UDALL|SHUMWAY
COUNSELORS AT LAW SINCE 1965

Roger C. Decker

WRITER'S DIRECT LINE: 480-461-5343
EMAIL: rcd@udallshumway.com

May 24, 2024

VIA EMAIL AND CERTIFIED MAIL
jcw@wheelerlawgroup.law

Julianne Wheeler, Esq.
Wheeler Law Group
1490 S. Price Road, Suite 203
Chandler, AZ 85286-8600

Re: LandArizona/JAK LLC adv. Rod Schlesener dba HT4

Dear Ms. Wheeler:

Greetings. Udall Shumway PLC represents LandArizona/JAK LLC ("LandArizona") with respect to the company's dispute with your client Rod Schlesener dba HT4.

We are in receipt of the La Paz County Superior Court lawsuit that your law firm filed against our client, foreclosing a Notice and Claim of Mechanic's and Materialman's Lien recorded with the La Paz County Recorder on November 21, 2023. This correspondence is to inform you of certain facts with which you may not be familiar. We believe the rationale provided herein should be persuasive as to our request for your client to dismiss his lawsuit, release the notice of *lis pendens* and notice and claim of mechanic's lien that he has recorded.

We also demand that your client file a petition to expunge from the Superior Court records, the lien foreclosure lawsuit, the mechanic's lien claim, and the notice of lis pendens. We further demand that, immediately upon issuance of the order of expungement, that he serve the order on the La Paz County Recorder to expunge the mechanic's lien and notice of *lis pendens* from La Paz County Recorder filing records.

The facts of LandArizona's defenses and counterclaims are as follows.

On or about October 11, 2023, your client drafted and supplied to James Kunisch, on behalf of LandArizona, a "Conditional Waiver and Release on Final Payment". That release was substantially the same as the form appearing at A.R.S. 33-1008(D)(3). One of the major differences was the elimination of the following language:

> The undersigned warrants that he either has already paid or will use the monies he receives from this final payment to promptly pay in full all his laborers, subcontractors, materialmen and suppliers for all work, materials, equipment or services provided for or to the above referenced project up to the date of this waiver.

That language is intended to protect the payor, i.e., LandArizona, from paying twice for the same subcontractor labor or materials supplied to the project. The presence of that clause in the release would benefit our client only, and not Mr. Schlesener.

Accordingly, we perceive only two possible reasons that your client made the decision to remove that clause from the form of release that he prepared:

- Mr. Schlesener did not have any subcontractors or suppliers and therefore removed the clause, or

- Mr. Schlesener had subcontractors and suppliers and did not wish to make representations or commitments regarding paying them.

In either event, Mr. Schlesener removed that clause for his benefit, despite its intended protection of the financial interests of LandArizona.

Therefore, Mr. Schlesener cannot use the absence of the clause to his advantage by claiming that the release is substantially different from the form of release found at A.R.S. § 33-1008(D)(3) due to a change that he made and therefore is not entitled to full enforcement. To the contrary, because of the purpose of that language, with LandArizona as its sole intended beneficiary, the right to object to its absence belongs to LandArizona, only.

The fact that LandArizona accepted the waiver and release and paid the money set forth on the document, means that, at minimum in a *de facto* manner, LandArizona exercised the right to waive any such objection. As a result of Mr. Schlesener receiving and retaining LandArizona's payment of $25,010.34, the conditional waiver and release of lien rights and claims transformed into an unconditional waiver and release. Accordingly, Mr. Schlesener's recorded claim of mechanic's lien, lien foreclosure lawsuit, and recorded notice of *lis pendens* are all invalid for the following reasons.

Statutory deference. First, the lien release is entitled to statutory deference as a release of all lien rights in light of Ms. Schlesener accepting the $25,010.34 payment and thereby converting the conditional waiver and release into an unconditional waiver and release on final payment.

Arizona courts do not allow lien claims where the claimants has signed a waiver and release:

> In *George M. Morris Construction Company v. Four Seasons Motor Inn, Inc.*, 90 N.M. 654, 567 P.2d 965 (1977), where a lien claimant executed lien

waivers even though it had not received full payment, the court found that the lien claimant was nevertheless barred from asserting its lien since it had caused the owner of the property to change its position in reliance on the waiver. As the court stated:

> Here, the laborers could have refused to sign the waivers or put in a disclaimer as to those amounts they were unsure of having received (i.e. the fringe benefits). But by signing the waivers, the intervenors caused Bellamah to change its position (i.e. paying Morris their wages and fringe benefits).

567 P.2d at 969.

In *Holbrook v. Webster's, Inc.*, 7 Utah 2d 148, 320 P.2d 661 (1958), a lien claimant released "any lien or right to lien." Thereafter the lien claimant claimed that he had really intended to release the property only insofar as he had received payment for the labor or materials supplied. The court refused to consider his testimony ruling that the unambiguous language of the lien waiver had to be given effect as written:

> We are of the opinion that no genuine issue of fact is presented by the Lien Release. The only issue is one of law. It does not lie in the mouth of appellant to say that he was mistaken in the legal effect of the release or that he did not intend that it should be given the only legal effect of which it is susceptible.

320 P.2d at 663.

Amfac Distribution Corporation v. J.B. Contractors, Inc., 146 Ariz. 19, 24-25, 702 P.2d 566, 572-573 (App. 1985). Your client signed and submitted a release on final payment, and knowingly waived and released all lien rights on LandArizona's project. Your client's lien claim, lien foreclosure, and notice of *lis pendens* are in violation of Arizona law.

Accord and satisfaction. Secondly, even if the lien release is found to be substantially different from the form found at A.R.S. § 33-1008(D)(3), it is still an enforceable accord and satisfaction. A.R.S. § 33-1008(B) and (C) state:

> **B.** No oral or written statement purporting to waive, release or otherwise adversely affect a claim is enforceable or creates any estoppel or impairment of a claim unless it is pursuant to a waiver and release prescribed by this section or the claimant had actually received payment in full for the claim.

> **C.** This section does not affect the enforceability of either an accord and satisfaction regarding a bona fide dispute or any agreement made in settlement of an action pending in any court provided the accord and satisfaction or agreement and settlement make specific reference to the mechanic's lien or bond claims.

The form which your client supplied specifies in the title of the release, capitalized and bolded, that the $25,010.34 is a "**FINAL PAYMENT**". There is nothing ambiguous about that language. "Final Payment" means the parties agreed that no further monies would be requested or paid on the project.

Finally on this point, even if Mr. Schlesener had followed the requirements for a properly approved alteration or deviation from the proposals, the October 11, 2023, signed "Conditional Waiver and Release on Final Payment" releases all rights to any change orders:

> Rights based upon labor or service provided, or equipment or material delivered, pursuant to a written change order that has been fully executed by the parties prior to the date that this documents is signed by the claimant are waived and released by this document, unless listed as an Exception below.

That "Exceptions" section was left blank by your client, and the word "Rights" is unrestricted, as opposed to the language of the preceding sentence of the release specifying a release of lien, bond, and stop notice rights. The expansive and unrestricted release of all rights of any kind with respect to change orders is entirely consistent and harmonious with the phrase "FINAL PAYMENT" appearing in the title of document. There would be no further requirements of any kind on the contract, including for any change orders.

In that regard, please keep in mind that your client revised the statutory form of release and produced it to our client in signed form, presumably with your assistance. Accordingly, any waivers and releases were knowingly made, and any ambiguities will be construed against the drafter, i.e., your client, per the doctrine of *contra proferentem*.

Fraud. Third, LandArizona did not dispute the claims of Mr. Schlesener because the form of waiver and release resolved the matter. Mr. Schlesener was well aware of both LandArizona's dispute as to the full amount owed and reliance upon the form of release which Mr. Schlesener offered as resolving that dispute. LandArizona was entitled to rely on the document that Mr. Schlesener drafted and provided and did so – with that reliance being intended and foreseeable by your client. Accordingly, if this matter proceeds, LandArizona will counterclaim for fraud.

Additionally, Mr. Schlesener apparently inserted Invoice No. 3, p. 18 of the lien claim, into the lien without any previous presentation of it to our client for payment. Although Invoice No. 3 is only for $240.00, the fact of its appearance only at the time of recording the lien claim is consistent with the overall

fraudulent behavior alleged by our client regarding the conditional release on final payment.

Substantive deficiencies / unauthorized claims of Change Order work in the amount of the claim of lien. Fourth, there are substantive deficiencies of which Mr. Schlesener was aware before recording and foreclosing the lien claim.

The math of this contractual relationship is simple. On July 5, 2023, your client submitted three proposals in the total amount of $73,990.05. On August 18 and September 14, two progress payments were made in the amount of $20,000 and $23,000, respectively, totaling $43,000.00. On October 12, 2023, your client presented to LandArizona a conditional release on final payment in the amount of $25,010.34, which LandArizona immediately paid by direct deposit. The successful direct deposit and transfer of funds into Mrs. Schlesener's account converted the conditional release on final payment into an unconditional waiver and release. The total payment of $68,010.54, which differed from the proposal amounts by $5,980.05, constituted an accord and satisfaction and final resolution of any disputes between the parties.

Only after receiving those funds constituting a final payment, did Mr. Schlesener, on October 14, 2023, demand and attempt to extract from our client the additional amount of $20,245.70. It is facially self-apparent that the October 14, 2023 "Invoice" – which attributes more formality to it than is due -- is an improperly stitched-together, catch-all list of amounts that Mr. Schlesener is claiming after the fact. That work and those materials are not included within the signed proposal pages, which state that "Any alteration or deviation from above specifications involving extra costs will be executed only upon written order and will become an extra charge over and above the estimate." LandArizona did not agree to or pre-approve any alteration or deviation from the proposals, which demonstrated the manner in which those approvals must occur – a signed and dated acceptance of a written alteration of a proposal that was signed and dated by LandArizona. That did not occur, and therefore the lien claim is facially and knowingly invalid.

Mr. Schlesener shorted our client on materials, forcing LandArizona to cover those costs. Additionally, LandArizona did not agree to pay for the cost of hauling water. Further, the October 14, 2023 invoice, submitted two days after Mr. Schlesener received and deposited the final payment from LandArizona, did not take the required form of an approved and signed change order. Thus, the entire claimed dollar value of $20,245.70 in the lien claim, even if not barred by the release, would unrecoverable due to Mr. Schlesener not following the contractual pre-approval requirements for any labor or materials supplied pursuant to Invoice No. 4.

These insufficiencies and known flaws in the lien claim clearly and predictably invalidate the lien. As such, the lien is subject to penalties under A.R.S. § 33-420, the final section of this demand.

Penalties under A.R.S. § 33-420. Fifth, the mechanic's lien and the notice of *lis pendens* both violate A.R.S. § 33-420, subjecting your client to substantial automatic and continuing monetary penalties:

§ 33-420. False documents; liability; special action; damages; violation; classification

A. A person purporting to claim an interest in, or a lien or encumbrance against, real property, who causes a document asserting such claim to be recorded in the office of the county recorder, knowing or having reason to know that the document is forged, **groundless, contains a material misstatement or false claim or is otherwise invalid** is liable to the owner or beneficial title holder of the real property **for the sum of not less than five thousand dollars**, or for treble the actual damages caused by the recording, whichever is greater, and reasonable attorney fees and costs of the action.

B. The owner or beneficial title holder of the real property may bring an action pursuant to this section in the superior court in the county in which the real property is located for such relief as is required to immediately clear title to the real property as provided for in the rules of procedure for special actions. This special action may be brought based on the ground that the lien is forged, groundless, contains a material misstatement or false claim or is otherwise invalid. The owner or beneficial title holder may bring a separate special action to clear title to the real property or join such action with an action for damages as described in this section. **In either case, the owner or beneficial title holder may recover reasonable attorney fees and costs of the action if he prevails.**

C. A person who is named in a document which purports to create an interest in, or a lien or encumbrance against, real property and who knows that the document is forged, groundless, contains a material misstatement or false claim or is otherwise invalid shall be liable to the owner or title holder for the sum of not less than one thousand dollars, or for treble actual damages, whichever is greater, and reasonable attorney fees and costs as provided in this section, if he willfully refuses to release or correct such document of record within twenty days from the date of a written request from the owner or beneficial title holder of the real property.

D. A document purporting to create an interest in, **or a lien or encumbrance against, real property not authorized by statute**, judgment or other specific legal authority **is presumed to be groundless and invalid**.

Per the statute, this letter places your client on notice that he has already incurred, at minimum, a $5,000 penalty for his recorded claim of mechanic's lien, and a separate $5,000 penalty for his recorded notice of release of *lis pendens*.

THE REMAINING IMPROPER CLAIMS OF THE LAWSUIT

The Arizona Prompt Pay Act

Your client's lawsuit also makes claims for violations of the Arizona Prompt Pay Act, A.R.S. § 32-1181, et seq., and for unjust enrichment. Both are incorrect.

First, let me point out that your complaint improperly cites to the old version of the Prompt Pay Act at A.R.S. § 32-1129.01, which was amended several years ago. The new version now appears at A.R.S. § 32-1181, et seq., and the section which you presumably intended to recite is A.R.S. § 23-1182. However, that is not the most glaring deficiency in Count Three of your lawsuit.

The Prompt Pay Act deals with payments that are due under the contract at the time the payment request is submitted to the Owner. That occurred when Mr. Schlesener requested payment of $25,010.34 and submitted the lien release for that same amount on October 12. In response to that request and release, LandArizona paid the full amount of $25,010.34. At that point, the contract was, by agreement of the parties, completed and terminated. The Prompt Pay Act does not create obligations for owners after a contract is paid with what the contractor has designated to be a final payment.

The Prompt Pay Act states in relevant part at A.R.S. § 32-1182(K): "On final completion of the work, a contractor shall submit a billing or estimate for **final payment**." *Id.* (emphasis added). By your own client's release, that occurred on October 12, 2023. Accordingly, when your client stitched together another demand for payment, the contract was already paid and closed, and of no effect.

Finally, the sole and exclusive penalty of the Prompt Pay Act is the assessment of interest in the amount of eighteen percent (18%) per annum on sums that are still due and owing. A.R.S. § 32-1182(Q). ***But because there is no remaining amount due, there is no Prompt Pay Act penalty interest due.***

Unjust Enrichment

The final claim for recovery which your client alleges, i.e., unjust enrichment, also fails. Unjust enrichment is an equitable remedy available only in the absence of a contractual remedy:

> To establish a claim for unjust enrichment, a party must show: (1) an enrichment; (2) an impoverishment; (3) a connection between the enrichment and the impoverishment; (4) the absence of justification for the enrichment and the impoverishment; and (5) the absence of a legal remedy.

City of Sierra Vista v. Cochise Enter., Inc., 144 Ariz. 375, 381, 697 P.2d 1125, 1131 (App.1984).

Here, the parties executed a contract which established the rights and obligations of the parties. Mr. Schlesener cannot avoid the completion and final payment of the contract by asserting an unjust enrichment claim:

> As our supreme court has explained in *Brooks v. Valley Nat'l Bank,* 113 Ariz. 169, 548 P.2d 1166 (1976), if there is "a specific contract which governs the relationship of the parties, the doctrine of unjust enrichment has no application." 113 Ariz. at 174, 548 P.2d at 1171. *See also Johnson v. Am. Nat'l Ins. Co.,* 126 Ariz. 219, 223, 613 P.2d 1275, 1279 (App.1980). Here, Trustmark could have pursued a breach of contract claim based on the contractual documents applicable to Account Two. Because these contractual documents governed the relationship of the parties, the trial court properly granted Bank One's motion for JMOL on Trustmark's unjust enrichment claim.

Trustmark Insurance Company v. Bank One, Arizona, NA, 202 Ariz. 535,48 P.3d 485 (App. 2002). The parties' contract excludes any possibility of Mr. Schlesener invoking the doctrine of unjust enrichment.

As to that contract remedy, to the extent that any dispute over contract performance existed, LandArizona and Mr. Schlesener entered into an accord and satisfaction by virtue of LandArizona's payment of $25,010.43 in exchange for Mr. Schlesener's execution of a Conditional Release on Final Payment. That conditional release converted into an unconditional release following LandArizona's direct deposit of the $25,010.34 payment into the bank account of Mr. Schlesener.

DEMAND FOR DISMISSAL, RELEASE AND EXPUNGEMENT

This letter demands that your client dismiss his lawsuit and record a release of his claim of mechanic's lien and record a release of his notice of *lis pendens* immediately by not later than May 30, 2024. If he fails to do so within twenty days of the date of this correspondence, he will be required to pay an additional $1,000 penalty each for recording his mechanic's lien and for recording his notice of *lis pendens*.

Additionally, pursuant to A.R.S. § 12-1191(D)(1) and (3), with ten (10) days of the date of this correspondence, your client must file a petition with the La Paz County Superior Court to expunge the judicial record of the foreclosure action and notice of *lis pendens*. Within three (3) days of the issuance of an order expunging the record, Mr. Schlesener must serve the order upon the La Paz County Recorder.

Because your firm has served our client with a La Paz County Superior Court action, his answer date is running, and time is of the essence. Accordingly, by close of business Thursday, May 30. 2024, please email to us copies of recorded releases of Mr. Schlesener's notice of claim of lien and notice of *lis pendens*, and a copy of a filed notice of voluntary dismissal of Mr. Schlesener's lien foreclosure action.

Our client demands the payment of the statutory penalties described herein of $10,000 within fifteen (15) days of the date of this correspondence. If your office pursues the lawsuit against our client, we will pursue the greater of the statutory penalties or actual damages for the invalid lien claim and false notice of *lis pendens*. Our client states that actual damages have accrued due to your client's lawsuit and false filings, and therefore he will assert all appropriate counterclaims against Mr. Schlesener, including

a claim for fraud.

In the absence of dismissal of the lawsuit, this law firm will also file a special action to clear the property of both the lien claim and the notice of *lis pendens*, and to obtain actual damages, the attorney fees and costs for which Mr. Schlesener will be liable per A.R.S. § 33-420(B).

Should you require further information regarding this correspondence, please contact me at (480) 461-5343 or contact James Reed at (480) 461-5354.

Sincerely,

Roger C. Decker
James B. Reed

RCD/krj

Cc: LandArizona LLC