

**UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION**

In re:

LAND RESOURCE, LLC, *et al.*,

Debtors.

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Case No. 6:08-bk-10159-ABB, *et al.*

Chapter 7

(Jointly Administered)

**APPLICABLE DEBTOR**

THE RIDGES AT MORGAN CREEK,  
LLC, Case No. 6:08-bk-10190-ABB

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TAYLOR AND MURPHY  
CONSTRUCTION CO., INC.

Plaintiff,

Adv. Pro. No. 6:10-ap-00174-ABB

vs.

KEYBANK N.A., *et al.*,

Defendants.

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**ORDER**

This matter came before the Court on the Motion for Summary Judgment and supporting Affidavit (Doc. Nos. 12, 17) filed by Plaintiff Taylor and Murphy Construction Co., Inc. seeking summary judgment on its Complaint to Determine Validity, Priority, and Amount of Liens (Doc. No. 1). A hearing was held on December 13, 2010 at which counsel for Plaintiff and counsel for the Defendants KeyBank National Association (“KeyBank”) and Chicago Title Insurance Company (“Chicago Title”) appeared. The Motion is due to be denied for the reasons set forth herein.

### ***Wild Ridges Project***

Plaintiff was engaged by the Debtor The Ridges at Morgan Creek, LLC to provide roads, drainage, and erosion control for the Debtor's real property development known as "Wild Ridges" in the County of McDowell, North Carolina pursuant to a written contract executed by Plaintiff and Debtor on March 9, 2007.<sup>1</sup> Plaintiff performed labor and furnished materials from March 9, 2007 through June 27, 2008.

A Deed of Trust granting KeyBank a lien on Wild Ridges was recorded in the McDowell County Registry on July 3, 2007. The Deed of Trust is insured by Chicago Title. Plaintiff filed a Notice of Claim of Lien for \$397,588.49, plus interest, attorneys' fees and costs, in the General Court of Justice in McDowell County on October 3, 2008.

Wild Ridges was sold by the Chapter 7 Trustee pursuant to the Sale Order entered on February 3, 2009 (Lead Case Doc. No. 312) and the estate received sale proceeds of \$156,408.00. Plaintiff's and KeyBank's lien claims attached to the proceeds of sale pursuant to the Sale Order and the Agreed Order entered on October 27, 2009 (Lead Case Doc. No. 598), which clarifies the Sale Order and provides the Sale Order shall not affect the validity or priority of any lien rights of Plaintiff in the sale proceeds.

Plaintiff asserts, based upon North Carolina statutory law, its purported lien is superior to KeyBank's Deed of Trust lien because its lien is effective as of March 9, 2007—the date Plaintiff first provided labor and which date predates the recordation of KeyBank's Deed of Trust. Defendants filed Answers to the Complaint generally denying

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<sup>1</sup> The Debtor's case is being jointly administered with several related cases and the case *In re Land Resources, LLC*, Case No. 6:08-bk-10159-ABB has been designated the lead case.

Plaintiff's allegations. They filed no pleadings containing any substantive responses to the Complaint or the Motion for Summary Judgment.<sup>2</sup>

### *Analysis*

Granting summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c) (2007). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). A court determining entitlement to summary judgment must view all evidence and make reasonable inferences in favor of the party opposing the motion. Haves v. City of Miami, 52 F.3d 918, 921 (11th Cir. 1995).

This matter is governed by North Carolina statutory and case law. Plaintiff furnished labor and materials to the Debtor pursuant to their written contract and had a right to file a claim of lien on the Debtor's real property. N.C. GEN. STAT. § 44A-8 (2005). North Carolina statutory law provides a properly perfected materialmen claim of lien relates back to the date of the first furnishing of labor or materials listed in the claim of lien. N.C. GEN. STAT. § 44A-10 (2005). “By virtue of this statute, a contractor's lien for all labor and materials furnished pursuant to a contract is deemed prior to any liens or encumbrances attaching to the property subsequent to the date of the contractor's first furnishing of labor or materials to the construction site.” Frank H. Conner Co. v. Spanish Inns Charlotte, Ltd., 242 S.E.2d 785, 789 (N.C. 1978).

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<sup>2</sup> Defendants' requests to extend the time period for filing responses to Plaintiff's Motion for Summary Judgment were untimely filed and were denied.

Plaintiff recites the chronology of actions it took regarding its purported lien (filing a proof of claim, filing a Notice of Lis Pendens, *etc.*) and asserts, pursuant to Section 4A-8, it holds a properly perfected lien with such lien being valid as of March 9, 2007—the date on which labor or materials were first furnished and four months prior to the date the KeyBank Deed of Trust was recorded. Plaintiff did not address in its pleadings a fundamental threshold component in creating a valid perfected lien.

The North Carolina Courts have held for a lien to accrue there must be visible commencement of an “improvement” on the property “sufficient to put a prudent man on notice that a possible improvement is underway and that the property might be subject to a lien under G.S. 44A-8.” Frank H. Conner Co., 242 S.E.2d at 791.<sup>3</sup> “The requirement for furnishing materials at the site provides visible notice to subsequent lienors and encumbrances of the priority of suppliers of material . . . No lien shall attach prior to actual and visible placement of materials on the ground.” Raleigh Paint & Wallpaper Co. v. Peacock & Assocs., Inc., 247 S.E.2d 728, 731 (N.C. Ct. App. 1978).

Plaintiff provided no information as to whether there was visible commencement of an improvement or furnishing of materials on the Wild Ridges property that would have put KeyBank on notice the property might be subject to a lien. The existence of a visible commencement of an improvement or furnishing of materials is a material fact and has legal implications. Without visible commencement of an improvement or furnishing of materials, no lien accrues pursuant to North Carolina law.

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<sup>3</sup> “Improvement” is defined as: “all or any part of any building, structure, erection, alteration, demolition, excavation, clearing, grading, filling, or landscaping, including trees and shrubbery, driveways, and private roadways, on real property.” N.C. GEN. STAT. § 44A-7(2) (2005).

Plaintiff has not established the material facts that would entitle it to judgment. It has not established it is entitled to judgment as a matter of law. Its Motion for Summary Judgment is due to be denied pursuant to Federal Rule of Civil Procedure 56(c).

Accordingly, it is

**ORDERED, ADJUDGED and DECREED** that the Plaintiff's Motion for Summary Judgment (Doc. No. 12) is hereby **DENIED**.

Dated this 10th day of February, 2011.

/s/ Arthur B. Briskman  
ARTHUR B. BRISKMAN  
United States Bankruptcy Judge