

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF LOUISIANA**

IN RE:

TUSCANY RESERVE, LLC

CASE NO. **09-11027**

DEBTOR

CHAPTER 11

SHREVE LAND CONSTRUCTORS, LLC

ADV. NO.

PLAINTIFF

10-1042

v.

TUSCANY RESERVE, LLC.

COMPASS BANK AND

CITIZENS BANK AND TRUST COMPANY

DEFENDANTS

MEMORANDUM OPINION

Shreve Land Constructors, LLC ("Shreve Land") sued to determine the validity, priority and extent of its lien and that of another secured creditor, Citizens Bank and Trust Company ("Citizens"), on property of debtor Tuscany Reserve, LLC.¹ The evidence established that Shreve Land's lien outranks the Citizens mortgage, and did not support a finding that Shreve Land's obligation was novated or lost its ranking.

FACTS

The debtor and Shreve Land contracted on September 28, 2006 to build an apartment complex called Tuscany Villas ("Tuscany project") in Baton Rouge, Louisiana. The contract

¹ Shreve Land's complaint originally also sought to rank the lien of Compass Bank. However, on Shreve Land's motion the court's dismissed the plaintiff's claims against both Compass Bank and the debtor on February 22, 2011 (P-97).

was recorded October 16, 2006 in the mortgage records of East Baton Rouge Parish.² Compass Bank was the construction lender and the ranking mortgage on the project secures its claim.

When the debtor repeatedly failed to pay Shreve Land as agreed, on May 28, 2008, the contractor filed a statement of claim and privilege under the Louisiana Private Works Act in the mortgage records of East Baton Rouge Parish.³ The statement claimed \$1,166,104 for the plaintiff's work on the Tuscany project. Shreve Land later agreed to cancel the lien inscription after discussions with the debtor's principals because the lien filing was an event of default under the debtor's loan agreement with Compass. Both Carl Bantle, Shreve Land's owner and president, and Robert Peek, a member and the manager of the debtor, acknowledged that Compass would not have continued to fund the construction loan had Shreve Land not cancelled its lien inscription.⁴

According to Bantle's testimony, in exchange for its agreement to cancel the lien inscription and as additional security for Tuscany's debt, Shreve Land received: (1) the debtor's July 29, 2008 promissory note for \$1,066,104,⁵ which the debtor's members Peek, Arthur Lancaster and Lacy Howe also signed as co-makers; (2) the debtor's members' guaranty of up to \$598,480 of Tuscany's debt to Shreve Land; (3) a security interest in the debtor's membership interests and also in its distributions of cash, movables or immovables; and (4) a second mortgage on property in Frisco, Texas owned by Preston Reserve, L.L.C., an entity that some of

² Exhibit SLC 1. The Louisiana Private Works Act, La. R.S. 9:4801 *et seq.*, grants contractors a privilege on immovable property to secure the owner's debts for the price of the contractor's work on the immovable.

³ Exhibit SLC 2, pp. 1-2.

⁴ Bantle's affidavit prepared for Shreve Land's state court suit against the debtor recited Bantle's understanding that the lien was released "for the first mortgagee bank" (Compass) to continue funding the project, and in turn, amounts the debtor owed Shreve Land. Exhibit CBT 6, p.1.

⁵ Peek testified that Tuscany then owed Shreve Land \$1,066,104, which differs from Shreve Land's May 28, 2008 lien claim because the debtor paid Shreve Land \$100,000 after the plaintiff filed the May 2008 lien.

the debtor's principals owned.⁶ A July 28, 2008 letter signed by Bantle and the debtor's members memorialized the parties' agreement ("letter agreement").⁷ After Shreve Land cancelled the lien inscription on September 9, 2008,⁸ Compass funded two of the debtor's draw requests.

Bantle testified that Shreve Land's temporary measure to resolve the dispute was not intended to novate the debtor's contractual obligation or to relinquish any of Shreve Land's contract rights against Tuscany. The debtor agreed with this assessment: Peek confirmed that during their negotiations, Tuscany never discussed novation of the debtor's contractual obligation to Shreve Land or understood that Shreve Land was surrendering its rights under the original agreement. In fact, Peek conceded at trial that Shreve Land had not yet completed its undertaking before the parties' July 2008 letter agreement, and had more work to perform to fulfill its contract with Tuscany.

Despite their arrangement, Tuscany again defaulted and so Shreve Land filed two statements of claim and privilege on October 15, 2008, for work done on the project: one for a total amount of \$1,116,989.90 plus interest (interest was owed on \$1,056,095.90 of the total from May 15, 2008 and on the remaining \$60,894.00 from October 15, 2008);⁹ and the second for \$252,357.00, on which interest started accruing on September 15, 2008.¹⁰

⁶ Exhibits CBT 7 (deed of trust for Texas property), 18 (promissory note), 19 (security agreement) and 20 (guaranty).

⁷ Exhibit CBT 6, pp. 2-4.

⁸ Exhibit SLC 2, p.3.

⁹ Exhibit SLC 2, pp. 4-6.

¹⁰ Exhibit SLC 2, pp. 7-8. This statement of claim and privilege amended one filed on October 8, 2008 to add interest. Shreve Land filed yet another statement of claim and privilege on December 15, 2008 for \$285,232, plus interest from December 10, 2008, representing retainage owed on the construction contract. Exhibit 4C to Second Amended Petition for Money Judgment, Exhibit CBT 3.

Shortly before Shreve Land filed its statements of claim and privilege, on or about October 3, 2008, the debtor had borrowed operating funds from Citizens, securing the loan with a collateral mortgage on the immovable property subject to Shreve Land's Private Works Act claims.¹¹ Not long after, Shreve Land sued Tuscany and its principals on the July 29, 2008 promissory note, which had matured.¹² The state court petition specifically reserved Shreve Land's construction contract claims against the defendants. Shreve Land amended the petition on April 29, 2009 to allege claims against Tuscany under the recorded construction contract and the Louisiana Private Works Act as a result of the liens recorded in October 2008.¹³ The debtor's July 10, 2009 bankruptcy filing stayed Shreve Land's lawsuit.

ANALYSIS

I. Tuscany's Debt to Shreve Land was not Novated

Citizens Bank argues that Shreve Land's taking a promissory note in lieu of payment after Tuscany defaulted on its contract, and its later cancellation of the May 28, 2008 lien, through novation transformed Shreve Land's claim against Tuscany from a construction contract claim secured by Private Works Act liens into an unsecured claim based on the July 29, 2008 promissory note.

Louisiana Civil Code article 1879 defines *novation* as "the extinguishment of an existing obligation by the substitution of a new one." The Civil Code mandates a careful review of the facts surrounding a transaction before concluding that novation has occurred: "[t]he intention to

¹¹ The mortgage was recorded October 3, 2008. Exhibit CBT 2, pp. 4-6.

¹² Petition for Money Judgment, *Shreve Land Constructors, L.L.C. v. Tuscany Reserve, L.L.C. et al*, No. 571,498, Nineteenth Judicial District Court for East Baton Rouge Parish. Exhibit CBT 2.

¹³ Second Amended Petition for Money Judgment, Exhibit CBT 3. A Certificate of Substantial Completion for the Tuscany project was filed with the clerk of court for East Baton Rouge Parish on January 12, 2009. The certificate recited that the project was substantially completed on November 11, 2008. Shreve Land filed a notice of lis pendens to preserve its privilege on January 23, 2009.

extinguish the original obligation must be clear and unequivocal. Novation may not be presumed." La. Civ. Code art. 1880. Most importantly, Louisiana Civil Code Article 1881 states that –

Novation takes place when, by agreement of the parties, a new performance is substituted for that previously owed, or a new cause is substituted for that of the original obligation. If any substantial part of the original performance is still owed, there is no novation.

Novation takes place also when the parties expressly declare their intention to novate an obligation.

Mere modification of an obligation, made without intention to extinguish it, does not effect a novation. The execution of a new writing, the issuance or renewal of a negotiable instrument, or the giving of new securities for the performance of an existing obligation are examples of such a modification.

Novation requires a finding that the parties' intent (the most important factor), the character of the transactions involved, the surrounding facts and circumstances and the terms of the agreement indicate that the parties desired to effect a novation. *Scott v. Bank of Coushatta*, 512 So.2d 356, 360 (La. 1987). The party contending that novation has occurred has the burden of proving a novation by "convincing proof." *Pike Burden Printing, Inc. v. Pike Burden, Inc.*, 396 So.2d 361, 366 (La. App. 1st Cir. 1981).

No convincing evidence supports a finding that the debtor and Shreve Land intended to novate the debt based on payments due under the construction contract. Rather, the evidence demonstrated that the debtor merely intended to give Shreve Land a promissory note for an antecedent debt and provide additional security for the payment of that debt, actions permitted by article 1881 without novating the original obligation if the parties lacked the intent to do so.

Specifically, both Carl Bantle and Robert Peek testified that they intended that Shreve Land cancelled its May 28, 2008 lien inscription and accepted substitute and additional security for the construction contract debt solely to ensure Compass's continued funding of the Tuscany

project. The letter agreement corroborates their testimony and is further evidence of the parties' intention. Bantle and Peek also affirmed that the parties did not discuss Shreve Land's giving up any of its rights under the contract. Moreover, Peek admitted that Shreve Land had more work to do on the project after July 2008, plainly demonstrating that both parties intended that Shreve Land would complete the original contract. *See Sterlington Bank v. Terzia Lumber & Hardware, Inc.*, 146 So.2d 233, 235-36 (La. App. 2d Cir. 1962), citing *W.W. Carre Co. v. E. J. Stewart & Co.*, 117 So. 238, 239 (La. 1928) (accepting a note in exchange for an antecedent debt does not constitute novation without proof of a specific intent that the parties intended a novation, because novation is never presumed).

Shreve Land's lien filings in the fall of 2008 after Tuscany again defaulted further support a finding and conclusion that Shreve Land did not intend to create a new obligation in place of the debtor's obligation under the construction contract. Shreve Land's October 2008 statements of claim and privilege allege that Tuscany still owed plaintiff the amounts set forth in the May 28, 2008 statement of claim, plus amounts for later work for which the debtor had not yet paid Shreve Land. In fact, the April 2009 amendment to the Shreve Land's state court petition included the construction contract claims its original petition reserved the right to assert. All this evidence undermines Citizens' claim that novation took place.

In summary, Shreve Land responded to Tuscany's payment defaults by reaching an accommodation with Tuscany that enabled the debtor to continue to receive funding from the construction lender. The parties' letter agreement, and Shreve Land's acceptance of additional security for Tuscany's debt, did not release each other from the remaining substantial performance their original contract required. Therefore, the evidence does not support a finding that either the debtor or Shreve Land intended a novation of the 2006 construction contract. As a

result, Shreve Land's claim did not become an unsecured claim through novation and lose its secured status.

2. *Shreve Land's Louisiana Private Works Act Lien is Valid*

Citizens argues in the alternative that Shreve Land effectively abandoned its privilege by cancelling the May 2008 lien inscription and then accepting Tuscany's promissory note in payment of the construction contract debt. Neither the Louisiana Private Works Act nor any other Louisiana law supports this proposition.

Section 4801 of title 9 of the Louisiana Revised Statutes and the following provisions, collectively known as the Private Works Act, grant general contractors and others a privilege on immovable property to secure debts of the owner of the immovable for the price of the contractor's work on the immovable. The Private Works Act prescribes the measures necessary to establish and preserve the privilege.

First, written notice of the contract between a contractor and an owner must be filed with the recorder of mortgages in the parish where the work is to be done. La. R.S. 9:4811 (content of notice), 4831 (method and place of filing notice). The contractor's privilege is effective as of the date the notice of contract is filed, and ranks ahead of mortgages filed afterward. La. R.S. 9:4820 (privilege's effective date as to third persons), 4821 (ranking of privileges). To preserve the privilege afforded by La. R.S. 9:4801(1), after filing the notice of contract a contractor also must file a statement of claim or privilege within sixty days following the filing date of a notice of termination or substantial completion of the work. La. R.S. 9:4822(B). A contractor then must sue the immovable's owner to enforce the privilege within one year after the time for filing the statement of privilege expires to protect the privilege from extinguishment. La. R.S. 9:4823(A)(2). Finally, in order to be effective against third persons, La. R.S. 9:4833(E) requires

that within one year after filing the statement of claim or privilege, the privilege holder also file for recordation a notice of lis pendens identifying the lawsuit filed in compliance with section 4823.

To summarize, a general contractor desiring to effectuate and preserve its privilege as to third parties must file:

- (1) a written notice of contract;
- (2) a statement of claim or privilege within 60 days after the filing of a notice of termination or substantial completion of work;
- (3) a lawsuit to enforce the privilege within one year after the period for filing a statement of privilege expires; and
- (4) a notice of lis pendens within one year after the statement of privilege is filed.

Shreve Land filed its construction contract with the debtor in East Baton Rouge Parish on October 16, 2006, which therefore is the effective date of its contractor's privilege. Substantial completion of the Tuscany project occurred November 11, 2008,¹⁴ and so La. R.S. 9:4822(B) gave Shreve Land until January 10, 2009 to file a statement of claim in the public record to preserve its privilege. Shreve Land preserved the privilege against Tuscany by filing its statements of claim and privilege on October 15, 2008 and December 15, 2008.¹⁵ Next, to avoid extinguishment of the privilege Shreve Land was obliged to sue Tuscany before one year after the expiration of the time for filing a statement of privilege, or January 10, 2010. Its October 8, 2008 lawsuit against the debtor therefore was timely, as was the April 29, 2009 amended petition

¹⁴ See footnote 13.

¹⁵ Shreve Land's filing of the statements of claim and privilege before the Certificate of Substantial Completion was filed does not affect the privilege. *See Paul Hyde, Inc. v. Richard*, 854 So.2d 1000, 1003 (La. App. 4th Cir. 2003) (private works act claim filed *before* substantial completion of work was valid lien under La. R.S. 9:4822(B), since "[r]eading La. R.S. 9:4822(B) to require the filing of a lien only within a sixty-day window 'would make it more difficult for lien claimants to assert their rights'" (citation omitted).

that included a claim on the privilege. Finally, Shreve Land filed a notice of lis pendens to preserve the privilege against third parties on January 23, 2009,¹⁶ well within one year after filing its October 15, 2008 statement of claim and privilege.¹⁷ The evidence established that Shreve Land took all steps necessary to create and preserve its contractor's lien under La. R.S. 9:4822.

Moreover, Shreve Land did not abandon its privilege, as Citizens argues.¹⁸ Citizens relies on *Dixie Lumber Company, Inc. v. Trinity Universal Insurance Co.*, 148 So.2d 924 (La. App. 4 Cir. 1963). *Dixie Lumber* does not address abandonment or even cancellation of a lien, but rather the estoppel effect of *payment* on enforcement of a lien. Because the evidence established that Tuscany had not paid Shreve Land the amount due as of the July 2008 letter agreement and that the debtor later defaulted on its promissory note payment due on October 6, 2008, *Dixie Lumber* is inapplicable.

Nor has Citizens pointed to any Louisiana statute or jurisprudence that bars a contractor from filing a second statement of claim and privilege under La. R.S. 9:4801 after the contractor has cancelled an earlier lien inscription. Nothing in these facts suggests that Shreve Land did not have that right, as long as it was done in the manner prescribed by the Private Works Act. The debtor's construction contract with Tuscany was filed in the public records on October 16, 2006 and was not terminated. Shreve Land performed additional work on the Tuscany project after the July 2008 letter agreement and the cancellation of the May 28, 2008 statement of claim and

¹⁶ See footnote 13.

¹⁷ The notice of lis pendens would be timely even if the deadline for filing it is calculated from October 8, 2008, the day on which Shreve Land filed its original statement of claim and privilege for \$252,357 that its October 15, 2008 filing amended.

¹⁸ In fact, no section of the Private Works Act refers to *abandonment* of a privilege. The Act only addresses extinguishment of a privilege. Citizens points to no other Louisiana statute in support of its argument that Shreve Land abandoned the privilege.

privilege. Substantial completion of work on the Tuscany project did not occur until November 11, 2008. Thus, the October and December 2008 statements of claim and privilege were properly filed and remained valid encumbrances on the immovable property.

CONCLUSION

The evidence supports a finding and conclusion that the parties did not intend a novation of the debtor's original contractual obligation to Shreve Land. Shreve Land also established its valid contractor's privilege securing Tuscany's debt under the contract, effective October 16, 2006. That privilege primes Citizens's collateral mortgage.

Baton Rouge, Louisiana, March 3, 2011.

s/Douglas D. Dodd
DOUGLAS D. DODD
UNITED STATES BANKRUPTCY JUDGE