 completion of the work of improvement . . . if no notice of
7 completion or notice of cessation has been recorded, or (b) 60
8 days after recordation of a notice of completion or notice of
9 cessation." Cal. Civ. Code § 3115. In addition, when work ceases
10 completely on an uncompleted project for sixty days but resumes
11 thereafter, "a new date for priorities also begins with the
12 commencement of the new work." Miller & Starr, California Real
13 Estate 3d ed., § 11:127 (2000) ("Miller & Starr"); Cal. Civ. Code
14 § 3086. In other words, the "off-record" priority of the
15 mechanic's lien will relate back only to the re-commencement of
16 work.

17 **C. Application of Law to Undisputed Facts**

18 1. Work Commenced Prior to March 16, 2000

19 A mechanic's lien acquires off-record priority upon
20 "commencement of the work of improvement." Cal. Civ. Code § 3134.
21 "'Work of improvement' includes but is not restricted to the
22 construction, alteration, addition to, or repair, in whole or in
23 part, of any building, wharf, bridge, ditch, flume, aqueduct,
24 well, tunnel, fence, machinery, railroad, or road, the seeding,
25 sodding, or planting of any lot or tract of land for landscaping
26 purposes, the filling, leveling, or grading of any lot or tract of
27 land, the demolition of buildings and the removal of buildings."
28 Cal. Civ. Code § 3106 (emphasis added).

1 "For purposes of establishing the priority of mechanics' lien
2 claimants who perform work or supply materials for the
3 construction of an improvement, the work is not considered as
4 having 'commenced' until there is some physical work on the
5 property that is apparent and visible, and the work must be of a
6 permanent nature." Miller & Starr § 11:125 (citing various
7 California cases); see also Simons Brick Co. v. Hetzel, 72
8 Cal.App. 1, 236 P. 357 (1925) (construing "commencement of work"
9 under predecessor to California Civil Code section 3134).

10 In Simons, the holder of an unrecorded mortgage testified
11 that, when he went upon the premises for the purpose of
12 ascertaining if any construction was being done, there were no
13 tools or materials of any description on the premises nor any
14 evidence of a building being erected. Nonetheless, other evidence
15 demonstrated that a trench about sixty feet long and four feet
16 deep had been excavated along the front of the lot. The court
17 held that this trench constituted "commencement of work"
18 sufficient to put the mortgage holder on notice of construction.
19 Simons, 236 P. at 358. Similarly, the California Supreme Court
20 held in English v. Olympic Auditorium, Inc., 217 Cal. 631, 20 P.2d
21 946 (1933), that construction commenced where there was some
22 lumber on the ground and a test hole had been dug. English, 20
23 P.2d at 949. In National Charity League, Inc. v. County of Los
24 Angeles, 164 Cal.App.2d 241, 330 P.2d 666, 667 and 670 (1958), the
25 court concluded that construction had commenced (for tax
26 assessment purposes) when "the plaintiff had cleared said real
27 property, had dug certain trenches for foundations and had placed
28 lumber upon said property."

1 Here, Primecore's own witness took pictures prior to March
2 16, 2000, showing that trenches had been built on the property,
3 stakes had been placed, and that construction equipment was
4 present. Primecore's own witness testified that he saw "evidence
5 of construction going on" at the site prior to March 16. In
6 particular, he saw people working on the site, equipment being
7 operated on the site, and trenches on the site. Furthermore,
8 Primecore has not refuted that soil compaction occurred prior to
9 March 16, 2000. The foregoing work is undisputed. Under Simons
10 and English, because the effects of this work are apparent and
11 visible and of a permanent nature, construction commenced for the
12 purposes of California Civil Code section 3134. Primecore has not
13 introduced evidence that this work did not occur, so summary
14 judgment in favor of Killarney is appropriate as to this issue.⁴

15 2. Work Did Not Cease In April 2001

16 Primecore contends that Killarney lost any off-record
17 priority over Primecore's recorded lien because of a "cessation of
18 labor . . . for a continuous period of 60 days." Cal. Civ. Code §
19 3086(c). In particular, Primecore contends that labor ceased from
20 May 4, 2001, through July 6, 2001. Killarney, however, introduced
21 undisputed evidence that Anvil was on the site installing ground
22 floor exterior guard rails and interior handrails between May 9,
23 2001, and May 18, 2001. Therefore, labor did not cease
24 completely and continuously for a sixty-day period. W.F. Hayward

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26 ⁴As discussed in footnote 2, Primecore has raised extraneous
27 and irrelevant purported factual disputes in an effort to prevent
28 summary judgment that construction commenced prior to March 16,
2001. These arguments are either irrelevant or not supported by
facts or evidence.

1 Co. v. Transamerica Ins. Co., 16 Cal.App.4th 1101, 20 Cal.Rptr.2d
2 468, 473 (1993) ("cessation" is a "complete work stoppage" and
3 means "work by all trades has ceased on the project"). Because
4 Primecore has not introduced evidence to dispute that Anvil did
5 this work from May 9 through May 18, Killarney is entitled to
6 summary judgment because no dispute of material fact exists with
7 respect to this issue.⁵

8 3. Whether Killarney Timely Recorded Its Lien Is a
9 Question of Material Fact Precluding Summary
Judgment

10 Debtor recorded a Notice of Completion on December 20, 2001;
11 the Notice indicated that work was completed on November 8, 2001.
12 Debtor therefore did not record its notice of completion within
13 ten days of the purported date of completion as required by
14 California Civil Code section 3093(e), which provides that the
15 "the notice of completion shall be recorded in the office of the
16 county recorder of the county in which the site is located, within
17 10 days after such completion." Consequently, the notice of
18 completion was invalid. Fontana Paving, Inc. v. Hedley Bros.,
19 Inc., 38 Cal.App.4th 146, 45 Cal.Rptr.2d 295, 300-01 (1995) (where
20 notice of completion was not recorded within ten-day statutory
21 period, it was invalid and had no effect on the time for recording
22 mechanic's lien).

23 Killarney recorded its mechanic's lien on February 26, 2002.

24
25 ⁵Primecore argues that the work performed by Anvil was tardy
26 and that Killarney had issued a stop work notice for the relevant
27 time period. Neither of these arguments refutes the simple and
28 relevant fact that Anvil did do original installation work from
May 9 through May 18, 2001. Primecore cannot defeat summary
judgment by manufacturing irrelevant factual disputes. Liberty
Lobby, 477 U.S. at 247-48 (existence of immaterial factual dispute
will not defeat otherwise proper motion for summary judgment).

1 If the Notice of Completion had been valid, Killarney would have
2 been required to record its lien within 60 days of December 20,
3 2001 (or no later than February 18, 2002). Cal. Civ. Code § 3115.
4 Because the Notice of Completion was untimely and invalid,
5 however, Killarney had 90 days after the completion of the work of
6 improvement in which to record its lien. Id.; Fontana Paving,
7 Inc., 45 Cal.Rptr.2d at 300-01 ("When the owner records a notice
8 of completion outside the statutory 10-day period, it is invalid.
9 . . . Because the notice of completion was not filed within the
10 10-day period specified in section 3093, it has no legal effect on
11 the statutory lien-filing period."). See also Bronstein, *Trivial*
12 *(?) Imperfections: The California Mechanics' Lien Recording*
13 *Statutes*, 27 Loyola of Los Angeles Law Review 735, 748 (Jan. 1994)
14 ("In the case of an invalid notice of completion, the claimant's
15 lien recording is controlled by the ninety-day period of
16 limitations defined by sections 3155(a) or 3116(a) and not the
17 shorter period defined by sections 3115(b) or 3116(b).").

18 Killarney requests that this court enter summary judgment
19 that it filed its lien within 90 days of completion. The court
20 cannot do so, because a material fact dispute as to the date of
21 completion. Primecore contends that completion occurred on
22 November 8, 2001 (as set forth in the Notice of Completion) or
23 November 16, 2001 (the date that Killarney should have been off
24 the site according to notices it provided to subcontractors) while
25 Killarney contends that work was not completed until mid-January
26 2002.

27 Although section 3115 does not define "completion" as
28 "substantial completion," cases interpreting California's

1 mechanic's lien laws have held that "substantial completion"
2 triggers the 90-day time period. Mott v. Wright, 43 Cal.App. 21,
3 184 P. 517, 520 (1919); Hammond Lumber Co. v. Yeager, 185 Cal.
4 355, 197 P. 111, 112 (1921). Correction of "trivial
5 imperfections" will not extend the time for filing a mechanic's
6 lien. Greetenberg v. Collman, 119 Cal.App. 7, 5 P.2d 944, 946
7 (1931) ("Repairs of slight value or importance have been held not
8 to interfere with findings to the effect that the buildings or
9 improvements were previously completed.").

10 Here, a material factual issue exists as to whether the
11 project was substantially completed more than 90 days before
12 February 26, 2002. Primecore has produced sufficient evidence
13 (the Notice of Completion, the City of San Francisco's Certificate
14 of Final Completion and Occupancy filed on November 8, 2002, and
15 Killarney's memorandum to subcontractors regarding the date it
16 intended to vacate the premises (November 16)) to put this matter
17 at issue.

18 In addition, without knowing what was involved to complete
19 the tasks contained on the punch-list, this court cannot conclude
20 as a matter of undisputed fact that such tasks were not trivial.
21 Accordingly, summary judgment is denied as to this issue.

22 **D. Primecore's Informal Rule 56(f) Request**

23 For the reasons set forth in footnote 3, the court is denying
24 Primecore's informal Rule 56(f) request for further discovery.
25 Nonetheless, to the extent that the question of whether Killarney
26 timely filed its lien is still unresolved, discovery may proceed
27 on that issue.

28 IV. Disposition

1 Counsel for Killarney should submit an order consistent with
2 this memorandum decision. In doing so, counsel should comply with
3 B.L.R. 9021-1 and B.L.R. 9022-1. The court will hold a further
4 status conference in this matter on February 28, 2003 at 1:30 p.m.

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6 Dated:

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/s/ _____
Dennis Montali
United States Bankruptcy Judge

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