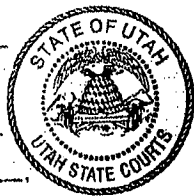


STATE OF UTAH
COUNTY OF Wayne
I hereby certify that the document to
which this certificate is attached is a
full, true and correct copy of the
original filed in the Utah State Courts.
WITNESS my hand and seal
this 11 day of March



The Order of the Court is stated below:

Dated: March 11, 2019
09:41:07 AM

/s/ WALLACE A. LEE
District Court Judge



DISTRICT/JUVENILE COURT

CLERK

Bryan H. Booth (#7471)

John W. Mann (#11712)

FETZER SIMONSEN BOOTH & JENKINS, P.C.

50 West Broadway, #1200

Salt Lake City, UT 84101

Office: (801) 328-0266

Fax: (801) 328-0269

bryan@mountainwestlaw.com

john@mountainwestlaw.com

Attorneys for Petitioner

Ent 156035 Bk 243 Pg 579
Date: 11-MAR-2019 1:38:09PM
Fee: \$26.00 Check Filed By: WD
COLLEEN ALLEN, Recorder
WAYNE COUNTY
For: DAVE CHRISTENSON

**IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR
WAYNE COUNTY, STATE OF UTAH**

670 TORREY LLC, a Utah limited liability
company,

Petitioner,

vs.

STRAIGHTLINE BUILDERS, INC., an
Arizona corporation,

Respondent.

**ORDER ON PETITION FOR SUMMARY
DETERMINATION OF AMOUNT
OWING UNDER CONSTRUCTION
LIEN FOR THE PURPOSE OF
PROVIDING ALTERNATE SECURITY**

Civil No. 190600005

Judge Wallace A. Lee

This matter comes before the Court on 670 Torrey, LLC's Petition for Summary Determination of Amount Owing Under Construction Lien for the Purpose of Providing Alternate Security (the "Petition"). A hearing was held on February 25, 2019 at 10:00 a.m. at the courthouse in Loa, Wayne County, Utah (the "Hearing"). Bryan H. Booth appeared on behalf of the Petitioner, and Benjamin D. Johnson appeared by telephone on behalf of the Respondent. Having considered the Petition and the supporting declaration, and having heard the arguments of the parties, the Court orders, adjudges, and decrees as follows:

EVIDENCE PRESENTED

1. The following facts were asserted in the Declaration of Dave Christenson and were presented at the Hearing by proffer (the "Christenson Allegations"):

a. 670 Torrey LLC ("Owner") is the owner of a hotel property located at 670 East Highway 24 in Torrey, Utah (the "Property") and more particularly described as:

BEG AT NW COR OF SMITH PROP TAX PARCEL O-867 SD PT LOC N00°11'48" W 1219.43 FT ALNG 1/4 SEC LN & N89°58'02" W 455.81 FT ALNG S R-W LN OF ST HW U-24 FRM S1/4 COR SEC 7 T29S R5E SLB&M & RUN TH S 448.65 FT ALNG W BNDRY OF SD PARCEL O-867 TO N LN OF PARCEL O-867-2 TH S89°59'23" W 430.80 FT ALNG EXIST FENCE LN TO E BNDRY OF TAX PARCEL O-865 TH N00°21'25" W 448.98 FT ALNG SD E BNDRY TO S R-W LN OF ST HW U-24 TH S89°58'02" E 433.59 FT ALNG SD R-W TO BEG CONT 4.45 AC M-L TOG/W ACCESS EASE ON W SIDE OF O-867 ALSO TOG/W UTIL EASE ACR O-867

Tax Parcel 02-0039-0889.

b. The hotel business operating on Owner's Property is managed by Evoke Hotel Management, LLC, formerly known as AVA Management, LLC.

c. Evoke Hotel Management, LLC does business as Red Sands Hotel ("Red Sands").

d. On or about November 6, 2017, Red Sands entered into a Standard Form of Agreement Between Owner and Contractor with Straightline Builders, Inc. ("Straightline") for construction of an addition to the existing hotel structure on the Property.

e. Red Sands and Straightline made certain amendments to the November 6, 2017 agreement on January 5, 2018 and on August 21, 2018.

Hereafter, the November 6, 2017 agreement, the January 5, 2018 amendments, and the August 21, 2018 revision shall be referred to collectively as the "Agreement."

f. Under the Agreement, Straightline agreed to substantially complete construction of the addition by May 1, 2018.

g. Straightline did not achieve substantial completion of the addition by May 1, 2018.

h. On September 10, 2018, Red Sands sent a 72-Hour Notice to Straightline (the "Notice") which demanded that Straightline recommence work no later than September 12, 2018 on the following items of incomplete or defective work:

- i. Drywall repairs;
- ii. Stucco repairs;
- iii. Window frame repairs;
- iv. Door repairs;
- v. Door closer adjustments;
- vi. Fire extinguisher installation;
- vii. Plumbing access panel installation;
- viii. Installation of fire-rated glass in certain doors;
- ix. Fire alarms and smoke alarms throughout the building;
- x. Locating phone, data, and electrical boxes

covered by drywall and repairing any damage from locating these boxes.

i. The Notice indicated that if work were not recommenced by Straightline within 72 hours, Red Sands would use any remaining contract funds to complete the unfinished items.

j. Straightline failed to recommence work within 72 hours after receiving the Notice.

k. Red Sands was required to retain other contractors to finish the work that should have been performed by Straightline.

l. The payments made by Red Sands to Straightline and Straightline's subcontractors and suppliers exceed the Guaranteed Maximum Price in the Agreement as adjusted to account for contingency amounts not authorized by Red Sands.

m. On October 17, 2018, Straightline recorded a Notice of Construction Lien (the "Lien") against the Property.

n. The Lien Notice claims that Straightline is owed and holds a lien for the amount of \$208,490.03.

2. Straightline cross-examined Mr. Christenson by telephone.

3. The Agreement provides at section 13.2.1 that "any claim arising out of or related to [the Agreement], except claims as otherwise provided herein (including but not limited to disputes between Owner and Contractor as set forth in Section 6.2.1 below) or waived in [the Agreement], shall be subject to mediation as a condition precedent to

arbitration or the institution of legal or equitable proceedings by either party.”

4. According to Mr. Christenson’s testimony:

a. Straightline did not demand or request mediation under the Agreement regarding the issues in dispute between the parties before recording its Lien in the Wayne County Recorder’s Office.

b. Red Sands did not demand or request mediation under the Agreement regarding the issues in dispute between the parties before filing the Petition;

c. Red Sands and Straightline have not participated in mediation.

ANALYSIS AND CONCLUSIONS

5. The Court finds Dave Christenson’s testimony to be credible for purposes of Utah Code section 38-1a-804(7). However, the Court holds that it is not making any final or binding findings of fact regarding the dispute between the parties. The conclusions reached in this Order are applicable only to a determination of alternate security as requested by the Petition and allowed by Utah Code section 38-1a-804(7).

6. During argument, Straightline objected to the Hearing because it claimed its principals, who are located in Arizona, did not have adequate time to prepare for or make arrangements to attend the Hearing, having only received notice of the Hearing from its registered agent on or about February 20, 2019. Straightline argues that it was not afforded due process because it did not have sufficient time to prepare and present evidence at the Hearing. Straightline requested the Court to reschedule the Hearing to allow Straightline to prepare for the Hearing and for its witnesses to attend the Hearing.

Counsel for Straightline informed the Court that he only learned of the hearing approximately one (1) hour before the Hearing and had been unable to review the Petition in any meaningful way and was unable to prepare for the Hearing in any meaningful way. Straightline also informed the Court that its witnesses were located in Arizona and did not have sufficient notice to make arrangements to attend the Hearing. Straightline further argued that the Court had scheduled a hearing in compliance with Utah Code section 38-1a-804(7)(e), by virtue of holding proceedings on February 25, 2019, and that the Court had the discretion to continue the Hearing to allow Straightline and its counsel to review the Petition, prepare a response, and schedule and make arrangements for witnesses to attend the Hearing.

7. Having presented no witnesses or documents, Respondent did not refute the Christenson Allegations.

8. The provisions of Utah Code section 38-1a-804(7) indicate an intent by the legislature to give the owner of property against which a construction lien has been filed an expedited procedure for challenging the amount of that lien for the sole purposes of filing alternate security. Section 38-1a-804(7)(e) directs the Court, upon receiving a sufficient petition, to schedule a hearing within 10 days. Section 38-1a-804(7)(c) requires the petitioner to serve on the respondent "a copy of the petition; and . . . a notice of hearing if a hearing is scheduled." The return of service filed by Petitioner shows that Straightline's registered agent in Utah was served with the Petition, the Declaration of Dave Christenson, and the Notice of Hearing on February 15, 2019.

9. Straightline does not dispute that its authorized registered agent received service

on that date but asserts through counsel that the principals of Straightline did not receive the Petition and Notice of Hearing from its registered agent until February 20, 2019. Nonetheless, the Court concludes that service was effected within a reasonable time before the hearing and that Straightline was afforded due process.

10. Straightline argued that Petitioner was not entitled to relief because it failed to satisfy the contractual condition of participating in mediation, as set forth in section 13.2.1 of the Agreement. However, Straightline recorded the Lien against the Property without first requesting mediation. Once the Lien was recorded, Petitioner's only remedy afforded by statute was to file the Petition. The Court concludes that Petitioner's failure to participate in mediation does not preclude Petitioner from requesting relief under Utah Code section 38-1a-804(7).

11. The Court finds that the testimony presented by Mr. Christenson is credible and adequately supported by the documents presented as exhibits at the Hearing.

12. Based upon the testimony and evidence presented, the Court determines, for purposes of this proceeding only, that the amount claimed by Straightline under its construction lien is excessive.

13. For the sole purpose of alternate security under Utah Code section 38-1a-804, the Court hereby sets the amount of Straightline's construction lien at \$100.00. As stated in Utah Code section 38-1a-804(7)(g), this determination:

is limited to a determination of the amount claimed under a preconstruction or construction lien for the sole purpose of providing alternate security and does not conclusively establish:

- (i) the amount to which the claimant is entitled;
- (ii) the validity of the claim; or
- (iii) any person's right to any other legal remedy.

14. Petitioner may record a certified copy of this Order against the Property.

 END OF ORDER – SIGNATURE APPEARS AT TOP OF FIRST PAGE

Approved as to form:

BENNETT TEULLER JOHNSON & DEERE

/s/ Benjamin D. Johnson

Benjamin D. Johnson
Counsel for Respondent

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