1 CA-CV 11-0788

IN THE COURT OF APPEALS OF ARIZONA
DIVISION 1

THE WEITZ COMPANY, LLC,

Appellee,

vs.

NICHOLAS HETH, *et alia,*

Appellants.

On Appeal from the Superior Court of Maricopa County
Case No. CV 2008-028378

BRIEF OF THE APPELLEE

MICHAEL J. HOLDEN
State Bar No. 006361
BARRY A. WILLITS
State Bar No. 016091
Holden Willits PLC
Two North Central Avenue, Suite 1220
Phoenix, Arizona 85004
Telephone: (602) 508-6210
Facsimile: (602) 508-6211
mholden@holdenwillits.com
bwillits@holdenwillits.com

JONATHAN STERNBERG
Missouri Bar Number 59533
Jonathan Sternberg, Attorney, P.C.
1111 Main Street
7th Floor, Harzfeld's Building
Kansas City, Missouri 64105
Telephone: (816) 474-3000
Facsimile: (816) 474-5533
jonathan@sternberg-law.com

COUNSEL FOR APPELLEE
THE WEITZ COMPANY, LLC

Table of Contents

Table of Citations

Cases

Arizona Revised Statutes

Arizona Rules of Civil Procedure

Arizona Rules of Civil Appellate Procedure

Other Authorities

Statement of the Case

This is an appeal from a judgment ordering the foreclosure of a general contractor's mechanic's lien attached to a residential condominium project it built.

Appellee The Weitz Company, LLC ("Weitz"), brought this action in the Superior Court of Maricopa County against the project's owner, purchasers of individual condominium units, and the unit purchasers' mortgage lenders. Weitz's complaint stated three claims: (1) breach of contract against the project owner; (2) foreclosure of Weitz's mechanic's lien against all defendants; and (3) alternatively, restitution for unjust enrichment against all defendants (Index of Record 1).

Weitz successfully sought partial summary judgment that its lien had priority over the unit purchasers and their lenders (I.R. 531, 586, 592). It then moved for summary judgment on its claim for foreclosure (I.R. 589). The court granted summary judgment in part, finding Weitz's mechanic's lien was prior but leaving open the monetary amount to which Weitz was entitled (I.R. 714).

Thereafter, the parties stipulated to the amount of Weitz's lien, as well as the amounts in which it attached to each unit purchaser's condominium unit (I.R. 815). The court entered final judgment on October 12, 2011 (I.R. 818).

On November 2, 2011, the unit purchasers and their lenders filed a timely notice of appeal (I.R. 824). This Court has jurisdiction under A.R.S. § 12-2101(A)(1).

Statement of Facts

This case arises out of the construction of the Summit at Copper Square ("the Project"), a 23-story building containing 165 units of mixed-use commercial and residential condominiums located at 310 South 4th Street in Phoenix, Arizona (Index of Record 469).

The Summit at Copper Square, LLC ("Summit"), the Project's owner, hired Weitz to be the Project's general construction contractor (I.R. 550, ¶ 1). Prior to Weitz's improvements, the property at 310 South 4th Street was an empty lot (I.R. 550, ¶ 8). Weitz and its subcontractors spent 30 months and $59 million completing the Project in its entirety (I.R. 705, ¶ 7).

A. First National's Construction Loans and Weitz's Payment Process.

In April 2005, Summit obtained a construction loan for $44 million from First National Bank of Arizona (I.R. 550, ¶ 3). On April 26, 2005, First National recorded a deed of trust on the Project, securing its loan (I.R. 550, Exhibit 2). On September 9, 2005, Summit entered into a construction contract with Weitz to build the project (I.R. 550 ¶ 8). Weitz began construction on November 21, 2005 (I.R. 550, ¶ 8).

In December 2005, Summit and First National modified the construction loan's terms (I.R. 550, Ex. 3, § 3.3). They increased the construction funds available from $44 million to $52.5 million (I.R. 550, Ex. 3, § 3.3). As a result, on

December 20, 2005, First National recorded an assumption agreement and deed of trust securing the additional promised funding (I.R. 550, Ex. 3).

In February 2007, First National issued Summit a second construction loan for the project in the amount of $10,356,000 (I.R. 550, Ex. 4). First National recorded a deed of trust for that loan on February 28, 2007 (I.R. 550, Ex. 4). In all, First National committed over $60 million for constructing the Project (I.R. 550, Ex. 4-5).

Each month during construction, Weitz submitted monthly applications to Summit for payment (I.R. 705, ¶¶ 5-6). First National reviewed and approved each payment application, thereafter releasing loan proceeds to Summit so Summit could pay Weitz (I.R. 705, ¶ 6).

First National did not pay out loan proceeds all at once (I.R. 705, ¶¶ 5-7). Rather, the loan was disbursed over more than two years in accordance with the amount of construction Weitz performed: as Weitz gradually completed construction (simultaneously increasing the value of First National's collateral), First National released loan proceeds (I.R. 705).

B. Change in the payment process: Summit and First National promised Weitz that final construction payments would come from the sale of condominium units, not First National's construction loan.

In the summer of 2007, First National indicated it no longer would fund the final $4 million of construction costs "due to [its] capital requirements imposed by

regulatory agencies" (I.R. 512, Ex. A, ¶ 9). By that time, First National had approved – and Summit had paid to Weitz – $55,722,075.00 (I.R. 705, ¶ 11). But Weitz's adjusted guaranteed maximum price for performing the work was $59,584,682.00, making for a shortfall of approximately $4 million (I.R. 705, ¶¶ 7, 8).

Accordingly, Summit, First National, and Weitz began discussing alternative methods of funding the Project to completion (I.R. 816, Ex. B). Ultimately, Summit, First National, and Weitz agreed that if Weitz continued work, Weitz would be paid from the proceeds obtained in selling individual condominium units (I.R. 816, Ex. B). First National agreed to allow Weitz to be paid sale proceeds "so that a lien wouldn't be filed" against the Project, its collateral (I.R. 816, Ex. B).

At this point, though, Weitz still was several months from completing the Project (I.R. 705, Ex. 6). For example, no specific floor or individual unit even received a certificate of occupancy until December 2007, several months later (I.R. 705, Ex. 6). In response to discovering First National would not disburse loan proceeds for the final $4 million of construction costs, Weitz could have stopped work (I.R. 816). In reliance upon Summit's and First National's agreement to allow Weitz to receive payment from sale proceeds, however, Weitz elected to complete the construction (I.R. 512, Ex. 1; I.R. 816, Ex. B).

C. First National reneged, taking all sale proceeds without paying Weitz.

As construction neared completion, Summit began pre-selling individual units (I.R. 550, ¶ 6). Ultimately, by the end of 2008, it had sold more than 80 units (I.R. 550; I.R. 818). Most of the units were bought through a customary combination of purchaser's down-payment plus a mortgage lender's loan funds secured by an individual deed of trust on the condominium unit (I.R. 502). Some unit purchasers originally purchased with mortgage loans but have since paid them off (I.R. 818). Additionally, seven units were bought in cash without any mortgage (I.R. 818). Finally, several units have been resold two or more times since the Project was completed, including more than ten through trustee foreclosure sales (I.R. 818).

Weitz, however, did not receive "a single penny" from the sale of any unit (I.R. 816, Ex. B). Despite its earlier promises, First National unilaterally decided "it could not permit funds from unit closings to go to Weitz. Rather, [First National] would require that all [*sic*] Summit apply all funds toward paying the loan from the Bank" (I.R. 512, Ex. A, ¶ 11). First National explained it "had to deviate from the plan to apply closing funds to Weitz's progress payments due to restrictions imposed by federal regulators" (I.R. 512, Ex. A, ¶ 11). Ultimately, First National received nearly $40 million from the sale of the individual units (I.R. 588, ¶ 6).

Thus, as a result of First National's actions, Weitz never was paid the final $3.8 million it was owed on the Project (I.R. 469). When asked if he would have expected Weitz to continue working (let alone complete the Project) had Weitz been told First National would take all the sale proceeds, Summit's principal testified: "No. No" (I.R. 816, Ex. B).

Weitz recorded a mechanic's lien on the Project on May 9, 2008 (I.R. 588, Ex. 3). It amended the lien on June 6, 2008 (I.R. 588, Ex. 4).

D. The construction loan did not contain any "release prices."

In their opening brief, citing to the deed of trust securing First National's original loan, Appellants state, "The construction loan agreement between First National Bank and Summit specified 'release prices' for the release of condominium units from the construction loan deed of trust as units were sold" (Appellants' Brief 6). This simply is not true.

The deed of trust provision on which Appellants rely does not contain any release prices for the sale of any individual units (I.R. 550, Ex. 2, ¶ 13(a); Appendix A18). Rather, this provision merely disallowed Summit from selling or conveying any units without first obtaining First National's written consent, "which [First National] may withhold in its sole and exclusive discretion" (I.R. 550, Ex. 2, ¶ 13(a); Appx. A18). The provision allowed First National to demand

all sale proceeds be paid to it, allowing it to withhold its consent and not allow the sale (I.R. 550, Ex. 2, ¶ 13(a); Appx. A18).

Summit's principal acknowledged the lack of pre-negotiated release prices in the proceedings below (I.R. 816, Ex. B; Appx. A19-21). Contrary to Appellants' assertion, he testified he failed to negotiate a "step down" of the release prices for each unit with First National:

> I took responsibility for not having the release prices codified in the mortgage the way that you would have it in others.
>
> In a lot of transactions, you would negotiate up front, the step up or step down, depending which way you looked at it, in terms of repayment to the lender.

(I.R. 816, Ex. B; Appx. A20). Nothing in the Record controverts or even disputes this testimony.[1] As such, because Summit failed to lock in release prices in advance, First National was able to demand all the sale proceeds despite its earlier promises Weitz would be paid from those sales (I.R. 816, Ex. B; Appx. A20).

There simply were no individual amounts of the overall construction loan allocated on a unit-by-unit basis in the loan documents. Appellants' suggestion otherwise lacks any support in the Record. Further, the combined condominium sales never fully repaid First National's loan, nor were First National's deeds of trust ever fully released (I.R. 501, Ex. 12a, 12b; I.R. 562, Ex. 3).

[1] At no time before the trial court did Appellants even submit an affidavit testifying to the existence of release prices (I.R. 564).

E. The condominium unit purchasers' title insurer and mortgage lenders required additional collateral due to Weitz's lien rights.

Summit and the title insurer who issued the policies for all the unit sales specifically recognized Weitz's lien rights would attach prior to any units being sold (I.R. 816, Ex. 5). For this reason, the title insurer required Summit enter into a general indemnity agreement (I.R. 816, Ex. 5). Under its express terms, Summit and its title insurer agreed:

- Summit was commencing work on real property "which may thereafter result in Mechanics' Liens" (§ 2);

- Summit "has an interest in … insuring against loss which may be sustained by reason of Mechanics' Liens, or without exception to Mechanics' Liens, arising out of such work of improvement" (§ 3); and

- To "induce" the title insurer to issue "such policies of title insurance … [Summit] promises and agrees to hold harmless, protect and indemnify [title insurer] from and against any and all liabilities … resulting directly or indirectly from any Mechanics' Liens …" (§ 5).

(I.R. 816, Ex. 5).

Ultimately, the title insurer started requiring a portion of each sale's proceeds to be held in escrow to pay off the fraction of Weitz's lien attached to that unit (I.R. 562, Ex. 2; I.R. 641, Ex. 2). The following e-mail exchange involving the title insurer concerned the July 2008 sale of penthouse unit 2201:

> EMAIL #1:
>
> Rose sent down a recording package for this file …. She is telling us on her recording instructions that all three mechanics liens are out per you. I am asking to confirm that ….
>
> RESPONSE:
>
> For this order only, the liens are out. *We are holding $50,000 to cover liens on this unit.*

(I.R. 562, Ex. 2; I.R. 641, Ex. 2) (emphasis added). Thus, in July 2008, the title insurer was requiring $50,000 of the sale proceeds of unit 2201 be held back to cover Weitz's lien (I.R. 562, Ex. 2; I.R. 641, Ex. 2).

F. Proceedings Below.

On November 7, 2008, Weitz filed a complaint in the Superior Court of Maricopa County against Summit, the owner of every sold unit, and the unit purchasers' individual mortgage lenders (I.R. 1). Weitz sought damages for breach of contract against Summit and sought foreclosure of its lien against all defendants (I.R. 1).

The unit purchaser defendants and their mortgage lenders, all of whom are Appellants here, challenged Weitz's lien claim on multiple fronts. Initially, Weitz and Appellants each cross-moved for summary judgment on the issue of whether Weitz's lien had priority (I.R. 503, 531). The trial court granted Weitz's motion and denied Appellants', holding Weitz's lien had priority over any competing interests in the case as a matter of law (I.R. 586).

Appellants then sought special action review in this Court, also moving to stay the proceedings below (I.R. 594, 595). This Court denied the request for a stay and declined special action jurisdiction (I.R. 599). Appellants sought review in the Supreme Court, which also was denied (I.R. 602).

Weitz then moved for summary judgment on its foreclosure claim (I.R. 589). The trial court granted Weitz's motion in part, finding its lien was valid and in compliance with all statutory requirements (I.R. 714). But the court found that disputed questions of fact over whether the lien amount represented the reasonable value of the labor, materials, fixtures, and tools Weitz furnished to the Project for which it had not been paid precluded summary judgment as to that value (I.R. 714).

Shortly before trial on the lien value was to begin, the parties stipulated both to that amount – $2,125,000 – and the individualized amounts to which it attached to each of the sold units (I.R. 815). The trial court entered a final judgment of foreclosure in Weitz's favor on October 12, 2011 (I.R. 815, 818; Appx. A1-17).

The unit owners and their mortgage lenders timely appealed to this Court (I.R. 824-30).

Statement of the Issues

I. The trial court did not err in holding the doctrine of equitable subrogation does not apply because the law of Arizona forbids partial subrogation to a mortgage. As no unit purchaser or its respective lender, either alone or in the aggregate, fully discharged the entire obligation secured by First National's original deed of trust, they cannot be equitably subrogated into its priority position.

II. The trial court did not err in holding Weitz's mechanic's lien had priority over Appellants, because the law of Arizona is that equitable subrogation cannot be allowed where it would prejudice an intervening interest or create an injustice. Equitably subrogating Appellants into the construction loan would prejudice Weitz and create an injustice because it would (a) allow Summit to have sold Weitz's work without paying Weitz after Weitz was induced to continue working with promises of being paid from unit sales, and (b) require Weitz to deal with multiple first lienholders rather than simply one bank.

Argument

Summary

First National financed construction of a condominium project for Summit. Summit's obligation to First National was secured by a deed of trust on the whole project. Summit hired Weitz to be the Project's general construction contractor.

When the project was nearing completion, First National refused to make any further advances under its loan to allow Summit to pay Weitz's final $4 million of construction contract payments. Summit and First National, however, promised that if Weitz completed construction, Weitz would be paid from each unit's sale. Weitz completed construction, but Summit and First National failed to pay. More than 80 units ultimately were sold. Weitz recorded a mechanic's lien. First National's loan was never fully paid off. The law of Arizona is that Weitz's mechanic's lien relates back to when Weitz commenced construction.

Weitz sought to foreclose its lien against four categories of unit purchasers: (1) unit purchasers with mortgages (and their mortgage lenders); (2) unit purchasers with mortgages who paid off their mortgage after the case began; (3) unit purchasers for cash; and (4) subsequent unit purchasers who bought from the other three categories, including via trustees' or foreclosure sales. The trial court agreed that Weitz's lien was prior and a final judgment was entered ordering that Weitz's lien be foreclosed against all categories of unit purchasers.

On appeal, Appellant mortgage lenders argue they are equitably subrogated into First National's position and thus have priority over Weitz's lien. This is without merit. In Arizona, partial subrogation is prohibited. Because no Appellant fully performed the obligation of another and because the entire obligation secured by First National's deed of trust never was fully discharged, Appellants cannot piecemeal subrogate into First National's position. Moreover, such subrogation would be *in*equitable, prejudicing Weitz: the developer could sell Weitz's work without ever paying Weitz.

The Court should affirm the trial court's judgment.

Standard of Review

All issues in this appeal are reviewed de novo.

This is an appeal from a grant of summary judgment. This Court "review[s] de novo a grant of summary judgment …." *Ochser v. Funk*, 228 Ariz. 365, ¶ 11, 266 P.3d 1061, 1065 (2011). "Summary judgment is appropriate only if no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law." *Id.* (citing Ariz. R. Civ. P. 56(c)(1)).

Whether one lien has priority over another lien is a question of law reviewed de novo. *Sun Valley Fin. Servs. of Phoenix, L.L.C. v. Guzman*, 212 Ariz. 495, 499, ¶ 17, 134 P.3d 400, 404 (App. 2006).

Introduction

Weitz recorded a mechanic's lien after the developer failed to pay fully for the labor, materials, and equipment Weitz furnished to the Project. The law of Arizona is that Weitz's mechanic's lien has priority over "all liens, mortgages or other encumbrances" attaching to the Project after Weitz commenced work. A.R.S. § 33-992(A). It is undisputed that the interests of all Appellants – including all unit purchasers and their respective lenders – attached to the project after Weitz commenced work. Thus, under the express provisions of Arizona's mechanic's lien laws, Weitz's mechanic's lien has priority over the interests of Appellants.

Appellants contend that, under the doctrine of equitable subrogation, they should leapfrog over Weitz's mechanic's lien and take the priority position of the original lender, First National. But Appellants bear the burden to prove that equitable subrogation applies here. Unless Appellants are permitted to substitute into the lien priority status of First National, Weitz's mechanic's lien has priority over the interests of all Appellants.

I. The trial court did not err in holding the doctrine of equitable subrogation does not apply, because the law of Arizona forbids partial subrogation to a mortgage. As no unit purchaser or its respective lender, either alone or in the aggregate, fully discharged the entire obligation secured by First National's original deed of trust, they cannot be equitably subrogated into its priority position.

Arizona follows the Restatement (Third) of Property: Mortgages ("Restatement") as to the application of equitable subrogation. Under the Restatement, partial subrogation is prohibited: if a purported subrogee does not pay off the obligation secured by the mortgage in full, it cannot equitably subrogate to the original lender's position. In this case, Appellants did not pay off First National's obligation in full. Are they entitled to equitable subrogation?

Appellants argue the trial court erred in holding Weitz's mechanic's lien has priority over the deeds of trust held by the mortgage lenders for the new unit purchasers (Appellants' Brief 12). They also argue the same for new unit purchasers who purchased solely for cash and for mortgage lenders of subsequent purchasers (Aplt. Br. 18, 21). Appellants argue those parties should have been equitably subrogated into the priority position of the deed of trust securing First National's construction loan, which secured the entire Project.

This argument is without merit. In its recent decision in *Sourcecorp, Inc. v. Norcutt*, 2012 WL 1138251 (Ariz. Apr. 6, 2012), the Supreme Court adopted the Restatement approach for equitable subrogation in Arizona. The Restatement is plain that partial subrogation is absolutely prohibited. That is, satisfaction of

anything less than the entire obligation secured by a prior lien cannot activate equitable subrogation as to that prior lien.

While Appellants argue this is different for multi-parcel projects under one construction loan deed of trust, no authority supports that position. Indeed, the only courts ever to hear that issue have disagreed with Appellants. No court following the Restatement rule on equitable subrogation has allowed partial subrogation into the position of the original deed of trust.

In this case, no Appellant, alone or combined, extinguished the full construction loan obligation secured by First National's deed of trust covering the whole Project. Thus, they cannot partially subrogate into it. Equitable subrogation simply does not apply here.

A. Arizona follows the Restatement approach for equitable subrogation.

"Equitable subrogation is 'the substitution of another person in the place of a creditor, so that the person in whose favor it is exercised succeeds to the rights of the creditor in relation to the debt.'" *Sourcecorp*, 2012 WL 1138251 at *1 ¶ 5 (quoting *Mosher v. Conway*, 45 Ariz. 463, 468, 46 P.2d 110, 112 (1935)). It is an "equitable remedy … 'designed to avoid a person's receiving an unearned windfall at the expense of another.'" *Id.* (quoting Restatement at § 7.6 cmt. a). Under this doctrine, generally

> a person having an interest in property who *pays off* an encumbrance in order to protect his interest is subrogated to the rights and

> limitations of the person paid." [*Mosher*, 45 Ariz.] at 472, 46 P.2d at 114; *see also* Restatement § 7.6(a) (providing that "[o]ne who *fully performs an obligation of another*, secured by a mortgage, becomes by subrogation the owner of the obligation and the mortgage to the extent necessary to prevent unjust enrichment").

Id. (emphasis added).

Courts throughout the United States have adopted one of three competing approaches to equitable subrogation: the "majority approach," the "minority approach," and the "Restatement approach." *See Lamb Excavation, Inc. v. Chase Manhattan Mortg. Corp.*, 208 Ariz. 478, 480-82 ¶¶ 8-14, 95 P.3d 542, 544-46 (App. 2004). The majority approach applies equitable subrogation only "when the subsequent mortgagee had no actual knowledge of an existing lien, reasoning that the subsequent mortgagee, having paid the preexisting obligation, reasonably had expected to step into the shoes of the previous creditor." *Id.* at 480 ¶ 8, 95 P.3d at 544. The minority approach restricts its application further, adding in an element of "constructive notice" so as to apply equitable subrogation "only in extreme cases bordering on fraud …." *Id.* at 545 ¶ 9, 95 P.3d at 545.

In *Sourcecorp*, however, noting there is "some ambiguity in Arizona case law regarding the test for equitable subrogation," the Supreme Court firmly adopted the third option – the Restatement approach – "because it is most consistent with the rationale for equitable subrogation." 2012 WL 1138251 at *3 ¶

12. It adopted Restatement section 7.6 as Arizona's approach to equitable subrogation for lien priority. *Id.* at *4 ¶ 16.

B. The Restatement approach prohibits partial subrogation.

Section 7.6(a) of the Restatement creates a black-letter rule that "[o]ne *who fully performs* an obligation of another, secured by a mortgage, becomes by subrogation the owner of the obligation and the mortgage to the extent necessary to prevent unjust enrichment." (Emphasis added.) The comment to that section explains this rule further:

> Where subrogation to a mortgage is sought, the entire obligation secured by the mortgage must be discharged. *Partial subrogation to a mortgage* ***is not permitted***. The reason is that partial subrogation would have the effect of dividing the security between the original obligee and the subrogee, imposing unexpected burdens and potential complexities of division of the security and marshalling upon the original mortgagee.

Restatement § 7.6 cmt. a (emphasis added).

Thus, the Restatement precludes equitable subrogation if the party seeking to be subrogated failed to discharge the entire prior obligation. Under the Restatement approach the Supreme Court expressly adopted in *Sourcecorp*, partial subrogation to a mortgage or deed of trust simply "is not permitted." Restatement § 7.6 cmt. a. Indeed, even before *Sourcecorp*, this Court had adopted this rule that a party only can be subrogated to the rights of a prior secured party "upon payment

of the *entire* prior debt." *See, e.g.*, *Western Coach Corp. v. Rexrode*, 130 Ariz. 93, 97, 634 P.2d 20, 24 (App. 1981).

In this case, no Appellant – neither any new unit purchaser nor their mortgage lenders – fully discharged the $60 million underlying obligation secured by First National's deed of trust over the entire Project. Rather, the individual lenders for the new unit purchasers paid small portions of the global original loan amount when individual units were sold. First National did agree to partially release its deed of trust as to individual units upon sale of that unit in order to receive those sale proceeds. But no single unit's sale, nor all unit sales combined, either satisfied the entire original loan or caused the full release of the original deed of trust securing that loan.

C. The Restatement rule against partial subrogation applies in this case.

Appellants' argument that equitable subrogation should be applied where the prior obligation was not fully performed is unprecedented. It is plainly contrary to the Restatement and lacks any authority in its support. Indeed, Appellants do not cite any.

Instead, without citing to the record, Appellants claim the Restatement's prohibition on partial subrogation does not apply here because,

> By paying the release prices, [they] effectively obtained as to each sold parcel a full settlement of the construction loan for less than the full amount of that obligation. The construction lender then released

> its deed of trust on each sold parcel, and consequently, the security in those parcels that is not divided between two lenders.

(Aplt. Br. 13).

This argument is flawed for two reasons. First, the Restatement allows equitable subrogation only for "one who" "fully performs" an obligation of another. Courts often explain that the performing party "merely steps into the shoes of the person to whose rights he is subrogated." *Mosher*, 45 Ariz. at 473, 46 P.2d at 114. In sharp contrast to the Restatement requirement of one person fully performing another's obligation, Appellants in this case admittedly did not individually or in the aggregate "fully perform" the underlying obligation. Nevertheless, they seek equitable subrogation. Simply stated, over 100 different parties want to step into one pair of shoes. The Restatement forbids this.

Appellants' argument is wrong for a second reason: contrary to their claim, there were no "release prices" in the construction loan. Weitz also addresses this above, in its Statement of Facts. *See supra* pp. 6-7. In their Statement of Facts, Appellants claimed the "construction loan agreement between First National Bank and Summit specified 'release prices' for the release of condominium units from the construction loan deed of trust as units were sold" (Aplt. Br. 6) (citing Index of Record 550, Exhibit 2, ¶ 13(a); Appendix A18).

But the original deed of trust for the first $44 million construction loan (I.R. 550, Ex. 2; Appx. A18) does not support the ultimate existence of step-down

"release prices." Although that actual deed of trust contemplated release prices *could* exist in the ultimate loan agreement, the actual loan documents negotiated with First National include no such individual amounts of the overall construction loan allocated to individual units. Indeed, Summit's principal conceded he wholly failed to negotiate a "step down" of the release prices for each unit with First National:

> I took responsibility for not having the release prices codified in the mortgage the way that you would have it in others.
>
> In a lot of transactions, you would negotiate up front, the step up or step down, depending which way you looked at it, in terms of repayment to the lender.

(I.R. 816, Ex. B, pp. 111-12; Appx. A20).

First National's overall construction loan simply was not apportioned on a unit-by-unit basis. No evidence in the Record supports Appellants' contention otherwise. The construction loan secured by First National's original deed of trust never was fully satisfied, extinguished, or performed. In other words, it is undisputed that no Appellant "fully performed" the obligations of the developer to repay the loan to First National, as the Restatement expressly requires as a prerequisite.

The "obligation secured by the mortgage" in whose shoes Appellants seek to step – First National's construction loans – was for approximately $60 million. As the closing statements from the lenders for the new unit purchasers plainly show,

none of them paid off First National in full (I.R. 502, Exs.12a, 12b). Rather, a portion of each of the more than 80 transactions paid a small percentage of the $60 million loan amount (I.R. 502, Exs. 12a, 12b). Even combined together, however, these incremental payments still left the original loan unsatisfied (I.R. 512, p. 3).

Thus, Appellants' argument that the prohibition on partial equitable subrogation does not apply to them because "there is no division of the [prior] security between lenders and because the blanket deed of trust was released by the first lender as to each sold parcel" (Aplt. Br. 13) simply has no basis in fact. The obligation that must be fully discharged in order for Appellants to be equitably subrogated into a priority position above Weitz's mechanic's lien is the original $60 million loan, not theoretical, nonexistent fractional slivers of interests sliced off that loan. Summit did not obtain 80 different, separate, unit-specific loans from First National. It obtained one loan secured by one deed of trust. No subsequent purchaser or lender, either alone or together, paid that off (I.R. 512, p. 3).

D. The Restatement rule against partial subrogation bars Appellants from subrogating into First National's position.

As a result, applying equitable subrogation to Appellants "would have the effect of dividing the [prior loan] between [Summit] and [Appellants], imposing unexpected burdens and potential complexities of division of the security and marshalling upon the original mortgagee." Restatement § 7.6 cmt. a. Thus, under

the Restatement approach – Arizona's approach – Appellants' desired result "is not permitted." *Id.*

Tellingly, every Arizona equitable subrogation case that Appellants cite distinguishably involved subrogation into a prior obligation that the subrogee *fully* had paid off and *entirely* extinguished. *Mosher*, 45 Ariz. at 469, 46 P.2d at 112 (redemption of prior deed in full); *Peterman-Donnelly Eng'r & Contractors Corp. v. First Nat'l Bank of Ariz.*, 2 Ariz. App. 321, 322, 408 P.2d 841, 842 (1965) (refinancing lender extinguished prior construction loan). *Lamb*, 208 Ariz. at 479, n.1, 95 P.3d at 544 (refinancing lender extinguished prior construction loan).

Appellants insist the Restatement's express rule against partial equitable subrogation should not apply in this case because the Project "includes multiple separate parcels of real estate" (Aplt. Br. 12). That is, the Project's units are condominiums, which A.R.S. §§ 33-1202 and 1204(A) deem "separate parcels of real estate" in what is effectively a vertically-platted subdivision.

Of course condominiums are individual parcels of property. But A.R.S. §§ 33-1202 and 1204(A) concern *taxing* them. Conversely, subrogation focuses on the underlying debt – here, First National's single, global construction loan. Unlike taxation, which applies individually and prospectively, subrogation looks back at the prior obligation: putative subrogees must take the prior debt as they find it. Nothing in A.R.S. §§ 33-1202 and 1204(A) remotely suggests that a single,

global construction loan covering an entire project magically transmogrifies into multiple mini-loans when the project is a condominium project.

Indeed, Appellants cite no authority allowing partial equitable subrogation in a multi-parcel project simply because it is a multi-parcel project. The only two courts ever to have heard this issue have followed the rule against partial subrogation. *See*:

- *First Am. Title Ins. Co. v. Liberty Capital Starpoint*, 254 P.3d 835 (Wash. App. 2011)[2] (foreclosure of contractor's mechanic's lien against new owners of some units in condominium project and their mortgage lenders upheld despite argument "that because '[they] paid in full the portion of senior lienor [bank's construction] loan allocated to the unit owners' units,' they should be equitably subrogated to [bank's] first priority position");
- *Ex parte Lawson v. Brian Homes, Inc.*, 6 So.3d 7 (Ala. 2008) (equitable subrogation of new homeowners and their mortgage lenders in a subdivision development into global construction lender's position so as to gain priority over mechanic's lien reversed partly because prior lien not completely extinguished)(following Restatement § 7.6 cmt. f)).

[2] Washington, too, has adopted the pure Restatement approach to lien priority and equitable subrogation. *First Am.*, 254 P.3d at 495 (citing *Bank of Am., N.A. v. Prestance Corp.*, 160 P.3d 17, 18 (Wash. 2007)).

As discussed above, the Restatement provides the "reason" partial subrogation is not permitted "is that partial subrogation would have the effect of dividing the security between the original obligee and the subrogee, imposing unexpected burdens and potential complexities of division of the security and marshalling upon the original mortgagee." Restatement § 7.6 cmt. a.

This case exemplifies this reasoning. The complexities in attempting to divide First National's original security among Appellants – with their individual circumstances and ever-variable interest amounts – would be enormous. More than 80 of Appellants are unit purchasers with mortgages, each contracting with one or more of the twenty lender Appellants. If this category were subrogated, the prior First National obligation would have to be subdivided among more than 100 different parties, with some portion of subrogation rights presumably going to the mortgage lenders, some going to the purchaser itself, and the remainder staying with First National.

Subrogation in that situation would not be self-executing, but would require courts to invent rules addressing how the original security should be divided. For example, should purchaser's and lender's respective interest be divided for any particular unit in proportion both to the amount of its down payment and the ever-changing amount of its mortgage it since has paid off? Because purchasers are

making monthly payments (or perhaps not making them), from month-to-month, the subrogated amount would always be in flux.

These issues would be exacerbated over time as units are bought, sold, or foreclosed on. Indeed, some of the unit purchasers originally had mortgages but paid them off after this litigation began. Seven defendants are unit purchasers who bought with cash. Finally, some are second- and third-tier purchasers who have bought from the original purchasers (or their lenders). Do those units qualify to be subrogated in perpetuity? How should those derivative interests be documented in Arizona's recording statutes? What about increases and decreases in value of the collateral? If more equity is generated later on – either by paying down the subsequent mortgage or through increase in market value – is that new equity separately foreclose-able?

The burden to Weitz also is clear. Without subrogation, Weitz was second in lien priority only to First National's loan, leaving one superior obligor and obligee with whom to deal should Weitz seek to foreclose. If Appellants and their successors in perpetuity subrogate into First National's fractured positions, however, there would be more than 80 parties (today) in variable positions at variable times.

These complex uncertainties are precisely why the Restatement – and thus the law of Arizona – forbids partial subrogation. Such partiality ultimately is

burdensome and inequitable. Appellants' attempt to circumvent this clear and certain rule is without merit.

E. Weitz has standing to invoke the rule prohibiting partial subrogation.

Appellants briefly insinuate Weitz somehow does not have standing to object to their so-far unsuccessful attempts to invoke equitable subrogation because "[t]he rule against partial subrogation is for the benefit and protection of the senior creditor, not the junior creditor" (Aplt. Br. 14). They argue that, "as a junior lienholder, Weitz cannot invoke" that rule (Aplt. Br. 14). For this proposition, Appellants cite three cases, all without pinpoint citations: *Dietrich Indus., Inc. v. United States*, 988 F.2d 568 (5th Cir. 1993); *Byers v. McGuire Props., Inc.*, 679 S.E.2d 1 (Ga. 2009); and *Pep'e v. McCarthy*, 672 N.Y.S.2d 350 (App. Div. 1998).

As with all Appellants' other authorities, however, these three are inapposite. First, *none* of these cases holds a junior lienor "cannot invoke" the Restatement's rule prohibiting partial subrogation. Indeed, each case *decided* a junior lienor's attack against subrogation as impermissibly partial. *Dietrich*, 988 F.2d at 572-73; *Byers*, 679 S.E.2d at 8; *Pep'e*, 672 N.Y.S.2d at 351-52.

Second and more importantly, none of these cases actually involved a partial subrogation. Rather, they all concerned the dissimilar situation in which a senior lienholder voluntarily agreed to deem its debt satisfied in full at a discount and,

accordingly, release its entire lien. *Dietrich*, 988 F.2d at 572-73; *Byers*, 679 S.E.2d at 8; *Pep'e*, 672 N.Y.S.2d at 351-52. In all three cases, the courts held that the voluntary settlements did not constitute partial subrogation because the obligations were fully performed and extinguished. The junior lienholders could not complain about the senior lienholder's decision to "forgive" part of what it was owed. In this case, however, there has been no such performance or agreed satisfaction. The facts belie any contention otherwise.

F. Even under Appellants' argument, Weitz would have priority over unit owners who purchased subject to mortgages.

As discussed above, a party only can be eligible for equitable subrogation into a prior obligation if it has "perform[ed] an obligation of another, secured by a mortgage …." *Sourcecorp*, 2012 WL 1138251 at *1 ¶ 5 (quoting Restatement § 7.6(a)).

This case involves three basic sets of defendants: (1) unit owners who purchased subject to mortgages; (2) the mortgage lenders for those unit owners; and (3) unit owners who purchased for cash. The trial court's judgment was against all three sets (I.R. 818, 820). On appeal, however, Appellants argue only that the mortgage lenders, the unit owners who purchased for cash *without* mortgages, and subsequent persons in *these* two sets of parties' positions are equitably subrogated into the position of theoretical slivers of First National's deed of trust (Aplt. Br. 12, 18, 21).

Conspicuously, Appellants' arguments entirely omit the unit owners themselves who purchased subject to mortgages. Appellants seek to address subrogation of mortgage lenders and all-cash purchasers, but not the most common purchaser: one who buys using both cash *and* a mortgage. And for good reason: the law of Arizona is that those individual purchasers cannot be equitably subrogated.

The unit owners who purchased subject to mortgages have not "performed an obligation of another." Restatement § 7.6(a). Only their lenders have – and even then only partially. As a result, Appellants concede by omission that new unit owners who purchased subject to mortgages are not eligible to be equitably subrogated.

Moreover, Appellants now have waived any argument otherwise. It is well-settled that an appellant's failure to raise an argument in its opening brief constitutes a waiver of that argument. *State v. Larson*, 222 Ariz. 341, 346 ¶ 23, 214 P.3d 429, 434 (App. 2009); *Nelson v. Rice*, 198 Ariz. 563, n. 3, 12 P.3d 238, 242 (App. 2000); ARCAP 13(c).

The Restatement plainly limits equitable subrogation only to those situations where "[o]ne fully performs an obligation of another." Restatement § 7.6(a). "Partial subrogation … is not permitted." *Id.* at cmt. a. All Appellants' authorities applying equitable subrogation did so where the entire prior obligation into which

the subsequent party subrogated was completely paid off, discharged and extinguished.

Appellants' attempt to subrogate those among them who are lender defendants and those who are cash purchasers into the position of a loan that has not been fully discharged is without merit. Appellants have failed to meet this basic, threshold requirement for equitable subrogation. Equitable subrogation does not apply in this case.

The Court should affirm the trial court's judgment.

II. The trial court did not err in holding Weitz's mechanic's lien had priority over Appellants, because the law of Arizona is that equitable subrogation cannot be allowed where it would prejudice an intervening interest or create an injustice. Equitably subrogating Appellants into the construction loan would prejudice Weitz and create an injustice because it would (a) allow Summit to have sold Weitz's work without paying Weitz after Weitz was induced to continue working with promises of being paid from unit sales, and (b) require Weitz to deal with multiple first lienholders rather than simply one bank.

Arizona follows the Restatement as to whether a subsequent lien should equitably subrogate into a prior one. Under the Restatement, equitable subrogation is not allowed when it will materially prejudice the holders of intervening interests. In this case, Appellants' equitable subrogation into First National's loan's position would mean allowing Weitz's work to be sold without paying Weitz. Would equitable subrogation materially prejudice Weitz?

Under the Restatement, equitable subrogation is only allowed "to the extent necessary to prevent unjust enrichment." Restatement § 7.6(a). The Restatement provides the following rules to guide courts in determining whether subrogation is appropriate to prevent unjust enrichment:

- when the person performing the obligation "reasonably expected to receive a security interest in the real estate with the priority of the mortgage being discharged;" and
- if subrogation will not materially prejudice the holders of intervening interests in the real estate.

Restatement § 7.6(b).

At the end of their brief, Appellants fleetingly argue equitably subrogating them into the position of First National's deed of trust covering the whole Summit project would not prejudice Weitz (Appellants' Brief 27-28). Citing cases and Restatement provisions involving simple refinancing, rather than multiple sales of portions of the property to third parties, Appellants argue this is because Weitz is in the same junior position either with subrogation as it was before the sales transactions (Aplt. Br. 27-28). This argument is without merit.

In adopting the Restatement approach to lien priority, including equitable subrogation, the Supreme Court in *Sourcecorp, Inc. v. Norcutt*, 2012 WL 1138251 at *6 ¶ 25 (Ariz. Apr. 6, 2012), also adopted the Restatement's prohibition on subrogation that materially prejudices intervening interests.

Allowing Appellants equitably to subrogate individually to fractured portions of the position of First National's deed of trust would burden and prejudice Weitz materially. While mechanics' lienors may not be prejudiced in refinancing situations involving one owner and one successor lender, the equities here are manifestly different. This case involves the ultimate sale of units to third parties.

Under these circumstances, equitably subrogating Appellants to First National's position would mean (a) Summit could sell Weitz's work – the

completed condominium units – without ever paying Weitz, even though Weitz was induced to continue working (and incur additional losses) by promises it would be paid by unit sales, and (b) Weitz would be required to deal with multiple first lienholders rather than simply one lender.

Nor could Appellants have "reasonably expected to receive" a first priority position. Appellants' title insurer actually required that Summit indemnify against mechanics' liens as an inducement to issuing the title insurance. Ultimately, the insurer required a portion of sale proceeds be held in escrow to pay off the portion of Weitz's lien attached to a sold unit. In short, to the extent Appellants had any reasonable expectations, they expected to be junior to Weitz's lien.

A. Equitable subrogation cannot act inequitably and work an injustice to an intervening interest.

In its recent opinion in *Sourcecorp*, 2012 WL 1138251, the Supreme Court adopted the Restatement approach to equitable subrogation. *See supra* pp. 16-18.

As part of its decision in *Sourcecorp*, the Court also adopted the Restatement's prohibition on *in*equitable subrogation: applying the remedy so as materially to prejudice the holder of an intervening interest. 2012 WL 1138251 at *6 ¶ 25. "Subrogation will be recognized only if it will not materially prejudice the holders of intervening interests." *Id.* (quoting Restatement § 7.6 cmt. e).

Of course, the mere act of leapfrogging over an intervening interest, standing alone, is not prejudicial, because "preventing a junior lienholder from advancing in

priority is an intended consequence of equitable subrogation." *Id.* (citing *Lamb Excavation, Inc. v. Chase Manhattan Mortg. Corp.*, 208 Ariz. 478, 483 ¶¶ 18, 95 P.3d 542, 547 (App. 2004)). Indeed, the Restatement itself recognizes that, generally, "The holders of … intervening interests can hardly complain [about subrogation]; their position is not materially prejudiced, but is simply unchanged." *Id.* (quoting Restatement § 7.6 cmt. e).

In the unique circumstances of this case, however, allowing equitable subrogation to subsequent unit purchasers' lenders would materially prejudice Weitz's intervening interest and result in an injustice.

B. The purpose of Arizona's statutory mechanic's lien law is to ensure contractors are paid for their work.

Obviously, like all contractors, Weitz is keenly aware its mechanic's lien rights do not have priority over the construction lender if the construction loan is recorded within ten days of work commencing on the project. A.R.S. § 33-992(A). Indeed, the equities are balanced under this structure, as construction loan proceeds are agreed to be applied to pay construction costs. It is equitable that the value the contractor created should move to the benefit of the lender whose funds are used to pay the contractor.

Contractors expect, though, that owners and construction lenders will ensure the contractor is paid before the project is sold or before the construction loan is replaced by permanent financing (Index of Record 532 ¶ 12).

Arizona's mechanic's lien statutes plainly reinforce this expectation. Indeed, potential mechanic's lien claimants must send a preliminary notice to the owner and construction lender within 20 days of commencing work on a project. A.R.S. § 33-992.01.[3] The primary purpose of this notice is to alert the owner and lender that a contractor or other materialman is furnishing labor or materials on the particular project. As such, it notifies the upstream parties that the contractor is preserving its right to later record a mechanic's lien if full payment is not received.

Under this statutory scheme, copies of the statutory notice are sent to construction lenders to allow those lenders to ensure potential lienors are paid from construction loan proceeds, thereby avoiding mechanics' liens – and foreclosures – on their projects. Since construction lenders in many cases have priority over the mechanic's lienors, the Legislature enacted this protection to assist the construction lender in delivering a lien-free project before selling it or converting it to permanent financing. If the lender for a purchaser in all circumstances automatically is subrogated to the construction lender's lien priority, however, there would be little reason for sending 20-day notices to the construction lender.

[3] The failure to provide the 20-day notice is fatal to the lien. *KAZ Constr., Inc. v. Newport Equity Partners*, 2012 WL 687839 at *5 ¶ 16 (Ariz. App. Mar. 2, 2012). The purpose of the notice statute is "to allow meaningful communication among owner, lender, and general contractor to ensure payment of potential lien claimants." *Id.* (citing *Delmastro & Eells v. Taco Bell Corp.*, 228 Ariz. 134, ¶ 13, 263 P.3d 683, 688 (App. 2011)).

Plainly, a construction contractor reasonably expects to receive payment on a mechanic's lien claim when the underlying property is sold to a third party. As one commentator explained,

> The doctrine upon which the [mechanic's] lien is founded is the consideration of natural justice that the party who has enhanced the value of property by incorporating therein his labor or materials shall have a preferred claim on such property for the value of his labor or materials. … [T]he rule is a general one that a purchaser of land to which a mechanic's lien has attached takes title subject to such lien.

Louis Boisot, TREATISE ON MECHANICS' LIENS § 4 at 4; § 312 at 306 (1897).

Similarly, the Supreme Court has recognized that the improved property on which the contractor and subcontractors have performed work "is a fund set aside for the payment of [mechanic's] lien creditors." *Wylie v. Douglas Lumber Co.*, 39 Ariz. 511, 521, 8 P.2d 256, 260 (1932).

Furthermore, in the similar case of *Ex parte Lawson v. Brian Homes, Inc.*, 6 So.3d 7 (Ala. 2008), involving a residential housing development, the Alabama Supreme Court recognized the difference for equitable subrogation purposes between an owner who refinances its own property and a developer who sells parcels of property to ultimate third-party owners:

> The second loans … were not made to the original debtor. That is, they were not made to the developer. Rather, they were made to the ultimate purchasers of the houses. Also, the second loans were made to the ultimate purchasers not for the direct purposes of extinguishing any prior encumbrance, but rather for the purpose of enabling the purchasers to make their purchases of the houses. Although the moneys from these second loans were loan proceeds in the hands of

> the purchasers, they merely constituted *payments* by the purchasers to the developer. [If the subsequent lenders were granted equitable subrogation], the lien of a material's supplier properly recorded under our statutes would become all but meaningless whenever a house is purchased by a purchaser who utilizes loan proceeds to pay the builder or developer for the house and the builder or developer, in turn, upon being paid for the house by the purchaser, used the proceeds of the sale to pay off its construction loan.

6 So.3d at 13 (emphasis in the original).[4]

Similarly, the Alabama court also rejected the argument that a contractor somehow receives a windfall if the ultimate purchaser's lender is not equitably subrogated to the construction lender's priority:

> The [lower court] contends that [the contractor] would be receiving a 'windfall' if the lenders' purchase-money mortgages were not subrogated to the [owner's] construction loan. If we held against [the contractor], however, the [owner] would receive the windfall. The [owner] would have the value of [the contractor's] work without having paid anything for it.

Id. at 15.

Thus, when, as here, a developed project is sold to third parties, the equities shift in favor of the mechanic's lien claimants. In this case, the interests of the contractor who created the value of the developer's property competes with the interests of the respective unit purchasers' lenders on their respective "purchase money loans" (or, more likely, as here, the buyers' title insurer). Both the new unit owners and their mortgage lenders likely purchased title insurance, which,

[4] Alabama, too, follows the Restatement approach. *Lawson*, 6 So.3d at 7.

according to their closing documents, included protection against outstanding mechanics' liens (I.R. 502).

C. In the circumstances of this case, Appellants' attempted equitable subrogation would prejudice Weitz by allowing Weitz's work to be sold without it ever being paid.

The equities in this case are the polar opposite of those in the cases Appellants cite, *all* of which involved mere refinancing for a single owner. *See Continental Lighting & Contracting, Inc. v. Premier Grading & Utilities, LLC*, 227 Ariz. 382, 384, 258 P.3d 200, 202 (App. 2011); *Lamb*, 208 Ariz. at 479 ¶ 2, 95 P.3d at 544; *Peterman-Donnelly Eng'r & Contractors Corp. v. First Nat'l Bank of Ariz.*, 2 Ariz. App. 321, 322, 408 P.2d 841, 842 (1965). Indeed, the Restatement acknowledges the "most common context for [equitable] subrogation is the 'refinancing' of a mortgage loan." Restatement § 7.6, cmt. e.

Unlike the more typical circumstances of single-owner refinancing, however, this case stems from the actual sale and transfer of property. Under Arizona's statutory mechanic's lien laws, contractors reasonably expect to receive payment on a mechanic's lien when the underlying property is sold (I.R. 532 ¶ 12). Weitz's work enhanced the value of the Summit property, actually creating the saleable units in the first place. If Summit can sell off Weitz's work without paying Weitz's lien or applying the sales proceeds to reduce the lien priority of the

first deed of trust, Summit would receive a windfall and Weitz would be prejudiced. *Lawson,* 6 So.3d at 15.

Here, Summit benefited from the sale by reducing its obligations to its construction lender, while Weitz – who normally also would expect to benefit to the same extent by an equivalent reduction in the first deed of trust position – instead would have that first deed of trust position reinstated without additional consideration to Weitz. Equitable subrogation is intended to prevent unjust enrichment, not create it. *Id.*

Indeed, when Weitz first was informed First National would not pay it the final owed $4 million, it simply could have walked off the job. But, based on First National's and Summit's promises to pay it from unit sales, Weitz was induced to finish the job. Had it walked away, the very collateral in which Appellants seek first priority would neither have been created nor sold. Weitz completed the project so the units could be sold and it could be paid. Appellants' response amounts to "too bad."

But the Washington Court of Appeals' decision in the similar case of *First Am. Title Ins. Co. v. Liberty Capital Starpoint,* 254 P.3d 835 (Wash. App. 2011), explains "too bad" is simply an inequitable answer. In that case, a junior construction lender (Liberty) paid off the general contractor's mechanic's lien,

took an assignment of its priority position, and then sought to foreclose out the interests of the individual unit owners, just as Weitz has here. *Id.* at 839.

The unit purchasers argued, just as here, that they should be equitably subrogated into the position of the senior construction lender and ahead of Liberty's mechanic's lien because they "paid in full the portion of" the construction loan allocated to their units. *Id.* at 846-47. The court held subrogation in that circumstance would prejudice Liberty's superior lien interests because Liberty was supposed to have final approval over all sales, presumably to get paid. *Id.* at 847-49. When the sales happened without Liberty's approval, Liberty was prejudiced because it was deprived the chance to protect itself, such as by "demanding additional collateral from" the developer. *Id.* at 848.

The same is true here. First National and Summit promised to pay Weitz from the sale of units, but did not. Had Weitz known First National unilaterally would take all sale proceeds, it could have acted to protect itself, such as stopping work. Plainly, First National's actions prejudiced Weitz. As a result, Weitz is in a worse position, with higher losses, than had the subsequent sales not occurred.

Moreover, the Washington court in *First Am.* echoed the Restatement's and *Sourcecorp*'s admonition that, "in the real estate context, equitable subrogation has been traditionally invoked only to prevent unjust enrichment; equitable remedies are not granted where it would produce injustice." *Id.* at 849 (citing Restatement §

7.6 cmt. (f)). Allowing Weitz to be paid from sale proceeds, when Weitz had incurred the costs to construct the very units being sold, would not unjustly enrich Weitz.

The Restatement and every Arizona case allowing equitable subrogation generally address the context of a mere single-owner refinance. But allowing an owner to sell the very collateral its contractor has built to third parties despite the existence of a valid mechanic's lien effectively would nullify Arizona's statutory mechanic's lien rubric. To allow Summit actually to sell and convey individual units free and clear of Weitz's lien would give Summit a windfall and would prejudice Weitz.

Under the Restatement approach now firmly adopted in Arizona, Appellants' attempted *in*equitable subrogation must be rejected. Equity cannot work an injustice. The Court should affirm the trial court's judgment.

D. Even under Appellants' theory, Weitz's mechanic's lien rights cannot be totally eliminated.

Appellants' argument in their second issue on appeal is that the four[5] unit owners among them who purchased for cash also should be equitably subrogated into the position of First National's construction loans (Aplt. Br. 18).

Appellants likely make this an issue because the trial court held separately that only lenders, not fee owners, ever can seek the remedy of equitable

[5] The judgment actually includes seven owners in this category (I.R. 818).

subrogation into a prior obligor's position (I.R. 586, 592). Weitz previously had explained this below in detail (I.R. 561).

As Appellants note, however, *Sourcecorp* – first in this Court, then in the Supreme Court – changed this (Aplt. Br. 18-19). The Supreme Court did indeed hold that, under appropriate circumstances, a fee owner can invoke equitable subrogation. *Sourcecorp*, 2012 WL 1138251 at *6-7 ¶¶ 27-28.

So, in some circumstances, cash purchasers can equitably subrogate to a prior obligor's interest. Whether and how equitable subrogation applies, however, depends on the facts of the particular case. *Id.* at *7 ¶ 29 (citing *Mosher v. Conway*, 45 Ariz. 463, 468, 46 P.2d 110, 112 (1935)). In the unique circumstances of this case, the prohibition on partial subrogation, *see supra* pp. 15-26, and on prejudicial subrogation, *see supra* pp. 31-41, likewise forecloses *these* cash purchasers' ability to do so.

However, even if these cash purchasers somehow could be equitably subrogated into First National's position, *Sourcecorp* is plain that, unlike a lender, they would not have a lien interest upon which they could foreclose, but rather only a priority interest that could not eliminate Weitz's mechanic's lien:

> ¶ 27 [Lienor] also argues that if the [cash purchasers] are placed in the position of [prior mortgagor], they could eliminate [lienor's] judgment lien by a collusive refinancing followed by a foreclosure by the new first mortgage holder. This concern, however, is addressed by the limits to the equitable remedy. As a result of paying the obligation owed to [prior mortgagor], the [cash purchasers] only "become[ ] by

> subrogation the owner of the obligation and the mortgage *to the extent necessary* to prevent unjust enrichment."
>
> ¶ 28 In determining the extent to which the [cash purchasers] are subrogated to the prior position …, we note that they are cash purchasers rather than creditors looking to the property to secure a debt. With respect to creditors, "[o]rdinarily one who is entitled to subrogation is permitted to enforce both the mortgage and the secured obligation." Fee owners are in a different situation, because the merger doctrine generally holds that if they acquire a mortgage on their own property, the lien is extinguished because the lesser interest "merges" into the greater.
>
> ¶ 29 Recognizing that equitable subrogation depends on the facts of the particular case, *we conclude that it is not appropriate to confer on the [cash purchasers] a right to "foreclose" on the interest to which they are subrogated. Instead, the purposes of equitable subrogation are fully served by deeming the[m] to have a priority to proceeds from any sale of the property in the amount they paid to satisfy the debt …. Applying equitable subrogation in this manner does not eliminate [lienor's] lien.* To the extent that lien adversely affects the [cash purchasers'] equity or renders the property less marketable, we neither address nor foreclose any claims the [cash purchasers] might have against their title insurer.

2012 WL 1138251 at *6-7 ¶¶ 27-29 (citations omitted) (emphasis added).

So even ignoring the prohibition on partial and prejudicial subrogation and supposing instead the cash purchasers (and the unit purchasers' lenders in the other unit sales circumstances) in this case somehow could invoke equitable subrogation, it still would not eliminate Weitz's mechanic's lien. Instead, Appellants would subrogate only to a priority right, not a foreclosure right. Weitz still could foreclose on the remaining equity in the cash purchasers' units.

Conclusion

The Court should affirm the trial court's judgment.

Respectfully Submitted,

HOLDEN WILLITS PLC

by /s/Michael J. Holden

Michael J. Holden
State Bar No. 006361
Barry A. Willits
State Bar No. 016091
Two North Central Ave., Suite 1220
Phoenix, Arizona 85004
Telephone: (602) 508-6210
Facsimile: (602) 508-6211
mholden@holdenwillits.com
bwillits@holdenwillits.com

Jonathan Sternberg, Attorney, P.C.

by /s/Jonathan Sternberg

Jonathan Sternberg
Missouri Bar Number 59533
1111 Main Street
7th Floor, Harzfeld's Building
Kansas City, Missouri 64105
Telephone: (816) 474-3000
Facsimile: (816) 474-5533
E-mail: jonathan@sternberg-law.com

COUNSEL FOR APPELLEE
THE WEITZ COMPANY, LLC

Certificate of Compliance

Pursuant to ARCAP 14, I certify that this brief uses proportionately spaced type of 14 points or more, is double-spaced using Times New Roman font, and contains 9,872 words.

May 2, 2012 /s/Jonathan Sternberg
Date Attorney

Certificate of Service

I hereby certify that, on May 2, 2012, I mailed two true and accurate copies of this Brief of the Appellee to the following:

Mr. Charles W. Wirken
Gust Rosenfeld P.L.C.
One East Washington Street
Suite 1600
Phoenix, Arizona 85004-2553
Telephone: (602) 257-7422
Facsimile: (602) 254-4878

Counsel for Appellants
Nicholas Heth, *et alia*

/s/Michael Holden
Attorney

Appendix

COPY

OCT 12 2011 FILED 2:45pm
MICHAEL K. JEANES, Clerk
By C. CASTRO Deputy

HOLDEN WILLITS PLC
Two North Central Avenue, Suite 1700
Phoenix, Arizona 85004
Telephone (602) 508-6210
Facsimile (602) 508-6211

Michael J. Holden (State Bar No. 006361)
mholden@holdenwillits.com
Barry A. Willits (State Bar No. 016091)
bwillits@holdenwillits.com
Attorneys for Plaintiff The Weitz Company LLC

SUPERIOR COURT OF ARIZONA

COUNTY OF MARICOPA

THE WEITZ COMPANY LLC, an Iowa limited liability company,

Plaintiff,

vs.

THE SUMMIT AT COPPER SQUARE, LLC, an Illinois limited liability company, et al.,

Defendants,

BLINDS & BEYOND BY WIKLER, INC., an Arizona corporation,

Counterclaimant and Cross-Claimant,

vs.

THE WEITZ COMPANY, LLC, an Iowa limited liability company,

Counterdefendant and

THE SUMMIT AT COPPER SQUARE, LLC, an Illinois limited liability company; THE SUMMIT AT COPPER SQUARE COMMERCIAL, LLC, an Illinois limited liability company, et al.

Case No. CV2008-028378

STIPULATED JUDGMENT FOR FORECLOSURE

(Assigned to the Honorable John Buttrick)

Cross-Defendants.

JACE CLARK, a single man; GEORGE CASNER, a single man; JAMES L. CRAMER, as Trustee of THE FIRST AMENDED AND RESTATED JAMES L. CRAMER LIVING TRUST DATED JUNE 17, 2008; DENNIS GUDENAU; BRIAN SIMPSON AND RACHEL SIMPSON, husband and wife; BONNIE TEARPAK, a single woman; KEFFELER, INC., a Colorado Corp.; RODNEY HATCH and TERESA HATCH, husband and wife; BARRY SCHWARTZ, a married man; JEFFREY TEMPLIN, a married man; KEN PERLMUTTER, a married man; SHELLY MALKIN, a married woman; JODY STORM GALE and CHRISTIE BAUER GALE, husband and wife; JOSE L. RINCON and ADRIANA B. RINCON, husband and wife; JEFF TEMPLIN and TERRI TEMPLIN, husband and wife; GREGG TEMPLIN and SUZANNE W. TEMPLIN, husband and wife; XIYUAN MAN, a married woman; MICHAEL J. HAASCH and LAURA S. HAASCH, husband and wife; JEFFREY M. LEZAK and CAROLE E. LEZAK, husband and wife; EUGENE C. AND MICHELLE BLACKARD, husband and wife; RICHARD H. FOX, a married man; BRAD BLOCK, an unmarried man; WILLIAM J. MILNE PROFIT SHARING PLAN; DARRYL GOLDSTEIN, an unmarried man; KEN ADELSON; CARY E. FRUMES, an unmarried man; ENTRUST NEW ENGLAND LLC FOR THE BENEFIT OF JOEL GREENBERG IRA 5005; ARI SILVASTI, a married man; STEVE SZABO and KAREN SZABO, husband and wife; CHICAGO SUMMIT, LLC, an Illinois

limited liability company; FRANC W. BRODAR and JENNIFER A. BRODAR, husband and wife; CHRISTOPHER K. WILSON, a single man; MICHAEL SCHWARTZ, a married man; WILLIAM SCHWARTZ, a married man; EDWARD C. CHANG, a married man; DANIEL C. BERRYMAN and CHARLOTTE A. BERRYMAN, TRUSTEES OF THE DANIEL AND CHARLOTTE BERRYMAN TRUST DATED SEPTEMBER 21, 2004; H. DENNIS PETERSON AND CAROL A. PETERSON, TRUSTEES OF THE PETERSON LIVING TRUST DATED MARCH 6, 2006; EDUARDO L. ACOSTA, a married man; CRAIG HUSTON, an unmarried man; ROBERT CORY ALBANO, a single man; PATRICK ESTFAN and SALLY ESTFAN, husband and wife; MITCHELL S. LOVE and MAUREEN LOVE, husband and wife; JEFFREY N. WALTON and SHERRI WALTON, husband and wife; STEPHEN ELDERKIN, a single man; TINA ROSPOND, a single woman; TODD S. VROOMAN, a married man; ELIZABETH L. KONOPSKI, an unmarried woman; ANDREW J. RIGOLI and CHI B. NGUYEN, husband and wife; L. KENNETH BROOKS, an unmarried man; PATRICK J. WALSH and MELISSA R. WALSH, husband and wife; MARK LOWE, an unmarried man; KEITH E. TUCKER, a married man; RANDAL GOLDEN, a married man; SHANNON BREEN, a single person; AFARIN RADJAEI-BOKHARAI, an unmarried person; SAUL SHAPIRA, an unmarried man; EDWARD SAX, a married man; JOEL SAX and VERONICA MCKAY, husband and wife; T&D COPPER SQUARE, LLC, an Arizona limited liability company; SANDEEP P. VIVEK and LILLIAN A. VIVEK, trustees of THE VIVEK FAMILY REVOCABLE TRUST; COLIN AND

LAVONNE CHAPMAN, husband and wife; JEFFREY A. HART, an unmarried man; MICHAEL J. FARRAGE and CYNTHIA K. FARRAGE, husband and wife; DEBRA TORNABENI and DANNY GUNSALLUS, husband and wife; NEIL O. CAPIN, SR. and JOSEFINA CAPIN, husband and wife; VICENZO COSTA, an unmarried man; ALDER KNOTT HOLDINGS LLC, a Nevada limited liability company; JEFFREY OSTREICHER and DEBORAH OSTREICHER, husband and wife; JARED SHAPIRO, a single man; KELLY D. MILLER and SHANNON E. MILLER, trustees of THE KELLY D. AND SHANNON E. MILLER TRUST; ART GARTENBERG, an unmarried man; NISHA KIRTI SHAH, a single woman; KIRTI Z. SHAH, a married man; MARK F. RUDINSKY and CHRISTINA J. RUDINSKY, husband and wife, as Trustees of the MARK AND CHRISTINE RUDINSKY FAMILY TRUST UNDER TRUST AGREEMENT DATED MAY 10, 1993; PITRE PROPERTIES LIMITED PARTNERSHIP, an Arizona limited partnership; ROBERT S. SHAPS and MIMI K. SHAPS, husband and wife; JAMES KEARNS and JUDITH (JUDY) KEARNS, husband and wife; ON-CALL SOLUTIONS, LLC, an Arizona limited liability company; DEEPA K. SHAH and NIHAAL M. RAO, husband and wife; KENNETH P. MUELLER and DENISE A. MUELLER, husband and wife; DAVID HOCHBERG and ELYSE HOCHBERG, husband and wife; GEORGE A. SHUGARD, an unmarried man; JORDAN GREENE and STEPHANIE GREENE, husband and wife; LAWRENCE R. KUSHNER and EILEEN S. KUSHNER, husband and wife; DEBRA J. GOODWIN, a single woman; LYNDA L. GIBSON, an unmarried woman; DANIEL GREGUSKA

and LISA GREGUSKA, husband and wife; THOMAS GREGUSKA and PATRICIA GREGUSKA, husband and wife; and JOHN GREGUSKA and JACKIE GREGUSKA, husband and wife; TING AND LING DEVELOPMENT GROUP, LLC, an Arizona limited liability company; VINCENT ZERILLI, an unmarried man; RICHARD DELEVITT and SHARON DELEVITT, husband and wife; VIRGIN FARM PARTNERS, a California general partnership; ROBERT LABINE, JR., an unmarried man, and CYNTHIA BORTNER, an unmarried woman; USAA FEDERAL SAVINGS BANK, a Texas corporation; FNBN-RESCON I, LLC, a Delaware limited liability company; COUNTRYWIDE HOME LOANS, INC., a New York corporation; CHASE HOME FINANCE, LLC, a Delaware limited liability company; BAC HOME LOAN SERVICING, LP, a subsidiary of Bank of America, a national association; PRIMELENDING, A PLAINSCAPITAL COMPANY, a Texas corporation; ALLY CAPITAL CORPORATION, a Utah chartered bank; RICHARD L. GORDON ENTERPRISES PENSION PLAN; JERGROW LLC; BANK OF AMERICA HOME LOAN SERVICING LP, a division of Bank of America, N.A., a national association; MACQUARIE MORTGAGES USA INC., a Delaware corporation; FEDERAL NATIONAL MORTGAGE ASSOCIATION; FEDERAL HOME LOAN MORTGAGE CORPORATION; ING BANK, FSB, a federal savings bank; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware corporation; WASHINGTON MUTUAL BANK, F.A., a federal savings bank; WELLS FARGO BANK, N.A., a national banking association; COLE TAYLOR BANK, a foreign corporation;

M&I MARSHALL & ILSLEY BANK, a Wisconsin corporation; BANK OF AMERICA, N.A., a national banking association; JPMORGAN CHASE BANK, N.A., a national banking association; M&I BANK, FSB, a federal savings bank; NATIONAL CITY MORTGAGE, a division of NATIONAL CITY BANK, a national banking association; ABN AMRO MORTGAGE GROUP, INC., a Delaware corporation; HARRIS BANK, N.A., a national banking association; CITIMORTGAGE, INC., a New York corporation; AMTRUST BANK, a federal savings bank; COMPASS BANK, an Alabama State Bank; NORTH AMERICAN SAVINGS BANK, FSB, a federal savings bank; PERL MORTGAGE, INC., an Illinois corporation; GMAC MORTGAGE, LLC, a Delaware corporation; CHARLES SCHWAB BANK, N.A., a national banking association; FIRST HORIZON HOME LOANS, a division of FIRST TENNESSEE BANK, a national banking association; PREMIER FINANCIAL SERVICES, INC., an Arizona corporation; TAYLOR, BEAN & WHITAKER MORTGAGE GROUP, a Florida corporation,

Cross-Claimants,

vs.

THE SUMMIT AT COPPER SQUARE, LLC, an Illinois limited liability company; THE SUMMIT AT COPPER SQUARE COMMERCIAL, LLC, an Illinois limited liability company, et al.; W DEVELOPMENTS, LLC, an Illinois limited liability company; DAVID WALLACH and MARIA WALLACH, husband and wife,

Cross-Defendants.

Upon the stipulation of Plaintiff The Weitz Company, LLC ("Weitz") and the Owner and Lender Defendants (as listed and described in the Table in Paragraph A below), and good cause appearing therefor, this case having been presented to this Court,

THE COURT FINDS THAT:

1. Each and every one of the Owner and Lender Defendants has been properly served with process, or has otherwise duly appeared as a party defendant in this case.

2. Defendant Blinds & Beyond by Wikler, Inc. ("Blinds") has answered or otherwise appeared in this action and has approved this Judgment as to form separately from the other Owner and Lender Defendants.

3. Weitz holds a mechanic's and materialman's lien against the subject property (the "Property," as described below in paragraphs A and B), pursuant to a Notice and Claim of Lien as recorded May 9, 2008, in the office of the County Recorder of Maricopa County, Arizona (the "MCR") at MCR Document No. 2008-0415219, as amended by an Amendment to Notice and Claim of Lien as recorded June 6, 2008 at MCR Document No. 2008-0503892 (collectively "the Weitz Lien").

4. A Lis Pendens was recorded on November 7, 2008 as MCR Document No. 2008-0962273 (the "Weitz Lis Pendens").

5. Blinds recorded its own Notice and Claim of Lien on June 12, 2008 against a portion of the Property and recorded its own Lis Pendens on December 12, 2008.

NOW, THEREFORE, THE COURT ORDERS, ADJUDGES, AND DECREES THAT:

A. Weitz is granted Judgment in this matter in the total, cumulative amount of $2,125,000.00 (the "Judgment Lien Amount"). Weitz, and the Owner and Lender Defendants shall bear their own attorneys' fees and costs and expenses incurred or to be incurred in this matter. This Judgment Lien Amount includes the principal lien amount with respect to any and all liens recorded by Weitz against the Property and applicable to this case, all pre- and post-judgment interest, Weitz's costs of suit and its Weitz Lien-related expenses, and all attorneys' fees and costs incurred to date and to be incurred on appeal (meaning that each party is to bear its own attorneys' fees and costs including on appeal). That Judgment Lien Amount is allocated by percent against the below-listed Units in the subject real property, as to each respective Owner and Lender, in the percent and amount per Unit as shown in the following incorporated Table:

Units	Owners	Lenders	Allocated Percent	Judgment Lien Amount $2,125,000
501	Heth, Nicholas	ING Bank FSB, a Federal Savings Bank	1.23%	26,137.50
502	Schwartz, Barry Templin, Jeffrey Perlmutter, Ken Malkin, Shelly	Perl Mortgage, Inc. (through nominee Mortgage Electronic Registration System, Inc.)	0.813%	17,276.25
503	Gale, Jody Storm and Christie Bauer	Perl Mortgage, Inc. (through nominee Mortgage Electronic Registration System, Inc.)	0.921%	19,571.25
505	Rincon, Jose L. and Adrianna B.	Washington Mutual Bank, F.A.	1.246%	26,477.50
507	Templin, Jeff Templin, Terri Templin, Gregg Templin, Suzanne W.		0.957%	20,336.25
603	Haasch, Michael J. and Laura S.	Wells Fargo Bank, N.A.	0.921%	19,571.25
604	Lezak, Jeffrey M. and Carol E.	Perl Mortgage, Inc. (through nominee Mortgage Electronic Registration System, Inc.)	0.885%	18,806.25

Units	Owners	Lenders	Allocated Percent	Judgment Lien Amount $2,125,000
605	Fox, Richard H. and Block, Brad	Perl Mortgage, Inc. (through nominee Mortgage Electronic Registration System, Inc.)	1.246%	26,477.50
606	Ayon, Gregorio Meza and Lopez, Siglifredo	Washington Mutual Bank, F.A.	1.23%	26,137.50
607	Ramos, Edward C. and Tamara R.	Mortgage Electronic Registration System, Inc., as nominee for Perl Mortgage, Inc.	0.957%	20,336.25
608	Scott and Nicolle Rose, as trustees of the Scott Matthew Rose and Nicolle Claudine Rose Family Trust Dated August 28, 2008	Perl Mortgage, Inc. (through nominee Mortgage Electronic Registration System, Inc.)	0.957%	20,336.25
609	Goldstein, Darryl Adelson, Ken Frumes, Cary E.	Perl Mortgage, Inc. (through nominee Mortgage Electronic Registration System, Inc.)	1.011%	21,483.75
610	Lezak, Jeffrey M. and Carol E.	Perl Mortgage, Inc. (through nominee Mortgage Electronic Registration System, Inc.)	0.849%	18,041.25
701	Entrust New England FBO Joel Greenberg IRA 5005		1.228%	26,095.00
703	Silvasti, Ari	Perl Mortgage, Inc. (through nominee Mortgage Electronic Registration System, Inc.)	0.921%	19,571.25
705	Moskowitz, David	Wells Fargo Bank, N.A.	1.246%	26,477.50
706	Boyd, Kenneth A. and Mary E.	GMAC Mortgage, LLC (through nominee Mortgage Electronic Registration System, Inc.)	1.228%	26,095.00
707	Szabo, Steve and Karen		0.957%	20,336.25
708			0.00%	0.00
709	Chicago Summit LLC	Cole Taylor Bank	1.011%	21,483.75
801	The Summit at Copper Square LLC	First National Bank of Arizona	0.00	0.00
802	Brodar, Franc W. and Jennifer A.	Charles Schwab Bank, N.A. (through nominee Mortgage Electronic Registration System, Inc.)	0.813%	17,276.25
803	Kerievsky, Ross transferred to RHK Trust I Dated December 1, 2003.	AK Trust I Citimortgage, Inc. (through nominee Mortgage Electronic Registration System, Inc.)	0.921%	19,571.25
804	Schwartz, Michael and William	Mortgage Electronic Registration System, Inc., as nominee for Perl Mortgage, Inc.	0.885%	18,806.25
805	Castillo, Michael	Countrywide Bank, FSB (through nominee Mortgage Electronic Registration System, Inc.)	1.246%	26,477.50

Units	Owners	Lenders	Allocated Percent	Judgment Lien Amount $2,125,000
806	Chang, Edward C.	Bank of America, N.A. Wells Fargo Bank, N.A.	1.23%	26,137.50
809	Berryman, Daniel C. and Charlotte A. as Trustees of the Daniel and Charlotte Berryman Trust Dated September 21, 2004	M&I Marshall & Ilsley Bank	1.011%	21,483.75
810	Tucker, Lawrence	Mortgage Electronic Registration System, Inc., as nominee for Citimortgage, Inc.	1.355%	28,793.75
901	Peterson, H. Dennis and Carol A, Trustees of the Peterson Living Trust Dated March 6, 2006	Bank of America, N.A.	1.23%	26,137.50
902	Acosta, Eduardo L.	GMAC Mortgage, LLC, as assignee of Nova Financial & Investment Corp. (through nominee Mortgage Electronic Registration System, Inc.)	0.813%	17,276.25
903	Huston, Craig	Perl Mortgage, Inc. (through nominee Mortgage Electronic Registration System, Inc.)	0.921%	19,571.25
904	Albano, Robert Cory	Wells Fargo Bank, N.A.	0.885%	18,806.25
905	Estfan, Patrick and Sally	GMAC Mortgage, LLC, as assignee of Perl Mortgage, Inc.	1.246%	26,477.50
906	Love, Mitchell and Maureen, and Walton, Jeffery N. and Sherri	Perl Mortgage, Inc. (through nominee Mortgage Electronic Registration System, Inc.)	1.23%	26,137.50
909	Elderkin, Stephen		1.011%	21,483.75
1001	Vrooman, Todd	Macquarie Mortgages USA, as assignee of Liberty Financial Group	1.23%	26,137.50
1002	Bourget, Linne	First Horizon Home Loans, a division of First Tennessee Bank (through nominee Mortgage Electronic Registration System, Inc.)	0.813%	17,276.25
1004	Valencia, Adriana Banda and Endress, Brandon Joseph	GMAC Mortgage, LLC, assignee of Perl Mortgage, Inc. (through nominee Mortgage Electronic Registration System, Inc.)	0.885%	18,806.25
1005	Schwartz, Barry Templin, Jeffrey Perlmutter, Ken Malkin, Shelly	Perl Mortgage, Inc. (through nominee Mortgage Electronic Registration System, Inc.)	1.246%	26,477.50

Units	Owners	Lenders	Allocated Percent	Judgment Lien Amount $2,125,000
1006	Konopski, Elizabeth L.	JPMorgan Chase Bank, N.A.	1.23%	26,137.50
1007	Rigoli, Andrew J. and Chi B. Nguyen	Wells Fargo Bank, N.A.	0.957%	20,336.25
1008	Urias, Oswaldo Gudino, Rosalva	Wells Fargo Bank, N.A.	0.957%	20,336.25
1010	Brooks, L. Kenneth	Mortgage Electronic Registration System, Inc., as nominee for Perl Mortgage, Inc.	1.355%	28,793.75
1101	Walsh, Patrick J. and Melissa R.	Perl Mortgage, Inc. (through nominee Mortgage Electronic Registration System, Inc.)	1.23%	26,137.50
1104	Lowe, Mark		0.885%	18,806.25
1105	Tucker, Keith E. Golden, Randal	Citimortgage, Inc. (through nominee Mortgage Electronic Registration System, Inc.)	1.246%	26,477.50
1106	Breen, Shannon	Citimortgage, Inc. (through nominee Mortgage Electronic Registration System, Inc.)	1.23%	26,137.50
1110	Radjaei-Bokharai, Afarin	M&I Bank, FSB	1.355%	28,793.75
1202	Shapira, Saul	GMAC Mortgage, LLC, assignee of Nova Financial & Investment Corp. (through nominee Mortgage Electronic Registration System, Inc.)	0.813%	17,276.25
1205	Sax, Edward; Sax, Joel and Veronica McKay	Citimortgage, Inc. (through nominee Mortgage Electronic Registration System, Inc.)	1.246%	26,477.50
1206	Davey, Michael; T&D Copper Square, LLC	Perl Mortgage, Inc. (through nominee Mortgage Electronic Registration System, Inc.)	1.23%	26,137.50
1209	Vivek, Sandeep P. and Lillian A. Trustees of the Vivek Family Revocable Trust		1.011%	21,483.75
1210	Colin and Lavonne Chapman	GMAC Mortgage, LLC, assignee of Suburban Mortgage, Inc.	1.355%	28,793.75
1304	Hart, Jeffery A.	GMAC Mortgage, LLC, assignee to Perl Mortgage, Inc. (through nominee Mortgage Electronic Registration System, Inc.)	0.885%	18,806.25
1305	Farrage, Michael J. and Cynthia K.	M&I Marshall & Ilsley Bank (through nominee Mortgage Electronic Registration System, Inc.)	1.246%	26,477.50
1309	Tornabeni, Debra	Bank of America, N.A.	1.011%	21,483.75

Units	Owners	Lenders	Allocated Percent	Judgment Lien Amount $2,125,000
1401	Capin, Neil O., Sr and Josefina	GMAC Mortgage, LLC, assignee of Nova Financial & Investment Corp. (through nominee Mortgage Electronic Registration System, Inc.)	1.228%	26,095.00
1403	Costa, Vincenzo	Citimortgage, Inc. (through nominee Mortgage Electronic Registration System, Inc.)	0.921%	19,571.25
1404	Frumes, Cary E. Adelson, Ken Goldstein, Darryl	GMAC Mortgage, LLC, assignee of Perl Mortgage, Inc. (through Mortgage Electronic Registration System, Inc.)	0.885%	18,806.25
1405	Alder Knott Holdings LLC	M&I Marshall & Ilsley Bank	1.246%	26,477.50
1406	Pope, Joshua	Perl Mortgage, Inc. (through nominee Mortgage Electronic Registration System, Inc.)	1.228%	26,095.00
1409	Faircloth, Carl L. and Patricia S.	GMAC Mortgage, LLC, assignee of Perl Mortgage, Inc. (through nominee Mortgage Electronic Registration System, Inc.)	1.011%	21,483.75
1410	Ostreicher, Jeffrey and Deborah Shapiro, Jared	Mortgage Electronic Registration System, Inc., as nominee to Perl Mortgage, Inc.	1.355%	28,793.75
1501	Lee, Gary S.	The Carnegie Hill Corp. (through nominee Mortgage Electronic Registration System, Inc.)	1.228%	26,095.00
1505	Miller, Kelly D. and Shannon E., Trustees of the Kelly D. and Shannon E. Miller 1998 Trust	M&I Marshall & Ilsley Bank	1.246%	26,477.50
1506	Hilbert, Brian; Blessed Investments, LLC	Perl Mortgage, Inc. (through nominee Mortgage Electronic Registration System, Inc.)	1.228%	26,095.00
1510	Gartenberg, Art	Mortgage Electronic Registration System, Inc., nominee for First Horizon Home Loans, a division of Tennessee Bank, N.A.	1.355%	28,793.75
1601	Shah, Nisha Kirti Shah, Kirti Z.	FNBN-RESCON I, LLC as successor-in-interest to First National Bank of Arizona (through nominee Mortgage Electronic Registration System, Inc.)	1.228%	26,095.00
1605	Rudinsky, Mark F. and Christine J., as Trustees of the Mark and Christine Rudinsky Family Trust under Trust Agreement dated May 10, 1993	Premier Financial Services, Inc. (through nominee Mortgage Electronic Registration System, Inc.)	1.246%	26,477.50

Units	Owners	Lenders	Allocated Percent	Judgment Lien Amount $2,125,000
1606	Pitre Properties Limited Partnership		1.228%	26,095.00
1701	Shaps, Robert S. and Mimi K.; Kearns, James and Judith (Judy)	Citimortgage, Inc. (through nominee Mortgage Electronic Registration System, Inc.)	1.228%	26,095.00
1705	On-Call Solutions, LLC A. Gianni Vishteh	National City Mortgage, a division of National City Bank	1.246%	26,477.50
1706	McCartney, Michael L. as Trustee of the Michael L. McCartney Revocable Living Trust dated December 27, 2005	Bank of America, N.A.	1.228%	26,095.00
1710	Shah, Deepa K. Rao, Nihaal M.	JPMorgan Chase Bank, N.A., assignee of Legend Mortgage, Inc.	1.355%	28,793.75
1801	Mueller, Kenneth P. and Denise A.	Wells Fargo Bank, N.A.	1.228%	26,095.00
1805	Hochberg, David and Elyse	Citimortgage, Inc. as successor-in-interest to ABN Amro Mortgage; Harris Bank, N.A.	1.246%	26,477.50
1806	Greene, Jordan and Stephanie	Citimortgage, Inc.	1.228%	26,095.00
1902	Shugard, George A.	Taylor, Bean & Whitaker Mortgage Group (through nominee Mortgage Electronic Registration System, Inc.)	0.813%	17,276.25
1903	Entrust New England FBO Joel Greenberg IRA	North American Savings Bank, FSB	0.921%	19,571.25
1905	Kushner, Lawrence R. and Eileen S.	Citimortgage, Inc. (through nominee Mortgage Electronic Registration System, Inc.)	1.246%	26,477.50
1909	Amtrust Bank, successor-in-interest to Herbst, Timothy P.	Amtrust Bank (through nominee Mortgage Electronic Registration System, Inc.)	0.975%	20,718.75
1910	Goodwin, Debra J. Gibson, Lynda L.		1.355%	28,793.75
2002	Greguska, Daniel and Lisa; Greguska, Thomas and Patricia; Greguska, John and Jackie	Compass Bank	1.246%	26,477.50

Units	Owners	Lenders	Allocated Percent	Judgment Lien Amount $2,125,000
2101	Ting and Ling Development Group, LLC		1.734%	36,847.50
2102	Zerilli, Vincent	Countrywide Home Loans, Inc., assignee of CFS Mortgage Corp. (through nominee Mortgage Electronic Registration System, Inc.)	1.246%	26,477.50
2105	Delevitt, Richard and Sharon	Wells Fargo Bank, N.A.	1.355%	28,793.75
2201	Virgin Farms	FNBN-RESCON I, LLC as successor-in-interest to First National Bank of Arizona. Summit at Copper Square LLC	1.734%	36,847.50
2203	Labine, Robert Jr. Bortner, Cynthia	M&I Marshall & Ilsley Bank	1.246%	26,477.50
2205	Bleich, Jeffrey	Perl Mortgage, Inc. (through nominee Mortgage Electronic Registration System, Inc.)	1.355%	28,793.75
2206	Bleich, Ronald S.	Perl Mortgage, Inc. (through nominee Mortgage Electronic Registration System, Inc.)	1.355%	28,793.75

B. The Weitz Lien is a valid and enforceable lien securing all of the Judgment Lien Amount as set forth in the Table above in Paragraph A, as allocated to the respective Units -- which Units are parts of the real property located in Maricopa County, Arizona, known and described as The Summit at Copper Square, according to: (i) the Condominium Declaration for The Summit at Copper Square, a Condominium, as recorded June 30, 2005 at MCR No. 2005-907410; and (ii) the Condominium Plat for The Summit at Copper Square, a Condominium, as recorded June 29, 2005 at MCR Book 758 of Maps, Page 47 (including as to each Unit the apportioned undivided percentage interest in and to the common area as set forth in said Declaration and as designated on said Plat) (all Units described may also be called the "Property"—whether collectively or individually).

C. Weitz is the lawful owner and holder of the Weitz Lien.

D. The Weitz Lien is hereby foreclosed. One or more Writs of Special Execution shall be issued by Weitz in this action to the Sheriff of Maricopa County, Arizona, directing that officer and his office to seize and sell the Property on a Unit-by-Unit basis at public auction sale in the manner prescribed by law and the practice of this Court to raise the respective Judgment Lien Amount due Weitz, again on a Unit-by-Unit basis, as set forth in the foregoing Table. Weitz or any other party to this action is permitted to bid and be a purchaser at any such sale. If a Unit so sold is not redeemed within 6 months after the date of its sheriff's sale, and no notice by a subsequent lien holder thereto has been filed in accordance with the provisions of Arizona Revised Statutes § 12-1284, the Sheriff shall then promptly deed the subject Unit to the purchaser at the sheriff's sale.

E. Weitz may purchase any Unit at the sheriff's sale by applying all or any portion of the allocated Judgment Lien Amount applicable to that particular Unit toward the purchase price of that specific Unit, but not otherwise as to any other Unit(s).

F. The Owner and Lender Defendants, and their respective unknown heirs and devisees, and Blinds; any person claiming through or under them; any persons whose right, title, claim, interest, estate, or lien in, to, or upon the Property that was acquired after the recording of the Weitz Lien; any person having knowledge of the Weitz Lien after execution and delivery of the Weitz Lien; and/or any person whose rights are subject to the effect of the Weitz Lis Pendens; is or are after the statutory period of redemption hereby forever barred and foreclosed from any and all right, title, claim, interest, estate, or equity or other right of redemption in, to, and upon the Property.

G. The purchaser of the Unit sold at any sheriff's sale shall be allowed to take possession of it upon expiration of the statutory period of redemption. If possession is denied to the purchaser, then there shall issue without any further order of the court, a Writ of Possession directing the Sheriff to place the purchaser or its assigns in possession of that Unit.

H. Weitz and the Owner and Lender Defendants have executed and filed a Stipulation for Entry of Judgment and Covenant Not to Execute ("Stipulation") in this action wherein Weitz agrees that it shall take no action to foreclose upon the Property until such time as the Owner and Lender Defendants' appeal of certain claims and defenses as detailed in subsection "I" below are exhausted. In addition, Weitz shall take no action to foreclose upon the Property if Owners and Lenders pay the Judgment Lien Amount as set forth in the Stipulation. Weitz shall also take no action to foreclose upon individual condominium units within the Property if any Owner or Lender pays the amount of the Judgment Lien Amount allocated to their respective unit .

I. Weitz and the Owner and Lender Defendants have preserved their rights to appeal the Court's rulings on the following specific issues only: (i) whether the doctrine of equitable subrogation entitles the Owner and Lender Defendants to priority over the Weitz Lien; and/or (ii) whether the doctrine of judicial estoppel precludes Weitz from recovering the amount sought in the Weitz Lien, each of which is more fully set forth in the Stipulation. The Owner and Lender Defendants' right to appeal any other issues, rulings, or decisions in this matter are waived.

J. All claims and cross-claims asserted in this matter remaining between the Owner and Lender Defendants and The Summit at Copper Square, LLC; The Summit at Copper

Square Commercial, LLC; W Developments, LLC; and David and Maria Wallach, shall be treated as separate claims in accordance with Rule 54(b) of the Arizona Rules of Civil Procedure, as the Owner and Lender Defendants intend to continue to prosecute those claims.

K. Pursuant to Rule 54(b), Arizona Rules of Civil Procedure, there is no just reason for delay and, accordingly, the Court directs the immediate entry of final judgment with respect to the claims fully adjudicated herein by and between Weitz and the Owner and Lender Defendants, and by and between Weitz and Blinds. Claims between Blinds and the Owner and Lender Defendants shall be treated as separate claims in accordance with Rule 54(b) of the Arizona Rules of Civil Procedure.

L. The Clerk shall enter this Judgment forthwith.

DATED: October 6, 2011.

Judge of the Superior Court
JOHN A. BUTTRICK

prior to delinquency, and shall not permit any default to occur in the payment of, any moneys due under the security agreement covering such fixture or personal property, and any such nonpayment or default shall constitute an Event of Default. Should the lien and security interest of this Deed of Trust be subject to a prior security interest with respect to any of the Property, all of Trustor's right, title and interest in and to any deposits made in connection with the transaction creating the prior security interest are hereby assigned to Beneficiary, together with the rights and benefits previously or hereafter obtained by reason of any payments made with respect thereto. As used in this paragraph (10), the term "security interest" shall include a lease.

11. **Actions or Proceedings Affecting Property; Duty to Appear.** Trustor agrees to appear in and prosecute or defend any action or proceeding that may affect the priority of this Deed of Trust or the security, rights or powers of Beneficiary hereunder or that seeks to impose liability on Trustee or Beneficiary because of any act or omission of Trustor, and Trustor shall pay all costs and expenses (including the cost of searching title) and attorneys' fees incurred in such action or proceeding. Beneficiary may appear in and defend any action or proceeding purporting to affect the security or priority hereof or the rights or powers of Beneficiary. Beneficiary may, if Beneficiary reasonably determines that Trustor is failing or will fail to do so, pay, purchase, contest or compromise any adverse claim, encumbrance, charge or lien which, in the judgment of Beneficiary, appears to be prior or superior to the lien of this Deed of Trust. All amounts paid, suffered or incurred by Beneficiary in exercising the authority granted in this Deed of Trust, including reasonable attorneys' fees, shall be added to the Obligation, shall be a lien on the Property and shall be due and payable by Trustor to Beneficiary on demand, together with interest from the date of advance until paid at the then effective Default Rate. The foregoing amounts shall also be guaranteed by any guarantee(s) now or hereafter relating to the Obligation.

12. **Additional Documents.** Trustor agrees to execute and deliver to Beneficiary, upon demand, any additional agreements, instruments or documents that Beneficiary deems reasonably necessary on a conservative basis to secure to Beneficiary any right or interest granted or intended to be granted to Beneficiary under this Deed of Trust. In the event any rights, easements or other hereditaments shall hereafter become appurtenant to any part of the Property, they shall become subject to the lien of this Deed of Trust.

13. **Sale, Lease or Conveyance by Trustor.**

(a) Except for the sales of Units for which release prices are provided pursuant to the Loan Agreement and except for any liens or security interests granted to the Mezzanine Lender pursuant to documents which have been consented to by Lender pursuant to the Intercreditor Agreement (defined in the Loan Agreement, Trustor shall not sell, transfer, lease, assign, convey or further encumber (including granting any easements (except for public utility or other easements needed to service the improvements being constructed on the Real Property) or other interests affecting title to the Property) or pledge or hypothecate any of its interest in all or any portion of the Property, voluntarily, involuntarily or by operation of law, without the prior written consent of Beneficiary, which Beneficiary may withhold in its sole and exclusive discretion. Beneficiary may require as a condition of its consent a change in the terms and conditions of repayment of the Obligation, including payment of a fee, an increase in interest rate payable and/or a reduction in the time remaining prior to the maturity date. For the purposes of this paragraph (13), a change in the control or management or ownership of Trustor, or the transfer of fifty (50%) percent of the ownership or voting interests in Trustor, or the dissolution of Trustor, shall be deemed a transfer of the Property which gives Beneficiary the right to exercise the remedies set forth herein.

(b) Trustor shall give Beneficiary ten (10) business days' prior written notice of any proposed transaction which requires Beneficiary's consent, and Trustor shall furnish to Beneficiary such

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

THE WEITZ COMPANY LLC, an Iowa limited liability company,

Plaintiff,

vs.

THE SUMMIT AT COPPER SQUARE, LLC, an Illinois limited liability company, et al.,

Defendants.

No. CV 2008-028378

DEPOSITION OF:

DAVID T. WALLACH

BLINDS & BEYOND BY WIKLER, INC., an Arizona corporation,

Counterclaimant and Cross-Claimant,

vs.

THE WEITZ COMPANY, LLC, an Iowa limited liability company,

Counterdefendant and

THE SUMMIT AT COPPER SQUARE, LLC, an Illinois limited liability company; et al.,

Cross-Defendant.

Phoenix, Arizona
September 22, 2010
9:00 o'clock a.m.

REPORTED BY: DONNA FORD TERRELL, RPR, RMR, RDR, CRR
Certified Reporter #50250

PREPARED FOR:

BRUSH & TERRELL
COURT REPORTERS
26712 North 90th Lane
Peoria, Arizona 85383
(623) 561-8046

"David acknowledges that he didn't secure adequate funding for the entire project up front, and that was his mistake."

A. That's not an accurate reflection of what was said.

What was said was that the gap in funding was recognized up front by everybody.

Q. M'hum.

A. I took responsibility for not having the release prices codified in the mortgage the way that you would have it in others.

In a lot of transactions, you would negotiate up front, the step up or step down, depending which way you looked at it, in terms of repayment to the lender.

It might start out as a hundred percent of the proceeds for the first 35 percent, and then it might go down to 80 percent for the next 35 percent, and then down to 50 percent until fully paid. It's -- you know, within those numbers is a negotiation you would typically have with a lender.

And despite having those conversations up front that the proceeds will exceed the amount of debt, that was not then codified in the mortgages. So I have taken responsibility. And I have said at that time and at the time you asked me that I said kind of mea culpa as a

lawyer missing that. But that should have been in those documents, and it wasn't.

Again, nobody was that concerned at that time until First National Bank of Arizona had the FDIC in their back office and they're saying, "You know, we can't change that now."

So that was the part that I was taking responsibility for, not for the --

Q. Lack of funding?

A. -- lack of funding, right.

Q. Then the next line below that says, "David will fund directly to" -- I can't read the next word -- "to" something "20 K for" -- and then the next line is cut off.

Do you know what that refers to?

A. That's -- again, that's that parallel track. That's the deal that we were trying to set up with First National Bank of Arizona to bring in additional equity in order to acquire the 50 units, and then put First National Bank of Arizona into second position on those 50.

And then First National Bank would be in first position on the 24 plus The Summit Commercial.

Q. Okay. So that was -- the note was in reference to your--