DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

GALEB, MILLER DEVELOPMENT, LLC, an Arizona limited liability corporation,	)	1 CA-CV 07-0872
	)	DEPARTMENT C
Plaintiff/Counter-Defendant/Third Party Defendant/Appellee/Cross-Appellant,	)	**MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)
v.	)	
MARKHAM CONTRACTING CO., INC., an Arizona corporation,	)	
Defendant/Counter-Claimant/Third Party Plaintiff/Appellant/Cross-Appellee.	)	

Appeal from the Superior Court in Maricopa County

Cause No. CV2002-019416

The Honorable F. Pendleton Gaines, Judge

REVERSED IN PART; VACATED IN PART AND REMANDED

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P O R T L E Y, Judge

¶1 Markham Contracting Co., Inc. ("Markham"), challenges the trial court's order finding it liable under Arizona Revised Statutes ("A.R.S.") section 33-420(A) (2007) for filing five groundless lis pendens and granting Galeb-Miller Development, LLC ("Galeb-Miller"), damages for overbonding and interest. Galeb-Miller filed a cross-appeal asserting that the trial court erred by failing to award it additional damages under A.R.S. § 33-420(C). For the following reasons, we reverse in part, vacate in part and remand for additional proceedings.

FACTS AND PROCEDURAL BACKGROUND

¶2 Galeb-Miller is the owner and developer of the subdivision Village at San Tan Heights ("subdivision"), a multi-use development consisting of 279.1 acres divided into thirteen

parcels. Beginning in early 2002, Galeb-Miller contracted with Markham to do the subdivision's grading and paving work.[1]

¶3 Approximately six months later, Markham claimed Galeb-Miller was delinquent in its payments and stopped all work. Galeb-Miller subsequently paid Markham approximately $793,000, but not before suing Markham for breach of contract and for a declaratory judgment of its rights, status, and legal relationship to Markham.

¶4 Before Markham was served with the complaint on January 31, 2003, it recorded 43 mechanics' liens on twelve subdivision parcels. The liens totaled $607,135.26, which included termination fees and interest.

¶5 Galeb-Miller recorded lien discharge bonds ("bonds") between February and April 2003. Galeb-Miller also demanded that Markham release the liens for termination fees ("March 20th letter"). Markham had, in the meantime, reduced the total lien amount to $565,856.78. Galeb-Miller served the bonds on Markham's attorney on June 16, 2003.

¶6 Galeb-Miller amended its complaint in May 2003 to seek a declaration that Markham's liens were defective and request statutory damages under A.R.S. § 33-420. Markham filed an answer, counterclaim, and third-party complaint. The

[1] We note that the following timeline would be far simpler had both parties timely served each other and timely recorded documents.

counterclaim alleged breach of contract, breach of the covenant of good faith and fair dealing, promissory fraud, slander/libel per se, and intentional interference with contract relations. Markham's third-party complaint sought to foreclose on its liens.

¶7 Prior to filing the third-party complaint, Markham's counsel obtained litigation guarantees, which listed lien discharge bonds on five of the parcels. When Markham filed its third-party complaint, it recorded eleven lis pendens against the subdivision property, including the five parcels listed in the litigation guarantees.

¶8 Ten days after Markham was served with the lien discharge bonds, it released the lis pendens on the parcels covered by bonds, and subsequently amended its third-party complaint to collect under the bonds, in lieu of lien foreclosure.

¶9 Galeb-Miller filed four motions on January 6, 2004. It sought to: (1) reduce the bond amount to reflect payments made to Markham;[2] (2) reduce the value of Markham's liens by deleting termination fees and interest, and collect additional damages for their inclusion; (3) recover damages under A.R.S. § 33-420(A) for invalid lis pendens; and (4) secure partial

[2] Markham does not dispute that Galeb-Miller paid it $120,006.81 in September 2003 and $19,657.37 in December 2003.

summary judgment regarding five percent termination fees on eight "unperformed paving contracts".

¶10 The court denied three of the four motions. The court "exclude[d] Markham's claims for 'liquidated damages' (termination fees) arising out of unperformed contracts and 18% 'prompt pay' interest from a calculation of the lien amounts," and reserved the issue of A.R.S. § 33-420 damages for trial. Both parties subsequently filed unsuccessful motions for clarification.

¶11 The court appointed a special master on December 3, 2004. The special master recommended that the court find Markham liable for $215,000[3] in damages because Galeb-Miller suffered no actual damages from the groundless lis pendens.

¶12 Both parties objected to the special master's rulings. The court affirmed the § 33-420(A) damages and overruled Galeb-Miller's objection that the special master failed to address damages under A.R.S. § 33-420(C). The remaining issues were set for a jury trial, except for any interest claims, which would be calculated after the jury verdict.

¶13 On the fifth day of trial, the parties reached a settlement agreement and placed it on the record, pursuant to Arizona Rule of Civil Procedure 80(d). Galeb-Miller agreed to

[3] Damages were calculated at $5,000 for each of the 43 lots affected by the five groundless lis pendens. *See* A.R.S. § 33-420(A).

pay Markham $285,000 to resolve "all issues" minus some exceptions. Specifically, the parties agreed that a special master or judge would decide any interest claim on the $285,000 and all late payments, the judge would decide attorneys' fees, and both parties had a right to appeal any A.R.S. § 33-420 issues.

¶14 Subsequently, the parties jointly submitted the following unresolved issues to the court: the rate of interest on the $285,000 settlement, the effect on the interest calculations regarding the $215,000 assessed against Markham, and whether Galeb-Miller was entitled to offset Markham's interest against Galeb-Miller's need to overbond[4] the project.

¶15 A different special master heard the parties' interest claims and issued a final report on March 2, 2007. The special master determined Markham had some valid interest claims but that they were offset by the $215,000 plus interest awarded to Galeb-Miller and the interest on overbonding for the improper liens. After calculating all of the interest claims with the

[4] Release bonds are required by A.R.S. § 33-1004(B) (2007) to be in an amount one and one-half times the amount of the lien. Galeb-Miller placed the cash value of the bonds in a restricted account with less than one percent rate of return. "Overbonding" refers to being required to bond on liens that, Galeb-Miller argues, were "inflated" in value due to the inclusion of interest and termination fees, and the subsequent lost use of those funds.

offsets, the special master found that Markham owed Galeb-Miller $29,266.

¶16 The court adopted the special master's report. The court also found Galeb-Miller was the prevailing party and, as a result, awarded it $425,000 in attorneys' fees, $173,210.26 for taxable costs and other expenses, and $19,834.55 for the special masters' fees.

¶17 Markham timely appealed and Galeb-Miller cross-appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(B) (2003).

ISSUES

¶18 We have grouped the issues on appeal into four distinct categories: (1) liability under A.R.S. § 33-420(A); (2) the parties' settlement agreement; (3) Galeb-Miller's cross-appeal for A.R.S. § 33-420(C) damages; and (4) attorneys' fees.[5]

DISCUSSION

I. Standard of Review

¶19 We review de novo statutory interpretation, legal conclusions, and mixed questions of law and fact, and will not set aside a trial court's findings of fact unless they are clearly erroneous. *City of Tucson v. Clear Channel Outdoor, Inc.,* 218 Ariz. 172, 182, ¶ 27, 181 P.3d 219, 229 (App. 2008);

[5] We also note that most of these issues would be moot had both parties conducted themselves with a greater degree of professionalism.

Rand v. Porsche Fin. Servs., 216 Ariz. 424, 434, ¶ 37, 167 P.3d 111, 121 (App. 2007) (interpretation of a contract is a question of law and reviewed de novo); *Robson Ranch Mountains, L.L.C. v. Pinal County,* 203 Ariz. 120, 125, ¶ 13, 51 P.3d 342, 347 (App. 2002). Even if conflicting evidence exists, a finding of fact is not clearly erroneous so long as substantial evidence supports it. *Kocher v. Dep't of Revenue of Ariz.,* 206 Ariz. 480, 482, ¶ 9, 80 P.3d 287, 289 (App. 2003).

II. A.R.S. § 33-420(A)

¶20 Markham argues that it cannot be held liable for damages under A.R.S. § 33-420(A) because it did not know, or have reason to know, that the five lis pendens were groundless when they were recorded.

¶21 Section 33-420(A) provides:

> A person purporting to claim an interest in, or a lien or encumbrance against, real property, who causes a [lis pendens] asserting such claim to be recorded in the office of the county recorder, knowing or having reason to know that the document is forged, groundless, contains a material misstatement or false claim or is otherwise invalid is liable to the owner or beneficial title holder of the real property for the sum of not less than five thousand dollars, or for treble the actual damages caused by the recording, whichever is greater, and reasonable attorney fees and costs of the action.

¶22 A lis pendens may be filed in actions affecting title to real property. *Hatch Cos. Contracting, Inc. v. Ariz. Bank*, 170 Ariz. 553, 556, 826 P.2d 1179, 1182 (App. 1991). An action,

however, which proceeds to judgment after the filing of a lien discharge bond, does not affect title to real property. *Id.* at 557, 826 P.2d at 1183. A lis pendens, as a result, filed after a lien discharge bond is groundless and subject to liability for § 33-420 damages. *Id*.

¶23 The statute requires that the person claiming an interest in the property knows or has reason to know that the document is groundless or otherwise invalid.

¶24 A party has a "reason to know" if:

> [T]he actor has knowledge of facts from which a reasonable man of ordinary intelligence or one of the superior intelligence of the actor would either infer the existence of the fact in question or would regard its existence as so highly probable that his conduct would be predicated upon the assumption that the fact did exist.

Id. at 559, 826 P.2d at 1185 (quoting Restatement (Second) of Torts § 12(1) cmt. a (1965)). The phrase "should know" means the "actor is under a duty to another to use reasonable diligence to ascertain the existence or non-existence of the fact in question and that he would ascertain the existence thereof in the proper performance of that duty." Restatement (Second) of Torts § 12(1) cmt. a. Whether a party knows or has reason to know that a lis pendens is groundless is a question of fact and must be determined on a case-by-case basis. *See Pence*

v. Glacy, 207 Ariz. 426, 429, ¶ 16, 87 P.3d 839, 842 (App. 2004).

¶25 If "an attorney files a lis pendens without the client's knowledge or consent," a client cannot be assessed damages under A.R.S. § 33-420(A). *Wyatt v. Wehmueller*, 167 Ariz. 281, 287, 806 P.2d 870, 876 (1991). In *Wyatt*, the plaintiffs purchased sixty acres of real property from defendants. *Id.* at 871, 806 P.2d at 282. Their complaint alleged that they only received fifty-six acres. *Id.* After filing their complaint the plaintiffs defaulted on their payments. *Id.* Defendants notified and recorded a notice of trustee sale. *Id.* On the morning of the trustee sale, plaintiffs' attorney recorded lis pendens without notifying the plaintiffs. *Id.* at 871-72, 806 P.2d at 282-83. Because the plaintiffs did not know that lis pendens were being filed they could not know that they were invalid. *See id.* Consequently, the *Wyatt* court held that the plaintiffs were not liable under § 33-420 and ruled that the client can only be held liable under § 33-420 if the client has the statute's required scienter (knows or has reason to know). *Id.* at 284, 287, 806 P.2d at 873, 876.

¶26 There are, however, limited circumstances when the attorney's knowledge that a document is invalid may be imputed to the client. For instance, in *Santa Fe Ridge Homeowners' Ass'n v. Bartschi*, an attorney's knowledge was imputed to the

client because the client knew that the action was not one affecting title to real property. 219 Ariz. 391, 399, ¶ 25, 199 P.3d 646, 654 (App. 2008). Likewise, in *Hatch*, the attorney's knowledge was imputed because the lis pendens was filed after service of the lien discharge bond. 170 Ariz. at 555, 559, 826 P.2d at 1181, 1185. The circumstances of this case, however, do not warrant any imputation of knowledge.

¶27 Here, prior to filing the third-party complaint, Markham's counsel obtained litigation guarantees indicating that the bond's surety, Contractors Bonding and Insurance Co. ("CBIC"), should be named as a party. Markham's counsel, as a result, actually knew or had reason to know that the lis pendens covering the bonds mentioned in the litigation guarantees were groundless. *See Phipps v. CW Leasing, Inc.*, 186 Ariz. 397, 400, 923 P.2d 863, 866 (App. 1996) (noting that "'constructive notice' is the inference of knowledge of the fact in question by operation of law," and where applicable "a person should be treated as if he had actual notice." (quoting *Main I Ltd. P'ship v. Venture Capital Constr. and Dev. Corp.,* 154 Ariz. 256, 259, 741 P.2d 1234, 1237 (App. 1987))). There is no evidence in the record, however, that Markham knew or should have known that Galeb-Miller had filed bonds and lis pendens could not be filed.

¶28 Galeb-Miller argues that, under *Hatch*, the attorney's knowledge can be imputed to a client if the client knows the

document is being recorded and the attorney knows or has reason to know the document being recorded is invalid.

¶29 In *Hatch*, a subcontractor ("Hatch") was not paid by the general contractor for work performed. Hatch filed notice and claim of mechanics' lien against the subject property. *Hatch,* 170 Ariz. at 555, 826 P.2d at 1181. The contractor obtained a lien discharge bond and served Hatch with the bond.[6] *Id.* Hatch sued to foreclose its lien (and for breach of contract), named the surety as a defendant, and requested judgment on the bond against the contractor and the surety. *Id.* Because Hatch knew the lis pendens was being filed and it was filed (through his attorney) after he had been served with a copy of a lien discharge bond, the court imputed the client's knowledge to counsel. *Id.* at 559, 826 P.2d at 1185. Hatch was liable, as a result, under A.R.S. § 33-420(A) for filing a groundless lis pendens. *Id.*

¶30 We find *Hatch* distinguishable. Here, unlike *Hatch* where the client had actual notice after being served the bond, Markham was unaware of the bonds. Galeb-Miller did not serve the bonds on Markham's attorney until ten days after the lis pendens were filed.

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[6] The case states that "Hatch had been served with a copy of the bond" and that after being served with the bond "Hatch filed a lis pendens." *Hatch*, 170 Ariz. at 555, 826 P.2d at 1181.

¶31 Moreover, unlike *Hatch*, where the known surety was included as a defendant and judgment on the bond was requested, there is no indication that CBIC was named in its capacity as a surety. Even though CBIC was named as a third-party defendant, the third-party complaint makes no mention of the bonds. In fact, the third-party complaint is completely silent regarding the capacity in which CBIC is named as a party and CBIC's interest in the property, as it only mentions CBIC once, when it states "[u]pon information and belief, [CBIC] is a corporation authorized to do business in the State of Arizona."

¶32 Further, there is no evidence in the record that Markham's attorney gave Markham copies of the litigation guarantees or told a corporate officer about them. Markham's president was deposed and testified that he read and verified the third-party complaint but was unaware of the litigation guarantees. Moreover, although he was aware that a title company was hired to do litigation guarantees on the various properties, he did not personally review any of the litigation guarantees, and relied on experts to conduct the review for him. He also testified that he did not investigate CBIC's role in the case or why it was named as a defendant. Markham only had knowledge that CBIC had an interest in the property, not the nature of the interest.

¶33 In addition, the third-party complaint does not reference the litigation guarantees, the guarantees are not attached, and there is no indication that either the company or Markham's attorney forwarded the guarantees to Markham. Consequently, Markham neither knew nor had reason to know that lien discharge bonds had been filed and that, as a result, the lis pendens were groundless when they were recorded.

¶34 Galeb-Miller argues that Markham is still liable under § 33-420(A) because Markham, as a corporation that can only have knowledge through its agents, had knowledge through its attorney's knowledge,[7] which should therefore be imputed to Markham.[8]

¶35 In *Wyatt*, agency arguments were explicitly addressed and rejected. The court stated that common law agency

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[7] The parties do not dispute that Markham's attorney was acting within her authority when she recorded the lis pendens.

[8] Land Title Association of Arizona's amicus brief also argues that the lawyer's knowledge should be inputed to the client, in addition to arguing that *Wyatt* and *Hatch* are distinguishable because the parties in *Wyatt* included individuals, a general partnership and a corporation, while the plaintiff in *Hatch* was a single corporation. We find that distinction irrelevant. The significant factor under the statute is knowledge. Thus, in determining whether there is knowledge, it is irrelevant whether the client is a corporation, partnership or a single person.

Land Title states if a Markham corporate officer filed an invalid mechanics' lien, Markham might be subject to sanctions under A.R.S. § 33-420. It then asks why Markham should not be accountable for a wrongful recording by its attorney. *Wyatt* answers this question when it states that common law agency principles are abrogated under A.R.S. § 33-420. *Wyatt*, 167 Ariz. at 286, 806 P.2d at 875.

principles do not apply to a statute granting treble damages, such as A.R.S. § 33-420, because allowing treble damages removes it from common law analysis and imposes the scienter requirement on the claimant.[9] *Wyatt*, 167 Ariz. at 286, 806 P.2d at 875.

¶36 Furthermore, A.R.S. § 33-420(A) abrogates the common law agency principle that an attorney has implied authority to act on a client's behalf because the statute requires scienter on the part of the client in order to be held responsible for his attorney's acts. *Id.* at 284-85, 806 P.2d at 873-74.

¶37 When read in conjunction with subsection (E),[10] A.R.S. § 33-420(A) cannot be violated "by one whose 'guilt' is based only on imputed knowledge." *Id.* at 285, 806 P.2d at 874. Additionally, the damages available under A.R.S. § 33-420(A) are punitive in nature and it is improper to use common law agency principles to recover punitive damages. *Id.* at 286, 806 P.2d at 875. Because the statute's purpose is deterrence, as opposed to

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[9] Because *Wyatt* determined that agency principles are inapplicable, cases imputing an attorney's inexcusable neglect to a client are inapposite. *See, e.g., Panzino v. City of Phoenix,* 196 Ariz. 442, 447, ¶¶ 11-16, 999 P.2d 198, 203 (2000) (examining Arizona Rule of Civil Procedure 60(c) and discussing the imputation of inexcusable neglect from an attorney to a client).

[10] Arizona Revised Statutes § 33-420(E) provides: "A person purporting to claim an interest in, or a lien or encumbrance against, real property, who causes a document asserting such claim to be recorded in the office of the county recorder, knowing or having reason to know that the document is forged, groundless, contains a material misstatement or false claim or is otherwise invalid is guilty of a class 1 misdemeanor."

compensation for actual loss, if only the attorney is guilty, only the attorney should be punished, not the client. *Id.* at 286-87, 806 P.2d at 875-76. Consequently, Markham cannot be held liable without the necessary scienter, which it did not have. *See supra* ¶ 20-33.

¶38 Based on the foregoing analysis and the facts of this case, we find that Markham did not know or have reason to know that the lis pendens were groundless. As a result, it was improper for the trial court to impute the attorney's knowledge to Markham, and assess damages under A.R.S. § 33-420(A). Accordingly, we reverse the judgment of the trial court and vacate the award of $215,000 and the interest to Galeb-Miller.[11]

III. The Settlement Agreement

¶39 Markham argues that the trial court erred by offsetting its award by Galeb-Miller's claims for overbonding and interest on the $215,000[12] because these claims were barred by the settlement agreement. For the reasons that follow, we agree.

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[11] Given our holding, we need not reach the issue of whether damages under A.R.S. § 33-420(A) should be based upon the number of documents recorded or the amount of property affected by the recorded documents; nor need we determine whether Galeb-Miller's conduct and violation of A.R.S. § 33-1004 precludes it from recovering damages under A.R.S. § 33-420(A).

[12] We need not address Markham's arguments against any claim for interest on the $215,000 because we reverse that judgment.

¶40 Settlement agreements are governed by general contract principles. *Emmons v. Superior Court*, 192 Ariz. 509, 512, ¶ 14, 968 P.2d 582, 585 (App. 1998). "The purpose of contract interpretation is to determine and enforce the parties' intent." *U.S. W. Commc'ns, Inc. v. Ariz. Corp. Comm'n,* 185 Ariz. 277, 280, 915 P.2d 1232, 1235 (App. 1996). To determine intent, we look at the plain meaning of the words in the context of the contract as a whole. *United Cal. Bank Inc. v. Prudential Ins. Co.,* 140 Ariz. 238, 259, 681 P.2d 390, 411 (App. 1983). It is not within the function or power of a court to rewrite or alter a contract between parties. *Goodman v. Newzona Inv. Co.,* 101 Ariz. 470, 472, 421 P.2d 318, 320 (1966). "Where the intent of the parties is expressed in clear and unambiguous language, there is no need or room for construction or interpretation and a court may not resort thereto." *Mining Inv. Group, L.L.C. v. Roberts*, 217 Ariz. 635, 639, ¶ 16, 177 P.3d 1207, 1211 (App. 2008) (quoting *Goodman,* 101 Ariz. at 472, 421 P.2d at 320). In addition, while intent is a question of fact, whether a contract is reasonably susceptible to more than one interpretation is a question of law for the court and reviewed de novo. *In re Estate of Lamparella*, 210 Ariz. 246, 250, ¶ 21, 109 P.3d 959, 963 (App. 2005).

¶41 Galeb-Miller's and Markham's Rule 80(d) oral settlement agreement set forth that: (1) "Galeb-Miller will pay

Markham $285,000 for the construction issues . . . [which] will *resolve all issues in our litigation with the exception of a few points here"* (emphasis added); (2) "a special master or a judge will decide interest on the [$285,000] and on all late payments"; (3) "the [j]udge . . . will decide legal fees"; and (4) "Markham retains the right to appeal the $215,000, [§] 33-420 damages . . . the [§] 33-420 issues . . . and any [other] appeal issues[.]" Mr. Markham Sr. asked for clarification and the court confirmed that the interest and attorney fees issues based on prompt pay were also preserved.

¶42 Galeb-Miller argues that the first special master and the judge "determined the parties never intended for the settlement to release Galeb-Miller's interest," offset and overbonding claims, or any claims previously reserved for post-verdict resolution.[13] The express terms of the settlement agreement, however, are clear and unambiguous. The $285,000 payment "resolved all issues" except for: interest on the $285,000 and all late payments, legal fees, Markham's right to appeal the $215,000, A.R.S. § 33-420 damages, and any other A.R.S. § 33-420 issues.

¶43 No part of the settlement agreement reserved Galeb-Miller's overbonding claims, interest claims, or post trial

[13] Prior to the settlement agreement, interest issues were to be determined by the judge after the jury verdict.

issues. The parties did not discuss overbonding and intended for the settlement to resolve "all issues" except those specifically reserved. *See Helena Chemical Co. v. Coury Bros. Ranches, Inc*., 126 Ariz. 448, 453, 616 P.2d 908, 913 (App. 1980) (stating that contracts are interpreted by an objective standard, not by the secret intentions of a party). If Galeb-Miller wanted to reserve its interest and overbonding issues, it could have reserved them. *See Employer's Mut. Cas. Co. v. McKeon,* 170 Ariz. 75, 79, 821 P.2d 766, 770 (App. 1991) (declining to interpose an award of interest in a settlement agreement where the parties "could have negotiated for an award of interest," but did not).

¶44 We conclude, as a result, that the clear and unambiguous terms of the settlement agreement barred Galeb-Miller's offset and overbonding interest claims and any issues previously reserved for post-verdict resolution. Accordingly, we reverse the judgment of the trial court and vacate the award of overbonding interest to Galeb-Miller.

IV. Cross-Appeal

¶45 In its cross-appeal, Galeb-Miller contends that the trial court should have awarded it damages under A.R.S. § 33-420(C) because Markham's liens included termination fees and interest.

¶46 Liens are permitted for "work or labor done or professional services, materials, machinery, fixtures or tools furnished." A.R.S. § 33-981(A) (2007); *accord Fortune v. Superior Court*, 159 Ariz. 549, 551, 768 P.2d 1194, 1196 (App. 1989). Prior to completion of a contract, a contractor may only lien "for the 'reasonable value' of the work done or services performed." *Fortune,* 159 Ariz. at 551, 768 P.2d at 1196 (quoting *Parker v. Holmes,* 79 Ariz. 82, 83, 284 P.2d 455, 457 (1955)); *accord* A.R.S. § 33-981(B). "[L]iquidated damages for unperformed services or anticipated profits are not lienable under A.R.S. § 33-981." *Fortune*, 159 Ariz. at 552, 768 P.2d at 1197. Pursuant to A.R.S. § 33-420(C), damages may be assessed against the lien holder if the lien is for non-lienable damages. The statute explains:

> A person who is named in a document which purports to create an interest in, or a lien or encumbrance against, real property and who knows that the document is forged, groundless, contains a material misstatement or false claim or is otherwise invalid shall be liable to the owner or title holder for the sum of not less than one thousand dollars, or for treble actual damages, whichever is greater, and reasonable attorney fees and costs as provided in this section, *if he willfully refuses to release or correct such document of record within twenty days from the date of a written request from the owner or beneficial title holder of the real property.*

A.R.S. § 33-420(C) (emphasis added).

¶47 If a claimant, however, has a good faith belief that he can rightfully impose a lien under the lien statutes and therefore refuses to relinquish it, he cannot be charged with acting in bad faith because the lien statutes are "confusing and difficult to understand." *Adams Tree Service, Inc. v. Transamerica Title Ins. Co.,* 20 Ariz. App. 214, 219, 511 P.2d 658, 663 (1973).

¶48 Markham contends that it had a good faith belief that it could lien for termination fees and interest.[14] Galeb-Miller argues that because Markham did not release any portion of the liens after receipt of Galeb-Miller's March 20th letter, which stated that termination fees were not lienable and demanded Markham release such portions of the liens, it should have received § 33-420(C) damages.[15] The record does not reflect that the trial court determined what portion of the amount was not lienable.

¶49 First, Galeb-Miller recorded some bonds before March 20th, which released any corresponding liens by operation of

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[14] We note that A.R.S. § 33-420(C) imposes liability if a person named in a document has actual knowledge of the document's invalidity, while A.R.S. § 33-420(A) imposes liability if a claimant has "reason to know" a document is invalid as well as for actual knowledge.

[15] Because Arizona law is clear that a lien is discharged and lost upon the filing of a bond, we reject Galeb-Miller's argument that a release bond does not extinguish a lien. *See* A.R.S. § 33-1004.

law.[16] It is not clear from the record, however, which liens were released prior to the March 20th letter.

¶50 Second, the special master did not specifically find whether Markham knew that it could not lien for termination fees or for interest. He merely noted that evidence was not presented on those claims.

¶51 Third, the trial court subsequently acknowledged that A.R.S. § 33-420(C) issues were not dealt with directly by the special master but declined to analyze and address the parties' positions on the argument. *See supra* ¶ 12. Additionally, there were no findings made on other A.R.S. § 33-420(C) issues, such as whether the liens contained a material misstatement or a false claim. *See, e.g., Bianco v. Patterson*, 159 Ariz. 472, 474, 768 P.2d 204, 206 (App. 1989) (awarding damages under A.R.S. § 33-420(A) where the lis pendens covered 1,800 acres as opposed to a specified 40 acres, which would have been proper).

¶52 Fourth, the special master only examined whether the liens were groundless, not whether the liens contained a material misstatement, false claim or were otherwise invalid.

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[16] After a lien is discharged, a claimant must pursue the bond for payment instead of foreclosing on the property subject to a lien. A.R.S. § 33-1004(A), (E); *Hanson Aggregates Ariz., Inc. v. Rissling Constr. Group, Inc.,* 212 Ariz. 92, 94, ¶ 7, 127 P.3d 910, 912 (App. 2006). Because any claims by Markham after the March 20th letter would be against the bonds, they are essentially overbonding claims and barred by the settlement agreement.

See Evergreen W., Inc. v. Boyd, 167 Ariz. 614, 621, 810 P.2d 612, 619 (App. 1991) (equating the term groundless with frivolous).

¶53 For the foregoing reasons, we reverse the judgment below and remand for the following factual determinations: (1) whether the liens contained a material misstatement, false claim, or were otherwise invalid; (2) whether the March 20th letter gave Markham actual knowledge that its liens contained a material misstatement, false claim, or were otherwise invalid;[17] and (3) if the March 20th letter gave Markham knowledge that its liens were partially invalid, which liens were still in effect at that point.[18]

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[17] It is unclear from the record when Markham's last lien was discharged. However, it appears undisputed that all of the liens were discharged prior to April 2004, which is when the court ruled that Markham should exclude termination fees and interest from its liens, and when Galeb-Miller sent a second letter, requesting that Markham fill out and sign "Release of Bond" forms. Thus, the March 20th letter is the only letter the trial court needs to consider to determine if Markham had knowledge and "willfully refuse[d] to release or correct" the liens within twenty days of that demand. A.R.S. § 33-420(C).

[18] The record reflects that the bonds were recorded between February and April 2003. Once recorded, the bonds discharged Markham's liens by operation of law. *See United Metro Materials, Inc. v. Pena Blanca Props., L.L.C.*, 197 Ariz. 479, 480, ¶ 1, 4 P.3d 1022, 1023 (App. 2000) (stating that when lien discharge bonds are obtained pursuant to A.R.S. § 33-1004, such bonds remove liens from the property by operation of law); *see also* A.R.S. § 33-1004(A). Consequently, as a matter of law, Markham can only be liable under A.R.S. § 33-420(C) for the liens that were not discharged by the bonds.

V. Attorneys' Fees

¶54 The trial court determined that Galeb-Miller was the prevailing party and awarded Galeb-Miller attorneys' fees. Because we are reversing and vacating all of the trial court's rulings which awarded Galeb-Miller damages, offsets and interest, we vacate the award of attorneys' fees.

¶55 Galeb-Miller requests attorneys' fees on appeal and both parties request attorneys' fees on the cross-appeal. Considering each party's partial success on appeal, we deny both requests for attorneys' fees. A final determination of which party is entitled to attorneys' fees will be appropriate upon conclusion of this matter on remand.

CONCLUSION

¶56 For the foregoing reasons, we reverse the judgment of the trial court; vacate all damages, offsets and interest awarded to Galeb-Miller; and remand for additional proceedings consistent with this decision.

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MAURICE PORTLEY, Judge

CONCURRING:

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PHILIP HALL, Presiding Judge

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MICHAEL J. BROWN, Judge