SIGNED this 07 day of July, 2005.

FRANK R. MONROE
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

IN RE:	§	CASE NO. 03-15057-FRM
	§	CASE NO. 03-15058-FRM
MARSHALL'S VISTA, LTD. and	§	
MARSHALL'S HARBOR, LTD.	§	CHAPTER 7
	§	
Debtors	§	(Jointly Administered under Case No. 03-15057-FRM

MEMORANDUM OPINION

This Court held a hearing on January 4, 2005 with regard to Vestin Mortgage, Inc's Motion for Sanctions against Point Construction, Inc. ("Point Construction") and its counsel pursuant to Rule of Bankruptcy Procedure 9011. This Court has jurisdiction under 28 U.S.C. §1334(a), (b) and (d), 28 U.S.C. §151, 28 U.S.C. §157(a) and (b)(1), and the Standing Order of Reference in this District. At the conclusion of the hearing, the Court requested the parties to provide their Proposed Findings of Fact and Conclusions of Law regarding Vestin's Motion. This Memorandum Opinion shall constitute Findings of Fact and Conclusions of Law as required by Bankruptcy Rule 7052

which is made applicable to contested matters under Bankruptcy Rule 9014.

Findings of Fact

On August 30, 2004, this Court signed the Agreed Order Compelling Debtors to Turn Over "Cash Collateral" in Aid of Lift of Stay Order ("Agreed Order"). Pursuant to the Agreed Order, Western United Life Assurance Company ("Western"), Marshall's Vista, Ltd., and Marshall's Harbor, Ltd. (the "Debtors"), and Vestin Mortgage, Inc. ("Vestin") agreed that the cash collateral belonging to each of Western and Vestin should be turned over to Western and Vestin respectively. On September 15, 2004, within the fifteen (15) day time period in which to object to the terms of the Agreed Order, Point Construction (an entity controlled by Mr. Morse, the same individual that controlled the Debtors) filed its Objection to the Agreed Order (the "Point Construction Objection"). The Point Construction Objection alleged, among other things, that it had constitutional and statutory liens for work it did on the property sold to generate the cash collateral, and thus had rights to the cash collateral which were prior and superior to the rights of Vestin and Western. All of the work for which Point Construction claimed a statutory and/or constitutional lien senior to Vestin's lien was done after Vestin filed its deeds of trust although Point Construction had performed work prior to the filing which it had been paid for. Nov. 30, 2004 Tr. 15, 18. Vestin filed its deeds of trust with respect to the properties in March 2002 and May 2002 respectively. Vestin Exhibits 4 & 5.

Point Construction also filed a lawsuit in the 250th Judicial District of Travis County, Texas in Cause No. GN203052, styled "Point Construction v. Vestin Mortgage, Inc. and Western United Life Assurance Company" (the "State Court Action") containing similar allegations.

On September 17, 2004 counsel for Vestin requested by letter that Point Construction

withdraw the Point Construction Objection and discontinue the State Court Action on the grounds that both were factually and legally frivolous. Vestin Exhibit 3. On September 30, 2004, counsel for Vestin served Point Construction with its Motion for Sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure made applicable through Bankruptcy Rule 9011. Vestin Exhibit 3A. On November 3, 2004, after more than 21 days had elapsed from the date of service without Point Construction having withdrawn the Point Construction Objection, Vestin then filed the Motion for Sanctions with this Court.

On November 30, 2004 the court held a hearing on the Point Construction Objection. Based upon the factual record before it and the statutory and legal authorities, the Court determined that Point Construction had in fact made certain improvements on the property pursuant to an oral contract with the Debtors prior to the deeds of trust being filed of record but that it had been paid for that work. The contract was oral because Mr. Morse, the person in total control of both the Debtors and Point Construction, indicated there was no need to make a written contract with himself. Western and Vestin, however, required written contracts before they would loan money to fund further construction on the properties because they wanted to be protected and in a position of control in order to ensure Morse's use of the funds was for the purposes for which they were being lent. Therefore, Point Construction was required to enter into written loan agreements with Western and Vestin.

Specifically, on behalf of Point Construction and each of the Debtors, Morse signed a "Construction Control Agreement" in which Point Construction agreed with Vestin as follows: (1) as a condition to each disbursement of loan proceeds, to provide a lien release from itself and each subcontractor; (2) to adhere to all of the terms and conditions in the Construction Loan Agreements;

(3) that there would be no changes to the plans or specifications for work to be done on Marshall's Harbor and/or Marshall's Vista without first obtaining Vestin's written permission; and (4) to satisfy any liens placed on the Marshall's Harbor or Marshall's Vista properties and hold the owners and Vestin harmless. Nov. 30, 2004 Tr. 41-44, Vestin Ex. 8 TI01359, TI00990, TI01225, TI0992, TU01248 and TI0993.

In the Construction Loan Agreements Point Construction agreed that as of the closing of the Vestin loans to the Debtors, it had no claims against or affecting the Debtors' properties except for those previously disclosed by each Debtor to Vestin in writing [which were none]. Nov. 30, 2004 Tr. 46-48; Vestin Ex. 8 TI 1248 and TI00971.

In connection with and as a condition of each Vestin loan, Morse was required to and did provide an affidavit stating that all amounts due for work done by Point Construction on the Marshall's Harbor and Marshall's Vista properties before the filing of the Vestin deeds of trust were fully paid and that there were no mechanic's and materialmen's liens against the properties. Nov. 30, 2004 Tr. 34-35; Vestin Ex. 1. Morse provided those affidavits, and affirmed that no liens existed in favor of Point Construction even though Morse now alleges that the same at least "incepted" on the properties prior to Vestin's deeds of trust. *Id.* In this regard, the Court specifically found that in reliance on Morse's representations, Vestin and Western loaned money to the Debtors that was then used to make further improvements to the properties. Nov. 30, 2004 Tr. 115. As such, the Court concluded, in overruling Morse's contention that Point Construction has a valid lien that preempted Vestin and Western, that it "makes absolutely no sense to allow Point Construction in this case a constitutional lien as an effective insider of the Debtors by effectively allowing it to gain from breaching, ignoring and/or misrepresenting the facts to the lenders upon

which they reasonably relied in loaning money. . .That makes absolutely no sense and it's not the law in the state of Texas." Nov. 30, 2004 Tr. 116.

The Construction Loan Agreements that Point Construction agreed to honor further provided that the loans were in balance (and that each draw request was a reaffirmation of such) and that the undisbursed loan funds together with any sums provided or to be provided to Borrowers/Debtors were sufficient to construct the improvements on the properties and accomplish the purposes contemplated by the loan documents [even though such was not the case]. Nov. 30, 2004 Tr. 49-50; Vestin Ex. 8 TI 01247-48 and TI 00970-71.

Between the time the loans were made and up until about March 2003, Point Construction signed disbursement vouchers in which it made representations to Vestin and Western that all construction to date had been performed in accordance with the approved plans and specifications for the projects and that there had been no changes in the plans and specifications other than as expressly permitted by the Construction Loan Agreements and/or as had been approved in writing pursuant to the Construction Loan Agreements. Each lien waiver and release signed by Point Construction, with respect to the Vestin loans, released all prior claims for labor, services and equipment through the date of the lien. Point Construction signed such releases up until March 2003. Nov. 30, 2004, Hrg. Vestin Ex. 2; Nov. 30, 2004 Tr. 50-53; Vestin Ex. 2.

The work in Marshall's Vista for which Point Construction claimed a lien superior to the Vestin deed of trust was as follows: retaining walls for holes, greens, tee boxes and fairways, rock work, dirt work, creating waterfalls and dams. Nov. 30, 2004 Tr. 26-29, 60-63. The work in Marshall's Harbor for which Point Construction claimed a lien superior to Vestin's deed of trust was as follows: utility work for plumbing for the marina, silt fences for erosion control, rock berms, tree

protection, excavation work and the storage of material for dams. Nov. 30, 2004 Tr. 29-30, 72-74. This work was all outside of the Vestin loan budget and not authorized by Vestin in writing or otherwise. Nov. 30, 2004 Tr. 74.

None of the work for which Point Construction claimed liens superior to Vestin's deeds of trust involved constructing a building, a structure fit for the habitation of people or animals, or even a structure for the storage of property. Nov. 30, 2004 Tr. 26-30, 60-63, 72-74. Accordingly, the Court found that the Marshall's Vista improvements for which Point Construction sought to assert liens "were in the nature of drainage, shaping of the golf course, moving dirt, building retaining walls, building dams, building a waterfall or two, general dirt work, building roads, building erosion control, fences, etc." and "were not in the nature of constructing a building as that term is used in the Constitution." Nov. 30, 2004 Tr. 115. The Court likewise found that with respect to Marshall's Harbor the construction "there was for water and sewer lines and materials that were delivered to prospective dam sites" and that none of that met "the definition of building under applicable constitutional and case law." Nov. 30, 2004 Tr. 118-19.

Morse caused Point Construction to file a lien affidavit in support of its alleged statutory and constitutional liens on October 6, 2003 after he caused the filing of each of the Debtors' bankruptcy cases. Nov. 30, 2004 Tr. 58-60. Vestin Exhibits 9 & 10. Point Construction did not provide formal written notice of the filing of the lien to Vestin or to the Debtors because, as to the latter, Morse testified he "didn't think he needed to inform himself." Nov. 30, 2004 Tr. 36-38

Other than two invoices, dated April 17, 2003 and March 14, 2003, each reflecting work done prior to the dates of the invoices, there are no records to support the amounts asserted in the lien affidavit filed by Point Construction on October 6, 2003. Nov. 30, 2004, tr. 55-57. As of June,

2003, there were no contemporaneous records of the work alleged to have been done with respect to which Point Construction asserts a constitutional lien. Nov. 30, 2004, Tr. 67-70.

Morse admitted having previously sworn that all work done by Point Construction on the Marshall's Harbor and Marshall's Vista properties for which Point Construction had not been paid was Morse's "equity" in the properties. Nov. 30, 2004 Tr. 63-66. As Morse explained in his deposition, "And if I built a retainer wall on my golf course and there's no retainer wall line item on the budget, I've had to spend that money out of my own pocket if it's there." Nov. 30, 2004 Tr. 64.

Accordingly, the Court further found that Point Construction provided no documentation to support its claim that it was entitled to be paid. Nov. 30, 2004 Tr. 117. Morse provided only general testimony, which this Court found to be insufficient to meet the requirements of the Constitution. *Id.* The Court also found that work done in violation of a lender requirement that budget or plan changes be approved in writing could not be the subject of a lien placed ahead of the lender after the fact. *Id.*

The Court further found that Point Construction, even though it was controlled by Morse, the same person controlling the Debtors, chose not to participate in the reorganization in any meaningful way prior to its filing of the Objection to the Agreed Order. It did not file a motion to lift the stay nor any other pleading in order to seek recognition of its alleged lien claims. Rather it "laid behind the log" with respect to what Point Construction claimed in the eleventh hour were valid mechanic's and materialmen's claims and constitutional lien claims. The plan and disclosure statement made no mention of those alleged claims. Nov. 30, 2004 Tr. 118.

The Court also determined that the foreclosures transferred title to the cash collateral in

question to the lenders free from any alleged claims of Point Construction as none of the lien claims were alleged until after the foreclosures had taken place except for the filing of the statutory lien in the lien records alone. Nov. 30, 1004 Tr. 118.

On December 13, 2004, this Court issued its Order Resolving Objections to Agreed Order Compelling Debtors to Turn Over "Cash Collateral" in Aid of Lift Stay Order ("Order Resolving Objections"). In the Order Resolving Objections, this Court concluded that "Point Construction does not and did not possess a constitutional lien on any real property of Marshall's Vista and/or Marshall's Harbor that was foreclosed on by Western and Vestin." The Court's Order Resolving Objections further concluded that "Point Construction does not have a statutory lien on any property of Marshall's Vista and/or Marshall's Harbor that was foreclosed on by Western and Vestin" and moreover that "Point Construction has no lien, or other claim of any kind, against the cash collateral of Western or Vestin." In so ruling the Court found that "Point Construction's claims have no basis in fact or law." The Court therefore denied the Point Construction Objection in all respects and ordered that the cash collateral be turned over pursuant to the terms of the Agreed Order.

Vestin has alleged that counsel for Point Construction knew when he filed the Point Construction Objection that Morse had filed affidavits in connection with the Vestin loan closings stating that there were no liens on the properties on which Vestin was receiving first position liens. Jan. 4, 2005 Tr. 9. They also claim counsel for Point Construction knew when he filed the Point Construction Objection that Point Construction had signed lien releases when it received loan disbursements from Vestin and had read a specimen of them. Jan. 4, 2005 Tr. 10. Further, Vestin claims that counsel for Point Construction knew when he filed the Point Construction Objection that Vestin had already foreclosed its liens on Marshall's Harbor and Marshal's Vista collateral. Jan. 4,

2005, Tr. 11. and that Point Construction had no records to support its October 6, 2003 lien affidavit asserting both a constitutional and statutory lien other than the March and April 2003 invoices covering work done more than four (4) months before the filing of the lien affidavit and covering only a tiny fraction of the asserted claim in any event. Jan. 4, 2005 Tr. 16-17. All of those contentions are, in fact, true.

Point Construction's counsel did not read Morse's prior trial or deposition testimony containing admissions inconsistent with Point Construction's assertions before filing the Point Construction Objection. Jan. 4, 2005 Tr. 16-18. Point Construction's counsel did not personally determine whether Point Construction's lien affidavit was filed before or after the Debtors' petitions but rather incorrectly "understood" that the lien affidavit had been filed first. Jan. 4, 2005 Tr. 18-19. Point Construction's counsel knew when he filed the Point Construction Objection that the work Point Construction had done and for which it was making a constitutional lien claim was "bringing in the infrastructure to a subdivision, retaining walls, streets, utilities, [berms], that sort of thing, lot clearing." Jan. 4, 2005 Tr. 19-20. Point Construction's counsel knew when he filed the Point Construction Objection that with respect to the inception of a lien doctrine that "if there are no liens, a lien hasn't incepted." Jan. 4, 2005 Tr. 38. Clearly, counsel inadequately investigated the facts upon which Point Construction's lien claims are based.

Vestin claims that the Point Construction Objection was filed only to cause unnecessary delay in the payment of the cash collateral previously agreed by the parties and to cloud Vestin's title to the foreclosed properties. Point Construction caused Vestin to expend substantial fees and costs in its defense of the Point Construction Objection –$16,021.50 in fees and $1,900.94 in expenses for a total of $17,922.44. Vestin Exhibits 12 and 13. The records of the fees and expenses

expended were sufficiently specific and detailed. The fees and expenses expended appear to be necessary and reasonable to respond to the Point Construction Objection. The hourly rates charged are within what is fair and reasonable for the type and quality of work involved.

Legal Issue

Are Point Construction and its counsel's actions in filing the Point Construction Objection sanctionable under Federal Rule of Bankruptcy Procedure 9011?

Conclusions of Law

A bankruptcy court may render sanctions under Bankruptcy Rule 9011. Rule 9011 authorizes a court to sanction if an attorney violates his or her certification that there is a legal or factual basis for their pleading, motion or other paper. Bankruptcy Rule 9011 states in relevant part:

> The signature of an attorney or a party constitutes a certificate by him that he has read the document; that to the best of his knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass, to cause delay or to increase the cost of litigation. . . If a document is signed in violation of this rule, the court. . . shall impose on the person. . an order to pay to the other party or parties the amount of reasonable expenses incurred.

Federal Rule of Bankruptcy Procedure 9011.

Rule 9011(c) provides that the Court, after notice and a reasonable opportunity to respond, may impose appropriate sanctions for violations of Rule 9011(b). Sanctions under Rule 9011 are warranted when 1) the papers are frivolous, legally unreasonable or without factual foundation; or 2) the pleading is filed in bad faith or for an improper purpose. *In re Mroz,* 65 F.3d 1567, 1572 (11th Cir. 1995) citing *In re Smith,* 82 B.R, 113, 114 (Bankr. D. Ariz. 1988).

A court confronted with a motion for sanctions under Bankruptcy Rule 9011 must first

determine whether the party's claim is objectively frivolous in view of the law or facts. A complaint is factually groundless and merits sanctions where the plaintiff has absolutely no evidence to support its allegations. *Mroz* 65 F.3d at 1573 citing *In re General Plastics Corp.,* 170 B.R. 725, 731 (Bankr. S.D. Fla. 1994). If a lawsuit is frivolous, the court must then consider whether the person signing the document should have been aware that it was frivolous. *Scrap Metal Buyers of Tampa, Inc. v. Charles Bluestone Co., Inc.*, 214 B.R. 509 (M.D. Fla. 1997), citing *McGuire Oil Co. v. Mapco, Inc.*, 958 F.2d 1552, 1563 (11th Cir. 1992).

Constitutional Liens

Point Construction claimed constitutional liens on the properties. Article 16, §37 of the Texas Constitution provides as follows:

> Mechanics, artisans and materialmen of every class shall have a lien upon the building and articles made or repaired by and for the value of their labor done thereon or material furnished therefore; and the Legislature shall provide law for the speedy and efficient enforcement of said liens.

A constitutional lien claim arises when improvements are made to property pursuant to contract with the owner, and money is owed for such improvements. *Contract Sales Co. v. Skaggs*, 612 S.W.2d 652 (Tex. Civ. App.-Dallas 1981, no writ). A constitutional lien extends to all land necessary to the enjoyment of the improvement, or that may be designated and set apart as intended to be used and enjoyed in connection with the improvements. *Strang v. Pray*, 89 Tex. 525, 35 S.W. 1054, 1056 (1896). This lien is self-executing and does not require compliance with the provisions of Chapter 53, Tex. Prop. Code to perfect the lien, including filing of a lien affidavit. *Strang,* 35 S.W. at 1056; *Farmers' & Mechanics' National Bank v. Taylor,* 40 S.W. 876, 879-80 (Tex. Civ. App. 1897), *aff'd*, 40 S.W. 966 (Tex. 1897).

Point Construction urged that its lien is prior in right to Vestin's deed of trust liens because

of the "inception" of the lien doctrine. Based on this law, Point Construction claimed that even if the work that was the basis of its lien claim was performed after the lender's deed of trust was recorded, that the lien still had priority because its actual "inception" was before Vestin recorded its deeds of trust. Point Construction argued that it commenced construction prior to the execution of the deeds of trust, that Vestin knew this and therefore Point Construction's constitutional lien for post deed of trust work had in fact incepted, was valid and had priority.

In order for a contractor to be able to claim a constitutional lien for work done after the filing of a lender's first priority deed of trust, the contractor must be able to point to a lien that incepted prior to the lender's filing of a deed of trust. *Oriental Hotel Co. v. Griffiths,* 33 S.W. 652, 583-586 (Tex 1895)(execution of general construction contract fixed the date of inception and thus priority was given to liens although labor and materials furnished after the date of the deed of trust). Here, however, there was no construction contract between the Debtors and Point Construction. Case law also indicates *Oriental's* holding with respect to the "relation back" doctrine has been narrowly and cautiously applied and that if there is no lien existing prior to the filing of the deed of trust, there is nothing to which a subsequently arising mechanic's and materialmen's lien can "relate-back." *McConnell v. Mortgage Inv. Co of El Paso, Texas,* 305 S.W. 2d 280. 283-288 (Tex. 1957); *Irving Lumber Co. v. Alltex Mortgage Co.,* 446 S.W. 2d 64, 68-69 (Tex. Civ. App. 1969), *aff'd,* 468 S.W.2d 341 (Tex 1971) These cases recognize that if contractors do work for which they are paid, then a deed of trust is filed and then contractors do more work for which they are not paid, the deed of trust is senior to the later liens that may arise from the subsequent work.

Point Construction urged that *McConnell* and cases following its holding are no longer valid law due to the codification of the "inception" of the lien doctrine pursuant to Section 53.123(b) Tex.

Prop. Code. This section provides that a mechanic's lien has priority over all liens not perfected as of the time of "inception" of the mechanic's lien. Section 53.124(a) Tex. Prop. Code, then provides that the "inception" of a mechanic's lien "is the commencement of construction of improvements or delivery of materials to the land on which the improvements are to be located and on which the materials are to be used." Section 53.124 (b) provides that "the construction or materials under subsection (a) must be visible from inspection of the land on which the improvements are being made." Point Construction then urged based on a Texas appellate court's opinion that the proposition espoused in *McConnell* and its prodigy-- that the priority position of a mechanics' and materialmen's lien cannot be "related back" to premortgage work for which full payment has been made-- is no longer sound. *First Federal Savings and Loan Association of Beaumont v. Stewart Title Company,* 732 S.W.2d 98 (Tex. Civ. App.–Beaumont 1987, writ denied). The *First Federal* appellate court perceived that the failure of the legislature to codify the *McConnell* exception to the "related back" doctrine has sounded its death knell. *Id.* at 112. The *First Federal* court, however, in surmising that the relation back doctrine applies to liens for work actually performed after the date of the recording of the deeds of trust when the actual commencement of work was prior to such recording, acknowledged that this issue was not totally free from doubt citing *McConnell*. *Id.* at 111. Of course, *First Federal* is the only case, and an intermediate appellate court case at that, to suggest that *McConnell*, a Texas Supreme Court case, is no longer valid law. And, *First Federal* involved a dispute between a lender and the title company, acting as escrow agent, which had certified that there were no mechanic's, laborer's or materialmen's liens on borrower's property prior to disbursing funds. The lender sued the title company for breach of fiduciary duty, misrepresentation fraud and negligence. Evidently, certain laborers constructed slabs on *two*

homes[1] that were being built by the borrower and upon which work had allegedly commenced prior to the recording of *First Federal's* deeds of trust. *Id.* at 105. The court ruled there was a material fact question as to when work on the lots was visibly commenced that precluded entry of a summary judgment in that case. And, there was no evidence as to whether the bills or claims on these improvements had been paid or remained unpaid on the dates the deeds of trust were recorded or even if any bills or claims existed. *Id.* at 102. And, the slabs were also "improvements" as required under the statute for inception as opposed to preliminary or preparatory activities or structures. That is far from the facts of our case.

Vestin's arguments make sense in our case because constitutional liens are secret liens (i.e. not filed), and are to be narrowly construed. *L.D. Ledford Cosntr.Co., Inc. v. El Primero Training Ctr., Inc.,* 1985 U.S. Dist. LEXIS 16529, at *10 (S.D. Tex. Aug 26, 1985). If invoices for work done prior to the filing of a lender's deed of trust are fully paid and work for which payment is not made is done after the filing of the lender's deed of trust, then any lien arising out of the subsequent work arises when that work is done, not when the previously paid-for work was done. *Irving Lumber*, 446 S.W. 2d at 69. If the law were otherwise "it would put deed of trust holders in situations like this one where they would be helpless to defend themselves from secret liens of which they had no notice." *Id.* Assuming Morse is telling the truth, all the work he claims was performed occurred after the Vestin deeds of trust were filed. Point Construction was paid for all pre-Vestin work that it had done.

Vestin and Western also argued that the lien releases signed by Point Construction at closing and in connection with periodic draw requests operated to waive any lien whose inception would

[1]See discussion below as the *First Federal* case involved work that would qualify for constitutional lien protection whereas the alleged work in our case does not.

be prior to the date of the lenders' deeds of trust citing *San Antonio Bank and Trust Co. v. Anel, Inc.*, 613 S.W. 2d 55, 57-59 (Tex. Civ. App.-Texarkana 1981, writ refused n.r.e.); *Nystel v. Gully,* 257 S.W. 286, 288 (Tex. App. 1923). Point Construction claimed the lien waivers were only for work that Point Construction performed prior to the date of the lien waiver and for which it was paid and did not apply to work Point Construction performed after it executed lien waivers or for which it was not paid, including retainage. The point is, however, that Point Construction's current position is totally inconsistent with Mr. Morse's previous behavior of executing the lien waivers not only as principal of Point Construction but as principal of the Debtors. Further, he has produced no documentary evidence to support his claim or show what work was allegedly done by Point Construction [except for Mr. Morse's testimony and the two invoices of March 14, 2003 and April 17, 2003 in the combined total of $405,000, far less than the amount Mr. Morse claims Point Construction is owed]. And, Mr. Morse is not the most credible of witnesses to say the least.

Additionally, as Vestin contends even if a lien had "incepted" there was no "building" or "article" alleged to have been worked on by Point Construction, and therefore no constitutional lien could exist in any event. The term "building" has been defined as only those structures having a capacity to contain and which are designed for the habitation of man or animals or the shelter of property. *Peterson v. Stolz,* 269 S.W. 113 (Tex. Civ. App. Beaumont 1925, writ refused). The construction performed by Point was not upon structures having such a capacity.

Point Construction claimed that the Constitution is to be construed liberally. For this proposition Point Construction provided the following case law to suggest that other activities qualify as "construction or repair" of "buildings" for purposes of constitutional liens claiming that "building" has been generally held to include "any edifice erected by the hand of man of lumber,

iron, stone, brick, wood, marble, cement, or any other substance, connected together and designed for any use in the position fixed...". *Ambrose & Co. v. C.O. Hutchinson,* 356 S.W.2d 215 (Tex. Civ. App.–Ft. Worth 1962, no writ)(Pier, which was built of steel and heavy timber and one end anchored on dry land was "building" within constitutional provision). "Other activities that have been held to qualify as the construction or repair of a 'building' include constructing a sidewalk in front of a building [*Waples-Painter Co. v. Ross,* 141 S.W. 1027 (Tex. Civ. App.–Ft. Worth 1911), rev'd on other grounds, 107 Tex. 215, 176 S.W. 47 (1915)]; furnishing ice and refrigeration machinery that is bolted to a building [*Reeves v. York Eng'g & Supply Co.*, 249 F. 513 (5th Cir. 1918), cert. denied, 39 S.Ct. 182]; and installing vinyl tile firmly glued to a house [*Enlow v. Brown,* 357 S.W.2d 608 (Tex. Civ. App.–Dallas 1962, no writ)]" Youngblood, *Texas Mechanic's Liens*, Section 605 (1999). However, all these cases involve work in or around an existing building or actually involve building a structure. That is not the case at bar. And, it is true that the legislature has enacted mechanics' lien laws at Chapter 53, Tex. Prop. Code pursuant to which the improvements that are subject to statutory liens under Chapter 53 expressly includes streets, utilities, clearing, grubbing, draining, fencing, artificial lakes or pools made for supplying or storing water, machinery or apparatus used for irrigation and landscaping. Section 53.001(2), Tex. Prop. Code. But, this all relates to statutory liens, not constitutional liens. And, there is a big difference.

In fact, Texas courts have consistently construed the constitutional lien as only for work done on structures with the capacity to contain and designed for the habitation of man or animal. The most recent cases reflect that Texas courts still refuse to impose a constitutional lien for exactly the kinds of work for which Point Construction seeks one–road work, excavation, utilities, dirt work, etc. *National W. Life Ins. Co., v. Acreman Constr. Co.,* 415 S.W. 2d 265, 269 (Tex. Civ. App.

–Beaumont [9th Dist.] 1967, judgment modified by 425 S.W 2d 815 (Tex. 1968) (no constitutional lien for cutting and burning underbrush or building road); *Lodal and Bain Eng'r, Inc. v Bayfield Pub. Utility Dist.,* 583 S.W.2d 653, 655-56 (Tex. Civ. App.–Houston [1st Dist.] 1979, reversed on other grounds *Quincy Lee Co. v. Lodal and Bain Engineers, Inc.,* 602 S.W.2d 262 (Tex. 1980))(no constitutional lien for engineering services for housing development-indicating that contemplation that buildings will be built in the future did not trigger a constitutional lien for work not directly performed in connection with a structure with the capacity to house people, animals or property); *Taylor v. Rigby*, 574 S.W 2d 833, 834, 836-37 (Tex. Civ. App.–Tyler 1978, writ refused n.r.e.)(no constitutional lien for plumbing work for mobile home park); *L.D. Ledford Constr. Co., Inc.,* 1985 U.S. Dist. LEXIS 16529 at *6 (S.D. Tex. Aug. 26, 1985)(no constitutional lien for building up the entrance to a horse-training center, for building up a slope next to a store, cutting streets into an area for in which trailers were parked and leveling a gully). This Court determined that Point Construction's activities could not qualify for "construction or repair" of a "building" for purposes of granting a constitutional lien. None of the case law provided by Point Construction even remotely supports its position to the contrary or a good faith argument for the extension of the law.

Statutory Liens

A contractor's statutory lien claim must be supported by sufficient records, *In re Mid America Petroleum, Inc.,* 83 B.R. 937 at 941 (Bankr. N.D. Tex. 1988) and must be filed within four months of the work it purports to cover. *Tex. Prop. Code §53.052(a)(2004).* The only invoices Point Construction provided to support its statutory lien affidavit were for work done more than four months before Point Construction's filing of the lien and in an amount of less than 25% of the total it claimed in this Court was owed. Point Construction kept no contemporaneous records, regularly

kept or otherwise, supporting the remainder of the work for which the lien claim was made. The statutory lien was clearly invalid.

Other Important Factors

Vestin made additional contentions as well to which Point Construction responded with legal or other arguments that failed to sufficiently address Vestin's defenses. The Court need not address every point and counterpoint to determine if Point Construction and its counsel had actual legal justification in bringing the Objection. This is not a situation in which an independent third party contractor or materialman is simply attempting to get paid on a project where it was employed to supply goods or services to the property owner. This is actually the next round of several rounds of continuing disputes between Mr. Morse and Vestin that started in state court, moved to bankruptcy court when the Chapter 11 proceedings were filed, continued through an unsuccessful reorganization attempt and has now culminated in Mr. Morse once again pursuing relief against Vestin; this time through Point Construction. And, although Point Construction made an argument that existing law (although this Court believes it is specious) supports the legal contentions made, there is no evidentiary support or factual basis to support Point Construction's contentions. Had counsel for Point Construction reviewed all the loan documents, affidavits, etc. thoroughly in this case and had he reviewed prior trial and deposition testimony of Mr. Morse thoroughly, he would have discovered the very real and gross inconsistencies in the positions Mr. Morse has taken as the party in control of both Debtors and Point Construction. Counsel indicated at the sanctions hearing that he did not review documents in their entirety (specifically Counsel indicated he did not read the deeds of trust nor the loan agreements in their entirety and did not remember if he was aware that Point Construction had also agreed to be bound by the Construction Loan Agreements) and

sometimes he reviewed only specimens -specifically as to the lien waivers. He also indicated that although he generally reviewed the closing binder, he only looked for items that would preclude the lien claims. He talked some with Debtors' prior state court counsel, but apparently did not feel the need to review the transcripts of the state court proceeding or Mr. Morse's depositions, the parties' past history nor the interplay between the Debtors, Point Construction and Vestin. Counsel evidently glossed over information he had in his possession in which Mr. Morse swore over and over again on behalf of Point Construction that there weren't any liens on the properties. Further, he effectively ignored the signed contracts and waivers of claims all of which were executed for the purpose of getting Vestin to lend money to the Debtors which Morse also controlled. Counsel also overlooked the lack of any substantial contemporaneous records of Point Construction supporting Morse's allegation that work was done. Counsel primarily relied on what Mr. Morse told him was the nature of the work Point Construction had allegedly performed, when the work was allegedly done, and that Point Construction hadn't been paid. Counsel also was either unaware of or ignored clear state law that requires a "structure" or "building" in order for there to be any potential for a constitutional lien claim. Counsel ignored the fact that Point Construction and the Debtors were insiders of each other due to Mr. Morse's control as well as the long history of litigation between Morse and Vestin. Counsel appeared unconcerned about Point Construction's lack of documentation to support the work Morse alleges was done. Most of all, counsel was either unaware of or chose to ignore the fact that Mr. Morse never in the previous one year history of the Marshall's Vista/Marshall's Harbor Chapter 11 cases did one single thing to pursue collection or recognition of Point Construction's alleged lien in those cases even though he controlled both the Debtors and Point Construction. And, counsel continued to pursue this matter even after Vestin's

counsel by letter dated September 17, 2004 pointed out to him some of the most problematic facts with his Objection to the Agreed Order.

Point Construction's claim is frivolous in view of the existing law as applied to the facts of this case and was pursued at the behest of Mr. Morse to delay the cash collateral payment to Vestin and to attempt to cloud Vestin's title to the realty.

Mr. Morse controlled Point Construction and he controlled the Debtors and he admitted such control was complete. Mr. Morse was an insider of all three entities and knew exactly what he was doing at all times. He obviously felt no need to sign written agreements between the Debtors and Point Construction for the improvements he alleges Point Construction made. And, he kept almost no records with regard to such work; when it was done, what was charged for it, etc. However, he did sign documents with Vestin on behalf of the Debtors that stated there were no liens, that construction was within budget, no work was done outside the budget [when, in fact, it is exactly work Point Construction allegedly performed outside the budget that Mr. Morse now wants to be placed ahead of Vestin], and he signed affidavits on behalf of both Debtors and Point Construction affirming that all liens were paid or waived. He failed to have Point Construction participate in the reorganization in any meaningful way. Point Construction failed to file a motion to lift the stay, nor did it file any type of pleading to put any party or the Court on notice of its claimed liens until after the Debtors' plan was rejected by the Court and the case converted to Chapter 7 and Vestin and Western foreclosed on the property. Neither the Debtors' schedules, disclosure statement or plan made mention of such claims which Mr. Morse surely knew about at the time the Debtors filed for bankruptcy since he caused Point Construction to file such a claim in the lien records of Travis County just after the Debtors filed bankruptcy. Further, Point Construction did not participate in

the lift stay litigation that Vestin and Western filed, and basically, as stated in this Court's prior Order, "laid behind the log"until it attempted to claim late in the game that it held valid liens. It is absolutely incredulous to this Court that Point Construction, guided by Mr. Morse, would have the gall under these circumstances to even attempt to make such claims. It is also difficult under these circumstances to see how counsel, if he had taken any time to actually read the loan documents in their entirety and research the background of this case, could not have rather easily determined the absurdity of his legal arguments when applied to the facts and evidence of this case.

Mr. Morse's tactics are despicable. He cannot be believed. He will apparently do or say anything if he thinks it will defeat or hurt Vestin. This would have been evident to counsel had he made the necessary and appropriate investigation. Point Construction's Objection under the extenuating circumstances of this case is patently frivolous. Sanctions pursuant to Fed. R. Bankr. Pro. 9011(c) are appropriate and necessary. A monetary sanction should be assessed against both Point Construction and its counsel in the amount of the reasonable attorneys' fees and expenses for the time spent by counsel for Vestin in responding to this Objection and pursuing this Motion.

Vestin requested at the sanctions hearing that Point Construction also be enjoined from prosecuting or otherwise pursuing the State Court Action against Vestin until the fees and expenses imposed as sanctions have been paid to Vestin citing *Farguson v. Mbank Houston, N.A.*, 808 F.2d 358, 360 (5th Cir. 1986). Farguson, a pro se plaintiff, filed a complaint against MBank claiming various causes of action. The District Court dismissed the complaint with prejudice as frivolous and irrational. Farguson then filed a second complaint against the same parties on the same claims. The District Court again dismissed this complaint, but also imposed monetary sanctions and ordered that Farguson refrain from instituting any further actions against any or all of the defendants based on

matters set forth in the complaint. Farguson then filed his appeal.

The Fifth Circuit determined that the injunction component of the sanctions is a drastic remedy but one that was warranted in this case. *Id.* at 358. The Fifth Circuit cautioned in *Day v. Allstate Ins. Co.*, 788 F.2d 1110 (5th Cir. 1986) that where monetary sanctions are ineffective in deterring vexatious filings, enjoining such filings would be considered. The Second Circuit reached the same conclusion noting that the injunction against future filings must be tailored to protect the courts and innocent parties, while preserving the legitimate rights of litigants. *In re Martin-Trigona*, 737 F.2d 1254 (2d Cir. 1984). In *Martin-Trigona*, a broad injunction prohibiting any filings in any federal court without leave of that court was upheld. The Fifth Circuit recognized in *Day* that such a broad order may be appropriate if a litigant is engaging in a widespread practice of harassment against different people.

In *Farguson* the injunction imposed by the District Court was specific and limited as it related only to the same claims against the same defendants–other claims against other parties were not enjoined. The Circuit determined that while the order penalized Farguson for abusive litigation, the injunction served only to effectuate its judgment and protect the named defendants from further litigation on claims which twice were found to be frivolous.

The Fifth Circuit then decided to impose its own sanctions on appeal, *sua sponte* as such were also warranted. The Fifth Circuit imposed monetary sanctions of $500. As an additional non-monetary sanction, the Circuit further ordered that neither its clerk nor the clerks of any federal court that it had jurisdiction over (where Farguson has been ordered to pay sanctions) shall accept any further filings by Farguson until all monetary sanctions imposed had been paid and satisfactory proof of such furnished.

In light of the extenuating circumstances in this proceeding and as an additional non-monetary sanction as well as acknowledging respect for this Court's inherent power to protect its jurisdiction and judgments, Point Construction is enjoined from prosecuting or otherwise pursuing the State Court Action against Vestin until such time as Point Construction has demonstrated to this Court that the sanctions awarded herein have been paid to Vestin.

Conclusion

The Motion for Sanctions should be granted and the sanction is awarded jointly and severally against Point Construction and its counsel in the amounts of $16,021.50 for attorneys' fees and $1,900.94 in expenses to reimburse Vestin for the time spent by Vestin's counsel in connection with this matter. As an additional non-monetary sanction, Point Construction is enjoined from prosecuting or otherwise pursuing its State Court Action against Vestin until the fees and expenses awarded under the Motion for Sanctions have been paid to Vestin.