

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION
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In re: Case No. 9:17-bk-06512-FMD
Chapter 13

Martin J. McCarthy and
Laura McCarthy,

Debtors.

**ORDER OVERRULING
DEBTORS' OBJECTION TO
CLAIM NO. 5-3 AND ALLOWING
CLAIM IN REDUCED AMOUNT**

THIS CASE came before the Court for trial on March 29, 2019, on *Debtors' Objection to Claim No. 5-3 Filed August 16, 2018, by Ravenwood Homes, LLC and Request for Attorney's Fees*.¹

Debtors filed a petition under Chapter 13 of the Bankruptcy Code on July 26, 2017. Ravenwood Homes, LLC ("Ravenwood") timely filed Claim No. 5-3 as a secured claim in the amount of \$98,636.57, including attorney's fees (the "Claim"). The Claim arises from Ravenwood's construction of a home for Debtors under a Construction Agreement dated September 16, 2014. Debtors object to the secured status of the Claim because Ravenwood did not record a claim of lien as required by § 713.08 of the Florida Statutes, and did not assert an equitable lien in a prior state court foreclosure action. In addition, at trial, Debtors presented evidence to support their contention that the Claim should be disallowed because the work performed by Ravenwood under the Construction Agreement was substandard.

The Court finds that because Ravenwood did not comply with the recording requirements of § 713.08, it is not entitled to a construction lien. However, under Florida law, an equitable lien

against real property may arise where the parties' conduct shows that the claimant should be entitled to proceed against the property as a matter of equity. In this case, Debtors and Ravenwood signed a Construction Agreement and a Notice of Commencement of construction, Debtors' property was improved by Ravenwood's services, and the parties' conduct entitles Ravenwood to an equitable lien on the property. However, the total amount of Ravenwood's secured claim should be reduced by the amount of its claim for attorney's fees because such an award is not authorized by contract or statute.

A. Background

On August 26, 2013, Debtors signed a Notice of Commencement.² As set forth in the Notice of Commencement, Debtors were the owners of real property located at 359 Japura Street, Punta Gorda, Florida (the "Property"), the Property was to be improved by the construction of a house and pool, and Ravenwood was the contractor for the project. On August 27, 2013, the Notice of Commencement was recorded in the Public Records of Charlotte County, Florida.

On September 16, 2014, Debtors (as Owners) and Ravenwood (as Contractor) entered into a Construction Agreement.³ The Construction Agreement provided for Ravenwood to build a 2,091 square foot custom home (the "Home") on the Property for the total contract amount of \$245,111.00. The Construction Agreement further provided that "[s]ubstantial [c]ompletion shall be defined as obtainment of Certificate of Occupancy for the project."⁴

The project was financed by a construction loan from Aileron Interim Credit Fund, LLC.

Throughout 2015, Ravenwood provided labor and materials to construct the Home.⁵ On December 28, 2015, Charlotte County issued a Certificate of Occupancy for the Home.⁶ The Certificate of Occupancy stated that the Home had

¹ Doc. No. 43.

² Ravenwood's Exhibit 1-d.

³ Debtors' Exhibit 1; Ravenwood's Exhibit 1-a.

⁴ Construction Agreement, ¶ 4.3.

⁵ See Ravenwood's Exhibit 2.

⁶ Debtors' Exhibit 7; Ravenwood's Exhibit 1-b.

been inspected for compliance with the Florida Building Code's requirements for occupancy.

Debtors claim that the completed Home did not satisfy the terms of the Construction Agreement with Ravenwood for a number of reasons, including (1) the bathroom walls do not have the agreed finish, (2) the cabinets above the washing machine were not raised, (3) the sump pump should not have been installed in the laundry room, (4) the shower is 3.5 inches smaller than agreed, (5) the ceiling height is two inches lower than agreed, (6) a bathroom window is crooked, (7) the floor tile is uneven, (8) the bathtub was not the agreed quality, (9) the front door did not have decorative inserts, (10) the pool does not have a solar heating system as agreed, and (11) the roof shingles were "rippled." Debtors also complain, generally, that the Home, including the garage, was not finished or cleaned to their level of expectation.

Nevertheless, around the time that the Certificate of Occupancy was issued in late December 2015, without Ravenwood's knowledge, Debtors moved into the Home, changed the locks, and denied Ravenwood access to the Home.

On January 26, 2016, Ravenwood's president and owner, Mr. Wishtischin, signed a Conditional Waiver and Release on Final Payment.⁷ The Waiver and Release stated that it would be effective to release Ravenwood's lien rights and claims for payment upon receipt of a check in the amount of \$80,898.81 as the final construction draw. However, Debtors did not approve the final draw under the Construction Agreement, and the funds were not released to Ravenwood.

In August 2016, after Aileron claimed a default by Debtors under the construction loan, Aileron filed a foreclosure complaint against Debtors and Ravenwood in the Circuit Court of Charlotte County, Florida (the "Foreclosure Action").

Aileron also recorded a Notice of Lis Pendens related to the Property in the Public Records of Charlotte County.⁸ Ravenwood filed an answer in the Foreclosure Action that included a crossclaim against Debtors for breach of contract and quantum meruit.⁹

In December 2016, Debtors refinanced the construction loan through an entity known as "loanwise financial LLC"¹⁰ and satisfied the debt owed to Aileron. When Aileron's debt was satisfied, it dismissed its complaint in the Foreclosure Action. However, Ravenwood was not paid at the time of the refinancing and its crossclaim against Debtors remained pending after dismissal of Aileron's complaint.

On July 26, 2017, while the Foreclosure Action (i.e., Ravenwood's crossclaim) was still pending, Debtors filed a petition under Chapter 13 of the Bankruptcy Code. On their schedules, they listed the Property as their homestead, and listed Fannie Mae/Cenlar as a secured creditor with a mortgage on the Property in the amount of \$234,289.00.¹¹

On August 16, 2018, Ravenwood filed Amended Claim No. 5-3 as a secured claim in Debtors' bankruptcy case in the amount of \$98,636.57.¹² The Claim consists of the following components:

Balance on contract - \$60,698.81
Money advanced to vendors - \$4,348.00
Attorney's fees - \$23,519.13
Legal costs to third parties - \$1,242.40
Interest - \$8,828.23
TOTAL - \$98,636.57

Debtors object to Claim No. 5-3 as a secured claim because Ravenwood did not record a claim of lien as required by § 713.08 of the Florida Statutes, and did not claim an equitable lien in the prepetition Foreclosure Action.

⁷ Ravenwood's Exhibit 1-g.

⁸ Ravenwood's Exhibit 1-e.

⁹ Ravenwood's Exhibit 1-c.

¹⁰ See attachments to Claim No. 6-1 filed by Texas Capital Bank, N.A.

¹¹ Doc. No. 11.

¹² Ravenwood had timely filed a secured claim. (Claim No. 5-1). Debtors objected to Claim No. 5-1 as lacking documentation to support the claim's secured status. (Doc. No. 23). The Court sustained the objection without prejudice to Ravenwood's filing an amended claim. (Doc. No. 30).

B. The Claims Process in Bankruptcy

Section 501 of the Bankruptcy Code provides that a creditor may file a proof of claim in a bankruptcy case.¹³ Rule 3001 of the Federal Rules of Bankruptcy Procedure provides that a proof of claim shall conform substantially to the appropriate Official Form, shall be executed by the creditor or the creditor's agent, and shall be accompanied by the writing upon which it is based and evidence of any security interest, if appropriate.¹⁴

Under Rule 3001(f), a proof of claim that is "executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim."¹⁵ In other words, a claim constitutes prima facie evidence of its validity and amount if it contains the information required by Rule 3001.¹⁶

Rule 3007 of the Federal Rules of Bankruptcy Procedure governs the filing of objections to claims.¹⁷ If a claim has been filed in accordance with Rule 3001, the Eleventh Circuit Court of Appeals has stated that an objecting party bears the burden of proof to come forward with enough substantiation to overcome the claimant's prima facie evidence of validity.¹⁸ The objecting party has the burden of going forward with evidence to support its objection, and the evidence must be of a probative force equal to the information contained in the proof of claim.¹⁹

C. Construction Lien

Part I of Chapter 713 of the Florida Statutes, which may be cited herein as the "construction lien law," establishes a statutory framework for the creation and enforcement of construction liens to protect those who have provided labor and materials for the improvement of real property.²⁰

Section 713.08 of the Florida Statutes is entitled "Claim of lien." Section 713.08(1) provides:

(1) For the purpose of perfecting her or his lien under this part, every lienor, including laborers and persons in privity, shall record a claim of lien which shall state:

(a) The name of the lienor and the address where notices or process under this party may be served on the lienor.

(b) The name of the person with whom the lienor contracted or by whom she or he was employed.

(c) The labor, services, or materials furnished and the contract price or value thereof. . . .

(d) A description of the real property sufficient for identification.

(e) The name of the owner.

(f) The time when the first and the last item of labor or service or materials was furnished.

(g) The amount unpaid the lienor for such labor or services or materials and for unpaid finance charges due under the lienor's contract.²¹

Under § 713.08(5), the "claim of lien may be recorded at any time during the progress of the work or thereafter but not later than 90 days after the final furnishing of the labor or services or materials by the lienor."²²

Even though the construction lien law is intended to protect those who improve real property, a construction lien is "purely a creature

¹³ 11 U.S.C. § 501(a).

¹⁴ Fed. R. Bankr. P. 3001.

¹⁵ Fed. R. Bankr. P. 3001(f).

¹⁶ *In re Walston*, 606 F. App'x 543, 546 (11th Cir. 2015).

¹⁷ Fed. R. Bankr. P. 3007.

¹⁸ *In re Walston*, 606 F. App'x at 546.

¹⁹ *In re Fanning*, 2019 WL 2179734, at *2 (Bankr. W.D. Okla. May 22, 2019).

²⁰ Fla. Stat. § 713.001; *Trump Endeavor 12, LLC v. Fernich, Inc.*, 216 So. 3d 704, 707 (Fla. 3d DCA 2017).

²¹ Fla. Stat. § 713.08(1).

²² Fla. Stat. § 713.08(5).

of the statute.”²³ Accordingly, contractors who seek the statute’s benefits must strictly comply with its requirements.²⁴

Ravenwood did not record a claim of lien in the clerk’s office of Charlotte County, Florida in compliance with § 713.08. No claim of lien appears in the evidence, and Ravenwood does not assert that it recorded a claim of lien as required by the statute. The Court concludes that Ravenwood does not hold a valid construction lien under § 713.08 of the Florida Statutes.

D. Equitable Lien

“Florida law is clear that an equitable lien may be imposed on one of two bases: (1) a written contract that indicates an intention to charge a particular property with a debt or obligation; or (2) a declaration by a court out of general considerations of a right or justice as applied to a particular circumstances of a case.”²⁵

Under the first basis, it is sufficient that an agreement exists that shows the parties’ intent to charge the property with a particular debt, and no showing of fraud or other egregious conduct is required.²⁶ Under the second basis, the equitable lien may arise “by reason of the conduct of the parties affected, that would entitle one party as a matter of equity to proceed against certain property.”²⁷ In either case, the funds creating the debt must have been used to enrich the owner’s interest in the property subject to the lien.²⁸ “Equitable liens may be based upon considerations of estoppel or to prevent unjust enrichment.”²⁹

In this case, Debtors and Ravenwood entered into a Construction Agreement for Ravenwood to build a custom Home on Debtors’ Property, and for

Debtors to pay Ravenwood the sum of \$245,111.00 for the construction of the Home.³⁰ Debtors and Ravenwood also signed a Notice of Commencement that was recorded in the public records of Charlotte County.³¹ The Notice was recorded in accordance with the “construction lien law” provisions of Chapter 713 of the Florida Statutes, and stated that improvements would be made to Debtors’ Property.

Ravenwood furnished materials and labor to build the Home on Debtors’ Property and the Home was “substantially completed” in December 2015, but Debtors did not approve the final payment due to Ravenwood under the Construction Agreement. The circumstances surrounding the nonpayment warrant the imposition of an equitable lien for the balance claimed on the contract. The equitable factors include:

1. The Home passed Charlotte County’s inspection under the Florida Building Code, and a Certificate of Occupancy was issued on December 28, 2015.³²

2. Debtors moved into the Home around the time that the Certificate of Occupancy was issued, without Ravenwood’s knowledge and before Ravenwood delivered the keys to Debtors.

3. Ravenwood’s owner and president testified that Debtors refused to grant Ravenwood access to the Home after they moved in, and Debtors acknowledged that they changed the locks on the Home when they took possession.

²³ *Sam Rodgers Properties, Inc. v. Chmura*, 61 So. 3d 432, 438 (Fla. 2d DCA 2011)(quoting *Delta Fire Sprinklers, Inc. v. OneBeacon Ins. Co.*, 937 So. 2d 695, 698 (Fla. 5th DCA 2006)).

²⁴ *Sam Rodgers Properties, Inc. v. Chmura*, 61 So.3d at 438.

²⁵ *Wichi Management LLC v. Masters*, 193 So. 3d 961, 963 (Fla. 3d DCA 2016)(citing *Golden v. Woodward*, 15 So. 3d 664, (Fla. 1st DCA 2009)).

²⁶ *In re Marcum*, 508 B.R. 499, 502 (Bankr. M.D. Fla. 2014).

²⁷ *Wichi Management LLC v. Masters*, 193 So. 3d at 963(quoting Fla. Jur.2d, Liens § 4).

²⁸ *Id.*; *See In re Marcum*, 508 B.R. at 502(The money borrowed was used to pay real estate taxes for the property.).

²⁹ *Tribeca Lending Corp. v. Real Estate Depot, Inc.*, 42 So. 3d 258, 262 (Fla. 4th DCA 2010).

³⁰ Debtors’ Exhibit 1; Ravenwood’s Exhibit 1-a.

³¹ Ravenwood’s Exhibit 1-d.

³² Debtors’ Exhibit 7; Ravenwood’s Exhibit 1-b.

4. By denying access to the Home, Debtors prevented Ravenwood from attempting to correct the alleged defects in workmanship, as permitted by Article 14 of the Construction Agreement.

5. In January 2016, Ravenwood signed a Conditional Waiver and Release on Final Payment which stated that the waiver “becomes effective to release” Ravenwood’s claims only upon receipt of final payment under the Construction Agreement.³³ But in December 2016, Debtors refinanced the construction loan through loanwise financial LLC without approving the final payment to Ravenwood. According to Ravenwood’s owner/president, the refinancing was accomplished through Debtors’ unauthorized use of the Conditional Release.³⁴

In other words, the circumstances show that (1) Debtors’ interest in their Property was enriched by Ravenwood’s construction of the Home, which passed County inspection and which is Debtors’ current residence, (2) Debtors deprived Ravenwood of the opportunity to correct any alleged construction defects by refusing to grant Ravenwood access to the Home, and (3) Debtors frustrated Ravenwood’s disputed lien rights by satisfying the construction loan without payment or notice to Ravenwood. General considerations of right or justice warrant the imposition of an equitable lien on the Property in favor of Ravenwood.

Debtors argue that Ravenwood did not assert its entitlement to an equitable lien in the crossclaim it filed in the Foreclosure Action. But Ravenwood’s crossclaim included a claim for quantum meruit and was still pending when Debtors filed their Chapter 13 case. Ravenwood could have moved to amend its crossclaim to seek the imposition of an equitable lien. Because the facts giving rise to an equitable lien relate back to the events giving rise to the crossclaim, such relief would likely have been granted.

E. Debtors’ Objection to the Claim Based on the Quality of the Home Construction

Although Debtors testified regarding a litany of complaints concerning the construction of the Home, they did not offer the testimony of an expert witness on this issue. Ravenwood’s owner and president, Mr. Wishtischin, testified credibly regarding each of the issues raised by Debtors (*e.g.*, the ceiling height in a block construction home is a multiple of the standard height of cement blocks; the pump was needed for the air conditioner; the Home had passed inspection and Charlotte County had issued the Certificate of Occupancy; the walls were finished to industry specifications; and the quality of the Home’s construction was consistent with its price point). Debtors were particularly concerned regarding the “ripples” in the roof shingles. Although their concern was largely directed to the cosmetic effect of the ripples, as it turns out, the roof had been replaced at insurance company expense after tornado damage. In addition, Debtors took possession of the Home without notice to Ravenwood and did not give Ravenwood the opportunity to address their complaints. Finally, Debtors did not present evidence that the value of the Home as constructed was less than the contract price of the Construction Agreement.

Having carefully reviewed the evidence and assessed the credibility of the witnesses, the Court finds that Debtors did not meet their burden of proof that the Claim should be disallowed because of Ravenwood’s substandard work.

F. Debtors’ Objection to the Claim as Untimely

Ravenwood timely filed Claim No. 5-1 in Debtors’ Chapter 13 case on November 21, 2017. Claim No. 5-1 was filed in the amount of \$98,636.57 and stated that it was based on “Mechanics Lien Home Construction.” Claim No. 5-3 was also filed in the amount of \$98,636.57, was also based on construction of Debtors’ Home, and attached the same breakdown of the contract

³³ Ravenwood’s Exhibit 1-g.

³⁴ See Doc. No. 92, Ravenwood’s Post-Trial Brief, p. 10.

balance and related charges that was attached to Claim No. 5-1.

An amended proof of claim should be “freely allowed where the purpose is to cure a defect in the claim as originally filed, to describe the claim with greater particularity or to plead a new theory of recovery on the facts set forth in the original claim.”³⁵

Here, Claim No. 5-3 is based on the same contract and the same facts as set forth in the original claim. It was not an attempt to file a new or unrelated claim. The Court finds that Claim No. 5-3 relates back to the filing of the original claim and should not be disallowed as untimely.

G. Attorney’s Fees

Ravenwood’s Claim No. 5-3 includes attorney’s fees in the amount of \$23,519.13, and related legal costs in the amount of \$1,242.40, for total legal fees and costs of \$24,761.53.

“Generally, attorney’s fees are not awarded unless authorized by statute or contract.”³⁶ It is an “elemental principle of law” in Florida that attorney’s fees may be awarded a prevailing party only in three circumstances: (1) where authorized by contract, (2) where authorized by a legislative act, or (3) where awarded for an attorney’s services in bringing money or property into the court.³⁷

In this case, the Construction Agreement does not provide for an award of attorney’s fees.

Under § 713.29 of the Florida Statutes, the prevailing party in an action to enforce a construction lien is entitled to recover attorney’s fees.³⁸ But the equitable lien imposed in favor of Ravenwood in this case is not a statutory lien under § 713.08 that triggers the attorney’s fee provision. Where a contractor fails in its statutory lien claim,

it is not entitled to an award of attorney’s fees under § 713.29.³⁹

Consequently, the attorney’s fees claimed by Ravenwood in Claim No. 5-3 are not authorized either by statute or by the Construction Agreement and should be disallowed. For similar reasons, to the extent that Debtors’ request for attorney’s fees in their Objection to Claim No. 5-3 is a request for an award of fees against Ravenwood, it should be denied.

H. Conclusion

Ravenwood filed Claim No. 5-3 as a secured claim in the amount of \$98,636.57 based on its construction of a custom Home on Debtors’ Property. Ravenwood did not comply with the recording requirements of § 713.08 of the Florida Statutes, and may not claim a construction lien under the statute. However, Ravenwood is entitled to an equitable lien on the Property, junior to that of the existing mortgage, because Debtors’ interest in the Property was enriched by Ravenwood’s work under the Construction Agreement, and Debtors impeded Ravenwood’s ability to cure the alleged defects and assert its lien rights.

The amount of the equitable lien as of the date of Debtors’ petition includes the balance due on the contract (\$60,698.81), money advanced by Ravenwood to vendors (\$4,348.00), and interest (\$8,828.23), but should not include Ravenwood’s claim for attorney’s fees and related legal costs.

Accordingly, it is

ORDERED:

1. Debtors’ Objection to Claim No. 5-3 Filed August 16, 2018, by Ravenwood Homes, LLC and Request for Attorney’s Fees is overruled in part.

³⁵ *In re International Horizons, Inc.*, 751 F.2d 1213, 1216 (11th Cir. 1985)(quoted in *In re Porco*, 2013 WL 1283378, at *2 (Bankr. M.D. Fla. Mar. 28, 2013)).

³⁶ *GMPF Framing, LLC v. Villages at Lake Lily Associates, LLC*, 100 So. 3d 243, 244 (Fla. 5th DCA 2012).

³⁷ *S and T Builders v. Globe Properties, Inc.*, 944 So. 2d 302, 304 (Fla. 2006).

³⁸ Fla. Stat. § 713.29.

³⁹ *GMPF Framing, LLC v. Villages at Lake Lily Associates, LLC*, 100 So. 3d at 245 n.1.

2. Claim No. 5-3 of Ravenwood Homes, LLC, is allowed as a secured claim in the reduced amount of \$73,875.04.

3. Ravenwood Homes, LLC, is entitled to an equitable lien in the amount of \$73,875.04, junior to the existing first mortgage, on Debtors' Property located at 359 Japura Street, Punta Gorda, Florida, 33983, legally described as:

LOTS 18 AND 19, BLOCK 577, PUNTA GORDA ISLES, SECTION 20, ACCORDING TO THE MAP OR PLAT THEREOF, AS RECORDED IN PLAT BOOK 11, PAGES 2A THROUGH 2Z42, INCLUSIVE, OF THE PUBLIC RECORDS OF CHARLOTTE COUNTY, FLORIDA.

4. To the extent that Debtors' request for attorney's fees is a request for an award of fees against Ravenwood, the request is denied.

DATED: August 30, 2019.

/s/ Caryl E. Delano

Caryl E. Delano
United States Bankruptcy Judge