



IT IS ORDERED as set forth below:

Date: August 17, 2010

C. Ray Mullins

**C. Ray Mullins
U.S. Bankruptcy Court Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

IN RE:

R & B CONSTRUCTION, et. al.

Debtor.

CASE NO. 08-62023-CRM (jointly
administered with 08-62029)

CHAPTER 11

ORDER

THIS MATTER is before the Court on the Objection to the Claim of Double D Paving, Inc. (the “Objection”). The Debtor alleges that the proof of claim filed by Double D Paving Inc. (“Double D”) should be disallowed or classified as an unsecured claim because Double D did not file a notice of the commencement of an action to enforce the debt (the “Notice of Commencement”) within 14 days of filing the proof of claim as required by O.C.G.A. § 44-14-361.1(a)(3).

Statement of Facts

Double D contracted with the Debtor to provide paving and grading services for three of the Debtor's properties. Double D recorded a Claim of Lien in the real property records of Richmond County on July 25, 2007, Newton County on July 26, 2007, and Henry County on August 8, 2007. Copies of the liens were sent to the Debtor as the property owner. On February 4, 2008, the Debtor filed for Chapter 11 relief. On April 4, 2008, Double D filed a proof of claim listed as claim number 54 ("the Claim"). According to the Claim, Double D purports to have a materialmen's lien in the amount of \$339,612.14, of which \$331,401.99 is secured.

Law and Analysis

Double D challenges the Objection on procedural and substantive grounds. First, it contends that the Objection must be dismissed because the Debtor is required to initiate an adversary proceeding to challenge the validity of its lien. Second, Double D asserts that the Debtor can not avoid its lien because the lien was properly perfected.

Double D's Procedural Challenge

A challenge to the validity or amount of a claim is resolved as a contested matter pursuant to Rule 9014 of the Federal Rules of Bankruptcy Procedure. However, if the objecting party challenges the validity, priority or extent of the lien, the action must be commenced as an adversary proceeding. Fed. R. Civ. P. 3007(b) & Fed. R. Bankr. P. 7001. The Court recognizes that the Debtor should have initiated an adversary proceeding in order to determine the validity of the lien. However, the Court "must disregard all errors and defects that do not affect any party's substantial rights." Fed. R. Civ. P. 61 & Fed. R. Bankr. P. 9005. Courts have resolved issues of lien validity outside of adversary proceedings when the parties had sufficient notice and the opportunity to be heard. *United States/IRS v Valley Nat'l Bank*, 199 BR 684, 687 (9th Cir. B.A.P. 1996); *First Conn. Consulting Group, Inc. v. Mocco*, 340 B.R. 210, 217 (D. Vt. 2006); *In*

re Command Servs. Corp., 102 B.R. 905, 908 (Bankr. N.D.N.Y. 1989). Double D does not contend it was prejudiced by the form of this proceeding. Indeed, Double D was given ample notice of the subject matter of the proceedings, submitted two briefs in support of its position, and participated in a hearing where it further advocated its position regarding the validity of its lien. A dismissal of the Objection will only serve to delay a decision by the Court with no tangible benefit to either party. “It serves no useful interest to perform elaborate procedural rites before interment of a lost cause.” *City Equities Anaheim, Ltd. v. Lincoln Plaza Development Co.*, 22 F.3d 954, 958-59 (9th Cir. 1994). Therefore, the Court finds that the Debtor’s failure to file an adversary proceeding is harmless error.

Validity of Double D’s Lien

A trustee may avoid a statutory lien that “is not perfected or enforceable at the time of the commencement of the case against a bona fide purchaser that purchases such property at the time of the commencement of the case, whether or not such a purchaser exists.” 11 U.S.C. 545(2).¹ However, a trustee’s avoidance powers are subject to any generally applicable law “that permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of perfection.” 11 U.S.C. § 546(b)(1). Further, a statutory lien may be perfected by post-petition notice if the only remaining requirement to perfect the lien is commencement of an action or seizure of property. 11 U.S.C. § 546(b)(2). Any action by a claimant to perfect, or to maintain or continue perfection, of an interest within the scope of § 546(b) is excepted from the stay. 11 U.S.C. § 362(b)(3).

In the case at bar, Double D contends that it has a statutory lien pursuant to Georgia’s Materialmen’s Statute. When a lien is created by state law, state law determines whether the lien

¹A Chapter 11 debtor becomes a debtor in possession upon the commencement its case. 11 U.S.C. § 1101(1). A debtor in possession has the same powers and limitations as a trustee with respect to 11 U.S.C. §§ 545 & 546.

is enforceable and whether it can be avoided by a bona fide purchaser. *United States v Hunter*, 45 F.3d 1023, 1029 (6th Cir. 1995); *In re Loretto Winery Ltd.*, 898 F.2d 715, 718 (9th Cir. 1990); *In re Phillips Constr. Co.*, 579 F.2d 431, 432 (7th Cir. 1978). Georgia law states that creditors may obtain a materialmen's lien on property if they provide material or services in the building, repair, or improvement of the property. O.C.G.A. § 44-14-361. However, the creditor must satisfy the following requirements in order to perfect its lien:

- (1) A substantial compliance by the party claiming the lien with his contract for building, repairing, or improving. . . ;
- (2) The filing for record of his claim of lien within three months after the completion of the work . . . in the office of the clerk of the superior court of the county where the property is located. . . At the time of filing for record of his claim of lien, the lien claimant shall send a copy of the claim of lien by registered or certified mail or statutory overnight delivery to the owner of the property . . . ;
- (3) The commencement of an action for the recovery of the amount of the party's claim within 12 months from the time the same shall become due. In addition, within 14 days after filing such action, the party claiming the lien shall file a notice with the clerk of the superior court of the county wherein the subject lien was filed.

O.C.G.A. § 44-14-361.1 (2007). The filing of a proof of claim in a debtor's bankruptcy case satisfies the requirement to commence a case within 12 months. *Melton v. Pacific Southern Mtg. Trust*, 241 Ga. 589, 593 (Ga. 1987); *Action Concrete v. Portrait Homes - Little Suwanee Point, LLC*, 285 Ga. App. 650, 653 (Ga. App. 2007).

The parties agree that Double D fulfilled the first two provisions of the statute and the first sentence of the third provision. The only issue in dispute is whether Double D was required to file the Notice of Commencement within 14 days of filing its proof of claim. Double D contends that it was not required to file a Notice of Commencement because: (1) the lien was perfected at the time of the petition and thus can not be avoided under § 545(2); (2) the lien was perfected under § 546(b)(2) when Double D filed its proof of claim; and (3) the Notice of

Commencement was not necessary because the Debtor is the property owner.

Double D asserts that the Debtor can not avoid its lien under § 545(2) because it was a secured creditor as soon as it substantially complied with the contract and that its secured status became “fixed” when the Debtor filed bankruptcy. Double D cites several cases supporting its position that a creditor maintains its secured status regardless of post-petition events. However, all the cases Double D cites involved a creditor that perfected its interest pre-petition. *See In re Neuenschwander*, 73 B.R. 727 (Bankr. S.D. Fla. 1987); *Toranto v. Dzikowski*, 380 B.R. 96 (S.D. Fla. 2007); *In re Stetson & Associates, Inc.*, 330 B.R. 613 (Bankr. E.D. Tenn. 2005). Double D was not a secured creditor when the Debtor filed bankruptcy. Georgia courts have consistently held that a materialmen’s lien is not perfected until all requirements of the statute are fulfilled. *Oglethorpe Savings and Trust Co. v. Morgan*, 149 Ga. 787, 792 (Ga. 1920); *Metromont Materials Corp., v. Cargill, Inc.*, 221 Ga. App. 853, 854 (Ga. App. 1996); *Eurostyle, Inc. v. Jones*, 197 Ga. App. 188, 188 (Ga. App. 1990); *see also, Ragsdale v. Chiu*, 185 B.R. 959, 960 (Bankr. N.D. Ga. 1995) (Brizendine, J.). At the time the Debtor filed bankruptcy, Double D was an unsecured creditor with an inchoate lien. Pursuant to § 546(b)(1) and § 362(b)(3), Double D could have become a secured creditor if it had fulfilled the remaining requirements of Georgia’s Materialmen’s Statute. The failure to file the Notice of Commencement extinguished Double D’s inchoate lien and left it with only an unsecured claim.

Double D contends that its proof of claim satisfied the notice requirement in § 546(b)(2) and that § 546(b)(2) excused its failure to commence the action *and* its failure to file the Notice of Commencement because both requirements are included in the same provision of O.C.G.A. § 44-14-361.1. The Court finds Double D’s argument unpersuasive. Section 546(b)(2) only excuses the failure to commence an action or seize an asset, it does not excuse the failure to file a *notice of the commencement of an action*. Double D’s interpretation of Georgia’s Materialmen’s

Statute ignores a material provision of the statute. It is “‘a cardinal principle of statutory construction’ that ‘a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.’” *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (*quoting Duncan v. Walker*, 533 U.S. 167 (2001)). O.C.G.A. § 44-14-361.1(a)(3) requires Notice of Commencement “in addition” to commencing the action itself. The term “in addition” evidences a desire by the legislature to create two separate requirements. Further, the Georgia Supreme Court, appellate courts, and bankruptcy courts, have held that the Notice of Commencement is a distinct requirement of the statute. *See e.g., Ragsdale*, 185 B.R. at 961 (finding that a creditor could not enforce a lien because it had failed to file a Notice of Commencement even though it had filed a lawsuit); *Palmer v. Duncan Wholesale*, 262 Ga. 28, 30-31 (Ga. 1992) (same); *Newton Lumber & Supply v. Crumbley*, 161 Ga. App. 741, 742 (Ga. App. 1982) (finding that filing of a proof of claim may commence an action but it does not satisfy requirement to file Notice of Commencement).

Double D contends that its proof of claim should satisfy the Notice of Commencement requirement because the Debtor is the property owner. The Georgia legislature created the Notice of Commencement requirement in order to ensure that third party purchasers were aware of a potential lien. *Ford Motor Co. v. Noland Co.*, 186 Ga. App. 541, 542 (Ga. App. 1988). Double D argues that the Notice of Commencement is unnecessary when the debtor is the property owner because the bankruptcy court controls the sale of estate property and the proof of claim would notify third party purchasers of its potential lien. However, the Court is not persuaded that a proof of claim is sufficient to satisfy the terms of the statute or the intent of Georgia’s legislature. The statute requires that the Notice of Commencement be filed with the “clerk of the superior court of the county wherein the subject lien was filed.” O.C.G.A. § 44-14-361.1(a)(3). A proof of claim is filed with the bankruptcy court not the superior court. This is

not a mere technicality, a third party purchaser would not have notice of a filing in the bankruptcy court, especially if the bankruptcy case is dismissed. Double D's interpretation would require all third party purchasers to review the county records *and* bankruptcy records in order to ensure that title is clear of a materialmen's lien. The Court finds that Double D's proof of claim does not satisfy the Notice of Commencement requirement even though the Debtor is the property owner.

Conclusion

Pursuant to O.C.G.A. § 44-14-361.1(a)(3), Double D was required to file the Notice of Commencement within 14 days of filing its proof of claim. Double D failed to comply with this provision and so its lien was never perfected. As such, the Debtor may avoid the lien under § 545(2). Double D is not without resort, it still has a claim against the estate but such claim is unsecured. Therefore,

IT IS ORDERED that the Objection be and is hereby **GRANTED**.

IT IS FURTHER ORDERED that the Claim shall be funded as a unsecured claim.

The Clerk of Court is directed to serve a copy of this Order upon the Debtor, the Debtor's counsel, Double D, Double D's counsel, and the U.S. Trustee.

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