7-17-2013

Credit Suisee AG v. Teufel Nursery, Inc. Appellant's Reply Brief Dckt. 40234

IN THE SUPREME COURT OF THE STATE OF IDAHO

CREDIT SUISSE AG, CAYMAN ISLAND BRANCH, fka CREDIT SUISSE, CAYMAN ISLAND BRANCH, Plaintiff/Respondent, vs. TEUFEL NURSERY, INC.; Defendant/Appellant, ACTION GARAGE DOOR, INC. Defendant.	REPLY BRIEF SUPREME COURT NO. 40234-2012 D.C. CASE NO. CV 08-114C

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

HONORABLE PATRICK H. OWEN

DISTRICT JUDGE, PRESIDING

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I. STATEMENT OF THE CASE

A. Nature of the Case

Appellant Teufel Nursery, Inc. ("Teufel") maintains the Statement of the Case previously submitted in Appellant's Brief filed April 12, 2013.[1] However, since the filing of the Appellant's Brief, the District Court has entered an amended judgment and several other judgments that are directly related to this appeal, so this Reply Brief will address the additional proceedings that have taken place since the filing of Appellant's Brief.

B. Course of Proceedings

Teufel restates its Course of Proceedings previously filed, and includes and incorporates the following additional information.

On April 12, 2013, Teufel filed its Appellant's Brief. Credit Suisse filed its Respondent's Brief on June 6, 2013. In the meantime, Credit Suisse also sought to amend the Second Amended Second Revised Judgment and Decree of Foreclosure and Order of Sale.[2] Credit Suisse filed their Motion for Relief from Judgment and to Amend Second Amended Revised Judgment and Decree of Foreclosure and Order of Sale on March 28, 2013, (R., Vol. II, pp. 190-191) along with a memorandum in support. (R., Vol. II, pp. 192-197) A hearing was scheduled on the matter on May 23, 2013, on the Motion for Relief, among other motions.

On May 24, 2013, at the District Court's request, Teufel filed its Response to Motion to Amend Second Amended Second Revised Judgment and Decree of Foreclosure and Order of Sale. (R., Vol. II, pp. 198-201) Teufel did not oppose the amendment, but merely stated

[1] As mentioned in the Appellant's Brief, this appeal deals with the failed resort known as Tamarack Resort ("Tamarack Resort") and its developer, Tamarack Resort, LLC ("Tamarack").
[2] The Second Amended Second Revised Judgment of Foreclosure and Order of Sale, filed June 18, 2012, was the main underlying basis for this appeal. (R., pp. 4236-4387).

Teufel's position that the District Court had the authority to amend the judgment pursuant to Idaho Rule of Civil Procedure 60(b) rather than this Court's remittitur granting the District Court jurisdiction to enter additional judgments relating to the Tamarack litigation. (R., Vol. II, pp. 198-201) On May 28, 2013, Credit Suisse filed its Reply to Teufel's Response to Motion to Amend, essentially agreeing with Teufel's position. (R., Vol. II, pp. 202-208) On June 4, 2013, the District Court entered its Decision and Order Re: Teufel's Response to Credit Suisse's Motion for Relief from the Judgment and To Amend the Second Amended Second Revised Judgment and Decree of Foreclosure and Order for Sale. (R., Vol. II, pp. 209-212) The District Court agreed with Teufel that it had authority to enter the amended judgment pursuant to Idaho Rule of Civil Procedure 60(b) and granted Credit Suisse's motion. (R., Vol. II, pp. 209-212)

Also on June 4, 2013, almost an entire year after the original Second Amended Revised Judgment and Decree of Foreclosure and Order of Sale was filed; the District Court entered its Third Amended Second Revised Judgment and Decree of Foreclosure and Order of Sale. (R., Vol. II, pp. 213-386)[3] This judgment specifically dealt with the portion of Tamarack Resort that was initially covered in this appeal. (R., Vol. II, pp. 213-386)[4]

That same day, the District Court entered four other judgments relating to Tamarack Resort property encompassed by the Teufel claim of lien. It entered its Seventh Revised Judgment and Decree of Foreclosure Against Tamarack Resort, LLC, and Order of Sale (R., Vol.

[3] As previously mentioned, there was no original "Judgment" or "First Amended Judgment" that were ever signed by the District Court, so the first judgment entered in the case was actually the Second Amended Second Revised Judgment. The Third Amended Second Revised Judgment was the only amendment to the original judgment that was appealed in this case.

[4] Exhibits A-1, A-2, B-1 and B-3 of both the Second and Third Amended Judgments listed metes and bounds descriptions and other lot and block legal descriptions that were property subject to Teufel's Claim of Lien.

II, pp. 387-397)[5]; the Fourth Amended Judgment and Decree of Foreclosure Against Tamarack Resort, LLC, and Order of Sale of Lake Wing Property (R., Vol. II, pp. 38-405)[6]; the Amended Judgment and Decree of Foreclosure and Order of Sale of Village Plaza Property (R., Vol. II, pp. 406-415)[7]; and the Judgment and Decree of Foreclosure and Order of Sale of the Trillium Townhome Property. (R., Vol. II, pp. 416-426)[8] As with the original judgment that is the subject of this appeal, these judgments were all entered pursuant to the District Court's findings in the Substitute Omnibus Findings of Fact and Conclusions of Law, erroneously setting Teufel's lien priority date in 2007 rather than 2004, and thus placing Teufel's priority junior to all other lien claimants, including Credit Suisse.

Teufel timely filed its Amended Notice of Appeal on June 13, 2013. (R., Vol. II, pp. 427-436) The Amended Notice of Appeal incorporated all of the judgments entered by the District Court on June 4, 2013. These judgments concluded all of the pending priority issues between Teufel and Credit Suisse that are the basis of this appeal. Consequently, this appeal should fully resolve all of Teufel's lien priority issues with Credit Suisse, however; if successful on appeal, Teufel's lien priority issues would need to be revisited on remand with the other mechanic's lien claimants in the judgments referenced above.[9]

As set forth in the Appellant's Brief, this appeal presents an interesting dynamic between questions of fact and law. It is Teufel's position that the District Court made erroneous factual

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[5] This Judgment gave BAG Properties, LLC lien priority over Credit Suisse and Teufel for a portion of property encompassed by the Teufel claim of lien.
[6] This Judgment gave MHTN, Inc. lien priority over Credit Suisse and Teufel for a portion of property encompassed by the Teufel claim of lien.
[7] This Judgment gave Banner/Sabbey II, LLC lien priority over Credit Suisse and Teufel for a portion of property encompassed by the Teufel claim of lien.
[8] This Judgment gave Tamarack Designs, LLC (formerly EZA, P.C. dba OZ Architecture of Boulder's) lien priority over Credit Suisse and Teufel for a portion of property encompassed by the Teufel claim of lien.
[9] BAG Properties, LLC, MHTN, Inc., Banner/Sabbey II, LLC, and Tamarack Designs, LLC.

findings which resulted in it making incorrect conclusions of law when it determined that Credit Suisse's mortgages had priority over Teufel's claim of lien. This appeal explores those incorrect factual findings and conclusions of law, which would expectantly result in the reversal of the District Court's determination regarding priority between Credit Suisse and Teufel, and a remand to the District Court to enter judgment accordingly. Furthermore, now that all judgments have been entered in this consolidated case, the District Court would also have to determine priority between Teufel and the remaining lien claimants that were granted priority over Credit Suisse.

C. Concise Statement of Facts

Teufel reiterates its Concise Statement of Facts in its Appellant's Brief. Because Credit Suisse did not include a Statement of Facts in its Respondent's Brief, no response is necessary. The facts relating to specific legal arguments will be addressed later herein.

ISSUES PRESENTED ON APPEAL

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II. ARGUMENT

Credit Suisse incorrectly urges this Court to adopt a new rule of law in Idaho for mechanic's liens. Specifically, Credit Suisse argues that priority dates for mechanic's liens relate to the "last time a lien claimant was paid" rather than the long-standing Idaho precedent requiring priority based upon "first began work on the property."[10] Unfortunately, the District Court's findings of fact and conclusions of law indicate that this was the direction the District Court took in determining priority between Credit Suisse and Teufel as well.

Idaho Code § 45-506 grants a mechanic's lien holder a priority date that relates back to the date materials or improvements **were first provided** by lien holder. *Beall Pipe & Tank Corp. v. Tumac Intermountain, Inc.*, 108 Idaho 487, 492, 700 P.2d 109, 114 (Ct. App. 1985). Essentially, the date of priority of a materialman's lien is the commencement date of the work or improvement, and has priority over any other lien, including mortgages, filed or recorded after that date. *White v. Constitution Mining and Milling Co.*, 56 Idaho 403, 55 P.2d 152 (1936).

Priority between mechanic's liens and other liens is governed by Idaho Code § 45-506 which states, in pertinent part:

> The liens provided for in this chapter shall be on equal footing with those liens within the same class of liens, without reference to the date of the filing of the lien claim or claims and are preferred to any lien, mortgage or other encumbrance, which may have attached subsequent to the time when the building, improvement or structure **was commenced**...

(Emphasis added). Pursuant to I.C. § 45-506, a mechanic's lien holder's priority date relates back to the date materials or improvements were first provided by lien holder. *Beall Pipe*, 108 Idaho at 492, 700 P.2d at 114.

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[10] *See* Respondent's Brief, p. 14.

Essentially, "commencement date" means the first day work is done on the project, whether there is a contract in place for that work or not. In this case, Teufel's "commencement date" was June 14, 2004, the first day a shovel hit the ground at Tamarack Resort.

1. Did the District Court Err in Finding That Teufel's Claim of Lien Did Not Have Priority Over Credit Suisse's Mortgages.

Credit Suisse properly cites the long-standing precedent in Idaho for determining priority for mechanic's liens; however, it then incorrectly applies that law to the facts in this case. Specifically, Credit Suisse cited a 1907 case, *Valley Lumber & Mfg. Co. v. Driessel*, 13 Idaho 662, 93 P. 765 (1907), for the proposition that "work knowingly provided under a separate and distinct contract cannot tack to an earlier contract."[11] Credit Suisse, however, completely overlooks this Court's most recent decision on this issue, *Hopkins Northwest Fund, LLC v. Landscapes Unlimited, LLC*, 151 Idaho 740, 264 P.3d 379 (2011), holding that if a project is one improvement, the priority date need not "tack," but rather it is when the mechanic's lien claimant first contributes to that one improvement. *Id.* at 746, 264 P.3d at 385.

a. Were the District Court's Factual Findings Regarding Teufel's Claim of Lien Clearly Erroneous?

Teufel reiterates that the District Court made several erroneous factual findings regarding the scope of Teufel's work at Tamarack Resort and the terms of Teufel's contract with Tamarack. Credit Suisse disagreed.

[11] *See* Respondent's Brief, p. 14.

i. Did the District Court Err in Finding That Teufel's Work at Tamarack Resort was Under Four Separate Contracts and Not a Continuous Single Contract?

The evidence at trial established that Teufel had one continuous contract with Tamarack and this evidence was uncontroverted by Credit Suisse. Furthermore, in its Respondent's Brief, Credit Suisse failed to address the issues raised in Teufel's Appellant's Brief, but rather it focused on the incorrect and erroneous findings of the District Court. For example, Credit Suisse seemed to hang its hat on the District Court's erroneous findings based upon the Affidavit of Rick Christensen, a document that was not admitted into evidence and could not be considered by the District Court. There is no dispute that the Affidavit of Rick Christensen **was not** entered or admitted as evidence in the Tamarack trial, yet, the District Court relied upon the Affidavit to make its erroneous findings.[12]

According to Idaho Code § 9-101, courts can take judicial notice of the following facts:

> 1. The true signification of all English words and phrases, and of legal expressions.
> 2. Whatever is established by law.
> 3. Public and private official acts of the legislative, executive and judicial departments of this state and of the United States.
> 4. The seals of all the courts of this state and of the United States.
> 5. The accession to office and the official signatures and seals of office of the principal officers of government in the legislative, executive and judicial departments of this state and of the United States.
> 6. The existence, title, national flag, and seal of every state or sovereign recognized by the executive power of the United States.
> 7. The seals of courts of admiralty and maritime jurisdiction, and of notaries public.
> 8. The laws of nature, the measure of time, and the geographical divisions and political history of the world. In all these cases the court may resort for its aid to appropriate books or documents of reference.

[12] *See* Substitute Omnibus Findings of Fact and Conclusions of Law Re: Validity, Priority and Amount of Various Liens and Mortgage Claims, p. 21 (R., p. 3841).

I.C. § 9-101. Courts cannot, however, take judicial notice of pleadings filed in a case that were not ultimately admitted at trial. The testimony of witnesses "shall be taken orally in open court unless otherwise provided by statute or by these rules, the Idaho Rules of Evidence, or other rules adopted by the Supreme Court of Idaho." I.R.C.P. 43(a). There is simply no statute or rule that allows a court to rely upon documentary evidence not admitted at the trial when making its factual findings.

While Idaho does not have a specific case on point, it is well settled only evidence that was actually admitted or considered by judicial notice can be considered at trial. For example, when answers to interrogatories are not offered and admitted at trial, they are not to be considered as evidence in the case. *Crollard v. Crollard*, 104 Idaho 189, 190-91, 657 P.2d 486, 487-88 (Ct. App. 1983). The Court of Appeals set forth its analysis as to why such unadmitted evidence could not be considered as follows:

> Answers to interrogatories are not part of the pleadings and they are not considered evidence unless introduced as such at trial. It has been held that error sufficient to reverse a judgment occurs when a judge has used interrogatories that have not been introduced into evidence, to establish a fact by inference. ... Moreover, in our view, answers to interrogatories do not become incorporated into evidence in a trial merely by allusion, indirect reference or physical presence before the court during the questioning of a witness. None of these circumstances suffices as a substitute for the application of the rules of evidence to establish the admissibility of the answer – especially where a party is precluded, by a judge's post-trial decision to treat the answers as evidence, from the opportunity to voice an objection to such evidence and to obtain a ruling thereon. ... Consequently, we hold there was no competent evidence introduced at trial...

Id. at 191, 657 P.2d at 488 (citations omitted).

Credit Suisse failed to offer any response to the portion of Teufel's Appellant's Brief setting forth all of the clearly erroneous factual findings of the District Court. Rather, Credit Suisse simply reiterated the District Court's erroneous findings based on the Affidavit of Rick

Christensen, followed by selective citations to the trial transcript that ignored Christensen's clear testimony on point that Teufel was the single landscaper, working on a single project for Tamarack Resort, and that the yearly agreements were merely reiterations of the overall contract with specific unit prices for materials that varied from year to year. The facts Credit Suisse (and the District Court) overlooked included:

- Teufel was hired by Tamarack in 2004 as the exclusive landscape company for Tamarack Resort and installed all of the landscaping at Tamarack Resort. (Tr., Vol. II, pp. 239-40, ll. 24-25, 1-14; p. 543, ll. 17-22)
- Tamarack represented that the project would be a multi-year project and it was Tamarack's intent to have one single landscape provider. (Tr., Vol. II, p. 254, ll. 3-18)
- Tamarack did not have a landscaping plan or other landscape specifications. This made drafting a multiyear contract impossible because there was no plan to provide the basis for the contract. (Tr., Vol. II, p. 236, ll. 7-22)
- Landscape Construction Agreements were drafted based on an established unit price and time and material basis for that year's pricing. (Tr., Vol. II, p. 256, ll. 22-24)
- The yearly agreements were a continuation of the work of each prior agreement. (Tr., Vol. II, p. 260, ll. 13-18)
- The 2004 Landscape Construction Agreement was extended in 2005, 2006 and 2007. (Tr., Vol. II, p. 540, ll. 4-14)

- Christensen testified that the landscape agreements (Tr. Exs. 9:001, 9:002, 9:003, 9:004) were not "separate or individual contracts with Tamarack Resort" but rather "it was just a modification of the original document." (Tr., Vol. II, p. 296, ll. 20-25)[13]
- Christensen and Chris Kirk both testified that Teufel worked continuously from June 2004 through August of 2008, never actually discontinuing making improvements to Tamarack Resort in that time. (Tr., Vol. II, p. 545, ll. 15-18; Tr. Vol. II, p. 294, ll. 6-18, p. 296, ll. 17-19)

It was undisputed that there was no intent by Tamarack or Teufel that more than one contract governed Teufel's work at Tamarack Resort. Credit Suisse failed to introduce **any** evidence to controvert the testimony of either Christensen or Tamarack's project manager, Chris Kirk. To the contrary, Credit Suisse cited the testimony of Kirk in its Respondent's Brief summarizing Teufel's agreements[14], but Credit Suisse failed to cite the testimony whereby Kirk affirmed that Teufel was hired as the general landscaper for all of Tamarack Resort, (Tr., Vol. II, p. 538, ll. 3-7), that Teufel was never fired as the general landscaper for Tamarack Resort, (Tr., Vol. II., p. 540, ll. 4-14), the 2005 agreement was an extension of the 2004 agreement, (Tr., Vol. II, p. 540, ll. 4-8), and that the scope and amount of work Teufel did for Tamarack Resort **did not shift and change** from year to year. (Tr., Vol. II, p. 543, ll. 23-25)

[13] Notably, despite the fact that the District Court relied on the Affidavit of Rick Christensen to "contradict" this clear testimony given at trial, the Affidavit of Rick Christensen does not actually contradict the testimony at trial. The Affidavit was offered in summary judgment proceedings and the paragraphs relied upon by the Court (and adopted by Credit Suisse in their Respondent's Brief) were foundational only and meant to provide background to introduce the documents for summary judgment purposes. The District Court actually relied on the Affidavit of Rick Christensen to **deny** Credit Suisse's motion for summary judgment. (R., p. 2809).

[14] Credit Suisse cited Kirk's testimony on cross-examination that Teufel needed to lock in their fees from year to year and this is why individual agreements were drafted from year to year. (*See* Respondent's Brief p. 17, and Tr., Vol. II., p. 546, ll. 8-13).

Credit Suisse then dedicated the next six pages of its Respondent's Brief on the "plain language" of the agreements, incorrectly concluding that they were separate contracts. Credit Suisse, however, failed to identify **any** evidence in the record or trial transcript to rebut the following:

- The 2004 Landscape Construction Agreement included language that stated, "[s]uch other tasks as may be directed by the Owner's Representatives," a catchall phrase that allowed Teufel to perform duties outside of the strict letter of the agreement. (Tr. Ex. 9:001)
- The 2005 Landscape Construction Agreement (Tr. Ex. 9:002), states that unit prices for tasks will be provided in Exhibit "B." Exhibit B provides a spreadsheet of the plants and materials for the anticipated work in 2005. Page 3 of Exhibit B has one column that is not identified in the Scope of Work, titled "Overall Site." This catchall category allocated plants to Tamarack Resort as a whole.
- Teufel worked through 2005 on every part of the Tamarack Resort. (Tr. Ex. 9:042; Tr., Vol. II, pp. 266-272) As testified by Christensen and Kirk, Teufel completed work on every aspect and in every location within the Tamarack Resort in 2004 and 2005. (Tr., Vol. II, p. 277, ll. 2-18, pp. 543-44, ll. 23-25, 1-3)
- The 2006 Landscape Construction Agreement (Tr. Ex. 9:003) states that unit prices for tasks will be provided in Exhibit "B" that included a column for "Spring-Fall overall/ row screening, etc."
- Teufel's work went well outside the bounds of the Scope of Work in the 2006 Landscape Construction Agreement. (Tr., Vol. II, pp. 543-44, ll. 23-25, 1-3)

- The 2007 Landscape Construction Agreement (Tr. Ex. 9:004) included a "Spring – other plantings" provision in the Scope of Work, which also demonstrates the intent to work outside of the enumerated areas in the Scope of Work.

Moreover, the **plain language** of the 2005, 2006, and 2007 Landscape Construction Agreements demonstrates that the contracts were extensions of previous contracts. Credit Suisse failed to rebut or explain the following terms in each of the continuation agreements:

- In the 2005 Landscape Construction Agreement (Tr. Ex. 9:002), the Scope of Work includes work such as, "1. **Finish** landscape installation for 20 Twin Creek Chalets and Rock Creek Cottages...3. **Complete** landscaping for Entry & Whitewater Roundabouts..." (emphasis added). This is a clear indicator that the work was ongoing, uniform and one part of the same improvement.
- The 2006 Landscape Construction Agreement has similar language: "**Complete** the landscape for the Bayview Sales Mod...Supplement landscaping at Discovery Village," (Tr. Ex. 9:003)
- The 2007 Landscape Construction Agreement required the "**Completion** of Golden Bar Townhomes (balance)..." (emphasis added). (Tr. Ex. 9:004)

Furthermore, most of the projects themselves were multi-year endeavors. For example, Teufel's work at Golden Bar was first placed in the Scope of Work in 2005 and included in 2006 and 2007. Other areas which spanned multiple years include Discovery Village, Discovery Chalets, Golf and Snow Maintenance Buildings, Golf Course, Staircase Chalets, Arling Center, and Steelhead Chalets. (Tr. Exs. 9:001, 9:002, 9:003, 9:004) The plain language of the agreements combined with the undisputed testimony of Kirk and Christensen that this was one

project, one improvement with no variance to the scope and nature of work confirms that the District Court made the clearly erroneous factual finding that Teufel had four separate and distinct contracts with Tamarack.

The exhibits and testimony presented at trial clearly establish that Teufel worked at Tamarack Resort under one contract, which was extended through 2007. Credit Suisse failed to point to any substantial or competent evidence in the record that would support the District Court's erroneous findings. Thus, Teufel's priority date was June of 2004 when it initially commenced work at Tamarack Resort, making it prior to the date Credit Suisse recorded its mortgages.

ii. Did the District Court Err in Finding That Teufel Only Maintained a Skeletal Crew and Not Perform Landscaping or Improvements at Tamarack Resort During the Winter Months or That Snow Removal Work Was Not Part of the Scope of Work for Teufel's Landscaping Contract?

Credit Suisse failed to point this Court to any evidence in the record that would refute the clear testimony at trial that Teufel never left Tamarack during the winter months. Rather, Credit Suisse simply cited to the District Court's clearly erroneous factual finding that Teufel "only maintained a skeletal crew at the Resort during the winter months."[15] Credit Suisse failed to address the following substantial, competent, and uncontroverted evidence:

- The only time period Teufel did not have a crew present at Tamarack Resort was December 22, 2004, to April 19, 2005.
- The evidence presented at trial clearly established that Teufel had a full crew on site from April 19, 2005, through December 31, 2007, and into 2008.

[15] *See* Respondent's Brief, p. 25.

- Christensen explained, "[S]ome of what we did, an important part of what we did is allowed for other construction to proceed. So if we weren't there, it literally could have brought the project to a halt. So that's why it was important for us to continue on." (Tr., Vol. II, p. 334, ll. 7-12)

In addition, Credit Suisse reiterated the District Court's erroneous finding that the winter work was non-landscaping, citing the testimony of Mike Stanger, one of Teufel's witnesses. Mike Stanger testified that "one crew in 2007, the winter of 2007, ...was directly assigned to clearing snow for construction of the Trillium Cottages and Trillium Townhomes." (Tr., Vol. II, pp. 518-19, ll. 24-15, 1-2) However, Mike Stanger's next sentence stated, "[a]nd we had another crew working in the Staircase Chalets...and that work was again pathways and walkways." (Tr., Vol. II, p. 519, ll. 2-3) This testimony was further supported by Trial Exhibit 9:047, the daily force accounts for January 2007. The work at the Staircase Chalets entailed far more than snow removal. Soil was graded on January 2, 2007, steps and pavers were installed on January 3, 2007, and grading continued on January 4, 2007. (Tr. Ex. 9:047) Teufel does not dispute that it performed snow removal at Tamarack Resort during January 2007; however, it did far more than snow removal as the evidence, both documentary and oral,[16] amply demonstrated.[17] There is simply no evidence to support the District Court's finding, rendering the finding clearly erroneous.

It was undisputed at trial that Teufel performed substantial work at the request of Tamarack outside the Scope of Work listed in each Landscaping Construction Agreement,

[16] Tr., Vol. II, pp. 518-19, ll. 24-25, 1-3; p. 255, ll. 8-17; p. 295, ll. 4-9.
[17] *See* Appendix A to Appellant's Brief, setting forth **all work** done by Teufel during the winter months at Tamarack Resort, which clearly demonstrates that the work was not insignificant or the crews "skeletal."

during the winter months. This work was billed at a time and hourly basis to Tamarack. (e.g. Tr., Vol. II, pp. 344-45, ll. 7-25, 1-8) (Tr. Exs. 9:041, 9:043, 9:045, 9:047) Because Teufel performed substantial work outside the Scope of Work from 2004 to 2007 under a time and material basis, there is an unbroken chain of work done outside of the Scope of Work for which it was specific contractual obligation, except for the "anticipation of future transaction." See *Franklin Bldg. Supply Co. v. Sumpter*, 139 Idaho 849, 851, 87 P.3d 955, 960 (2004). The work provided on an open account outside of the contractual obligations is lienable and supports the lienability of the contractual work. *Franklin Bldg. Supply Co. v. Sumpter*, 139 Idaho 849, 851, 87 P.3d 955, 960 (2004).

The four exhibits that encompassed all of the work orders and daily force accounts for the work done at Tamarack Resort by Teufel, Trial Exhibits 9:041, 9:043, 9:045 and 9:047, provide ample evidence that Teufel was performing work both within and outside of the Landscaping Construction Agreements, and that Teufel maintained a steady and continuous presence at Tamarack Resort year round. There is no evidence to support the District Court's contrary findings, thus the District Court's findings are clearly erroneous and should be reversed.

b. Based Upon the Factual Findings, Should the District Court's Conclusions of Law be Reversed?

The District Court erred when it found that Teufel's work at Tamarack Resort was under four separate contracts, rather than one single contract and one single improvement. Based upon these erroneous findings, the District Court then made the incorrect legal conclusion that Credit Suisse's mortgages were prior to Teufel's Claim of Lien. Credit Suisse failed to cite any Idaho case law that would support its position that Teufel's claim of lien did not have priority over its mortgages.

i. Did the District Court Incorrectly Determine That Teufel and Tamarack Were Not Operating Under an Open Account?

Credit Suisse properly cited the Idaho authority on open accounts, namely *Franklin Building Supply Co. v. Sumpter*, 139 Idaho 846, 851, 87 P.3d 955, 960 (2004). However, it then went on to incorrectly state that in Idaho, only materialmen, not laborers, are entitled to maintain open accounts.[18] There is simply no basis in law for such an assertion. To the contrary, an open account is:

> Simply an account with a balance which has not been ascertained. The account is kept open in anticipation of future transaction. Where an open account exists that parties are deemed to intend that individual items on the account will not be viewed separately but the account will be considered as a connected series of transactions.

Id.

Credit Suisse provided no response to Teufel's assertion that it maintained an open account for its work at Tamarack Resort for all work done outside of the scope and letter of the agreements. It was completely uncontroverted that all of the work Teufel performed outside of the contract from June 2004 to 2008 was performed as Tamarack dictated. There was no set amount of work, or a total amount to be paid or even a comprehensive plan any given year. (Tr., Vol. II, pp. at 8:9-22; 38:2-8; 66:15-25; Tr. Ex. 9:040A)

As Teufel operated at Tamarack Resort under an open contract, all of its work constituted a single improvement and its priority relates back to the first date that Teufel provided labor or materials to Tamarack Resort, June 14, 2004. I.C. §45-506; *see Ultrawall, Inc. v. Washington Mut. Bank,* 135 Idaho 832, 25 P.3d 855 (2001). Again, this legal premise was completely overlooked by Credit Suisse in its Respondent's Brief.

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[18] *See* Respondent's Brief, p. 27.

ii. Did the District Court Err Concluding That Teufel's Priority Date Was in 2007 and That Credit Suisse's Mortgages Were Prior to Teufel's Claim of Lien?

Credit Suisse cited no legal authority to support its position that Teufel's priority date was in 2007 because that Teufel had already been paid for its work in 2004, 2005 and 2006. The District Court determined that in order for Teufel's work to relate back to 2004, "the work must have been such to constitute a continuous single agreement." (R., p. 3838) (citing *Terra-West, Inc. v. Idaho Mut. Trust, LLC*, 150 Idaho 393, 247 P.3d 620 (2010)). While the District Court properly cited *Terra-West* for this proposition, the District Court misapplied the law to the facts of this case. This Court exercises free review over the District Court's legal conclusions.

As pointed out in Appellant's Brief, this Court recently issued a decision with facts very similar to the Tamarack matter in *Hopkins Northwest Fund, LLC v. Landscapes Unlimited, LLC*, 151 Idaho 740, 264 P.3d 379 (2011). Like this case, *Hopkins* addressed the scope of an improvement for a landscaping company like the improvements Teufel contributed to the Tamarack Resort. In *Hopkins* this Court expressly held that, "the labor and materials provided were for the benefit of the entire golf course and driving range, rather than for the individual improvements making up the golf course. Therefore, the golf course project is more properly characterized as a single improvement." *Id.* at 746, 264 P.3d at 385. The ruling in *Hopkins* is equally applicable here. Teufel's work at Tamarack Resort constituted a single improvement, as Teufel has asserted since the commencement of its foreclosure action. The Landscape Construction Agreements clearly state that the Project is the General Landscaping Work at Tamarack Resort, just as the contractor in *Hopkins* was to construct an 18 hole golf course and practice range. Teufel's work was divided into components covering all of Tamarack Resort,

like the work was divided into thirteen components in *Hopkins*. Thus, just as this Court ruled that the contractor's work in *Hopkins* constituted a single improvement, Teufel's work at Tamarack Resort constituted a single improvement.

Credit Suisse failed to point to any substantial or competent evidence that disputed the fact that Teufel performed work over every portion of Tamarack Resort each year. (Tr. Exs. 9:040, 9:040A, 9:042, 9:044, 9:046; Tr., Vol. II, pp. 543-44, ll. 23-25, 1-5) Teufel's work at Tamarack Resort constituted a continuous improvement that benefited the entire resort. Under *Hopkins,* Teufel's work did not cease and start over every year, and Teufel improved substantially all of Tamarack Resort continuously, rendering its work a single improvement. (Tr. Ex. 9:040A)

Moreover, Teufel's work outside of the substantial completion dates further supports a conclusion that there was a continuous agreement. Each Landscape Construction Agreement states that Teufel must commence work at Tamarack Resort as of the date of the Landscape Construction Agreement and "shall achieve substantial completion of the entire Work not later than..." (Tr. Exs. 9:001, 9:002, 9:003, 9:004) Testimony during trial reflected that Teufel did not meet these deadlines. (Tr., Vol. II, p. 253, ll. 1-5) Instead of suing Teufel for a breach of contract for failing to meet the substantial completion dates, Tamarack directed Teufel to move forward with the work after the substantial completion dates under the same terms Teufel had been working. (Tr., Vol. II, pp. 272-73, ll. 23-25, 1-4)

Finally, and even more informative, is the language used in the 2005, 2006 and 2007 Landscaping Agreements to describe the identified work; "**Finish** landscape installation...," "**Complete** landscaping...," (Tr. Ex. 9:002), "**Supplemental** landscaping...," "**Completion** of

the landscape...." (Tr. Ex. 9:003), and "**Completion** of Golden Bar Townhomes." (Tr. Ex. 9:004) (emphasis added). This plain language points to the parties' intent that Teufel continuously work on Tamarack Resort as a single, contiguous improvement.

Because the District Court erroneously found that Teufel had four separate contracts with Tamarack, it incorrectly concluded that Teufel's priority date was in 2007[19], and ultimately concluded that Credit Suisse's mortgages were prior to Teufel's Claim of Lien. This Court exercises free review over conclusions of law, and given the errors of the District Court in this case, this Court should reverse the District Court and find that Teufel's Claim of Lien is superior to the Credit Suisse mortgages.

2. Did the District Court Err in Calculating the Lien Amount?

The District Court improperly reduced Teufel's lien amount after the trial and further adopted the incorrect interest calculation in formulating Teufel's overall amount due.

a. Did the District Court improperly eliminate a portion of Teufel's lien amount?

Teufel presented substantial and competent evidence that the amount of its claim of lien that had priority over Credit Suisse's mortgages totaled $406,199.07. The District Court improperly reduced that amount to $306,543.30. (R., pp. 3842-46)[20] The District Court based

[19] Again, contrary to Idaho law, the District Court and Credit Suisse both reason that Teufel had been paid for its work in 2004, 2005 and 2006, thus it could only lien for its 2007 work.

[20] Teufel's original claim of lien totaled $564,560.23. (Tr. Ex. 9:006) The claim of lien included an allocation of amounts by area of the Tamarack Resort where the improvements were made. Although Teufel was not paid for any of the work covered by the claim of lien, Teufel was required to partially release its lien as to certain parcels of property within the Tamarack Resort because its prior attorney failed to name the property owners in the original complaint. These partial releases only released Teufel's lien priority for those amounts, but did not extinguish the actual amount Tamarack owed Teufel for the improvements. Teufel obtained a monetary judgment against Tamarack for the entire amount owed, plus costs and attorney's fees. The lien amount relating to priority over Credit Suisse's mortgages is the only issue in dispute for this appeal.

its decision to reduce the amount of the claim of lien for parcels that were not allocated to any one parcel, inappropriately negating almost $100,000 of Teufel's claim of lien.

Generally, if a claim of lien covers multiple properties or improvements, the lien claimant is required to allocate its lien among the various properties or improvements. I.C. § 45-508. The statute states:

> In every case in which one (1) claim is filed against two (2) or more buildings, mines, mining claims, or other improvements, owned by the same person, the person filing such claim must, at the same time, designate the amount due him on each of said buildings, mines, mining claims, or other improvement; otherwise the lien of such claim is postponed to other liens. The lien of such claim does not extend beyond the amount designated as against other creditors having liens by judgment, mortgage, or otherwise, upon either of such buildings, or other improvements, or upon the land upon which the same are situated.

I.C. § 45-508. However, if the work constitutes one improvement, such as landscaping for an entire project, the claim of lien does not fall under the requirements of I.C. § 45-508. *Hopkins*, 151 Idaho at 746, 264 P.3d at 385. This Court has further reiterated:

> The purpose of Idaho's mechanics' and materialmen's lien statutes, Chapter 5, Title 45, Idaho Code, ("lien law") is to compensate persons who perform labor and provide materials for improvements to or upon real property. *See generally BMC West Corp. v. Horkley,* 144 Idaho 890, 893-94, 174 P.3d 399, 402-03 (2007). In Idaho, "[m]aterialman's lien laws are construed liberally in favor of the person who performs labor upon or furnishes materials to be used in the construction of a building." *Id.* (internal quotation omitted). Indeed, such a right is grounded in Idaho's Constitution, which provides that "[t]he legislature shall provide by proper legislation for giving to mechanics, laborers, and material men an adequate lien on the subject matter of their labor." Idaho Const. art. XIII, § 6.

Id. at 744, 264 P.3d at 383. Although "improvement" is not defined in the lien law, this Court in *Hopkins* was abundantly clear that grading, filling, leveling, or otherwise improving ground was distinguished from improvements to buildings and structures. *Id.* If the improvements are made

to the land as a whole, it is more properly characterized as a single improvement and not bound by the allocation requirements in I.C. § 45-508. *Id.* at 746, 264 P.3d at 385.

In this case, the District Court invalidated portions of Teufel's Claim of Lien because the retention fees and erosion control amounts were not allocated to specific parcels of property. (R., p. 3846) Credit Suisse failed to direct this Court to any authority supporting the District Court's erroneous decision. Notably, Teufel was not required to allocate its Claim of Lien to such a mathematical certainty between the parcels at Tamarack. (*See Hopkins* discussion, *supra*). The District Court stated that Teufel had met its burden of proof on the information contained in Exhibit 9:056[21], but then it still reduced the lien for the erosion control and retention amounts, because "the item did not relate to any specific parcel for which foreclosure was sought." (R., p. 3846, fns. 68, 70, 72, 74, 75, 78, 79, 80, 90) The District Court improperly determined that these parcels "were not subject to the lien" because they were not attached to specific parcels or part of the "property" owned by Tamarack. *Id.* In all, the District Court subtracted $99,655.77 from Teufel's lien amount based on its lack of specificity in the lien, contrary to Idaho law.[22] Credit Suisse simply glossed over this fact and stated that *Hopkins* did not apply to Teufel because the Tamarack Resort "was not like a single project like a golf course."[23]

Further, Credit Suisse incorrectly stated in its Respondent's Brief that Teufel could not explain why there was discrepancy with the dollar amounts in the final calculation at trial and in

[21] Trial Exhibit 9:056 is attached to Appellant's Brief as Appendix J.
[22] *See* I.C. § 45-508, and *Hopkins*, 151 Idaho 740, 264 P.3d 379.
[23] *See* Respondent's Brief, p. 30.

the previously filed trial brief or lien disclosures.[24] To the contrary, Christensen specifically testified that the "erosion control" amount was mistakenly left out of the calculation "because it couldn't be pigeonholed to a parcel, so it was just left off when, in fact, it deserved to be included." (Tr., Vol. II, p. 475, ll. 21-24) He further testified that "retention" amounts were also left out of the previous disclosure for the same reason, that they were not attributable to any one specific parcel. (Tr., Vol. II, ll. 3-17) Christensen went on to testify that the amount of the lien was $406,199.07, which went completely uncontradicted by Credit Suisse. (Tr., Vol. II, p. 497, l. 1)

Because Teufel's lien need not be allocated in order to maintain validity and priority, this Court should reverse the District Court's reduction in the lien amount and reinstate Teufel's Claim of Lien in the amount of $406,199.07 as sought, and proven, at trial.

b. Did the District Court Err in its Calculation of Interest?

The District Court incorrectly adopted Credit Suisse's interest calculation, which is not supported by Idaho law. Credit Suisse argued that Teufel's rate of interest should be variable because this is the rate the District Court applied to the other lien claimants in the overall Tamarack Litigation.[25]

Teufel contracted with Tamarack to install landscaping at Tamarack Resort. Pursuant to the Paragraph 6.4 of the Landscape Construction Agreement:

> Payments due and unpaid under this Agreement shall bear interest from the date payment is due at a per annum rate equal to the prime rate published by Wells Fargo Bank in Boise, Idaho plus two percent (2%).

[24] For the same reason it was inappropriate for the District Court to rely upon the Affidavit of Rick Christensen, it was equally inappropriate for the District Court to rely on the Trial Brief as substantive evidence at the trial when the trial brief was not admitted into evidence. *See* argument *supra*, p. pp. 8-11.
[25] *See* Respondent's Brief, p. 37.

Paragraph 6.4 is found in the Landscape Construction Agreements for 2004, 2005, 2006 and 2007. (Tr. Exs. 9:001, 9:002, 9:003, 9:004) There was no reference to a variable interest rate in any of the Landscape Construction Agreements. Under the terms of the Landscape Construction Agreements, Paragraph 6.2.1, "payments shall be made by Owner no later than twenty (20) days after the Landscape Architect receives the Application for Payment." These calculations were provided to the District Court, yet it did not adopt the prejudgment interest calculation according to the Landscape Construction Agreements. Rather, the District Court erroneously adopted Credit Suisse's interest calculation citing its prior rulings in other mechanic's lien claims that the interest rate should be variable. This finding, however, is not supported by Teufel's Landscape Construction Agreements, which do not cite to a variable interest rate. (R., p. 4240) Credit Suisse failed to provide any legal authority explaining why it would be appropriate for the District Court to deviate from the plain language of the Landscape Construction Agreements. Accordingly, the District Court's interest calculation should be reversed and Teufel's calculations should be applied.

3. Did the District Court Err in Apportioning Teufel's Costs and Attorney Fees?

The District Court improperly apportioned Teufel's costs and attorneys' fees. Idaho Code § 45-513 states, in pertinent part, "the court shall also allow as part of the costs the moneys paid for filing and recording the claim, and reasonable attorney's fees." This has been interpreted to mean that "a successful lien claimant is entitled to an award of attorney fees incurred in foreclosure proceedings." *Perception Constr. Mgmt. v. Bell*, 151 Idaho 250, 254

P.3d1246 (2011). As Teufel successfully established its lien and its right to foreclose, it is entitled to attorney fees under I.C. §45-513.

Credit Suisse argued that because Teufel's claim of lien was not given priority over Credit Suisse's mortgages, a forty percent (40%) reduction in its fees were appropriate. Notably, Credit Suisse **did not** argue that if Teufel is ultimately granted priority by this Court, Teufel's costs and attorneys' fees were unreasonable or unnecessary. Credit Suisse simply reiterated the "prevailing party" analysis and argued that the District Court was within its discretion to apportion fees based on the priority issue.

Furthermore, the District Court did not make any findings that Teufel's attorneys' fees and costs were unreasonable. Thus, if the District Court's decision regarding priority between Teufel and Credit Suisse is reversed, Teufel should be awarded all of its costs and fees. Consequently, Teufel would be entitled to costs as a matter of right in the amount of $4,239.23, discretionary costs in the amount of $8,843.27 and attorneys' fees in the amount of $270,942.00, for a total of $284,024.50.

III. CONCLUSION

This appeal presents issues of both fact and law. The District Court made erroneous factual findings which resulted in it making incorrect conclusions of law when it determined that Credit Suisse's mortgages had priority over Teufel's claim of lien. After reviewing the Record, the Trial Transcript, and the Trial Exhibits, it should be apparent that the District Court's factual findings were clearly erroneous and not based upon substantial or competent evidence. Credit Suisse failed to direct this Court to any substantial or competent evidence or legal authority to support the District Court's findings and conclusions. Consequently, Teufel respectfully

requests that this Court reverse the District Court's erroneous findings of fact, and determine as a matter of law that Teufel's Claim of Lien has lien priority over Credit Suisse's mortgages, and the amount of Teufel's lien is $406,199.07, plus prejudgment interest as set forth herein, including all of Teufel's costs and attorneys' fees sought below.

RESPECTFULLY SUBMITTED this 17 day of July, 2013.

PICKENS LAW, P.A.

By: _____
Terri R. Pickens, of the firm
Attorneys for Teufel Nursery, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17 day of July, 2013, I caused to be served two true and accurate copies of the foregoing REPLY BRIEF by placing the same in the United States mail, First Class, postage prepaid, to the following:

Bruce Badger
Fabian Clendenin
215 S. State, Ste. 1200, Ste. 1200
Salt Lake City, UT 84111-2323

Terri R. Pickens