

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)	
)	
FARNAM ASSOCIATES)	
LIMITED PARTNERSHIP,)	CASE NO. BK91-80845
)	
Debtor)	A91-8119
)	
FARNAM ASSOCIATES)	
LIMITED PARTNERSHIP,)	
)	CH. 11
Plaintiff)	
vs.)	
)	
ANDERSEN CONSTRUCTION)	
COMPANY OF COUNCIL BLUFFS,)	
INC., GREGORY M. GORSKI, as)	
Trustee for the PATRICIAN)	
MORTGAGE COMPANY, THE)	
PATRICIAN MORTGAGE COMPANY,)	
a District of Columbia)	
corporation, GREGORY M.)	
GORSKI, as Trustee for)	
KRUPP INSURED PLUS II)	
LIMITED PARTNERSHIP,)	
a Massachusetts limited)	
partnership, KRUPP INSURED)	
PLUS II LIMITED PARTNERSHIP,)	
a Massachusetts limited)	
partnership, DEMARCO BROTHERS)	
COMPANY, RAY MARTIN COMPANY,)	
BAXTER ELECTRIC, INC.,)	
CONTINENTAL FIRE SPRINKLER)	
COMPANY, and ALLIED)	
CONSTRUCTION SERVICES, INC.,)	
)	
Defendants)	

MEMORANDUM

Pending before the Court are numerous motions for partial summary judgment. The combined hearing on all motions was held August 27, 1992. The plaintiff, Farnam Associates Limited Partnership (FALP), and defendants, Patrician/Krupp, are basically aligned and support the same position. That is, that

the lien of Patrician and its associated entity, Krupp, represented by deeds of trust recorded January 24, 1989, are superior to construction liens filed by Andersen Construction Company of Council Bluffs (Andersen) and all other defendants (Andersen subcontractors), in 1990.

This adversary proceeding is not a core proceeding under 28 U.S.C. § 157(b)(2). It concerns prepetition contract and state law lien rights and is otherwise related to the Chapter 11 case filed by FALP. The parties consented to this bankruptcy judge determining and entering appropriate orders and judgments pursuant to 28 U.S.C. § 157(c)(2). This memorandum contains the findings of fact and conclusions of law required by Fed. R. Civ. P. 52 as incorporated in Fed. Bankr. R. 7052.

Decision

1. The consensual liens represented by deeds of trust granted by the plaintiff to Patrician and Krupp and recorded on January 24, 1989, have priority over construction liens filed by Andersen and Andersen subcontractors in 1990.

2. The Andersen and Andersen subcontractor liens, except for the lien of Defendant Baxter Electric, Inc., (Baxter), were timely filed and attach to the plaintiff's interest in the property as of January 25, 1989.

3. Baxter waived all lien rights prior to January 25, 1989, and cannot assert a lien under the Nebraska Construction Lien Act (NCLA).

4. The construction liens filed by Andersen and the Andersen subcontractors are valid only for charges incurred as a result of services or supplies furnished on or after January 25, 1989, pursuant to the contract between plaintiff and Andersen executed in January of 1989.

Facts

The plaintiff and Andersen have entered into a fact stipulation identified as Exhibit A (Filing #84). In addition to the factual stipulation, the parties submitted the contract documentation in two volumes identified as Exhibits A(1) and A(2). Additional evidence in the form of affidavits in support of the various motions were submitted along with copies of the deposition of the president of Andersen and the chief financial officer of Andersen.

The parties agreed at the hearing that there are no issues of material fact and that the question to be determined by the Court, the lien priority between the parties, is a question of law. After a review of all of the submitted exhibits and the initial and supplemental briefs filed on behalf of each of the parties, the Court agrees that issues before it are questions of law with regard to an interpretation of the Nebraska Construction Lien Act (NCLA), Neb. Rev. Stat. §§ 52-125 through -159 (Reissue 1988), as such statute relates to actions of and between the parties concerning the particular construction project from which the dispute has arisen. The factual findings contained in this memorandum are taken from the factual stipulation and the uncontroverted evidence submitted by the parties.

1. At all times material hereto, FALP was the owner of certain real estate known as 900 Farnam Street, Omaha, Nebraska (the Property), and renovation of the building on the property which became known as the "Greenhouse Project".

2. On June 2, 1987, FALP and Andersen entered into a lump sum construction contract dated December 30, 1986, in the amount of \$7,490,477, (the First Contract), providing for renovation of the Property. Stipulation, Paragraph 2, and Andersen Deposition, at p. 50. A copy of the First Contract is Stipulation Exhibit 2 (hereinafter all numbered Exhibits refer to the exhibits to the Stipulation).

3. Construction commenced on or about June 15, 1987, under the First Contract. Stipulation, Paragraph 4.

4. FALP initially had a loan commitment with Puller Mortgage Associates, Inc., (Puller) which was never funded. Stipulation, Paragraph 5.

5. As a result of this lack of funding, FALP failed to pay Andersen in accordance with the terms of the First Contract. On December 28, 1987, Andersen shut down the job and ceased work on the First Contract. Stipulation, Paragraph 8. On December 30, 1987, Andersen filed a Construction Lien (Lien) in the amount of \$1,821,804 against the Property. Exhibit 13. On April 29, 1988, Andersen filed an Amendment to Construction Lien (Amended Lien) which increased the lien amount to \$1,953,718. Exhibit 14 and Stipulation, Paragraph 6.

6. The Lien indicates Andersen estimated completing the work by December 31, 1987. The Amended Lien, filed on April 29, 1988, states that the last materials and services had been provided on January 6, 1988. Exhibit 14. The lien filed by Andersen included a claim for work performed on which retainage

was held under the First Contract in the amount of \$257,742. Youngblood Deposition at pp. 111-113.

7. At the time of the First Contract, Andersen entered into written subcontracts (the Subcontracts) with various subcontractors, including Allied Construction Services, Inc. (Allied); Baxter Electric, Inc. (Baxter); Continental Fire Sprinkler Co. (Continental); and Ray Martin Company (Martin).

Andersen did not pay these subcontractors the amounts owed under the Subcontracts. As a result Allied filed a construction lien for \$699,223 on December 30, 1987; Continental filed a construction lien for \$81,025 on January 6, 1988; and Martin filed a construction lien for \$1,000,927.65 on April 15, 1988. Exhibits 15-17.

8. From December 28, 1987 until January 24, 1989, neither Andersen nor Andersen subcontractors performed any new construction at the site. Certain equipment ordered by Andersen when construction was still going, but delivered after construction had stopped, was returned. Stipulation, Paragraph 8.

9. Patrician was contacted by FALP to determine whether it would provide funds to revive the project. While analyzing the potential loan, Patrician requested information regarding the total cost of completing the renovation. Patrician received a Contractor's and/or Mortgagor's Cost Breakdown (Contractor's Cost Breakdown), signed by Herbert Andersen, the President of Andersen, which stated a total cost of \$5,138,547 to complete the project. Exhibit 27. The Contractor's Cost Breakdown also provided a detailed breakdown of the remaining costs associated with the renovation.

10. On or about January 5, 1989, FALP and Patrician entered into a Building Loan Agreement (BLA) setting forth the terms under which Patrician would lend FALP the sum of \$8,810,900 for construction and permanent financing for the Property, to be secured by, among other things, a first deed of trust on the Property. The BLA incorporated a copy of the \$5,138,547 cost of completion statement which both Andersen and FALP had previously signed. The BLA was structured to meet Department of Housing and Urban Development (HUD) requirements so that HUD would guarantee the loan. Stipulation, Paragraph 10 and Exhibit 23.

11. On or about January 12, 1989, FALP and Andersen entered into another construction contract (the Second Contract) for completion and renovation of the improvement on the Property.

The Second Contract incorporated the \$5,138,547 cost of completion. Stipulation, Paragraph 12.

12. On January 12, 1989, FALP executed and delivered to Andersen a Promissory Note (the Note) for \$462,316 and the Collateral Understanding (the Agreement). This was for a debt relating to the first contract including interest on the sums due and owing Andersen and its subcontractors. The Agreement specifically stated that no action to recover on the note would be taken against the property. A copy of the Note is set out in Stipulation Exhibit 48. A copy of the Agreement is set out in Stipulation Exhibit 49.

13. Patrician was unaware of the Note at the time of closing, January 24, 1989. Pharis Affidavit, Paragraphs 8 and 12.

14. On January 24, 1989, the Patrician and Krupp Deeds of Trust, Assignments of Rents and Security Agreements dated January 5, 1989, in the amount of \$8,810,900, were filed in the Office of the Douglas County Register of Deeds. Stipulation, Paragraphs 16 and 17 and Exhibits 41 and 42.

15. On or about January 25, 1989, the sum of \$1,588,277.02 was paid through the American Land Title Co., Omaha, Nebraska, to Andersen and certain of its subcontractors from proceeds of the BLA funds advanced on behalf of FALP. Stipulation, Paragraph 18.

16. Andersen, as well as its subcontractors, executed and delivered a lien waiver entitled "Release of Construction Lien" (the Andersen Waiver). Stipulation, Paragraph 19. The Andersen Waiver states in pertinent part:

KNOW ALL MEN, that we, the undersigned, in consideration of full payment of our claim, and other valuable consideration received, do hereby waive, relinquish and release the Construction Lien . . .

Exhibit 43 (emphasis supplied).

On January 23, 1989, Allied executed the following document titled "Release of Construction Lien" (hereafter Allied Waiver) which provided:

KNOW ALL MEN, that we, the undersigned, in consideration of full payment of our claim, and other valuable consideration received, do hereby waive, relinquish and release the Construction

Lien recorded in Book 194 at Page 523 of the Construction Lien Records of Douglas County Nebraska, which covers the real estate described on the attached Exhibit "A", which Exhibit "A" is incorporated herein by this reference.

Exhibit 44. The Allied Waiver was filed on January 25, 1989.

On January 25, 1989, Continental filed a document titled "Release of Construction Lien" (the Continental Waiver) which provided:

KNOW ALL MEN, that we, the undersigned, in consideration of full payment of our claim, and other valuable consideration received, do hereby waive, relinquish and release the Construction Lien recorded in Book 194 at Page 559 of the Construction Lien Records of Douglas County Nebraska, which covers the real estate described on the attached Exhibit "A", which Exhibit "A" is incorporated herein by this reference.

Exhibit 45.

On January 25, 1989, Martin filed a document titled "Release of Construction Lien" (the Martin Waiver) which provided:

KNOW ALL MEN, that we, the undersigned, in consideration of full payment of our claim, and other valuable consideration received, do hereby waive, relinquish and release the Construction Lien recorded in Book 195 at Page 430 and amended by Amendment recorded in Book 195 at Page 510 of the Construction Lien Records of Douglas County Nebraska, which covers the real estate described on the attached Exhibit "A", which Exhibit "A" is incorporated herein by this reference.

Exhibit 46.

On January 23, 1989, Baxter Electric, Inc., which had not filed a construction lien, executed a document titled "Waiver of Construction Lien" which stated in pertinent part:

NOW, THEREFORE, for and in consideration of \$97,500 and other good and valuable consideration, the receipt of which is hereby acknowledged, the undersigned hereby waives, releases and relinquishes any and all liens, claims or right or

rights of lien which he or it have or might have on or against the above-described real estate and the buildings or improvements thereon, arising under and by virtue of the laws of the State of Nebraska on account of labor or materials, or both, furnished or which may hereafter be furnished by the undersigned to or on account of the owner of said building or premises or his agents or contractors.

Exhibit 47.

17. Work under the Second Contract commenced on January 25, 1989. Stipulation, Paragraph 23. A Certificate of Final Inspection, Occupancy and Compliance (Certificate of Occupancy) for the property was issued by the City of Omaha on November 22, 1989. Exhibit 51.

18. Although the Certificate of Occupancy was issued in November, 1989, Andersen and other subcontractors continued to work on completion of the project pursuant to direction from representatives of FALP and Patrician from November, 1989, to March, 1990. The work was itemized on a document referred to as a "punch list." This list included cleanup; testing of electrical and plumbing systems; installation of cabinets, doors, sinks, fire extinguishers, etc. All of the punch list work was required by the terms of the contract. (McVey affidavit, Exhibit G, Filing #122; Andersen deposition)

19. On March 23, 1990, Andersen filed a Construction Lien (the 1990 Lien) against a portion of the Property in the Office of the Douglas County Register of Deeds in the amount of \$618,248.98. On May 10, 1990, Andersen amended the 1990 Lien to reduce the amount due to \$578,377.30. Stipulation, Paragraph 24.

20. After the initial Andersen 1990 lien was filed, the Andersen subcontractors filed construction liens. The amount of the Andersen subcontractor liens is included in the Andersen 1990 lien.

21. As part of the \$578,377.30, Andersen claims entitlement to \$257,742 in retainage it alleges was held back under the First Contract. Stipulation, Paragraph 24.

22. Andersen has also asserted a claim against the property for \$462,316 based on the Note. Such claim amount is not included in a construction lien but is based upon allegations by Andersen that Patrician made certain misrepresentations to

Andersen which should cause Patrician's interest to be equitably subordinated to Andersen's interest.

23. Andersen produced no evidence in support of the misrepresentation/equitable subordination theory. Patrician presented the deposition of the president of Andersen and the chief financial officer of Andersen, neither of whom could identify any statement or representation by Patrician which supports the theory. Exhibits D and E.

Conclusions of Law and Discussion

The construction liens claimed by Andersen and the Andersen subcontractors filed in 1990 include amounts due from FALP for work performed pursuant to the \$7 million contract (the First Contract) and separate amounts for work performed after January 25, 1989, pursuant to the terms of the \$5 million contract (Second Contract).

Andersen and the Andersen subcontractors claim that although there are two sets of contract documents, there is really only one contract or one project for which they provided services and material. According to them, the project is the renovation of the Greenhouse, changing it from an empty warehouse to an apartment complex. They claim that since the project began by initial construction in June of 1987, and "visible commencement" occurred at that time, the construction liens filed in 1990 relate back to the date of visible commencement and attach as of that date.

On the other hand, FALP and Patrician/Krupp claim that there are two separate contracts and that work was performed by Andersen and the various subcontractors pursuant to the First Contract from June of 1987 through December of 1987. Work on the project from January 25, 1989, through final performance in late 1989 or 1990 was performed under the authority of the Second Contract entered into between Andersen and FALP in January of 1989. Their position is that the 1990 liens, if they have any validity at all, cannot attach, for priority purposes, prior to January 25, 1989, because, first, each of the lien claimants now requesting payment for services or materials rendered prior to that date executed lien releases in consideration for payment on January 25, 1989. The second reason the 1990 liens allegedly attach as of January 25, 1989, or thereafter is that the First Contract was replaced by, merged into, revoked by, and superseded by the Second Contract.

Therefore, according to FALP and Patrician/Krupp, since a provider of services or material to a construction project is

required to base a claim for a construction lien on the terms of a "real estate improvement contract," and since the Second Contract is the only contract in existence as of January 25, 1989, the construction liens must relate to such contract and cannot attach prior to commencement of work under that contract.

This dispute arises because neither FALP nor Andersen nor the Andersen subcontractors filed a "notice of commencement" under NCLA Section 52-145. A notice of commencement describes the real estate to be improved, specifies the owner and states that any lien recorded after the recording of the notice of commencement has priority from the time the notice of commencement is recorded.

The NCLA provides the time for attachment of a construction lien at Section 52-137. Such lien does not attach unless the lien is recorded "after entering into the contract under which the lien arises and not later than 120 days after his or her final furnishing of services or materials." Section 52-137(1). According to the statute, if a lien is recorded while a notice of commencement is effective, it attaches as of the time the notice is recorded. Section 52-137(2). If the lien is recorded while there is no recorded notice of commencement, the lien attaches at the earlier of "visible commencement" of the improvement or the recording of the lien. Section 52-137(3).

If new construction is involved, visible commencement occurs when materials are delivered preparatory to construction; excavation has begun; or preparation of an existing structure to receive the new construction is begun. Section 52-137(4).

In this case, no notice of commencement was recorded and, according to the fact stipulation, this real estate improvement was not new construction but was "for the renovation and improvement of the Property." Stipulation at Paragraph 2 and Paragraph 12. Since the contract does not concern new construction, the statute provides at Section 52-137(5) that "the time visible commencement occurs is to be determined by the circumstances of the case."

Therefore, the legal issue to be resolved is: Whether the rights of the construction lien claimants are based upon one "contract" concerning the "project," which contract includes agreements entered into by FALP and Andersen in June of 1987 plus agreements entered into by FALP and Andersen in January of 1989, thereby defining "visible commencement" as the date in June of 1987 that the project began; or whether the rights of the construction lien claimants are based upon two contracts, one

entered into by FALP and Andersen in June of 1987 and a second and separate and complete contract executed in January of 1989.

As noted in the Decision section of this memorandum, this Court concludes that there were two separate contracts and the rights of the 1990 lien claimants arise under the January, 1989, contract and the lien releases and waiver executed by Andersen and the Andersen subcontractors prior to January 25, 1989, are for consideration and are valid and binding and prohibit the attachment of construction liens for amounts due from FALP for services or materials rendered prior to January 25, 1989.

1. Lien Releases and Waivers
Regarding Pre-January 1989 Claim

Regarding the lien releases, the president of Andersen, by deposition testimony, alleges that on the day he executed the lien release, he had no intention of releasing approximately \$257,000.00 of "retainage" under the First Contract. However, the lien which was filed by Andersen and the liens which were filed by the Andersen subcontractors at the end of 1987 or early in 1988, after the termination of construction activity, included all monies owed by FALP to Andersen and the subcontractors as of late 1987. Under the terms of the First Contract, FALP was to withhold as retainage 10% of the amount due under the contract, based upon progress payments. By the end of 1987 there was \$257,000.00 in retainage. Liens were filed and in January of 1989 liens were released in consideration for payments of amounts which did not include the retainage. The lien releases by Andersen and the other subcontractors and the lien waiver filed by Baxter did not reserve any rights to the retainage.

The testimony of Andersen does not raise a material issue of fact. Its ultimate purpose is to vary the terms of the Andersen waiver, which was an absolute written release of lien for amounts claimed in the construction lien. Such testimony is not admissible to vary the terms of the written release. Five Points Bank v. White, 231 Neb. 568, 571, 437 N.W.2d 460, 462 (1989); Abboud v. Michaels, 241 Neb. 747, 755, ___ N.W.2d ___ (1992). Any claim to a construction lien based upon that retainage was fully released in January of 1989.

Another reason why the pre-January 25, 1989, retainage cannot be included in the 1990 construction lien is that Andersen has been paid for the retainage and any other amounts it claims due from FALP under the First Contract. On January 25, 1989, Andersen and the Andersen subcontractors received a payment of \$1,588,277.02. Stipulation, Paragraph 18. That sum plus \$723,128.00 previously paid to Andersen and its subcontractor

left \$257,742.00, the retainage, unpaid under the First Contract. Stipulation, Paragraph 18.

FALP and Andersen then performed a calculation outlined in Paragraph 22 of the Stipulation which added the original amount of the First Contract plus change orders, plus additional costs anticipated under the Second Contract, plus interest on the unpaid portion of the First Contract, less prior payments and less anticipated payments from Patrician to pay off the construction liens and complete the Second Contract. The net amount, which included the retainage, is \$462,316.00. Stipulation, Paragraph 22.

Contemporaneously with entering into the Second Contract, FALP and Andersen entered into a separate agreement by which FALP executed a promissory note in the amount of \$462,316.00 and a document entitled "Collateral Understanding." These documents are Exhibits 48 and 49 to the Stipulation. They are referred to in Paragraph 21 of the Stipulation. As a result of the execution and receipt of such documents and the receipt of payments in consideration for the release of the first construction liens, Andersen had received, as of January 25, 1989, consideration for all funds due Andersen pursuant to the First Contract. Andersen had no further claim for a construction lien for any amounts due under the First Contract.

Apparently, the promissory note, which was to be paid in various installments, was not paid according to its terms. As a result, Andersen obtained a judgment against FALP for the amount of the balance due under the promissory note. However, the inability of Andersen to collect on the promissory note does not affect its validity as consideration and the equivalent of payment under the terms of the collateral agreement and the First Contract. The 1987 Andersen lien was released in full by a separate writing in return for full payment and, therefore, it no longer exists as a basis for a valid claim. See Gibson v. Koutsky-Brennan-Vana Co., 143 Neb. 326, 331, 9 N.W.2d 298, 302 (1943). Overruled on other grounds, Gillespie v. Hynes, 168 Neb. 49, 95 N.W.2d 457 (1959). In the Gibson case, the plaintiff alleged and proved that the defendant had specifically waived a mechanic's lien for valuable consideration, kept the consideration and thereafter filed a mechanic's lien. The trial court found in favor of the plaintiff and the Supreme Court affirmed with the following language:

Defendant's all-inclusive waiver was in fact an unconditional agreement to look only to the personal responsibility of the owner or contractor and not to the property. Brown v. Williams, 120

Pa. St. 24, 13 Atl. 519. Defendant was paid the consideration which it has at all times since retained, thereby receiving satisfaction to the extent that nothing could ever be due thereafter by reason of a mechanic's lien. Day & Frees Lumber Co. v. Bixby, 4 Neb. (Unof.) 154, 93 N.W. 688; White Lake Lumber Co. v Stone, 19 Neb. 402, 27 N.W. 395. By accepting and retaining the consideration defendant's status as an actual or potential lienor ceased. Taylor v. Dutcher, 60 App. Div. 531, 69 N.Y. Supp. 951; 40 C. J. 340, 341. The lien no longer exists but has gone as completely as though satisfied and paid in full. Sheets v. Prosser, 16 N. Dak. 180, 112 N.W. 72.

Gibson at 331-32, 9 N.W.2d at 302.

2. The Contract

It is the law of Nebraska that when the provisions of a contract together with the facts and circumstances that aid in ascertaining the intent of the parties are not in dispute, the proper construction of such a contract is a question of law. Mecham v. Colby, 156 Neb. 386, 397, 56 N.W.2d 299, 304 (1953); Meyers v. Frohm Holdings, Inc., 211 Neb. 329, 333, 318 N.W.2d 716, 719 (1982).

Therefore, the question of whether there was one contract beginning in June of 1987 for work on a project that was completed in the spring of 1990 or two contracts, the first of which began in June of 1987 and ended in December of 1987 and the second of which began in January of 1989 and was completed in the spring of 1990, is a question of law for the Court to determine.

The First Contract, Exhibit 2, was effective the 30th day of December, 1986. It identified Puller Mortgage Associates, Inc., as the authorized agent of the Federal Housing Commissioner with respect to co-insurance. It included numerous contract documents which it specifically referred to in Article 1, Paragraph B. It had a liquidated damages clause in the amount of \$2,988.84 per day which could be modified under certain circumstances by Puller. The First Contract was for a lump sum of \$7,490,477.00. At Article 3, Paragraph B, it required the contractor to request payment on a regular basis and such payment would not be authorized unless approved by Puller. In the Rider to Construction Contract, Exhibit 3, completion of the contract was required within thirteen months after the commencement notice and provided that time was of the essence. Article 2, Paragraphs 2.1 and 2.2. It provides at Article 9, Paragraph 9.1, that the

agreement is subject to and contingent upon the approval of Puller.

Exhibit 5 is the Contractor's and/or Mortgagor's Cost Breakdown which itemizes the cost of every item going into the project and totals the cost at \$7,490,477.00.

The First Contract commenced in June of 1987 and subcontracts entered into by Andersen provided for a total project completion date of July 15, 1988.

The Second Contract made effective as of the 30th day of December, 1986, identifies the time for performance under the contract as commencing within ten days of "initial closing of the loan with the lender" and to be completed by November 17, 1989. Exhibit 25, Article 2A.

The liquidated damages clause in Article 2C provides for damages of \$3,700.58 per day, with adjustment by HUD, not Puller. Monthly progress payments were to be authorized by the owner and HUD. See Article 3B. At Article 9D, the contractor certifies that it understands the contract is financed by a building loan "to be secured by a mortgage and subject to the terms of a Building Loan Agreement between the owner and HUD. (The Patrician Mortgage Company as lender)."

Exhibit 27 is the Contractor's Cost Breakdown for the Second Contract. It itemizes the various trade items which will be involved in the project pursuant to the contract. The total cost for those improvements is \$5,138,547.00.

Exhibit 25, the Second Contract, at Article 1, Section A, specifies "[t]his contract constitutes the entire agreement between the parties, and any previously existing contract concerning the work contemplated by the Contract Documents is hereby revoked." In Exhibit 28, The American Institute of Architects, General Conditions of the Contract for Construction (AIA Document A201, 13th ed. 1976) at Paragraph 1.1.2, the document states "[t]his Contract represents the entire and integrated agreement between the parties hereto and supersedes all prior negotiations, representations, or agreements, either written or oral."

The following language appears in Exhibit 26, the Rider to the Second Contract, at Paragraph 1.2:

This Agreement supersedes and replaces in its entirety any previous Construction Contract, and

neither party thereto shall have any liability or obligation to the other thereunder.

There are numerous Nebraska cases concerning the effect on the first contract by the execution of a second contract between the parties that has basically similar terms, except for the significant terms such as the price, the time for completion, and the scope of the work. In summary, those cases state that the second contract extinguishes the first. The contract which is revoked cannot be enforced and the same is true of a contract that has been superseded. See, e.g., Hasenauer v. Durbin, 216 Neb. 714, 720, 346 N.W.2d 695, 698 (1984) (all parts of a transaction prior to a writing which supersedes said parts makes those parts legally ineffective).

In Hasenauer, supra, seller agreed to sell buyers certain real estate. On March 14, buyers provided seller with \$7,236 and seller gave buyers the following receipt or agreement:

Received of Clinton or Mary Hasenauer Seven
Thousand Two Hundred Thirty Six & no/100 Dollars.
15% of South 160 acres of Sec. 27-9-33. Balance
of \$41,004.00 on this 160 acres when papers are
finished by Att Don Pederson. All paper, revenue
stamps and split abstract cost at expense of
buyer.

Id. at 716, 346 N.W.2d at 696.

At the March 20th meeting at the attorney's office, a prepared memorandum agreement was shown to all the parties. This new or second agreement had different terms and conditions than the first agreement and the parties signed it. Id. at 716-17, 346 N.W.2d at 697.

When the buyers refused to abide by their second agreement and petitioned the court for specific performance of the first contract, the court refused to enforce the first agreement, stating:

Whatever agreement may have been achieved by the parties before March 20 or may have resulted from the encounter on March 14, it is beyond any question that the written contract of March 20 superseded and discharged any prior agreement involving Durbins, Hasenaus, and Corlisses. The terms of the March 20 agreement of the parties control and dispose of the issues in this case because there is no effective and enforceable

agreement of the parties except the written contract of March 20, which the Hasenauers and Corlisses have repudiated.

Id. at 721, 346 N.W.2d at 699 (emphasis supplied)

In Caro, Inc. v. Roby, 215 Neb. 897, 342 N.W.2d 182 (1983), plaintiff sought to enforce a non-compete clause against its employee. The employee argued that the first contract, which contained the non-compete clause, was superseded by the second contract, which contained no non-compete clause and included the following:

This contract is the reduction to writing of previous oral understandings or conversations and shall supercede [sic] any and all previous agreememts [sic] of any kind between the parties.

Id. at 902, 342 N.W.2d at 185.

The court held that, as a matter of law, the second contract superseded the first and refused to enforce the non-compete clause in the first contract:

[I]t is clear, as a matter of law, that the second contract of December 1981 is complete in itself, that its terms are inconsistent with the terms of the earlier contract, and that the earlier and later contracts cannot subsist together. It is also clear, from the wording of the later contract itself, that the parties could not have intended anything other than the superseding of the earlier contract.

Id. at 905, 342 N.W.2d at 186.

In The Nebraskans, Inc. v. Homan, 206 Neb. 749, 294 N.W.2d 879 (1980), a real estate broker (Broker) entered into a first agreement (brokerage agreement) dated January 28, 1978, with a seller.

The broker obtained a buyer who agreed to purchase the property, subject to financing. At the same time that the buyer was found, broker and seller entered into a second agreement which gave broker six months to sell the property. A sale was consummated after the expiration of the six months. The broker, who was given no commission, then filed suit relying on the first contract.

The court held that the second agreement constituted a new agreement which discharged the old one. Id. at 751, 294 N.W.2d at 881. In so holding, the court noted the differences in the two agreements:

The brokerage agreement of January 28, 1978, and the listing agreement of February 19, 1978, cover the identical property to be listed. Both agreements are between the plaintiff and defendants. The inconsistency between them is a reduction in the sale price and a different time limit with a 6-month extension. Also, the latter agreement was an exclusive listing for the benefit of the plaintiff.

Id.

In Goings v. Gerken, 200 Neb. 247, 263 N.W.2d 655 (1978), the Nebraska Supreme Court found that because of a change in time and price in the second agreement, that agreement discharged the first. The court, citing In re Estate of Wise, 144 Neb. 273, 13 N.W.2d 146 (1944), stated:

A contract complete in itself will be conclusively presumed to supersede and discharge another one made prior thereto between the same parties concerning the same subject matter, where the terms of the later are inconsistent with those of the former so that they cannot subsist together.

Id. at 251, 263 N.W.2d at 658.

The facts of the cases discussed above are similar to the facts in this case. The rule to be derived from these cases is that if there are material changes in the two agreements, the court should conclude as a matter of law that the second agreement supersedes the first. In these two contracts between FALP and Andersen there are not only material changes with regard to the amount of the contract, the time for completion, the scope of the work, the ultimate lender, and the entity that has authority to approve progress payments, but there is specific language which revokes the prior agreement and provides that the second agreement supersedes and replaces the first.

This Court concludes that upon the execution of the Second Contract in January of 1989, the First Contract was a nullity and the parties' rights and duties thereafter were based upon the terms of the Second Contract.

Patrician and Krupp recorded their lien documents on January 24, 1989. Work commenced under the terms of the Second Contract no earlier than January 25, 1989, the date when Andersen and the Andersen subcontractors received payment for work performed under the First Contract and released or waived the earlier filed construction liens. Therefore, the lien priority, when viewed from the definition of "visible commencement" in Section 52-137(5) is that Patrician and Krupp are first in priority, having recorded their documents on January 24, 1989, and Andersen and the Andersen subcontractors are in a subordinate position with liens attaching at the time of "visible commencement" on or after January 25, 1989.

3. Validity of Andersen and Andersen Subcontractor Liens

The NCLA provides for attachment and enforceability of a construction lien based upon a contract and a filing of the construction lien "not later than 120 days after his or her final furnishing of services or materials". Section 52-137(1).

In this case, the City granted FALP a certificate of occupancy in November of 1989. However, thereafter, FALP and Patrician directed Andersen and the subcontractors to provide services and materials to complete the project to the satisfaction of FALP and Patrician and to complete it in conformance with the contract documents. The direction was contained in a "punch list". The punch list at Exhibit 52 contains more than fifteen pages of specific work items to be completed. On January 25, 1990, a representative of FALP or Patrician sent an additional punch list to Andersen. Exhibit 53. That list was two pages long, and although the amount of money involved, as a percentage of the total contract amount, was minimal, approximately \$6,200.00, the exhibit itself shows that all work had not been completed pursuant to the contract terms as of January 25, 1990. All parties agree that Andersen and one or more of the Andersen subcontractors continued to work on the project to complete the items on the punch list until approximately January 19, 1990. Stipulation at Paragraph 23.

On March 23, 1990, Andersen filed a Construction Lien, which was amended by reduction of the amount claimed on May 10, 1990. Stipulation at Paragraph 24. The Andersen 1990 Construction Lien includes amounts eventually claimed in construction liens filed by the Andersen subcontractors from March 30 through May 16, 1990. Stipulation at Paragraph 25.

Strictly construing the statutory language and applying it to the facts in this case requires a finding that the "final furnishing of services or materials" was on January 19, 1990, and

the Anderson 1990 Construction Lien was filed on March 23, 1990, well within the 120-day filing window of Section 52-137(1).

FALP and Patrician argue that the time begins to run for filing a construction lien when the project is substantially completed. They suggest that language of the predecessor statute, Section 52-102, provided the right to perfect a lien by filing it within a specific number of days from "the date of the last material furnished to or labor performed for the contractor". Such language has been interpreted by the Nebraska Supreme Court to mean that the statute begins to run upon "substantial completion" of the project. See Disbrow & Co. v. Peterson, 136 Neb. 719, 287 N.W.2d 220 (1939); Gatchell v. Henderson, 156 Neb. 1, 54 N.W.2d 227 (1952).

FALP and Patrician argue that the amended Section 52-137 does not overrule prior case law that effectively started the filing time with substantial completion. They suggest that the terminology in the two statutes is so similar as to create no legal distinction between the terms.

Under the prior statute, the Nebraska Supreme Court ruled that the time for filing a lien could not be delayed by performing minor labor or furnishing minor items or materials. Omaha Nat'l. Bank v. Continental W. Corp., 202 Neb. 238, 242, 274 N.W.2d 867, 870 (1979), (quoting Occidental Sav. & Loan Assn. v. Cannon, 184 Neb. 659, 171 N.W.2d 166 (1969)). FALP and Patrician argue that the certificate of occupancy is satisfactory evidence of substantial completion. See, e.g., J.M. Beeson Co. v. Sartori, 553 So. 2d 180 (Fla. Dist. Ct. App. 1989). Thus, they argue, the project was substantially completed no later than November 20, 1989. One hundred twenty days from that date is March 20, 1990, prior to the filing of any of the 1990 liens.

This Court is not convinced that the date of substantial completion of a project is the date that begins the running of the statute for perfection of a construction lien. First, the contractor and subcontractors obtain the right to perfect a lien only if they have performed work pursuant to the terms of a contract. Section 52-137(1). They have a right to such a lien if they file the lien within 120 days after the final furnishing of services or materials required or provided by that contract. In this case, a certificate of occupancy was issued on November 19, 1989, but shortly thereafter the contractor was directed to provide additional services and materials so that the project could be completed pursuant to the terms of the contract. The punch list under which Andersen operated was more than twenty pages long and Andersen and FALP have stipulated that work

continued on the project to complete the punch list items at least until January 19, 1990.

To determine if prior case law is applicable to this statute, the background, purpose and language of this statute should be compared to the prior act. Upon the adoption of this statute, the complete mechanic's lien statute in Nebraska was repealed. This current statute is unique in the United States. It was adopted by the Nebraska Legislature from a portion of the Uniform Simplification of Land Transfers Act (USLTA) drafted by the National Conference of Commissioners on Uniform State Laws. After the adoption of the Nebraska statute, the National Conference carved out a free-standing Uniform Construction Lien Act (UCLA) from USLTA. That Act and the Nebraska version of it significantly changed the priority of lien claimant by providing for the "notice of commencement" and eliminating the "visible commencement" priority rule unless a notice of commencement has not been filed. This statutory change also changes priority between lien claimants and details the rights of lower tiers of contractors. It provides for the recognition of lien waivers and specifically provides language different from prior Nebraska law with regard to the time for filing to perfect a lien. See, Marion W. Benfield, Jr., The Uniform Construction Lien Act: What, Whither, and Why, 27 Wake Forest L. Rev. 527 (1992). See also, Steven M. Siegfried & Stanley P. Sklar, Overview of the Uniform Construction Lien Act, 10 Construction Law. 13 (Aug. 1990).

The current Nebraska statute is unique and the Nebraska statute and the Uniform Act are significantly different from the prior Nebraska mechanic's lien law. The language is different, the purpose is different, the priorities are different, the perfection requirements are different. Therefore, the case law construing the prior act is not of much benefit when construing the meaning of the current statute.

The statute gives a claimant a lien if it is filed within 120 days of the final furnishing of services or materials. The contract in this case required Andersen and the Andersen subcontractors to perform services and provide material after the certificate of occupancy was issued. The punch list contains approximately twenty pages of work to be performed and there is no evidence before this Court that said twenty pages is the equivalent of "minor labor or furnishing minor items or materials."

Therefore, this Court finds that the 1990 construction liens, except for the Baxter lien which will be discussed in the next section, were timely filed and perfected but only with

regard to amounts earned for services rendered pursuant to the second contract from and after January 25, 1989.

4. Baxter Lien

In January of 1989 Andersen and all of the Andersen subcontractors on the First Contract executed releases of the filed construction liens. However, rather than executing a document entitled "lien release," Baxter executed a "waiver." That waiver

waives, releases and relinquishes any and all liens, claims or right or rights of lien which he or it have or might have on or against the above-described real estate and the buildings or improvements thereon, arising under and by virtue of the laws of the State of Nebraska on account of labor or materials, or both, furnished or which may hereafter be furnished by the undersigned to or on account of the owner of said building or premises or his agents or contractors.

Exhibit 47.

This Court has found in prior portions of the memorandum that this waiver, as well as the lien releases executed by the other parties, eliminated any right to a construction lien for funds due based upon services or materials rendered under the First Contract.

After execution of the Second Contract, Andersen entered into an agreement with Baxter to provide services and materials pursuant to the Second Contract. Baxter did provide such services and materials and has filed a 1990 construction lien. FALP and Patrician argue that the waiver executed by Baxter in January of 1989 eliminates any claim to a construction lien for services rendered thereafter.

The position of FALP and Patrician is consistent with the statutory language at Section 52-144(1) and (2). Those sections read as follows:

(1) A written waiver of construction lien rights signed by a claimant requires no consideration and is valid and binding, whether signed before or after the materials or services were contracted for or furnished. Ambiguities in a written waiver are construed against the claimant.

(2) A written waiver waives all construction lien rights of the claimant as to the improvement to which the waiver relates unless the waiver is specifically limited to a particular lien right or a particular portion of the services or materials furnished.

The waiver executed by Baxter is general in nature and is not limited to a particular lien right or to services rendered or materials provided during a particular time period. It specifically waives any right to a construction lien on or against this real estate improvement for materials or labor "furnished or which may hereafter be furnished." The unlimited nature of the waiver and the statutory language require this Court to conclude that Baxter has permanently waived the right to a construction lien on this project. Therefore, the 1990 construction lien filed by Baxter is unenforceable.

This conclusion may make little difference because the portion of the Baxter claim resulting from services or materials provided under the Second Contract is included in the Andersen lien which has been determined to be timely filed and validly perfected with a priority subordinate to that of Patrician/Krupp.

5. Equitable Subordination

In Andersen's Answer and Cross-Claim against Patrician, Andersen alleged that Patrician made a misrepresentation and that Patrician had concealed certain knowledge. Patrician included as part of its motion for summary judgment a request for judgment on this issue. In support of the motion Patrician submitted the depositions of two officers of Andersen, Herbert Andersen, President, and Francis Youngblood, Chief Financial Officer. In addition, as part of the evidence in support of the motion, Patrician submitted Andersen's answers to interrogatories.

Andersen did not submit any evidence in resistance to the motion for summary judgment, but relied upon the testimony of Mr. Andersen concerning the alleged misrepresentations.

A review of the depositions makes it clear that neither Mr. Andersen nor Mr. Youngblood could testify that Patrician made any statements or misrepresentations to Andersen.

There is no evidence in this record which would let the Court conclude that there is even a fact question concerning misrepresentation or the right of Andersen to equitably subordinate Patrician's priority. Patrician is entitled to a summary judgment pursuant to Fed. R. Civ. P. 56 if there is no

issue of material fact and the moving party is entitled to judgment as a matter of law. It is the burden on the party moving for summary judgment to point out that the record does not disclose a genuine dispute on a material fact. City of Mount Pleasant v. Associated Elec. Coop., Inc., 838 F.2d 268, 273 (8th Cir. 1988). The court said:

It is enough for the movant to bring up the fact that the record does not contain such an issue and to identify that part of the record which bears out his assertion. Once this is done, his burden is discharged, and, if the record in fact bears out the claim that no genuine dispute exists on any material fact, it is then the respondent's burden to set forth affirmative evidence, specific facts, showing that there is a genuine dispute on that issue. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 2514, 91 L.Ed. 2d 202 (1986). If the respondent fails to carry that burden, summary judgment should be granted.

Id. at 273-74.

In this case, Patrician has pointed out in the record that the officers of Andersen can present no evidence in support of the Andersen claim that Patrician made misrepresentations to Andersen prior to or during the contract administration. Without such misrepresentation or even minimal evidence thereof, the claim for relief with regard to equitable subordination or estoppel cannot stand and judgment should be entered in favor of Patrician on said claim. It is the duty of Andersen to fully respond to the motion and present whatever evidence Andersen has in support of its position and argue such evidence at the hearing on the motion for summary judgment.

Andersen has failed to produce any evidence on the issue and, therefore, has not met its burden.

Conclusion

Partial summary judgment shall be granted to FALP and Patrician/Krupp on the issues raised in their motions. The deeds of trust filed by Patrician and Krupp take priority over the construction liens filed by Andersen and the Andersen subcontractors. The Andersen and Andersen subcontractors' 1990 construction liens, to the extent they represent claims for funds due for services and materials rendered pursuant to the Second Contract executed in January 1989, are timely filed and validly

perfected but subject in priority to the lien interests of Patrician and Krupp.

The 1990 construction lien of Baxter is not perfected, because it has been waived.

The interest of Patrician shall not be equitably subordinated to the interest of Andersen, and Patrician shall not be estopped from claiming its priority.

The motions for partial summary judgment filed by Andersen and the Andersen subcontractors are denied.

A separate judgment entry shall be filed.

DATED: December 4, 1992.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

The following appearances are noted: for Farnam Associates Limited Partnership (FALP or plaintiff), Janice Woolley of Polack, Woolley & Forrest, P.C., Omaha, Nebraska; for Andersen Construction Company of Council Bluffs, Inc., (Andersen), Douglas S. Lash and John E. Lenihan of Brown & Brown, Omaha, Nebraska; for DeMarco Bros. Company (DeMarco), Sandra L. Dougherty of Lieben, Dahlk, Whitted, Houghton, Slowiaczek & Jahn, P.C., Omaha, Nebraska; for Ray Martin Company (Martin), Jim Gotschall of Gaines, Mullen, Pansing & Hogan, Omaha, Nebraska; for Allied Construction Services, Inc., (Allied), Dwight Steiner of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., Omaha, Nebraska; for Continental Fire Sprinkler Company (Continental), Lauren Hupp of Croker, Huck, Kasher, Lanphier, Dewitt & Anderson, P.C., Omaha, Nebraska; Irving Epstein of Brodkey & Epstein, Omaha, Nebraska, filed the motion and submitted evidence for Baxter Electric, Inc., (Baxter); for Patrician Mortgage Co., Inc., (Patrician), and Gregory M. Gorski, Trustee, (Gorski), Neal Danberg, Steven Johnson and Frank Schepers of Kennedy, Holland, DeLacy & Svoboda, Omaha, Nebraska; for Krupp Insured Plus II Ltd. Partnership (Krupp), Dean Sitzman of Steier, Rogers & Pistillo, P.C., Omaha, Nebraska.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)	
)	
FARNAM ASSOCIATES)	
LIMITED PARTNERSHIP,)	CASE NO. BK91-80845
)	
Debtor)	A91-8119
)	
FARNAM ASSOCIATES)	
LIMITED PARTNERSHIP,)	
)	CH. 11
Plaintiff)	
vs.)	
)	
ANDERSEN CONSTRUCTION)	
COMPANY OF COUNCIL BLUFFS,)	
INC., GREGORY M. GORSKI, as)	
Trustee for the PATRICIAN)	
MORTGAGE COMPANY, THE)	
PATRICIAN MORTGAGE COMPANY,)	
a District of Columbia)	
corporation, GREGORY M.)	
GORSKI, as Trustee for)	
KRUPP INSURED PLUS II)	
LIMITED PARTNERSHIP,)	
a Massachusetts limited)	
partnership, KRUPP INSURED)	
PLUS II LIMITED PARTNERSHIP,)	
a Massachusetts limited)	
partnership, DEMARCO BROTHERS)	
COMPANY, RAY MARTIN COMPANY,)	
BAXTER ELECTRIC, INC.,)	
CONTINENTAL FIRE SPRINKLER)	
COMPANY, and ALLIED)	
CONSTRUCTION SERVICES, INC.,)	
)	
Defendants)	

JUDGMENT

Partial summary judgment shall be granted to FALP and Patrician/Krupp on the issues raised in their motions. The deeds of trust filed by Patrician and Krupp take priority over the construction liens filed by Andersen and the Andersen

subcontractors. The Andersen and Andersen subcontractors' 1990 construction liens, to the extent they represent claims for funds due for services and materials rendered pursuant to the Second Contract executed in January 1989, are timely filed and validly perfected but subject in priority to the lien interests of Patrician and Krupp.

The 1990 construction lien of Baxter is not perfected, because it has been waived.

The interest of Patrician shall not be equitably subordinated to the interest of Andersen and Patrician shall not be estopped from claiming its priority.

The motions for partial summary judgment filed by Andersen and the Andersen subcontractors are denied.

DATED: December 4, 1992.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge