United States Bankruptcy Court
Northern District of Illinois
Eastern Division

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Bankruptcy Caption: In re Outboard Marine Corporation, et al.

Bankruptcy No. 00 B 37405

Adversary Caption: Bank of America, N.A. v. Outboard Marine Corporation, et al.

Adversary No. 01 A 00471

Date of Issuance: December 23, 2002

Judge: Judge John H. Squires

Appearance of Counsel:

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	
OUTBOARD MARINE CORPORATION, et al.,	)	Chapter 7
	)	Bankruptcy No. 00 B 37405
	)	(Jointly Administered)
Debtors.	)	Judge John H. Squires
	)	
	)	
BANK OF AMERICA, N.A.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adversary No. 01 A 00471
	)	
OUTBOARD MARINE CORPORATION, et al.,	)	
	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

This matter comes before the Court on the motion of Fox Systems, Inc. ("Fox Systems") and Fox and Brindle Construction Co., Inc. ("Fox & Brindle") for partial summary judgment pursuant to Federal Rule of Civil Procedure 56 and Federal Rule of Bankruptcy Procedure 7056 on the complaint filed by Bank of America, N.A. (the "Bank") against, among others, the Debtor, Outboard Marine Corporation, Fox Systems and Fox & Brindle to determine the extent, validity and priority of liens in the Debtor's property. Fox Systems and Fox & Brindle filed the instant motion seeking payment on their claims from funds received by

the Bank as a result of a post-petition sale of the Debtor's real property located in Georgia, in which Fox Systems and Fox & Brindle allege they have valid mechanic's liens. For the reasons set forth herein, the Court denies the motion.

I. JURISDICTION AND PROCEDURE

The Court has jurisdiction to entertain this matter pursuant to 28 U.S.C. § 1334 and Internal Operating Procedure 15(a) of the United States District Court for the Northern District of Illinois. It is a core proceeding under 28 U.S.C. § 157(b)(2)(K) and (O).

II. FACTS AND BACKGROUND

Many of the facts are undisputed and some background information is necessary. On January 6, 1998, Outboard Marine Corporation and some of its related entities (collectively the "Debtor") and its pre-petition lenders (the "Pre-petition Lenders") entered into a credit agreement pursuant to which the Pre-petition Lenders agreed to make revolving credit advances and provided letters of credit to borrowers. To secure payment of all obligations arising from the credit agreement, the Debtor granted the Bank, which was named Pre-Petition Agent for the benefit of the Pre-petition Lenders, security interests in specific collateral, including the Debtor's real property located in Georgia (the "Georgia Property"). The Bank, as Pre-petition Agent on behalf of the Pre-petition Lenders, properly perfected its security interest in the collateral.

On December 22, 2000, the Debtor filed a voluntary Chapter 11 petition. The case was converted to a Chapter 7 case on August 20, 2001, and Alex D. Moglia was appointed as the Chapter 7 case trustee (the "Trustee").

Fox Systems and Fox & Brindle are engaged in the business of providing certain construction related services, including electrical contracting. Fox Systems is a licensed electrical contractor in Georgia. See Affidavit of Randall Fox at ¶ 5. Fox & Brindle is a licensed general contractor in Georgia. See Affidavit of Steve Fox at ¶ 5.

Fox Systems received purchase orders from the Debtor for improvements to the Georgia Property, which were accepted by Fox Systems. See Affidavit of Randall Fox at ¶ 6. Fox & Brindle received purchase orders from the Debtor for improvements to the Georgia Property, which were accepted by Fox & Brindle. See Affidavit of Steve Fox at ¶s 6 and 7. For all improvements for which it asserts a lien, Fox Systems completed the improvements to the Georgia Property in a workmanlike manner in accordance with the terms of the Debtor's purchase orders and such improvements were accepted by the Debtor. See Affidavit of Randall Fox at ¶s 7 and 8.

For all improvements for which it asserts a lien, Fox & Brindle completed the improvements to the Georgia Property in accordance with the terms of the Debtor's purchase orders in a workmanlike manner, and such improvements were accepted by the Debtor. See Affidavit of Steve Fox at ¶ 9 and Affidavit of Phil Sanford at ¶ 6. Each Fox Systems improvement was completed less than ninety days prior to December 28, 2000. See Affidavit of Randall Fox at ¶ 9.

The first material factual dispute concerns when Fox & Brindle completed their work. This material fact is controverted by both the Trustee and the Bank. They argue that Exhibit A of the Trustee's Rule 402.N statement, which is an invoice dated October 3, 2000 by which Fox & Brindle billed the Debtor for "completion of three projects" totaling $6,999.00, the principal amount of the claim, demonstrates that the work was completed on October 3, 2000. Thus, they contend that Fox & Brindle recorded its lien claim late, or more than three months after completion of its work for the Debtor. Fox & Brindle, however, maintain that it completed its work as of November 17, 2000, which is not more than ninety days prior to February 8, 2001. See Affidavit of Phil Sanford at ¶ 6.

Fox Systems filed a mechanic's lien with the Clerk of the Superior Court of Gordon County, Georgia on December 28, 2000 against the Georgia Property in the amount of $54,124.09. See Affidavit of William R. Thompson, Jr. at ¶ 4 and Exhibit A thereto. Fox & Brindle filed a mechanic's lien with the Clerk of the Superior Court of Gordon County, Georgia on February 8, 2001 against the Georgia Property in the amount of $6,999.00. Id. ¶ 6 and Exhibit C thereto.

The Georgia Property was improved by Fox Systems and Fox & Brindle, owned by the Debtor at the time of the filing of the mechanic's liens, and sold pursuant to 11 U.S.C. § 363(f) pursuant to an order of the Court entered on February 9, 2001 (the "Sale Order").

After the filing of the bankruptcy petition, the Court authorized the Debtor to borrow from the post-petition lenders (the "Post-petition Lenders") pursuant to an order entered by the Court on January 25, 2001 (the "Final DIP Order"). The Debtor granted to the Post-petition

Lenders security interest in and liens upon and including "all real and personal property of the Debtors and their estates, whether now owned or hereafter acquired or arising, whether tangible or intangible, and wherever located. . . ."

Pursuant to the Final DIP Order, the Bank, as DIP Agent, was granted a fully perfected: (1) first priority security interest in and lien upon the collateral not subject to any other properly perfected, valid, non-avoidable and enforceable liens or security interests as of the petition date, subject only to the carve-out (as defined in the Final DIP Order); (2) priming lien in the pre-petition collateral in accordance with 11 U.S.C. § 364(d)(1); and (3) a junior lien in other collateral, subject to valid, non-avoidable and enforceable liens or security interests as of the petition date.

Thus, the Bank, as Pre-petition Agent and DIP Agent, alleges an interest in proceeds of the sale of the Debtor's Georgia Property. The Bank had no pre-petition interest in the Debtor's Georgia Property. The Bank's post-petition interest in the Debtor's Georgia Property arose through the Final DIP Order and pursuant to its terms is subordinate to all liens, which were properly perfected, valid, enforceable and non-avoidable as of the petition date. The Debtor owned the Georgia Property when Fox Systems and Fox & Brindle originally asserted mechanic's liens therein. They now assert liens as to the sale proceeds pursuant to the Sale Order in which liens were to attach to the sale proceeds.

On April 3, 2001, the Bank, the Debtor, the Official Unsecured Creditors' Committee, Fox Systems and Fox & Brindle stipulated that in exchange for the cancellation of Fox Systems and Fox & Brindle's mechanic's liens in the Georgia Property, the liens of Fox Systems and

Fox & Brindle would attach to the sale proceeds of the Georgia Property with the same validity, force and effect as if the liens attached to the Georgia Property itself. On April 3, 2001, Fox Systems and Fox & Brindle canceled their mechanic's liens pursuant to the stipulations and the Sale Order and such cancellations were duly signed and delivered to the Debtor. See Affidavit of William R. Thompson, Jr. at ¶s 8 and 9 and Exhibits B and D thereto.

On May 18, 2001, the Bank, in its capacity as Pre-petition Agent and DIP Agent filed the instant multi-count complaint to determine the extent, validity and priority of liens in various property of the Debtor and to compel the turnover of collateral proceeds. In Count VII of the complaint, the Bank argues that its valid and enforceable first priority lien as Pre-petition Agent and DIP Agent in the sale proceeds of the Georgia Property is superior to the lien interests asserted by various creditors, including Fox Systems and Fox & Brindle. Fox Systems and Fox & Brindle commenced actions for recovery of the amount of their claims by filing counterclaims against the Bank and cross-claims against the Debtor in this adversary proceeding in June 2001. At the time Fox Systems and Fox & Brindle filed their answers, counterclaims and cross-claims, the Georgia Property had already been sold under § 363(f) pursuant to the Sale Order.

III. CONTENTIONS OF THE PARTIES

The gist of this matter surrounds proper disposition of the proceeds of the sale of the Georgia Property. Fox Systems and Fox & Brindle assert that they have perfected liens, which are superior to all other parties, against the sale proceeds, and therefore are entitled to be paid

first to the extent of their lien claims, plus interest. The Bank and the Trustee argue that Fox Systems and Fox & Brindle have not properly complied with the requirements under Georgia law for attachment and perfection of their inchoate mechanic's lien interests in the sale proceeds of the Georgia Property. The Bank contends that its lien as Prepetition Agent and DIP Agent, which was granted pursuant to the Final DIP Order, has priority over any interest of Fox Systems and Fox & Brindle in the Georgia Property. According to the Bank, because Fox Systems and Fox & Brindle failed to comply with the requirements under Georgia law for attachment and perfection of their mechanic's lien interests in the Georgia Property, any interests would not be an "existing lien" as defined in the Final DIP Order. As a result, the lien of the DIP Agent granted under the Final DIP Order has priority over any interests of Fox Systems and Fox & Brindle in the Georgia Property.

IV. APPLICABLE STANDARDS

In order to prevail on a motion for summary judgment, the movant must meet the statutory criteria set forth in Rule 56 of the Federal Rules of Civil Procedure, made applicable to adversary proceedings by Federal Rule of Bankruptcy Procedure 7056. Rule 56(c) reads in part:

> [T]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c). See also Dugan v. Smerwick Sewerage Co., 142 F.3d 398, 402 (7th

Cir. 1998). The primary purpose for granting a summary judgment motion is to avoid unnecessary trials when there is no genuine issue of material fact in dispute. Trautvetter v. Quick, 916 F.2d 1140, 1147 (7th Cir. 1990); Farries v. Stanadyne/Chicago Div., 832 F.2d 374, 378 (7th Cir. 1987) (quoting Wainwright Bank & Trust Co. v. Railroadmen's Federal Sav. & Loan Ass'n of Indianapolis, 806 F.2d 146, 149 (7th Cir. 1986)). Where the material facts are not in dispute, the sole issue is whether the moving party is entitled to a judgment as a matter of law. ANR Advance Transp. Co. v. International Bhd. of Teamsters, Local 710, 153 F.3d 774, 777 (7th Cir. 1998).

In 1986, the United States Supreme Court decided a trilogy of cases which encourages the use of summary judgment as a means to dispose of factually unsupported claims. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Electric Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986); Celotex Corp. v. Catrett, 477 U.S. 317 (1986). The burden is on the moving party to show that no genuine issue of material fact is in dispute. Anderson, 477 U.S. at 248; Matsushita, 475 U.S. at 585-86; Celotex, 477 U.S. at 322.

All reasonable inferences drawn from the underlying facts must be viewed in a light most favorable to the party opposing the motion. Parkins v. Civil Constructors of Ill., Inc., 163 F.3d 1027, 1032 (7th Cir. 1998). The existence of a material factual dispute is sufficient only if the disputed fact is determinative of the outcome under applicable law. Anderson, 477 U.S. at 248; Frey v. Fraser Yachts, 29 F.3d 1153, 1156 (7th Cir. 1994). "Summary judgment is not an appropriate occasion for weighing the evidence; rather the inquiry is limited to determining if there is a genuine issue for trial." Lohorn v. Michal, 913 F.2d 327,

331 (7th Cir. 1990). The Seventh Circuit has noted that trial courts must remain sensitive to fact issues where they are actually demonstrated to warrant denial of summary judgment. Opp v. Wheaton, 231 F.3d 1060 (7th Cir. 2000); Szymanski v. Rite-way, 231 F.3d 360 (7th Cir. 2000).

The party seeking summary judgment always bears the initial responsibility of informing the Court of the basis for its motion, identifying those portions of the "pleadings, depositions, answers to interrogatories, and affidavits, if any," which it believes demonstrates the absence of a genuine issue of material fact. Celotex, 477 U.S. at 323. Once the motion is supported by a prima facie showing that the moving party is entitled to judgment as a matter of law, a party opposing the motion may not rest upon the mere allegations or denials in its pleadings, rather its response must show that there is a genuine issue for trial. Anderson, 477 U.S. at 248; Celotex, 477 U.S. at 323; Matsushita, 475 U.S. at 587; Patrick v. Jasper County, 901 F.2d 561, 564-566 (7th Cir. 1990). The manner in which this showing can be made depends upon which party will bear the burden of persuasion at trial. If the burden of persuasion at trial would be on the non-moving party, the party moving for summary judgment may satisfy Rule 56's burden of production by either submitting affirmative evidence that negates an essential element of the non-moving party's claim, or by demonstrating that the non-moving party's evidence is insufficient to establish an essential element of the non-moving party's claim. See Union Nat'l Bank of Marseilles v. Leigh (In re Leigh), 165 B.R. 203, 212-13 (Bankr. N.D. Ill. 1993) (citation omitted).

Rule 56(d) provides for the situation when judgment is not rendered upon the whole case, but only a portion thereof. The relief sought pursuant to subsection (d) is styled partial summary judgment. Partial summary judgment is available to dispose of one or more counts of the complaint in their entirety. Commonwealth Ins. Co. v. O. Henry Tent & Awning Co., 266 F.2d 200, 201 (7th Cir. 1959); Biggins v. Oltmer Iron Works, 154 F.2d 214, 216-17 (7th Cir. 1946); Quintana v. Byrd, 669 F. Supp. 849, 850 (N.D. Ill. 1987); Arado v. General Fire Extinguisher Corp., 626 F. Supp. 506, 509 (N.D. Ill. 1985); Capitol Records, Inc. v. Progress Record Distributing, Inc., 106 F.R.D. 25, 28 (N.D. Ill. 1985); In re Network 90°, Inc., 98 B.R. 821, 823 (Bankr. N.D. Ill. 1989); Strandell v. Jackson County, 648 F. Supp. 126, 136 (S.D. Ill. 1986). Rule 56(d) provides a method whereby a court can narrow issues and facts for trial after denying in whole or in part a Rule 56 motion. Capitol Records, 106 F.R.D. at 29.

Local Bankruptcy Rule 402.M of the Local Bankruptcy Rules for the United States Bankruptcy Court for the Northern District of Illinois, which deals with summary judgment motions, was modeled after LR56.1 of the Local Rules of the United States District Court for the Northern District of Illinois. Hence, the case law construing LR56.1 and its predecessor Local Rule 12(M) applies to Local Bankruptcy Rule 402.M.

Pursuant to Local Bankruptcy Rule 402, a motion for summary judgment imposes special procedural burdens on the parties. Specifically, Rule 402.M requires the moving party to supplement its motion and supporting memorandum with a statement of undisputed material facts ("402.M statement"). The 402.M statement "shall consist of short numbered paragraphs,

including within each paragraph specific references to the affidavits, parts of the record, and other supporting materials relied upon to support the facts set forth in that paragraph. Failure to submit such a statement constitutes grounds for denial of the motion." Id. Fox Systems and Fox & Brindle filed a 402.M statement that substantially complies with the requirements of Rule 402.M. It contained numbered paragraphs setting out uncontested facts with specific references to affidavits and parts of the record. Fox Systems and Fox & Brindle filed four affidavits in support of the instant motion.

The party opposing a summary judgment motion is required by Local Rule 402.N to respond ("402.N statement") to the movant's 402.M statement, paragraph by paragraph, and to set forth any material facts that would require denial of summary judgment, specifically referring to the record for support of each denial of fact. Local Bankr. R. 402.N. The opposing party is required to respond "to each numbered paragraph in the moving party's statement" and make "specific references to the affidavits, parts of the record, and other supporting materials relied upon." Local Bankr. R. 402.N(3)(a). Most importantly, "[a]ll material facts set forth in the [402.M] statement required of the moving party will be deemed to be admitted unless controverted by the statement of the opposing party." Local Bankr. R. 402.N(3)(b). The Bank and the Trustee, the parties opposing the motion, filed 402.N statements that substantially comply with the requirements of Rule 402.N.

V. DISCUSSION

The Court finds that there are material issues of disputed fact which preclude entry of summary judgment. Specifically, there is a dispute regarding when Fox & Brindle completed its work. The Bank and the Trustee contend that the work was completed on October 3, 2000. Fox & Brindle, on the other hand, maintain that the work was not completed until November 17, 2000. In addition, both the Trustee and the Bank dispute that Fox Systems and Fox & Brindle filed notice of their counterclaims and cross-claims with the Clerk of the Superior Court of Gordon County, Georgia. Based on these disputed material facts, the Court must deny entry of summary judgment.

Moreover, the Court finds that Fox Systems and Fox & Brindle have not demonstrated that they are entitled to judgment as a matter of law. The issue is whether these mechanic's lien claimants held "existing liens" as defined by the Final DIP Order that were perfected in accordance with Georgia law. In order to make this determination, the Court must determine whether the movants complied with the requirements under Georgia law for attachment and perfection of their inchoate mechanic's lien claims. A brief summary of those requirements follows.

Pursuant to Georgia law, all contractors that furnish materials for the improvement of real property shall have a "special lien on the real estate . . . or other property for which they furnish labor, services or materials." O.C.G.A. § 44-14-361(a)(2). This lien "may attach to the real estate for which the labor, services, or materials were furnished if they were furnished at

instance of the owner, contractor, or some person acting for the owner or contractor." O.C.G.A. § 44-14-361(b). Pursuant to § 44-14-361.1 of the Georgia statute, the liens specified in paragraphs (1) through (8) of subsection (a) of § 44-14-361 "must be created and declared in accordance with the following provisions, and on failure of any of them the lien shall not be effective or enforceable:"

> (1) A ***substantial compliance by the party claiming the lien with his contract for building, repairing, or improving***; . . . or for materials or machinery furnished or set up;
>
> (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*** or the contractor, as the agent of the owner;
>
> (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(a) (emphasis supplied).

Thus, a lienholder must meet the following five criteria before its lien shall be enforceable and effective: (1) substantial compliance with its contract for the improvement to the property; (2) record its lien with the appropriate clerk of the superior court within three

months of completing the work; (3) at the time of such recording, send a copy of the lien claim to the property owner; (4) commence an action for recovery within twelve months from the time the claim becomes due; and (5) file a notice with the clerk of the superior court of the county wherein the subject lien was filed within fourteen days after commencing an action for recovery. See Few v. Capitol Materials, Inc., 274 Ga. 784, 784-85, 559 S.E.2d 429, 430 (2002). The Georgia legislature has mandated strict compliance with these statutory provisions. Id. Lien statutes in derogation of the common law must be strictly construed in favor of the property owner and against the materialman. Id. (citations omitted); Palmer v. Duncan Wholesale, Inc., 262 Ga. 28, 30, 413 S.E.2d 437, 438-39 (1992) (citation omitted). The lien statute requires strict compliance with each provision. See Gwinnett-Club Assocs., L.P. v. Southern Elec. Supply Co., Inc., 242 Ga. App. 507, 509, 529 S.E.2d 636, 638 (Ga. App. 2000) (citations omitted). "'The lien comes into potential existence only when the statute is satisfied,' and if there is a failure to satisfy the statute, the lien is inoperative." Metromont Materials Corp. v. Cargill, Inc., 221 Ga. App. 853, 854, 473 S.E.2d 498, 500 (Ga. App. 1996) (quotation omitted).

Fox Systems and Fox & Brindle contend that they substantially complied with their contracts by completing the work for which they assert liens. Further, they allege that their lien claims were recorded within the three-month period required in the statute. They argue that the lien foreclosure process was interrupted by the sale of the Georgia Property pursuant to the Sale Order on February 9, 2001, prior to the filing of an action within the applicable twelve-month period. However, they maintain that by filing their counterclaims and cross-claims in this

matter, they have complied with the twelve-month suit provision under Georgia law as if their liens had still been attached to the real property. The Trustee argues that Fox & Brindle did not timely record its claim and therefore has no lien. Additionally, the Trustee contends that Fox Systems and Fox & Brindle failed to file the requisite subsequent notice with the appropriate clerk of the superior court within fourteen days of commencing their action for recovery. The movants counter that when a mechanic's lien has been detached from the land within a year of when the claim becomes due, notice of the filing of the suit is not necessary.

It is undisputed that Fox Systems and Fox & Brindle substantially complied with their contracts for the improvement to the Georgia Property. Thus the first element has been established.

In order to comply with the second statutory requirement, Fox Systems and Fox & Brindle were required to file "for record of [its] 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." O.C.G.A. § 44-14-361.1(a)(2). It is undisputed that Fox Systems complied with this second requirement. The Bank and the Trustee, however, take issue with Fox & Brindle's compliance. They argue that Fox & Brindle completed the work at the Georgia Property on October 3, 2000, and invoiced the Debtor as of that date for "completion of three projects" totaling $6,999.00, the amount of Fox & Brindle's alleged claim. Fox & Brindle recorded its lien with the clerk of Gordon County, Georgia on February 8, 2001. If the work was completed by October 3, 2000, then the recording was beyond three months after completion of the work, and thus, untimely. But, if the work was not finished until November

17, 2000, as Fox & Brindle contends, then the recording in February 2001 was timely. Hence, a material issue of disputed fact exists regarding this element as to Fox & Brindle and it has not demonstrated that it is entitled to judgment as a matter of law.

Next, the record is devoid of any evidence with respect to the third element--that at the time of recording their lien claims, Fox Systems and Fox & Brindle sent copies of the lien claims to the Georgia Property owner, which at that time was the Debtor. Thus, they have failed to demonstrate compliance with this element.

Fox Systems and Fox & Brindle have satisfied the fourth requirement, commencement of an action within twelve months from the time the claim becomes due. The Supreme Court of Georgia has held that the filing of a bankruptcy claim satisfies this element of commencing an action within twelve months. See Melton v. Pacific Southern Mortgage Trust, 241 Ga. 589, 592, 247 S.E.2d 76, 78 (1978). It is undisputed that the Debtor filed bankruptcy before Fox Systems and Fox & Brindle were able to file an action in the Georgia state court for recovery within twelve months from the time their claims came due. Nevertheless, both lien claimants filed counterclaims and cross-claims in this adversary proceeding in June 2001, within the requisite twelve-month period following the time their claims became due. Thus, the Court holds that Fox Systems and Fox & Brindle have complied with this fourth element of the statute.

Finally, Fox Systems and Fox & Brindle did not satisfy the statutory requirement that notice be filed with the clerk of the superior court of the county where the liens were filed within fourteen days of the commencement of the action. Filing the notice of commencement of the

action is a prerequisite to the enforceability of the lien, and if the lienholder fails to file the notice, the lien becomes unenforceable. Palmer, 262 Ga. at 30-31, 413 S.E.2d at 439; Gwinnett-Club, 242 Ga. App. at 509, 529 S.E.2d at 638. As the Georgia Supreme Court has made clear, a materialman seeking to enforce a lien has but one bite at the apple, and by failing to make the most of that one opportunity, it is precluded from enforcing the lien. Palmer, 262 Ga. at 31, 413 S.E.2d at 439. (A "subsequent bankruptcy filing [does] not breathe new life into the extinguished right to a lien so as to give the materialman another bite at the apple it had missed on its first bob."). The filing of a bankruptcy claim, however, does not satisfy the requirement that notice be filed with the superior court clerk. See Newton Lumber & Supply, Inc. v. Crumbley, 161 Ga. App. 741, 742, 290 S.E.2d 114, 115 (Ga. App. 1982).

The movants argue that they were not required to comply with this statutory mandate because the Georgia Property was sold on February 9, 2001, and at the time their counterclaims and cross-claims were filed in the bankruptcy case in June 2001, the Georgia Property had been sold to a third party, pursuant to bankruptcy court approval, free and clear of the mechanic's liens asserted in Georgia. Further, Fox Systems and Fox & Brindle entered into stipulations and filed cancellations of the liens in Georgia. Hence, they contend that the notice filing with the clerk in Georgia was no longer required under Georgia law.

There is some recent authority to the contrary, however, holding that the notice of suit requirement applies without regard to whether the action was brought directly against the property owner or against another party primarily liable for payment. See Ragsdale v. Chiu (In re Harbor Club, L.P.), 185 B.R. 959, 961 (Bankr. N.D. Ga. 1995). The court in Harbor Club

concluded that the purpose of the notice requirement after filing suit is directed toward providing notice to interested third parties. Id. at 963 (citing Amafra Enters., Inc. v. All-Steel Bldgs., Inc., 169 Ga. App. 388, 313 S.E.2d 110 (Ga. App. 1984)). Thus, the Harbor Club court concluded that "the statute now requires a notice of the recovery suit regardless of the location of the parties and the property." 185 B.R. at 963 (citation omitted). Consequently, the Court finds that Fox Systems and Fox & Brindle have not shown compliance with the last element required under the Georgia statute.

Consequently, the Court finds that Fox Systems and Fox & Brindle failed to comply with all of the requirements of the Georgia statute and, therefore, have unperfected mechanic's liens. Thus, as a matter of law, the Court hereby denies Fox Systems and Fox & Brindle's motion for partial summary judgment. Additionally, disputed issues of material fact exist, which requires the Court to deny the motion.

VI. CONCLUSION

For the foregoing reasons, the Court denies the motion of Fox Systems and Fox & Brindle for partial summary judgment.

This Opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. A separate order shall be entered pursuant to Federal Rule of Bankruptcy Procedure 9021.

ENTERED:

DATE: _____

_____

John H. Squires
United States Bankruptcy Judge

cc: See attached Service List

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	
OUTBOARD MARINE CORPORATION, et al.,	)	Chapter 7
	)	Bankruptcy No. 00 B 37405
	)	(Jointly Administered)
Debtors.	)	Judge John H. Squires
	)	
	)	
BANK OF AMERICA, N.A.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adversary No. 01 A 00471
	)	
OUTBOARD MARINE CORPORATION, et al.,	)	
	)	
	)	
Defendants.	)	

O R D E R

For the reasons set forth in a Memorandum Opinion the 23rd day of December, 2002, the Courts denies the motion of Fox Systems, Inc. and Fox and Brindle Construction Co., Inc. for partial summary judgment.

ENTERED:

DATE:_____

_____
John H. Squires
United States Bankruptcy Judge

cc: See attached Service List