THIS OPINION IS NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	CASE NO. 00-50896
	)	
W.G. LOCKHART CONSTRUCTION COMPANY, INC.,	)	CHAPTER 11
	)	
DEBTOR(S)	)	
	)	
W.G. LOCKHART CONSTRUCTION COMPANY, INC.,	)	**ADVERSARY NO. 01-5044**
	)	JUDGE MARILYN SHEA-STONUM
PLAINTIFF(S),	)	
	)	
vs.	)	
	)	
DEVELOPERS DIVERSIFIED REALTY CORPORATION, ET AL.	)	
	)	**ORDER GRANTING PARTIAL SUMMARY JUDGMENT**
DEFENDANT(S).	)	

This matter comes before the Court on the motion of defendant, Developers Diversified Realty Corporation ("DDRC") for summary judgment, the response of plaintiff-debtor and the reply of DDRC.

JURISDICTION

This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. As to DDRC, plaintiff-debtor has asserted two causes of action (unjust enrichment and foreclosure of mechanic's lien) that are based

solely upon state law and that arose prior to plaintiff-debtor's bankruptcy filing.[1] Accordingly, neither of those two causes of action are "core" proceedings under 28 U.S.C. §157(b)(2). *Sanders Confectionery Products, Inc. v. Heller Financial, Inc.*, 973 F.2d 474, 483 (6th Cir. 1992) (a "core" proceeding either invokes a substantive right created by federal bankruptcy law or one which could not exist outside of bankruptcy). Whether or not this Court has jurisdiction depends upon whether those matters are "related to" defendant-debtor's bankruptcy case.[2]

To fall within the jurisdiction of the bankruptcy court, a proceeding need only be "related to" a case under title 11. *See* 28 U.S.C. §1334(b).[3] A matter is related to a bankruptcy case if "the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy." *Michigan Employment Security Comm'n v. Wolverine Radio Co., Inc. (In re Wolverine Radio Co.)*, 930 F.2d 1132, 1142 (6th Cir. 1991), quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3rd Cir. 1984) (emphasis omitted). As noted by the Sixth Circuit, the key word in the test for determining jurisdiction is "conceivable." Certainty, or even likelihood, is not a requirement: "Bankruptcy jurisdiction

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1 Nowhere in its complaint does plaintiff-debtor assert either diversity or federal question jurisdiction as a basis for a federal court's determination of these causes of action.

2 No party to this adversary proceeding has moved this Court for abstention pursuant to 28 U.S.C. §1334(c)(2).

3 That code provision sets forth that "[n]otwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in *or related to* cases under title 11." 28 U.S.C. §1334(b) (emphasis added).

will exist so long as it is possible that a proceeding may impact on 'the debtor's rights, liabilities, options, or freedom of action' or the 'handling and administration of the bankruptcy estate.'" *Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Provider of Connecticut (In re Dow Corning Corp.)*, 86 F.3d 482, 491 (6th Cir. 1996). *See also Kelley v. Nodine (In re Salem Mortgage Co.)*, 783 F.2d 626, 634 (6th Cir. 1986) (noting that "[a]lthough situations may arise where an extremely tenuous connection to the estate would not satisfy the jurisdictional requirement, . . . a broader interpretation of the [jurisdiction] statute more closely reflects the congressional intent in adopting the new bankruptcy laws").

In the case at bar, the outcome of plaintiff-debtor's causes of action against DDRC will, in part, determine the value of the Liquidation Trust Assets pursuant to debtor's confirmed chapter 11 liquidating plan.[4] That value determination will then dictate the amount of the pro rata distribution to entities holding allowed general unsecured claims.[5] Because the outcome of plaintiff-debtor's causes of action against DDRC will have a direct effect upon the estate being administered by the Liquidation Trust pursuant to debtor's confirmed chapter 11

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[4] Pursuant to the Second Amended Joint Plan of Reorganization, "Liquidation Trust Assets" are defined as, *inter alia*, "all property of any kind, nature or description and in any form, of the Debtor, remaining in the Estate on the Effective Date, including, without limitation: (1) all claims, debts, rights and causes of action and defenses, setoffs and recoupments in favor of the Debtor . . . ." *See* Second Amended Joint Plan of Reorganization at pg. 8 **[Main Case, docket #406]**. *See also* Confirmation Order **[Main Case, docket #415]**.

[5] Pursuant to the Second Amended Joint Plan of Reorganization, entities holding allowed general unsecured claims are to receive a pro rata distribution of the Liquidation Trust Assets, less certain distributions. *See* Second Amended Joint Plan of Reorganization at pg. 13 **[Main Case, docket #406]**. *See also* Confirmation Order **[Main Case, docket #415]**.

plan, plaintiff-debtor's state law causes of action against DDRC are "related to" its bankruptcy case.

A bankruptcy court has jurisdiction to render final orders and judgments in core proceedings. *See* 28 U.S.C. §157(b). In otherwise related proceedings, the bankruptcy court instead submits proposed findings of fact and conclusions of law to the district court unless the parties to the otherwise related proceeding consent to the bankruptcy court's jurisdiction to enter final orders and judgments. *See* 28 U.S.C. §157(c)(1) and (2). Consent may be "express; it may be implied from a timely failure to object to the Bankruptcy Court's jurisdiction; or it may be implied from any act which indicates a willingness to have the Bankruptcy Court determine a claim or interest." *In re Baldwin-United Corp.*, 48 B.R. 49, 54 (Bankr. S.D. Ohio 1985).

In its complaint, plaintiff-debtor avers that all of the matters raised in this adversary proceeding are "core" proceedings. *See* Complaint at ¶2 **[docket #1]**. By such averment and the fact that plaintiff-debtor initiated this proceeding, it has expressly consented to this Court's jurisdiction to enter final judgment. DDRC did not expressly consent to this Court's jurisdiction to enter final judgment as one of its affirmative defenses includes an allegation that this Court lacks subject matter jurisdiction over plaintiff-debtor's complaint. *See* DDRC Answer at ¶27 **[docket #9]**. However, by making a motion for summary judgment, DDRC impliedly consented to the jurisdiction of this Court to enter final judgment relative to the matters raised in that dispositive pleading. *First Nat'l Bank of Dalton v. Browning Tufters,*

Inc. (In re Browning Tufters, Inc.), 3 B.R. 487, 491 (Bankr. N.D. Ga. 1980).

FACTS

Based upon the pleadings on file in this adversary proceeding and plaintiff-debtor's main chapter 11 case, the following facts are not in dispute:

1. During all times relevant to the dispute at issue, W.G. Lockhart Construction Company, Inc. ("Lockhart"), was a corporation engaged in the construction industry with its principle offices located in Summit County, Ohio.

2. DDRC is the owner of the Stow Community Shopping Center located at 4250 Kent Road in Stow, Ohio.

3. On November 16, 1995, DDRC entered into a contract with D.J. Miller Builders, Inc. ("DJ Miller") whereby DJ Miller would serve as the general contractor for construction of the Stow Community Shopping Center.

4. After entering into the contact with DDRC, DJ Miller then entered into contracts with various subcontractors. In January 1996, DJ Miller entered into a subcontract agreement with Lockhart (the "Subcontract Agreement").

5. Pursuant to the Subcontract Agreement, Lockhart was to perform various site improvements related to construction of the Stow Community Shopping Center including site excavation and grading and construction of sewers and water lines.

6. Lockhart actually began its work on the Stow Community Shopping Center in early December 1995 before it entered into the Subcontract Agreement with DJ Miller.

7. Lockhart never directly entered into a contract with DDRC regarding its obligations relative to construction of the Stow Community Shopping Center.

8. On February 5, 1996, DDRC filed with the Summit County Recorders Office a "Notice of Commencement" pursuant to Ohio Revised Code (sometimes referred to herein as "ORC") §1311.04 in regards to construction of the Stow Community Shopping Center.

9. Lockhart has never served a "Notice of Furnishing" upon DDRC pursuant to ORC §1311.05.

10. On January 17, 2001, Lockhart filed an "Affidavit to Obtain a Mechanic's Lien" with the Summit County Recorders Office regarding the work it performed on the Stow Community Shopping Center. In that affidavit, plaintiff-debtor contends that it is owed $636,018.68 plus interest at a rate of 12 percent.

11. At all times relevant to the issues raised in this adversary proceeding, Richard Stanley served as Lockhart's secretary. On June 11, 1996, Mr. Stanley signed a "Release and Waiver of Lien" which was issued to DDRC and which deals with labor and materials that Lockhart provided for construction of the Stow Community Shopping Center through December 31, 1995.

12. Lockhart filed a voluntary chapter 11 bankruptcy petition on March 30, 2000.

13. Lockhart, as debtor in possession pursuant to 11 U.S.C. §§1107 and 1108, commenced this adversary proceeding on March 29, 2001 against DDRC and seven other defendants.[6]

DISCUSSION

A. THE SUMMARY JUDGMENT STANDARD

A court shall grant a party's motion for summary judgment "if...there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law."

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[6] Pursuant to debtor's confirmed liquidating plan, the claims asserted by Lockhart, as debtor in possession, in this adversary proceeding were conveyed to a liquidating trust which retained counsel for the Official Committee of Unsecured Creditors (the "Committee") to prosecute the action. Therefore, it was actually the Committee and not plaintiff-debtor that filed the response to DDRC's motion for summary judgment. For the sake of clarity and because the Committee is raising the same arguments that plaintiff-debtor could have raised if it had continued to prosecute this matter, contra-arguments to DDRC's motion for summary judgment will be referred to as those of plaintiff-debtor and not the Committee. *See* Agreed Order Regarding Authorization to Prosecute Claims **[docket #19]**.

FED. R. CIV. P. 56(c); FED. R. BANKR. P. 7056. The party moving for summary judgment bears the initial burden of showing the court that there is an absence of a genuine dispute over any material fact, *Searcy v. City of Dayton*, 38 F.3d 282, 286 (6th Cir. 1994) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)), and, upon review, all facts and inferences must be viewed in the light most favorable to the nonmoving party. *Searcy v. City of Dayton*, 38 F.3d 282, 285 (6th Cir. 1994); *Boyd v. Ford Motor Co.*, 948 F.2d 283, 285 (6th Cir. 1991).

B. VALIDITY OF PLAINTIFF-DEBTOR'S MECHANIC'S LIEN

Through Count Four of its Complaint, plaintiff-debtor claims that it holds a valid, perfected mechanic's lien on the Stow Community Shopping Center and that, because it has not been paid for the indebtedness represented by the lien, is has a right to foreclose. *See* Complaint at ¶19-27 **[docket #1]**. Through its motion for summary judgment, DDRC contends that, because Lockhart failed to comply with required provisions of the Ohio Revised Code regarding mechanic's liens, that lien is invalid and unenforceable. *See* Motion for Summary Judgement at pgs. 7-17 **[docket #21]**.

Ohio's mechanic's lien law is codified in Ohio Revised Code §1311.01 *et seq*. The provisions of that statute which are relevant to the issue of validity of plaintiff-debtor's mechanic's lien are as follows:

ORC §1311.02 - Lien of subcontractor, laborer or materialman.

[E]very person who as a subcontractor, laborer, or materialman, performs any labor or work or furnished any material to an original contractor or any subcontractor, in carrying forward, performing, or completing any improvement, has a lien to secure the payment therefor upon

the improvement and all interest that the owner, part owner, or lessee may have or subsequently acquire in the land or leasehold to which the improvement was made or removed.

ORC §1311.04 - Owner, part owner or lessee to record notice of commencement of improvement; amendment of lien claimant's affidavit; service, posting of copies.

(A)(1) Prior to the performance of any labor or work or the furnishing of any materials for an improvement on real property which may give rise to a mechanic's lien under sections 1311.01 to 1311.22 of the Revised Code, the owner, part owner, or lessee who contracts for the labor, work, or materials shall record in the office of the county recorder for each county in which the real property to be improved is located a notice of commencement in substantially the form specified in division (B) of this section.

* * *

(I) If the owner, part owner, lessee, or designee fails to record the notice of commencement in accordance with this section, the time within which a subcontractor or materialman may serve a notice of furnishing as required by section 1311.05 of the Revised Code is extended until twenty-one days after the notice of commencement has been recorded.

* * *

(R) If an owner, part owner, lessee, or designee fails to record a notice of commencement in accordance with this section, no subcontractor or materialman who performs labor or work upon or furnishes material in furtherance of that improvement has to serve a notice of furnishing in accordance with section 1311.05 of the Revised Code in order to preserve his lien rights.

Section 1311.05 - Subcontractor or materialman to service notice of furnishing.

(A) Except as provided in section 1311.04 of the Revised Code and this section, a subcontractor or materialman who performs labor or work upon or furnishes material in furtherance of an improvement to real property and who wishes to preserve his lien rights shall serve a notice of furnishing, if any person

> has recorded a notice of commencement in accordance with section 1311.04 of the Revised Code, upon the owner's, part owner's, or lessee's designee named in the notice of commencement or amended notice of commencement and the original contractor under the original contract pursuant to which he is performing labor or work or furnishing materials, as named in the notice of commencement or amended notice and at the address listed in the notice or amended notice at any time after the recording of the notice of commencement or amended notice but within twenty-one days after performing the first labor or work or furnishing the first materials or within the extended time period provided for in division (I) or (J) of section 1311.04 of the Revised Code. . . .
>
> * * *
>
> (H) No subcontractor or materialman who performs labor or work upon or furnishes material in furtherance of an improvement has to serve a notice of furnishing in accordance with this section in order to preserve his lien rights if the owner, part owner, or lessee who contracted for the labor, work, or materials fails to record a notice of commencement in accordance with section 1311.04 of the Revised Code.
>
> **ORC §1311.06 - Filing of affidavit for mechanics' lien.**
>
> (A) Any person, or his agent, who wishes to avail himself of sections 1311.01 to 1311.22 of the Revised Code, shall make and file for record in the office of the county recorder in the counties in which the improved property is located, an affidavit showing the amount due over and above all legal setoffs, a description of the property to be charged with the lien, the name and address of the person to or for whom the labor or work was performed or material was furnished, the name of the owner, part owner, or lessee, if known, the name and address of the lien claimant, and the first and last dates that the lien claimant performed any labor or work or furnished any material to the improvement giving rise to his lien . . . .

It is undisputed that DDRC filed a "Notice of Commencement" on February 5, 1996. It is also undisputed that plaintiff-debtor has never served a "Notice of Furnishing" upon DDRC. Pursuant to ORC §1311.04 and §1311.05, once a "Notice of Commencement" is

filed, "a subcontractor . . . who wishes to preserve [its] lien rights *shall* serve a notice of furnishing . . . upon the owner's . . . designee named in the notice of commencement." *See* ORC §1311.04(A)(1) and ORC §1311.05(A) (emphasis added). Although Ohio's mechanic's lien statutes should be liberally construed once a lien has been established, the procedural steps required to create and perfect a mechanic's lien must be strictly satisfied and the burden of taking those steps is on the entity seeking the benefit of such lien. ORC §1311.22; *M.J. Kelly Co. v. Haendiges*, 391 N.E.2d 723, 725, 58 Ohio St.2d 505, 508 (Ohio 1979); *Hoppes Builders and Dev. Co. v. Hurren Builders, Inc.*, 692 N.E.2d 622, 624, 118 Ohio App.3d 210, 213-14 (Ohio Ct. App. 1996); *West Virginia Elec. Supply Co. v. Ohio River Plaza Assocs. Ltd.*, 612 N.E.2d 1263, 1266, 82 Ohio App.3d 605, 610 (Ohio Ct. App. 1992); *Baumgart v. Charms (In re Charms)*, 142 B.R. 186, 187 (Bankr. N.D. Ohio 1992); *Durrel Paint & Varnish Co. v. Arnold*, 152 N.E.2d 9, 12, 105 Ohio App. 172, 175 (Ohio Ct. App. 1957).

Because ORC §1311.05 required Lockhart to serve a "Notice of Furnishing" upon DDRC "to preserve [its] lien rights" and because Lockhart failed to ever serve such a document, the mechanic's lien at issue is invalid unless Lockhart was somehow excused from its service requirements. Through its response, plaintiff-debtor contends that it was not required to serve a "Notice of Furnishing" upon DDRC because DDRC did not record its "Notice of Commencement" until after construction work on the Stow Community Shopping Center had already begun. *See* Response at pg. 4, 6-8 **[docket #20]**. To support its contention, plaintiff-debtor cites to ORC §1311.01(A)(1) and §1311.04(R) and claims that

these statutory provisions waived its requirement to serve a "Notice of Furnishing" upon DDRC.

Although DDRC did not record its "Notice of Commencement" until after construction on the Stow Community Shopping Center had started, that fact alone does not excuse plaintiff-debtor's failure to serve DDRC with a "Notice of Furnishing" given ORC §1311.04(I), a statutory provision which plaintiff-debtor conveniently fails to reference or discuss anywhere in its response. That portion of Ohio's mechanic's lien statute clearly contemplates that, at times, a property owner will not record a "Notice of Commencement" until after work to improve the property is already underway. In such an instance, the time in which a subcontractor must serve a "Notice of Furnishing" upon the property owner "is extended until twenty-one days after the notice of commencement has been recorded." *See* ORC §1311.04(I). *See also Jim Morgan Elec. Co. v. Smith*, 684 N.E.2d 117, 85 Ohio Misc.2d 45 (Ohio Ct. App. 1996); *Jim Morgan Elec. Co. v. Smith*, 684 N.E.2d 121, 85 Ohio Misc.2d 53 (Ohio Ct. App. 1996). A subcontractor's duty to serve a "Notice of Furnishing" is fully excused ***only*** when a property owner fails to ever record a "Notice of Commencement," a fact which clearly does not exist in this case.[7]

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[7] In its response, plaintiff-debtor relies upon *R.N. Building Materials, Inc. v. C.R. Huffner Roofing & Sheetmetal, Inc.*, 683 N.E.2d 884, 85 Ohio Misc.2d 20 (Ohio Ct. App. 1997) to support its contention that Ohio's "mechanic's lien statute thus provides for waiver of the requirement [to serve a notice of furnishing] where the owner fails to comply with the requirements of Section 1311.04 by recording an untimely notice of commencement." *See* Response at pg. 7 **[docket #20]**. Plaintiff-debtor's reliance upon that decision is misplaced as that case dealt with the issue of whether or not the belatedly filed notice of commencement substantially complied with the form required in ORC §1311.04(B). Because plaintiff-debtor has never contended that DDRC's "Notice of Commencement" was deficient, the issue of substantial compliance and possible waiver of the duty to serve a "Notice of Furnishing" is not at issue in this adversary proceeding.

Nor can the fact that plaintiff-debtor filed a "Affidavit to Obtain a Mechanic's Lien" somehow compensate for its failure to comply with the requirements to serve a "Notice of Furnishing" upon DDRC. "It is a well-settled rule of statutory interpretation that statutory provisions be construed together and the Revised Code be read as an interrelated body of law." *State v. Moaning*, 666 N.E.2d 1115, 1116, 76 Ohio St. 3d 126, 128 (Ohio 1996). The affidavit filing requirement of ORC §1311.06 must, therefore, be read as a supplement and not an alternative to the "Notice of Furnishing" service requirement of ORC §1311.05. *See D&H Coal Co. v. Lay*, 175 N.E. 30, 32, 37 Ohio App. 433, 440 (Ohio Ct. App. 1930) ("the character, operation, and extent of the [mechanic's] lien must be ascertained by the terms of the statute creating and defining it, and the parties cannot extend the statute to meet cases for which the statute itself does not provide, though these cases may be of equal merit with those provided for"). Given Lockhart's failure to comply with the procedural requirements necessary to establish and preserve its mechanic's lien, that lien is invalid.[8]

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[8] Because the mechanic's lien is determined to be invalid, the Court need not discuss DDRC's arguments regarding the validity of Lockhart's affidavit of mechanic's lien. *See* Motion for Summary Judgment at pgs. 16-17 **[docket #21]**. The Court also need not discuss DDRC's contention that the complaint incorrectly states a claim for "Foreclosure of Mechanic's Lien" when the proper cause of action should be against a surety bond posted by DDRC pursuant to an "Application for Approval of Bond and Discharge of Mechanic's Lien" which was approved by the Summit County Court of Common Pleas in September 1997. *See* DDRC's Answer at ¶17 **[docket #9]** and Motion for Summary Judgment at pg. 5 **[docket #21]**.

C. UNJUST ENRICHMENT

Through Count Three of its Complaint, plaintiff-debtor claims that DDRC and JD Miller have been unjustly enriched by $674,179.80 through materials and labor furnished by Lockhart for construction of the Stow Community Shopping Center. *See* Complaint at ¶17-18 **[docket #1]**. Through its motion for summary judgment, DDRC raises two arguments with respect to the unjust enrichment claim. First, that the June 11, 1996 waiver executed by Mr. Stanley on behalf of Lockhart precludes any unjust enrichment claim for labor and material provided through December 31, 1995. *See* Motion for Summary Judgment at pg. 17-20 **[docket #11]**. Next, DDRC argues that, because it was awarded judgment against the general contractor, DJ Miller, for damages sustained relative to construction of the Stow Community Shopping Center, it is impossible that it could have been unjustly enriched by plaintiff-debtor's work in a sub-contractor capacity. *See* Reply at pg. 2-3 **[docket #21]**]. Both of these arguments are discussed, in turn, below.

1. Effect of "Release and Waiver of Lien"

The "Release and Waiver of Lien" executed in favor of DDRC by Mr. Stanley on behalf of Lockhart sets forth, in pertinent part, the following:

> For and in consideration and receipt of $39,219.00 which represents full payment for services, labor and or materials furnished through the 31st day of December 1995; the undersigned does hereby waive, release and relinquish any and all claims, demands and rights of lien for all work, labor, materials, machinery and other goods, equipment or service performed or furnished for the real property and the improvements hereinafter described: . . .

See Motion for Summary Judgment, Exhibit H **[docket #11]**. That document also sets forth that:

> The undersigned further warrants and represents that any and all valid labor, material and equipment bills (including taxes) due and payable relating to the aforementioned project on behalf of the undersigned have been paid in full.

See Id.

DDRC claims that, as a matter of law, the "Release and Waiver of Lien" precludes plaintiff-debtor from bringing any cause of action (including one for unjust enrichment) related to Lockhart's work on the construction of the Stow Community Shopping Center through December 31, 1995. Plaintiff-debtor contends that the "Release and Waiver of Lien" only limits the enforcement of a mechanic's lien for work performed and services rendered by Lockhart through December 31, 1995 and that its equitable claim for unjust enrichment is in no way affected by execution of that document.

If a contract is clear and unambiguous, then its interpretation is a matter of law and there is no issue of fact to be determined. *Inland Refuse Transfer Co. v. Browning-Ferris Industries of Ohio, Inc.*, 474 N.E.2d 271, 272, 15 Ohio St.3d 321, 322 (Ohio 1984). If a term cannot be determined from the four corners of the document, factual determination of intent or reasonableness may be necessary to clarify the questionable term. *Inland Refuse Transfer Co. v. Browning-Ferris Industries of Ohio, Inc.*, 474 N.E.2d 271, 273, 15 Ohio St.3d 321, 322 (Ohio 1984). *See also Kelly v. Medical Life Ins. Co.*, 509 N.E.2d 411, 413, 31 Ohio St.3d 130, 132 (Ohio 1987) ("The intent of the parties to a contract is presumed to reside in the

language the parties chose to employ in the agreement."). The Ohio Supreme Court has set forth a test for determining whether a contract is ambiguous: "Common words appearing in a written instrument will be given their ordinary meaning unless manifest absurdity results, or unless some other meaning is clearly evidenced from the face of overall contents of the instrument." *Shifrin v. Forest City Enterprises, Inc.*, 597 N.E.2d 499, 501, 64 Ohio St.3d 635, 638 (Ohio 1992). If no ambiguity appears on the face of the instrument at issue, parole evidence cannot be considered in an effort to demonstrate that an ambiguity exists. *Id. See also Portsmouth Iron Co. V. Murray*, 38 Ohio St. 323 (Ohio 1882) ("The right to a mechanic's lien for labor or materials furnished for the erection or repair of a building may be waived by an agreement either express or implied.").

As drafted, the "Release and Waiver of Lien" provides that Lockhart waives, releases and relinquishes "any and all claims, demands and rights of lien" for work it performed on the Stow Community Shopping Center through December 31, 1995. The term "claim" is defined as "[a] cause of action," "[a] [m]eans by or through which claimaint obtains possession or enjoyment of privilege or thing" or "[a] [d]emand for money or property as of right." BLACK'S LAW DICTIONARY 247 (6th ed. 1990). As used in the "Release and Waiver of Lien," the term "claim" is not preceded by any limiting modifier nor does the term "claim" appear to modify the phrase "rights of lien." In fact, as drafted, the term "claim" should be given a broad interpretation given the use of the modifiers "any and all."

Therefore, in giving the term "claim" its ordinary meaning, it should be read to include

not only a cause of action on a mechanic's lien but also a cause of action for unjust enrichment. When read in the context of the entire "Release and Waiver of Lien," the use of the term "claim" should be construed to encompass a release and waiver by Lockhart of its right to bring a cause of action for unjust enrichment for work performed on the Stow Community Shopping Center through to December 31, 1995. Such an interpretation does not result in a "manifest absurdity" nor is there any other meaning "clearly evidenced from the face of overall contents of the instrument."

2. Effect of Judgment Against DJ Miller

To succeed on a claim of unjust enrichment, a plaintiff must prove (1) that it conferred a benefit upon the defendant; (2) that the defendant had knowledge of such benefit; and (3) that for the defendant to retain the benefit under the circumstances would be unjust without payment. *Hambleton v. R.C. Barry Corp.*, 465 N.E.2d 1298, 1302, 12 Ohio St. 3d 179, 183 (Ohio 1984). In its Motion for Summary Judgment, DDRC argues that the amount by which it could be unjustly enriched, if any, must be limited by the "Release and Waiver of Lien." *See* Motion for Summary Judgment at pgs. 17-20 **[docket #11]**. In its Reply, however, DDRC contends that plaintiff-debtor should, as a matter of law, be precluded from pursuing any cause of action against it for unjust enrichment:

> Subsequent to DDRC's Motion for Summary Judgment, DDRC obtained judgment against Defendant, D.J. Miller Builders ("D.J. Miller") on DDRC's cross-claim in Summit County Common Pleas Case No.: CV-1997-07-4161, for $428,757.14. A copy of Judge Mary Spicer's judgment entry is attached hereto as Exhibit "C." This is the case which was pending before Lockhart dismissed its complaint against DDRC without prejudice.

> DDRC can only have been unjustly enriched if it failed to fulfill its obligations to D.J. Miller. Here, however, it is D.J. Miller who is indebted to DDRC. Therefore, as a matter of law, DDRC cannot have been unjustly enriched when it has been damaged in excess of $400,000.00. DDRC agrees that it would be unjust for it to keep any benefit conferred upon it, but DDRC has received no benefit. Instead, DDRC has incurred damages in the amount of $428,757.14.
>
> In the end, both DDRC and Lockhart must pursue their remedies against D.J. Miller. In the case at hand, however, DDRC, as a matter of law, has not been unjustly enriched because it has obtained a judgment against its general contractor, D.J. Miller.

See Response at pg. 2-3 **[docket #21]**.

Neither DDRC nor plaintiff-debtor have provided this Court with copies of the complaint or cross-claim in Summit County Common Pleas Case No.: CV-1997-07-4161. The judgment entry against DJ Miller and in favor of DDRC in that case sets forth, in pertinent part, the following:

> This matter came before the Court on Defendant and Cross-Claim Plaintiff, Developers Diversified Realty Corporation's Memorandum in Support of Damages for Default Judgment Against Defendant and Cross-Claim Defendant, D.J. Miller Builders Inc. Upon review of the Memorandum and the accompanying documentation in support, the Court hereby finds that DDRC has sustained damages in the amount of $428,747.14 as detailed in its Memorandum.

See Response at Exhibit C **[docket #21]**. DDRC has not provided this Court with a copy of the referenced "Memorandum" regarding damages.

This Court is wholly uninformed as to what causes of action DDRC raised against DJ Miller in its cross-claim. As such, this Court lacks any context with which to analyze the judgment that DDRC contends should preclude plaintiff-debtor from pursuing its cause of

action against DDRC for unjust enrichment regarding work performed on the Stow Community Shopping Center after December 31, 1995. Because facts and inferences relating to this cause of action must be viewed in the light most favorable to the plaintiff-debtor, the Court finds that DDRC has not met its burden of showing the Court that it is entitled to judgment as a matter of law on this particular issue.

CONCLUSION

Based upon the foregoing, the Court finds that plaintiff-debtor's mechanic's lien on the Stow Community Shopping Center is invalid. The Court also finds that plaintiff-debtor is precluded from bringing a cause against DDRC for unjust enrichment as to work performed on the Stow Community Shopping Center through December 31, 1995. As to work performed on the Stow Community Shopping Center after December 31, 1995, DDRC has not sustained the burden necessary to entitle it to summary judgment.

THEREFORE IT IS HEREBY ORDERED:

1. That Count Three of plaintiff-debtor's complaint is dismissed as to DDRC to the extent that it seeks compensation for unjust enrichment of any work performed on the Stow Community Shopping Center through December 31, 1995, and

2. That Count Four of plaintiff-debtor's complaint is dismissed as to DDRC.

_____

MARILYN SHEA-STONUM
Bankruptcy Judge

DATED: 10/29/01

THIS OPINION IS NOT INTENDED FOR PUBLICATION

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this ____ day of OCTOBER, 2001, the foregoing Order was sent via regular U.S. Mail to:

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_____
Lisa Napoli, *Law Clerk*