

ORDERED in the Southern District of Florida on JUNE 29, 2010



A. Jay Cristal

**A. Jay Cristal, Chief Judge Emeritus
United States Bankruptcy Court**

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

In re:

FONTAINEBLEAU LAS VEGAS,
HOLDINGS, LLC, ET AL.,

Debtors.

WILMINGTON TRUST FSB, as
administrative agent,

Plaintiff/Appellant,

vs.

A1 CONCRETE & DEMOLITION,
LLC, *et al.*,

Defendants/Respondents.

Case No. 09-21481-BKC-AJC
Chapter 11
(Jointly Administered)

Adv. No. 09-2480-BKC-AJC-A

ORDER CERTIFYING QUESTIONS OF LAW TO THE NEVADA SUPREME COURT

THIS CAUSE came before the Court *sua sponte*. This cause arises in the jointly administered bankruptcy cases of *Fontainebleau Las Vegas Holdings, LLC et al.*, Case No. 09-

21481-BKC-AJC. Prior to commencing these cases, the Debtors were constructing and developing the “Fontainebleau Las Vegas,” a casino hotel resort with gaming, lodging, convention and entertainment amenities (the “Project”). The Project is situated on approximately 24.4 acres at the sites of the former El Rancho Hotel and Algiers Hotel on the north end of the Las Vegas Strip. Prepetition, the Debtors halted construction of the Project because the Debtors’ lenders refused to loan additional amounts under the existing loan commitments. The parties to the loan commitments are currently in litigation in the United States District Court for the Southern District of Florida in a proceeding unrelated to the adversary proceeding in which the certified questions arise.

During the pendency of the bankruptcy case and the ongoing litigation in the United States District Court, the Debtors sold the Project. On January 29, 2010, the Court approved a sale of substantially all of the Debtors’ assets to Icahn Nevada Gaming Acquisition, LLC (“Icahn”). On February 18, 2010, the Debtors closed the sale transaction with Icahn, transferring the Debtors’ assets free and clear of all liens and encumbrances, with all liens and encumbrances from the Project attaching to the sale proceeds.

Thereafter, the case was converted from a Chapter 11 case to a Chapter 7 case.

This matter involves the validity, priority and extent of those liens and encumbrances on the sale proceeds under Nevada state law. On December 2, 2009, Plaintiff Wilmington Trust, FSB (“Wilmington”), in its capacity as administrative agent for a syndicate of prepetition lenders under a certain credit agreement dated June 7, 2007 between Bank of America, N.A. (“Bank of America”) and Fontainebleau Las Vegas, LLC and Fontainebleau Las Vegas, LLC, II (“Senior Lenders”), commenced this adversary proceeding by filing a four count complaint against hundreds of mechanics and materialman lien claimants (over 300 such claimants) who have

asserted statutory liens on Debtors' real property in Nevada. (A copy of the Complaint, together with all exhibits, is attached to this document.)

The Complaint includes counts for contractual subordination, equitable subordination and equitable subrogation, as well as a determination of the validity, priority and extent of mechanics liens. The Court entered a Sequencing Order to determine Count Four of the Complaint first. Count Four seeks equitable subrogation premised upon the Senior Lenders' satisfaction of a mortgage against the Project arising from a credit agreement between Bank of America and the Debtors that was executed in 2005.

This bankruptcy court certifies the following questions because there is no controlling precedent from the Nevada Supreme Court and because its resolution poses a significant potential impact upon the debtor and creditor relations in both federal and state courts.*

QUESTIONS PRESENTED FOR REVIEW

The parties and this Court respectfully submit the following issues for determination:

1. Whether the Senior Lenders' mortgage is senior to the mechanics' liens by virtue of the legal doctrine of equitable subrogation and/or loan replacement and modification, inasmuch as loan proceeds secured by Bank of America, as administrative agent for the Senior Lenders, were used to completely satisfy a senior mortgage which was recorded prior to the commencement of any work on the Project, with the expectation that the new loan would be

*The identical questions were previously certified by the United States Bankruptcy Court in the District of Nevada, in *Terra Contracting, Inc. v. VCSP, LLC et al.*, Adv. No. 09-01114-LBR. However, prior to any determination by the Nevada Supreme Court, the parties to that action resolved all pending issues at a mandatory mediation and sought withdrawal of the order certifying the questions. On June 8, 2010, the United States Bankruptcy Court for the District of Nevada entered the *Order re: Motion Requesting This Court Withdraw the Certified Questions and De-Certify the Issues Sent to the Nevada Supreme Court*. Consequently, the issues remain unresolved under Nevada state law.

secured by a lien with the same priority as the loan being satisfied?

2. Whether NRS §108.221 *et seq.* prohibits the use of equitable subrogation as found in the Restatement of Mortgages §7.6, or the use of replacement and modification as found in the Restatement of Mortgages §7.3, to allow a mortgage to “step into the shoes of” a pre-existing lien (which was fully satisfied by the mortgagee) when such pre-existing lien was recorded prior to the commencement of any work or improvement giving rise to a statutory lien under NRS §108.221 *et seq.*?

3. Whether subordination agreements executed by certain mechanics and materialman lien claimants, purporting to subordinate their liens to a new mortgage, are enforceable?

NAMES OF THE PARTIES

The parties in this matter are indicated on this Court’s docket, a copy of which is attached to this document. The docket indicates the Plaintiff parties and Defendant parties.

NAMES AND ADDRESSES OF COUNSEL

The Court’s docket, a copy of which is attached to this document, indicates the Plaintiff parties and Defendant parties respective counsel, where they are represented. Some of the Defendant parties do not have counsel who have appeared on their behalf and are listed on the docket as *pro se*.

ORDER FOR CERTIFICATION

Having complied with the provisions of Nev. R. App. P. 5(c), it is

ORDERED that upon entry, the Clerk of the United States Bankruptcy Court shall forward this Order to the Supreme Court of the State of Nevada, Capitol Complex, Carson City, Nevada 89179, under this Court’s official seal. It is further

ORDERED that upon receipt of the opinion of the Nevada Supreme Court, this matter shall be transferred to the Bankruptcy Court for further proceedings consistent with the opinion of the Nevada Supreme Court.

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Copies shall be provided to all parties to this adversary proceeding by the Clerk of Court through both ECF and by U.S. Mail.