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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

HOWARD S. WRIGHT CONSTRUCTION CO., **Plaintiff and Appellant,** **v.** **BBIC INVESTORS, LLC,** **Defendant and Respondent.**	**A109876** **(Alameda County Super. Ct. No. 2001-019199)**

Howard S. Wright Construction Co. (Wright) sought to foreclose a mechanic's lien recorded against the property of BBIC Investors, LLC. After a nonjury trial, the court determined that Wright's recordation of its mechanic's lien was premature and the lien was therefore void. On appeal, Wright contends this was error.

In the published portion of this opinion, we conclude the trial court erred because Wright recorded its claim of lien after its contract was completed, within the meaning of Civil Code section 3115, upon the anticipatory breach of the other contracting party. In the unpublished portion of the opinion, we conclude as an alternative basis for reversal that the trial court's key factual finding was not supported by substantial evidence. Although Wright's remaining arguments lack merit, for the foregoing reasons we reverse the judgment.

I. FACTS AND PROCEDURAL HISTORY

Respondent BBIC Investors, Inc. (BBIC), owned a former warehouse building located at 2201 Poplar Street in Oakland, California. 360networks (USA) inc. (360), a

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts II.C. and II.E.

telecommunications company, leased space in the premises from BBIC. 360 retained Wright to perform the construction work necessary for installing in the leased space a high-tech facility for 360's internet business. To this end, Wright and 360 entered into a written Design-Build Agreement. Meanwhile, BBIC posted and recorded a notice of nonresponsibility at the premises, intending to prevent the attachment of any mechanic's lien to its interest in the real property.

A. THE DESIGN-BUILD AGREEMENT

The project covered by the Design-Build Agreement was referred to as the "Oakland POP site." The contract described a work of improvement involving structural alteration of about 22,500 square feet for 360's use as a "POP" (point-of-presence) site for computer servers. Essentially, it involved converting a warehouse into a modern internet facility, with seismic upgrades, upgraded power, back-up generator, air-conditioning, "dry" sprinklers, waterproofing, and more. The budget for the project was approximately $5.2 million. Under section 12.1 of the Design-Build Agreement, however, 360 could make "changes by additions, deletions, or revisions."

Wright customarily maintained separate contracts for separate projects under separate job numbers. As explained by Wright's comptroller, Dawn Stephens, Wright followed the practice of the construction industry generally, which is "dominated by job cost accounting," wherein "costs are accumulated and coded to particular projects" depending on the type of contract. Wright's work under the Design-Build Agreement was assigned job number 6821. Indeed, Wright billed all of its work at the site under job number 6821.

B. MODIFICATION OF THE DESIGN-BUILD AGREEMENT

Wright began work under the Design-Build Agreement in March 2001. By May, however, it became clear that 360 was having serious financial trouble. In a letter dated May 10, 2001, 360's project manager, Jeff Garren, advised Wright's project manager, Hanno Nehrenheim: "Effective immediately 360networks has decided to place the Oakland POP site on hold. All necessary actions shall be taken to reduce capital

expenditures at this time." Garren also requested Nehrenheim to do what was necessary to leave the site "safe, secure and in compliance with all applicable codes."

Wright advised its subcontractors that the project had been placed on hold. A few days later, Nehrenheim sent an e-mail to Garren and BBIC's representative Foraker, with an attached "punchlist" of items Wright "plan[ned] to work from in getting the site ready for our departure."

On May 24, 2001, Nehrenheim sent Garren a letter with a subject line of "Authorization for Final Close-Out Work." The letter set forth the "final costs and work to be completed on this project" and requested formal authorization for this "additional work." The estimated price for the closeout work was $194,950. In an internal e-mail the next day, 360's Garren noted the "mothballing" of the project, construction of which was only about 65 percent complete.

Garren responded to Nehrenheim's May 24 letter with an e-mail on May 29, 2001. In the e-mail, Garren authorized Wright to proceed with the work described in Nehrenheim's letter. Specifically, he stated: "Please proceed with the items listed in your Authorization for Final Close-out Work letter of 5/24/01. The cost of this work ($194,950) should be completed in four (4) weeks and be billed in addition to and separately from HSW's May '01 application for payment." (As will be seen, BBIC contends this May 29 e-mail evinced the parties' modification of the Design-Build Agreement, while Wright contends—for the first time on appeal—that the e-mail confirmed the parties' "abandonment" of the Design-Build Agreement and a separate "closeout contract.")

On June 7, 2001, Nehrenheim sent an e-mail message to Tom Gallagher, Wright's vice-president and regional manager, stating: "360 stock dropped below a $1.00 today, closing at 99 cents. May want to *lien a little early*." (Italics added.)

An inspection for the closeout work was set for June 26, according to a June 14 e-mail from Garren, which bore the subject line of "Oakland POP (inspection of closeout work)."

On or about June 18, however, 360 advised Wright that it was not going to pay Wright any more money. Wright's chief financial officer, John Tremper, memorialized the conversation by correspondence dated June 19: "This letter is to confirm our phone conversation yesterday at which time you informed me that 360networks does not intend to make any payments on any of our contracts for at least 30 days even though certain amounts are due. You were unable to give me any assurances that payments due would be made after the 30-day period. [¶] That conversation indicates 360networks intention to breach the terms of our Agreements. [¶] If any of the above statements are [*sic*] incorrect, please contact me immediately, otherwise we will take appropriate action."[1] The record contains no response from 360 to Tremper's letter.

Also on June 19, Wright's laborers and tradesmen left the construction site. According to Wright, no more work was done at the site under any contract with 360.

C. WRIGHT RECORDS ITS CLAIM OF LIEN ON JUNE 20

Wright on June 20, 2001, recorded its claim of mechanic's lien against the subject improved real property, in the amount of $2,452,412, for "work, labor, materials and supervision for the renovation of [that] space . . . , furnished by [Wright] to be used and actually used in that certain work of improvement consisting of the renovation of said property" under "contract with . . . 360networks (USA) Inc". Wright later recorded a partial release of its mechanic's lien claim in the amount of $144,073, resulting in a claim of $2,308,339.

D. WORK AFTER JUNE 19

According to Nehrenheim's testimony at trial, Wright's work, "including the mothball or close-out work," was substantially completed on June 19, 2001, since that was the last day subcontractors pulled material or did any work on the project.

From Wright's job diary, however, the last work performed under job number

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[1] The reference in the letter to "contracts" and "Agreements" (plural) was apparently due to the fact that Wright was working on multiple jobs for 360, at sites in San Jose as well as Oakland and elsewhere.

6821 did not occur until June 26, 2001, when Wright moved some ductwork. Similarly, when asked at trial when construction stopped, Nehrenheim replied that the last entry was on June 25, in regard to moving out materials, while the last entry referring to subcontractors was on June 19. In addition, Nehrenheim acknowledged, the closeout inspection meeting took place at the site on June 26 as scheduled.

E. 360 FILES BANKRUPTCY

On June 28, 2001, 360 filed a petition for reorganization under Chapter 11 of the United States Bankruptcy Code.

F. WRIGHT'S FORECLOSURE ACTION

Wright filed its complaint to foreclose the mechanic's lien on August 6, 2001. Soon thereafter, Wright recorded a notice of pendency of its foreclosure action—its lis pendens.

1. Writ on Participating Owner Doctrine

BBIC, citing the notice of nonresponsibility it had filed, brought a motion for removal of Wright's mechanic's lien and expungement of its lis pendens. In response, Wright invoked the participating owner doctrine, by which it claimed that a lessor's notice of nonresponsibility is without effect if the lessor caused the work of improvement to be performed by requiring the lessee to make improvements. Based on BBIC's notice of nonresponsibility, the trial court ordered Wright's mechanic's lien removed and its lis pendens expunged.

In July 2002, Wright petitioned this court for a writ of mandate in case number A099318, seeking to set aside the trial court's orders removing its mechanic's lien and expunging its lis pendens. We issued a peremptory writ of mandate directing the trial court to vacate the orders and to conduct further proceedings in the foreclosure action. (*Howard S. Wright Construction Co. v. Superior Court* (2003) 106 Cal.App.4th 314, 326-327.) The matter was remanded for trial.

2. Trial

In January 2004, the issues of liability and damages were bifurcated for trial. In September 2004, trial to the court commenced on the issue of liability.

After presenting the evidence summarized *ante*, as well as evidence relevant to the participating owner doctrine, Wright announced its intent to rest its case. The trial court pointed out that Wright had neglected to address the issue of licensure or establish one of the elements of its cause of action—the validity of the mechanic's lien. The court observed that Wright's claim "may be premature," and "if [Wright] rest[s] now and [BBIC] says, I want judgment [under Code of Civil Procedure section 631.8], [it]'ll get it."

Wright decided not to rest its case. Instead, it again called Nehrenheim as a witness, among others. This time, led to some extent by Wright's attorney, Nehrenheim testified there was not simply a project for construction of the Oakland POP site project, but also a "close-out project." According to Nehrenheim, 360 abandoned the original construction project as of its May 24 letter, the closeout project began on May 24, and the May 29 e-mail confirmed that 360 was abandoning the construction project and Wright was performing just closeout or "mothballing" work.

In addition, Nehrenheim elaborated on the work performed at the site after June 19. As of that date, he explained, the project trailer remained on site and was full of project-related documents. Over the next few days, Nehrenheim and project superintendent Vince Wright emptied out the trailer and sent files back to Wright's San Francisco office. They spent some time at the trailer working on other matters as well, but did no work for 360.

Nehrenheim also accounted for the entries in Wright's job diary for June 20-22 and 25-26, 2001, which indicated that Wright had moved ductwork at the site on those dates. Nehrenheim asserted that BBIC's Dennis Henry had asked if the ductwork could be moved from the second floor, where it would have been installed if the closeout work had been finished, to a secured area on the first floor. Nehrenheim agreed, and he and Vince Wright used a pick-up truck to move the ductwork as requested. The record does not state exactly how long this took, but Nehrenheim testified they loaded and drove the pick-up truck "three to four" times from the second floor to the first floor. According to Nehrenheim, the fact that the work was recorded as the only entry on the job diary for

four days did not mean the work was being done all day, or even every one of those days, but just that the task was started on June 21 and the last load had not been run until June 26. Nehrenheim testified that no one was billed or charged for this work.

On cross-examination, Nehrenheim did not identify any formal contract for the purported "close-out" project, referring instead to just the May 24 letter from Wright and the May 29 e-mail from 360. He acknowledged that Wright's closeout work fell within the "fixed general conditions" provision of the Design-Build Agreement under job number 6821, covering demobilizing the field office, final cleaning, and site security—which was included in Wright's mechanic's lien. And although Nehrenheim asserted there were two projects at the site, he never claimed the work was performed under more than one contract.

3. BBIC's Motion for Judgment

After Wright rested its case, BBIC moved for judgment pursuant to Code of Civil Procedure section 631.8, asserting that Wright's lien, recorded on June 20, was recorded prematurely in light of Wright's work at the site after that date. (See Civ. Code, § 3115.)[2]

At the hearing, the parties agreed that timely recording of the claim of lien turned on section 3115 (which provides that a lien must be filed after the contractor has completed the contract), and section 3086, which the court and parties understood to define "completion." Wright maintained that its claim of lien was timely recorded, in part because there were really two projects—one for construction and the other for closeout—and 360's abandonment of the *construction* project on May 29 constituted actual completion under section 3086. The court stated that it was "struggling with [Wright's] notion that there are two projects," because Wright had "lumped them together in the same lien claim" under the Design-Build Agreement. To Wright's assertion that "it is obvious from the facts it is not one project," the court responded, "I

[2] Except where otherwise indicated, all statutory references hereafter are to the Civil Code.

guess the trier of fact isn't seeing the obvious. I think this is one project." Alternatively, Wright argued, its lien was timely recorded, because under section 3086 a lien could be filed 60 days after labor ceased on June 19.

The trial court postponed its ruling on the motion until after the close of evidence. (See Code Civ. Proc., § 631.8, subd. (a).)

4. BBIC's Case

In its case-in-chief, BBIC introduced evidence regarding Wright's purported premature recordation of the lien claim, as well as the participating-owner doctrine. Among the exhibits were subcontracts and subsequent settlements with subcontractors which, BBIC contended, disclosed Wright's understanding that it entered into subcontracts with subcontractors for a single "job," namely, job number 6821 for the Oakland POP site project under the Design-Build Agreement.

The parties submitted posttrial briefs addressing, among other things, the issue of premature recordation. The trial court took the matter under submission.

5. Order Granting BBIC's Motion for Judgment

The court's tentative decision indicated its intent to grant BBIC's motion for judgment based on Wright's failure to timely record its claim of lien. The court explained that Wright's June 20 recordation was premature, because the lien could not be recorded until after the contract was completed (§ 3115), "completion" occurs 60 days after cessation of labor (§ 3086, subd. (c)), and since Wright claimed that work ceased on June 19, the contract was not completed until around August 20, long after the recordation of the claim of lien. In addition, the court concluded, Wright's recordation was premature in light of its factual finding that work on the project did not actually end until June 26, six days after the claim of lien was recorded. (Italics added.) Wright filed a "REQUEST FOR ADDITIONAL STATEMENT OF DECISION." (See Cal. Rules of Court, rule 232; Code Civ. Proc., § 632.)

On March 1, 2005, the court issued a final statement of decision, which repeated the findings and conclusions from its tentative decision and added, in partial response to

Wright's request for an additional statement, some public policy reasons for its order. Judgment was entered in favor of BBIC.

This appeal followed.

G. PENDING WRIT

After entry of judgment dismissing the foreclosure action, BBIC obtained an order from the trial court expunging the lis pendens that Wright had recorded based on the mechanic's lien. Wright in turn petitioned this court for a writ of mandate (appeal number A110279), seeking to set aside the expungement order and requesting a stay of the order pending appeal. We granted the stay. We will rule on the petition by separate order.

II. DISCUSSION

At issue in this appeal is whether the trial court erred in granting BBIC's motion for judgment, on the ground that Wright had recorded its mechanic's lien prematurely. To begin, we embark on a cursory overview of mechanic's liens.

A "mechanic" in this context is one who has supplied materials or labor for the improvement of real property (other than the property's owner), and includes a contractor. To secure obligations owed by the owner to the mechanic pursuant to contract, the mechanic may file a lien on the improved property, which is sometimes referred to as the work of improvement. (See generally Cal. Const., art. XIV, § 3; § 3109 et seq.; 10 Miller & Starr, Cal. Real Estate (3d ed. 2001) Mechanics' Liens, §§ 28.1-28.7, at pp. 5-28 (Miller & Starr).)

As a requirement of enforcing the lien, the mechanic must record a claim of lien in the appropriate recorder's office within a statutory time period. (See, e.g., § 3115.) After the claim is recorded, the mechanic may initiate an action to foreclose the lien against the owner of the real property interest. (§ 3144.)

To prevail in a foreclosure action, the plaintiff bears the burden of proving, among other things, the validity of the lien. (*Basic Modular Facilities, Inc. v. Ehsanipour* (1999) 70 Cal.App.4th 1480, 1485.) For the lien to be valid, the claim of lien must have been timely recorded in compliance with the applicable statute. (*Remington v. Mulholland*

(1931) 118 Cal.App. 479, 481; see *M. Arthur Gensler, Jr. & Associates, Inc. v. Larry Barrett, Inc*. (1972) 7 Cal.3d 695, 703.)

As relevant here, the timeliness of the recording of a claim of lien is governed by section 3115, which provides both an earliest date and a latest date for timely recording. Section 3115 reads: "Each original contractor, in order to enforce a lien, must record his claim of lien *after* he completes his contract and *before* the expiration of (a) 90 days after the completion of the work of improvement as defined in Section 3106 if no notice of completion or notice of cessation has been recorded, or (b) 60 days after recordation of a notice of completion or notice of cessation." (Italics added.) The parties do not dispute that Wright was an "original contractor" for purposes of sections 3095 and 3115. (See § 3095; *Miller & Starr, supra,* Cal. Real Estate, Mechanics' Liens, § 28:8, at p. 31.)

It is not asserted, nor did the trial court find, that Wright's recordation was *late*. Rather, the court determined that Wright recorded its claim of lien too *early*. Relevant here, therefore, is the portion of section 3115 defining the earliest a claim of lien may be filed and still be timely: "after [the contractor] completes his contract."

The trial court and the parties have interpreted this phrase in varying ways at different stages of the litigation. We consider this issue in the next two sections.

A. CONSTRUING THE TRIAL COURT'S DECISION

The trial court ruled that Wright's June 20 recordation was premature, in part because it occurred less than 60 days after Wright stopped working at the site. The court reasoned that section 3086, subdivision (c), provides that "completion . . . in the case of any work of improvement other than a pubic work," occurs 60 days after cessation of labor under certain circumstances.[3] However, section 3115 refers to "completion of such

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[3] Section 3086 provides in part: "'Completion' means, in the case of any work of improvement other than a public work, actual completion of the work of improvement. Any of the following shall be deemed equivalent to a completion: [¶] (a) The occupation or use of a work of improvement by the owner, or his agent, accompanied by cessation of labor thereon. [¶] (b) The acceptance by the owner, or his agent, of the work of improvement. [¶] (c) After the commencement of a work of improvement, a cessation of

work of improvement" only in the context of calculating the *last* date for timely recording. The *earliest* date for timely recording turns on completion of the "*contract.*" Thus, to the extent the trial court employed "completion of such work of improvement," as defined by section 3086, subdivision (c), to determine when Wright had "complete[d] [its] contract" for purposes of establishing the earliest permissible date under section 3115, the court conflated the statutory nomenclature, if not the applicable legal standard.

Wright lambastes the trial court for this, spending part of its opening brief parading the horribles of what it claims to be such an errant construction of law. What Wright does not mention is the fact that it was *Wright itself* who led the trial court down this path. In Wright's memorandum of points and authorities regarding the timeliness of recordation, Wright had asserted that recordation is not premature if accomplished after "completion" under section 3115, and defined "completion" *by reference to section 3086*. In particular, Wright insisted that it could timely record its lien within 150 days after the closeout project was deemed "complete" *under section 3086, subdivision (c)*, by 360's refusal to pay on June 19, 2001. (Wright also argued it could timely record its lien within 90 days after 360 abandoned the construction project on May 29, 2001.)

Then at the hearing on BBIC's motion for judgment, Wright's counsel expressly confirmed that section 3115 *and section 3086* applied to the issue of the lien's *pre*maturity: "THE COURT: Do you think Civil Code Section 3115 applied? [¶] MR. MCQUEEN [Wright's attorney]: Yes, Your Honor. [¶] THE COURT: Do you think that Civil Code Section 3086 applies? [¶] MR. MCQUEEN: I think it applies as well, Your Honor." Expounding on its written submission, Wright's counsel then offered two arguments that the lien was timely recorded *under section 3086*: (1) 360's abandonment of the construction project constituted "actual completion" of the contract *within the*

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labor thereon for a continuous period of 60 days, or a cessation of labor thereon for a continuous period of 30 days or more if the owner files for record a notice of cessation."

meaning of section 3086; and (2) Wright's cessation of labor triggered a 60-day period in which Wright could timely record the claim of lien *under section 3086*.[4]

Ordinarily we would consider whether to dismiss the appeal based on doctrines such as invited error or waiver. (See generally *Norgart v. Upjohn Co*. (1999) 21 Cal.4th 383, 403 [invited error as estoppel]; *Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184-185 [waiver or forfeiture].) We need not do so in the matter before us, because the propriety of the court's ruling does not turn on its construction of the statute. (See *post*.) But it is nevertheless rather disingenuous—and disrespectful to the trial court—to attack the court and its ruling without acknowledging Wright's own contribution to the court's misstatement of the law.

In any event, any error in this portion of the court's legal analysis does not in itself compel reversal. It is well-established that we may uphold a judgment on a theory other than those relied upon by the trial court. (*14859 Moorpark Homeowner's Assn. v. VRT Corp*. (1998) 63 Cal.App.4th 1396, 1403.) Moreover, factual findings in the statement of decision could furnish a basis for affirmance, whether the legal standard was articulated correctly or not. In particular, the court concluded that Wright's recordation was premature based on the finding that "work ceased on June 26, 2001." This finding, if supported by substantial evidence, could indeed warrant a conclusion that recordation was premature, unless the contract was "complete[d]" within the meaning of section 3115 in some other manner before the June 20 recording. To the question of statutory construction we now turn.

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[4] During the discussion, the following exchange occurred: "THE COURT: Well, if we look at cessation of labor as occurring on June 19, the 60-day period would end sometime around August 20th. And, *thereafter*, a lien could be filed. [¶] MR. MCQUEEN: *That's what time the Gensler case says*." [¶] THE COURT: Is that what the statute says? I'll first start with the statute." (Italics added.) This may have led to the trial court's ruling, although Wright's counsel also argued that filing *within* the 60-day period would not be premature.

B. MEANING OF "COMPLETES HIS CONTRACT"

The meaning of the phrase "completes his contract" in section 3115 is a question of law we decide de novo. (See *Gary C. Tanko Well Drilling, Inc. v. Dodds* (1981) 117 Cal.App.3d 588, 594 (*Gary C. Tanko*).)

The parties agree that a construction contract is "complete[]" within the meaning of section 3115 if the contractor's obligations have been fully performed. As a corollary, a contract is generally *not* completed for purposes of section 3115 if work under the contract *remains* to be done. (Cf. *Lewis v. Hopper* (1956) 140 Cal.App.2d 365, 366-367 (*Lewis*).)[5] More precisely, a contractor completes the contract upon substantial performance of its obligations. (*Hammond Lumber Co. v. Yeager* (1921) 185 Cal. 355, 358 (*Hammond Lumber*); see *Lewis*, *supra*, at p. 367.)

Although Wright has no quarrel with this interpretation of section 3115 in the event of full performance, it maintains that a contractor also "completes his contract" when, by some event before full performance, it no longer has any further obligations under the contract. Thus, where the contract has been rescinded or otherwise terminated, Wright insists, it is "complete[]" at that point for purposes of commencing the lien recordation period under section 3115.

Generally speaking, we agree. If a contract could never be deemed complete under section 3115 unless all the work was performed, a contract cut short by mutual termination or the owner's material breach would never be "complete[]", the contractor could never timely record its claim of lien, and its lien could never be enforced. This would not only be contrary to common sense, it would conflict with legal authority. (See

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5 *Lewis* did not interpret section 3115, but is somewhat instructive on the broader concept of completion. In *Lewis*, a subcontractor recovered against a contractor under a labor and materialmen's bond, which provided that a lawsuit had to be filed within six months after completion of the "work described in the contract." (*Lewis, supra,* 140 Cal.App.2d at p. 366.) The subcontractor's lawsuit had been filed *more* than six months after the notice of completion was filed, but *less* than six months of the installation of four soap dispensers pursuant to the contract. The court held the lawsuit was timely, since the installation of four soap dispensers was work described in the contract, and the suit was filed within six months of installing the soap dispensers. (*Id*. at pp. 366-367.)

Schwartz v. Knight (1887) 74 Cal. 432, 434 [owner of property on which a building has been commenced cannot deprive a provider of materials of its right to file a timely lien by refusing or omitting to finish the building]; see also *Perazzi v. Doe Estate Co.* (1919) 40 Cal.App. 617, 619 [claim of lien was not prematurely recorded where all work actually agreed upon and requested had been done, notwithstanding discussion of a larger project]; Cal. U. Com. Code, § 2106, subds. (3) & (4) [upon termination of contract governed by Commercial Code, all obligations which are still executory are discharged].) It would also be contrary to the Legislature's intent to fairly balance the interests of contractors and property owners, since it would certainly place the contractor at a severe disadvantage.[6]

Simply put, a contract is complete for purposes of commencing the recordation period under section 3115 when all work under the contract has been performed, excused, or otherwise discharged.

Applying this rule to the matter before us, Wright contends the Design-Build Agreement was terminated (by the parties' abandonment or mutual rescission) and novated (by formation of a new and separate "closeout contract" for closeout work) by May 29, 2001. Furthermore, Wright urges, this new "closeout contract" was terminated (by 360's anticipatory breach) as of June 19, 2001. Because by June 19 both contracts had been terminated, and Wright no longer had any contractual obligations to 360, Wright insists its recordation of the claim of lien on June 20 was timely. BBIC, by contrast, asserts that the Design-Build Agreement was merely modified in May 2001, and work under the Design-Build Agreement in any event continued *past* June 20, 2001, rendering the recordation premature.

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6 Having an earliest day for recording the lien attempts to strike a balance between the contractor who wants to secure its right to be paid, and the property owner who does not want its property burdened with a lien until the contractor's obligations are fulfilled. (See *Gary C. Tanko, supra,* 117 Cal.App.3d at p. 594 [legislative intent behind mechanic's lien statutes is to balance interests of lien claimants and property owners]; *Diamond M. Co. v. Sanitary F. Co*. (1925) 70 Cal.App. 695, 702 [discussing effect of lien on property owner].)

We therefore turn to these arguments, examining first whether there was a modification of the Design-Build Agreement or a rescission or novation, then whether there was an anticipatory breach, and finally whether the work was completed before the claim of lien was filed. (Cf. § 3123 [claimant is not precluded "from including in the lien any amount due for labor, services, equipment, or materials furnished based on a *written modification* of the contract or as a result of the *rescission, abandonment, or breach* of the contract." (Italics added.)].)

C. MODIFICATION OR RESCISSION/NOVATION OF THE DESIGN-BUILD AGREEMENT

Whether the Design-Build Agreement was modified, or rescinded or novated, turns on the manifested intent of Wright and 360 in their correspondence of May 24, 2001, and May 29, 2001.

1. Substantial Evidence Supports the Implied Finding of Modification

The intent of Wright and 360 in their May correspondence is a question of fact. Implied in the trial court's decision is a factual finding that the correspondence merely effected a modification of the Design-Build Agreement, and that the Design-Build Agreement was the only contract between 360 and Wright in regard to the subject premises: the parties did not contend otherwise in the trial court.[7] We must therefore examine whether there was substantial evidence to support a finding that 360 and Wright intended to modify the Design-Build Agreement. (See generally *Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 888.)[8]

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[7] Nehrenheim testified, and Wright argued in the trial court, that there was an abandonment of the construction *project*. The court addressed this position, whether correctly or not, in its statement of decision: "[Wright] argues that the project was abandoned on May 29, 2001, and it had the right to record its claim immediately. Under Civil Code § 3115 the claim can only be recorded after cessation of work. Here it was recorded before the cessation of work." But Wright did *not* contend that there was an abandonment, rescission, or novation of the Design-Build *Agreement*, or that the parties formed a new and separate closeout contract. It is therefore not surprising that the court did not address these issues.

[8] Wright argues that we should decide de novo whether the parties intended a modification or a rescission, claiming there is no conflict in the evidence and the issue

Substantial evidence supports the court's implied finding. 360 and Wright authored their May 2001 correspondence knowing that 360 was in financial difficulties, the project contemplated by the Design-Build Agreement was only 65 percent completed, and 360 already owed Wright over $2 million. By May 10, 2001, 360 had placed the project on hold with the idea that the site would merely be rendered safe and secure. Nehrenheim followed up with items for "getting the site ready for our departure."

Against this backdrop, Nehrenheim's May 24 letter to Garren was sent with a subject line of "Authorization for Final Close-Out Work," setting forth the "final costs and work to be completed on this project," and requesting formal authorization for this "additional work." The letter referred to "HSWCC Job No. 6821," the job number used for work under the Design-Build Agreement. Nehrenheim requested Garren to "review this summary and provide your approval and/or comments regarding these charges." [9]

In response, Garren's May 29 e-mail authorized Wright to proceed with the work Nehrenheim had described. Garren stated in full: "Please proceed with the items listed in your Authorization for Final Close-out Work letter of 5/24/01. The cost of this work

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turns upon the construction of written instruments. We do not agree with Wright's position. But even if we were to exercise our independent judgment on this issue, for reasons we discuss *post* we would conclude that the May 24 and May 29 correspondence constituted a modification of the Design-Build Agreement rather than an abandonment, rescission, novation, or formation of a new and separate closeout contract.

9 The letter states: "Pursuant to our meeting last week, we have compiled the final costs and work to be completed on this project and are requesting a formal authorization for this additional work. We have submitted our May billing, bringing the total cost to date of this project to $2,727, 822.89. In this billing, we have included costs incurred to date on this project only. Looking forward, we have estimated the following additional costs beyond the latest billing: [listing general conditions and labor, paving, duct and piping, waterproofing, steel welding and shipping, frame and drywall for $194,950 to finish]. Please review this summary and provide your approval and/or comments regarding these charges. As directed last week, we have started scheduling subcontractor [*sic*] to complete this work, and require approval on these costs. Specially, we request approval on the paving, waterproofing, and duct/piping costs by the end of this week to confirm our scheduling. [¶] Thanks [*sic*] you again for your cooperation in working with us on the close-out of this project. Please contact us either at the jobsite or on my cell phone if you have any questions regarding these items."

($194,950) should be completed in four (4) weeks and be billed in addition to and separately from HSW's May '01 application for payment." Reasonably read, 360 and Wright expressed their mutual assent that Wright would perform the listed closeout work for the stated sum, and that this work would be the only remaining work to be done on the Oakland POP site under the Design-Build Agreement. In short, the parties intended to modify their obligations under the Design-Build Agreement.

Nehrenheim's May 24 letter *equates* the "closeout work" with the construction project that was the subject of the Design-Build Agreement. In the first paragraph Nehrenheim states: "we have compiled the final costs and work to be completed on *this* project." In the last paragraph, he writes: "Thanks [*sic*] you again for your cooperation in working with us on the close-out of *this* project." These references indicate that the work proposed in the May 24 letter is part of the same project for which 360 was billed over $2.7 million. While it is possible for parties to employ more than one contract for a single project, the absence of any reference to another contract here confirms there was just one contract.

We also note that the exchange of correspondence in May 2001 is substantially consistent with the procedure under the Design-Build Agreement for modifications by change orders. As mentioned, section 12.1 of the Design-Build Agreement provides in part: "This Agreement shall be subject to changes by additions, deletions, or revisions to the Work by Owner. . . ." Wright had to be notified of modifications "by receipt of additional and/or revised Drawings, Specifications, exhibits, or written orders." This was accomplished in substance by 360's letter of May 10, advising Wright that it was placing the project on hold but Wright would have to render the site safe and secure. Next, section 12.2 required Wright to submit to 360 "within ten (10) working days" a "proposal comprised of a detailed estimate with supporting calculations and pricing for the change together with any adjustments in the Contract Schedule required for the performance of Work as changed." This was accomplished by Nehrenheim's letter of May 24, 2001—"ten (10) working days after" 360's May 10 letter—which estimated the "final costs and work to be completed on this project" and requested 360's formal authorization for this

"additional work." Nehrenheim's May 24 letter also anticipated section 12.3, which provides that the proposed work could not begin until 360 "has approved in writing, through the issuance of a Change Order, the pricing for the change and any adjustment in the schedule for performance of the Work." "Change Order" is not defined in the definitions section of the Design-Build Agreement, but Garren's May 29 e-mail, instructing Wright to "[p]lease proceed with the items listed in your Authorization for Final Close-out Work letter of 5/24/01," and identifying the "cost of this work ($194,950)" and a performance schedule of "four (4) weeks," certainly comports with the essence of section 12.3. The similarity between the parties' May 2001 correspondence and the provisions for modification further demonstrates the parties' intent to modify the Design-Build Agreement.

Lastly, closeout work described in the May correspondence was not new and distinct, but fell within the ambit of the Design-Build Agreement and, indeed, most any other construction contract. Trial testimony included the following exchange between counsel and Wright's Tom Gallagher: "Q. Was there a punch list that was created in conjunction with BBIC by which -- and 360 by which the job was made safe and closed down? [¶] A. Yes. [¶] Q. That's an absolute on *any* job? [¶] A. That's correct. You never leave a job. You don't just walk off the job in the middle of the day with the doors unlocked and electrical power hanging in the air."[10] (Italics added.) Under the Design-Build Agreement, Wright was obligated to demobilize the field office, conduct final cleaning, and make the site secure. This obligation was discharged by work performed after May 29, 2001, and Wright billed such work under the job number used for the Design-Build Agreement.

Substantial evidence supported the conclusion that 360 and Wright modified the Design-Build Agreement by their correspondence of May 24 and May 29.

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10 A belated objection to the question that elicited this testimony was sustained; however, there was no motion to strike the testimony.

2. Abandonment and Novation

In its appellate briefs, Wright argues that the Design-Build Agreement was abandoned or rescinded by mutual agreement as of May 29, 2001, the date on which 360 instructed Wright to proceed with the closeout work. Wright also contends there was a novation, apparently comprised of Garren's May 29 e-mail and Nehrenheim's May 24 description of the proposed closeout work, which constituted a separate "closeout contract." For several reasons, Wright's abandonment and novation arguments are specious.

First, Wright is precluded from asserting any argument of rescission, novation, or a new and separate "closeout contract," since it never raised this argument in the trial court. It was not included in Wright's trial brief, its memorandum of points and authorities regarding the timeliness of recordation, its oral argument at the hearing on BBIC's motion for judgment, its posttrial brief, or even its objections to the court's tentative statement of decision. While Wright contended the construction *project* was abandoned by 360 on May 29 or June 19, it did not argue abandonment, rescission, or novation of the Design-Build Agreement itself. Not only does this omission cast doubt on the credibility of Wright's current argument that it had rescission and novation in mind in May 2001, the failure to raise the matter in the trial court bars any challenge to the judgment on this basis. (See *Richmond v. Dart Industries, Inc*. (1987) 196 Cal.App.3d 869, 874 (*Richmond*).)

Second, given the trial court's implied finding of a modification, and the fact that substantial evidence supports that finding, as a matter of law Wright's citation to purported evidence of abandonment and novation cannot compel reversal. Under the substantial evidence standard, we cannot reweigh the evidence before the trial court.

Third, even if we were to entertain Wright's argument despite its waiver, and decide the issue de novo as Wright urges, we would nonetheless conclude that Wright—who bears the burden of proof—had not produced evidence establishing an abandonment, rescission, or novation of the Design-Build Agreement or the formation of a new "closeout contract."

In this regard, we note that "abandonment" of the Design-Build Agreement, as the concept is postured by Wright in this appeal, is really *mutual rescission*. (§ 1689, subd. (a).) Specifically, Wright defines this abandonment as "rescission of an executory contract by mutual agreement before performance is completed." (See § 1689, subd. (a).)[11] Mutual rescission requires mutual assent: in this case, Wright would have to prove that 360 and Wright mutually agreed to terminate the Design-Build Agreement and return the parties to their precontract positions. *Novation* is the substitution of a new obligation for an existing one, such that the original contract is completely extinguished. (§ 1530; *Wells Fargo Bank v. Bank of America* (1995) 32 Cal.App.4th 424, 431.) Novation requires, among other things, mutual assent to the extinguishment of the old contract and the formation of the new contract. (See *Airs, Inc. v. Perfect Scents, Ltd.* (N.D. Cal. 1995) 902 F.Supp. 1141, 1147 [citing California law].) Indeed, "the intention of the parties to extinguish the prior obligation and to substitute a new agreement in its place must '*clearly appear*'." (*Davis Machinery Co. v. Pine Mountain Club, Inc*. (1974) 39 Cal.App.3d 18, 24-25 [no novation where the evidence did not show that the parties expressly stated an intent to extinguish the original contract].) The party alleging the novation bears the burden of proving it. (*Ibid*.)

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11 Despite this characterization, Wright nevertheless refers us repeatedly to *C. Norman Peterson Co. v. Container Corp. of America* (1985) 172 Cal.App.3d 628 (*Peterson*), which pertains not to the broader concept of contractual rescission but to the specialized concept of abandonment in the context of construction contracts. As the court in *Peterson* explains: "In the specific context of construction contracts, however, it has been held that when an owner imposes upon the contractor an excessive number of changes such that it can fairly be said that the scope of the work under the original contract has been altered, an abandonment of contract properly may be found. [Citations.] In these cases, the contractor, with the full approval and expectation of the owner, may complete the project. [Citation.] Although the *contract* may be abandoned, the work is not." (*Id*. at p. 640, italics in original.) The essence of this specie of abandonment is that the parties mutually agreed to disregard the contract and proceed otherwise, permitting recovery by the contractor in quantum meruit. (*Peterson*, *supra*, at pp. 641-645.) Wright insists it does not claim an abandonment in this sense occurred.

Wright did not prove that 360 and Wright clearly intended to terminate or extinguish the Design-Build Agreement, or to substitute a new agreement in its place. On their face, the May 24 and May 29 letters do not mention any intention of rescinding or extinguishing the Design-Build Agreement. Nor do they contain any statement that the closeout work would be done pursuant to a new or separate contract. 360 and Wright did not refer to any abandonment, novation, or "closeout contract," even though they alluded to "closeout work" for the Oakland POP project. And while the parties set forth the original Design-Build Agreement in a formal written agreement, there was no formal written agreement for the closeout work.

In addition, the parties' actions *after* May 29 belie any mutual rescission or novation. In internal correspondence on June 7, Nehrenheim suggested Wright "lien a little early" in light of 360's financial troubles. If he believed his exchange of correspondence with 360 back in May had *already* terminated the Design-Build Agreement, there would have been no reason to ignore Nehrenheim's sense of urgency and wait until 360's threat of nonpayment on June 19 to record the claim of lien—and yet it was indeed the June 19 threat of nonpayment that triggered Wright's recordation of the lien.[12] Furthermore, Garren's letter of June 14, with the subject line of "Oakland POP (inspection of closeout work)," referred to the Oakland POP project, not to any abandonment, novation, or "closeout contract," when discussing the closeout work.

And there is more. According to Wright's own job diary entries, work performed at the site after May 29 was given the same job number—6821—which had been designated as referring to the Design-Build Agreement for the Oakland POP site. Although the evidence was disputed on this point, use of the same job number is more

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12 We disagree with BBIC's contention that Nehrenheim's suggestion to "lien a little early" otherwise has any bearing on whether Wright timely recorded its claim of lien. Timeliness under section 3115 turns on the date the lien was recorded, not whether the contractor *intended* to file it earlier or later within the statutory period or even prematurely. Moreover, we question BBIC's view that Nehrenheim meant he wanted to file a lien prematurely, since that would have precluded Wright from foreclosing its lien at all. (§ 3115.)

consistent with a modification of the Design-Build Agreement than with a rescission of the Design-Build *Agreement* and performance of the work pursuant to a new and separate "closeout contract," which the parties never mentioned. In addition, Wright filed only one claim of mechanic's lien, and it did not allege more than one contract in its claim of lien or distinguish between work performed under the Design-Build Agreement and work performed under any "closeout contract." Rather, it merely referred to renovation of the property under "contract" with 360. Even in its complaint to foreclose the lien, Wright did not allege any abandonment, rescission, novation, or "closeout contract."

We also note that Nehrenheim's testimony—on which Wright relies for evidence of rescission and novation—says nothing about rescission or novation. When initially asked at trial about the "import of the May 29th" letter, he merely said it was "the final tally and cost of the work that we reviewed" and Garren's "authorization to proceed with that final list." Nehrenheim also understood the project was going to be "mothballed." Even when recalled to the stand for the purpose of establishing the timeliness of recordation, he asserted that the work involved two projects rather than one—a construction project that was abandoned and a closeout project—but never uttered a word about any mutual rescission, abandonment, or novation of the *Design-Build Agreement* or any formation of a new "closeout contract." And even if Nehrenheim's latter testimony could support Wright's current position on appeal, the trial court could have viewed it with suspicion, since there had been no mention of separate projects until the court warned Wright of a potential dismissal for premature recordation.

Wright's arguments are unpersuasive for other reasons as well. For example, Wright maintains that abandonment of the Design-Build Agreement may be inferred because it stopped work around May 9 with huge amounts undone, on May 24 it sent 360 an entirely different and separately priced-out set of tasks to close down the construction work, and 360 accepted the May 24 proposal and requested separate billing. This evidence, however, could also support an inference that the parties were intending to *modify* the Design-Build Agreement.

Similarly, Wright notes that Nehrenheim's May 24 letter to Garren includes amounts for "HSWCC [Wright] *General Conditions* and Labor" (italics added) for four weeks at a discounted rate and for miscellaneous invoices and bills not received for May bill. Wright argues that the Design-Build Agreement charged fixed general conditions as a fixed sum, whatever the duration of the contract, so there would have been no need to mention general conditions if this were only a modification, because the existing provision would have carried over. But the letter can reasonably be read to be explaining what Wright was going to charge 360 as consideration for the proposed closeout work; as part of the deal, 360 would have to pay an amount for "HSWCC General Conditions and Labor," whether it would otherwise have been included in a fixed sum. Again, this merely reflects a *modification* of the Design-Build Agreement, not a rescission or novation.

Lastly, Wright attempts to explain away its use of the same job number, and the absence of any formal document as referring to an abandonment, novation, or closeout contract, by claiming the parties had no need to think about this and Wright had also maintained the same job number earlier when the project went from a $300,000 design contract to a separate $5.2 million construction contract. We question whether Wright really lacked any need to consider these things, given its desire to salvage some right to over $2.7 million from a financially distressed client. Wright also asserts that, even if there was just one "project," there could still be two contracts, relying on *Peterson, supra*, 172 Cal.App.3d at page 640. But *Peterson* was decided under an "abandonment" theory that Wright distinguishes from its position in this appeal. And even if there *could* be two contracts, the evidence shows there was only one, as modified.

In the final analysis, Wright failed to establish an abandonment, rescission, or novation. Not only was there substantial evidence of modification, viewing the matter de novo Wright did not meet its burden of proof. It was reasonable to conclude from this evidence—and we do conclude—that the alleged "close-out project" was really an aspect of the Design-Build Agreement, as modified by the parties. As of June 19, therefore, the operative contract was the Design-Build Agreement.

D. TERMINATION OF THE DESIGN-BUILD AGREEMENT BY ANTICIPATORY BREACH

Wright contended in the trial court that the closeout "project" was completed by 360's repudiation of its obligation to make payments on or before June 19. In this court, the argument has morphed into a theory that a separate "closeout contract" was terminated as a matter of law by 360's anticipatory breach on June 19, and the closeout contract was thus complete as of that date. Because we have determined that there was no separate closeout contract, this particular argument is unavailing.

Nevertheless, 360 unquestionably repudiated its obligations as to *any and all* of its contracts with Wright on June 19. Thus, while there was no closeout contract, and the Design-Build Agreement was neither rescinded nor the subject of novation, Wright's obligations under the Design-Build Agreement terminated due to 360's anticipatory breach of *that* contract. This conclusion derives plainly from the evidence at trial, the record on appeal, and the legal propositions debated by the parties in their appellate briefs.[13]

Anticipatory breach arises where a party repudiates performance of its obligations before they come due; if sufficiently significant, the anticipatory breach discharges the other party's obligations and creates in the other party the right to pursue remedies for breach immediately. (*Romano v. Rockwell Internat., Inc*. (1996) 14 Cal.4th 479, 489.)

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13 As mentioned, Wright did not specifically contend in the trial court that the Design-Build Agreement was completed for purposes of section 3115 on the ground that 360 perpetrated an anticipatory breach of *that* contract on June 19. Rather, Wright argued that the events of June 19 either reflected an abandonment of the construction project or coincided with a cessation of labor. As a general rule, theories not raised in the trial court cannot be asserted for the first time on appeal, out of fairness to both the trial court and the opposing parties. (See generally *Richmond, supra,* 196 Cal.App.3d at p. 874.) Unlike Wright's rescission and novation claims, however, the concept of anticipatory breach *was* in play at trial. One of Wright's witnesses expressly referred to an "anticipatory breach of contract" arising on June 19 from 360's refusal to pay, and Wright argued this failure to pay ended its obligations to perform to 360. Moreover, we have discretion to consider a new theory on appeal if it pertains to a question of law on undisputed facts. (*Yeap v. Leake* (1997) 60 Cal.App.4th 591, 599, fn. 6.) Because there is no material dispute about the facts underlying 360's anticipatory breach, we would exercise such discretion here in the interests of justice.

The communications and actions of 360 and Wright around June 19, 2001, demonstrate anticipatory breach. On or about June 18, 360 told Wright that it had no intent or ability to pay any more money to Wright. Wright's CFO then wrote: "This letter is to confirm our phone conversation yesterday at which time you informed me that 360networks *does not intend to make any payments on any of our contracts for at least 30 days even though certain amounts are due*. *You were unable to give me any assurances that payments due would be made after the 30-day period*. [¶] *That conversation indicates 360networks [sic] intention to breach the terms of our Agreements.* [¶] If any of the above statements are [*sic*] incorrect, please contact me immediately, otherwise we will take appropriate action." On June 19, apparently without financial assurances from 360, Wright pulled the laborers and trades people from the construction site. As Gallagher testified at trial, "My recollection is once we had word from 360 that they did not intend to pay their invoices, we took that as *anticipatory breach of contract and we stopped*." (Italics added.) In fact, 360's anticipatory repudiation triggered recordation of the lien, and as we discuss *post*, Wright thereafter performed no significant work at the site under the Design-Build Agreement. The evidence thus confirms that the contract was terminated as of June 19.

Because of 360's anticipatory breach of the Design-Build Agreement, Wright had "complete[d] [its] contract" within the meaning of section 3115 on June 19. Accordingly, the recording of its claim of lien on June 20 was not premature. (§ 3115.)

E. COMPLETION OF PERFORMANCE OF THE CONTRACT

Even if the Design-Build Agreement had not been terminated by anticipatory breach, and the timeliness of the recordation of the lien therefore turned instead on whether the Design-Build Agreement was completed based on substantial performance, we could not uphold the judgment unless there was sufficient evidence of unfinished work under the modified Design-Build Agreement as of June 20.

On this point, the trial court ruled that work did not stop until June 26: "work continued on the project until June 26, 2001. See Exhibit 126 (Job Diary), pages H 70080-H 70084. This work was not 'trivial' or insignificant since [Wright] elected to

include the invoice for this work in its mechanic's lien claim. See [*Lewis, supra,* 140 Cal.App.2d at pp. 366-367]. The Court finds that work ceased on June 26, 2001, and, thus, the June 20, 2001, recordation was premature. The claim is void." Viewed a bit more broadly, the court found that work continued under the Design-Build Agreement after June 20, and therefore the contract had not been completed by the time the claim of lien was recorded.

We review the court's finding for substantial evidence. (*Hammond Lumber, supra,* 185 Cal. at p. 358 [date of completion of project is a question of fact to be reviewed for substantial evidence]; *Fontana Paving, Inc. v. Hedley Brothers, Inc.* (1995) 38 Cal.App.4th 146, 154, fn. 6 [substantial evidence supported court's finding of the date that work was completed].) Substantial evidence is not just any evidence, of course, but evidence that is credible, of ponderable legal significance, and of solid value in light of the whole record, such that a reasonable trier of fact could have reached the subject conclusion. (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633.)

In determining whether the contract was completed before June 20, we must look for substantial completion, without regard to trivial items left undone. (See, e.g., *Hammond Lumber, supra,* 185 Cal. at p. 358 [construction of a building was complete when the work was substantially completed, thus triggering the 90-day period to file a claim of lien, even though contractor later replaced defective work at a cost of $35.50]; *Lewis, supra,* 140 Cal.App.2d at p. 367 [noting that completion of project in context of mechanics' lien law is substantial completion, without regard to trivial matters].) The question before us, therefore, is whether substantial evidence supported the conclusion that there was non-trivial work performed (or still to be performed) after the lien was recorded on June 20.

The trial court's finding is not supported by substantial evidence. In reaching its ruling, the court relied on Wright's job diary entries on four dates after June 19, 2001; those entries indicated that Wright moved some ducting at the site on those dates under job number 6821—the job number for work under the Design-Build Agreement. But

other evidence gives context to those job diary entries and precludes any reasonable inference that nontrivial work was performed at the site, after June 19, pursuant to the Design-Build Agreement.

First, although recorded under job number 6821, the work was not required by the Design-Build Agreement as modified. Moving the ductwork from the second floor to the first floor was not included in the work proposed and accepted in the parties' modification of the Design-Build Agreement in May 2001. (To the contrary, ductwork was to be run from the roof *to* the second floor.) Furthermore, Nehrenheim's uncontradicted testimony was that the ductwork was moved from one floor to another at no extra charge, at *BBIC's* (rather than 360's) request.

Second, even if moving the ductwork was within the scope of demobilizing the field office, conducting final cleaning, or making the site secure as required by the Design-Build Agreement, it was trivial. On this point, BBIC has grossly exaggerated the evidence of the time it took to move the ductwork. As BBIC would have it, Nehrenheim admitted that Wright's job diary revealed that 64 hours of work was logged against the Oakland POP site project for June 20 through 26, comprising four 8-hour days for him and four 8-hour days for Vince Wright. But Nehrenheim said no such thing, and his testimony simply cannot be read that way. Although he was slated as a full-time employee on the project, neither Nehrenheim nor the job diary states that Nehrenheim (or Vince Wright) spent four days, eight hours per day, on matters mandated by the Design-Build Agreement between June 20 and June 26. Nor is there any basis to believe he did. And the trial court's reasoning that the work was not trivial because it was included in the mechanic's lien is unconvincing as well. In the first place, it does not appear Wright sought compensation for this particular work: while Nehrenheim testified that demobilization costs were included in the sum claimed by the mechanic's lien, the job diary does not identify "demobilization" work after June 19. In any event, the mere fact that Wright sought compensation for the work performed after June 19 would not in itself render it nontrivial. Considering the extent of the work that Wright performed under the

contract, as modified, three or four trips in a pick-up truck from one floor to another was insignificant.

Third, Nehrenheim's testimony concerning the completion of work and the job diaries themselves undermines the trial court's finding. *Before* the court reminded Wright of its obligation to prove the timeliness of recordation (and thus before any ground arose for questioning Nehrenheim's credibility), Nehrenheim testified that Wright's work, "including the mothball or close-out work," was *substantially complete on June 19*, based on the job diary and otherwise, because that was the last day that any subcontractors worked at the site. The trial transcript reads: "Q. All right. And if you would take a look again at Exhibit 126 which is the daily diary. [¶] And my question to you is: Can you tell from looking at the daily diary when the work of Howard S. Wright, including the mothball or close-out work, was substantially complete? That's a yes-or-no question. [¶] A. Yes. [¶] Q. Okay. And when was the work of Howard S. Wright on this project, as you just defined, or you can just redefine by confirming my question, when was it substantially complete? [¶] A. *June 19*. [¶] Q. *And what do you base that on?* [¶] A. *This was the last day that any subs pulled any material or did any work on the project*. [¶] Q. Okay. *And what was the last work done?* [¶] A. *The conversion of the dry system to dry sprinkler system, that was in the space to the wet system.* [¶] Q. All right. And that's the last day a subcontractor was on the site as well? [¶] A. That's correct." (Italics added.) Taking the evidence as a whole, the only reasonable inference is that Wright had substantially performed its obligations under the Design-Build Agreement as of June 19.

BBIC's efforts to steer us to other evidence—not cited by the trial court in its statement of decision—are misplaced. For example, BBIC notes that Nehrenheim and Vince Wright were at the site on June 20. But Nehrenheim testified without

contradiction that the work on that occasion did not pertain to Wright's contract with 360 and, at most, consisted of shipping some files back to its office.[14] Wright substantially performed its contract by June 19, even if it had not cleaned out a trailer until June 20.

Next, BBIC directs us to Nehrenheim's testimony that construction at the site did not cease until June 25. The subject testimony, however, must be read in its context: "THE COURT: When did construction cease? [¶] [NEHRENHEIM]: The last -- last entry we have is June 25th of us moving materials out of this space. The 25th of June. And the last entry we have where there was subcontractors on site was June 19th." Thus, Nehrenheim was merely recounting the job diary, which indicated that the *duct-moving* ("moving materials out of this space") occurred after June 19, but the tradespersons left on June 19. This is not inconsistent with his testimony that performance under the contract with 360 was substantially completed on June 19, even if the ductwork was moved thereafter as a favor to BBIC.

BBIC also refers us to Nehrenheim's testimony that Wright "worked 'til near the end of June on this project." However, this vague remark does not pinpoint the cessation of work under the Design-Building Agreement to be June 26 instead of June 19, and says nothing about the substance or relative significance of the work.

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14 Nehrenheim described the work as follows: "Q. [Mr. McQueen]: Okay. Now, this [job diary] does show two individuals present on June 20th 2001. And who are those individuals? [¶] A. [Mr. Nehrenheim]: That was the superintendent, Vince Wright, and the project manager, which is myself. [¶] Q. Okay. And where were you physically located? [¶] A. We were physically working out of the job construction trailer. [¶] Q. And why were you in a trailer at this point? [¶] A. Because all of our documents and files and offices were set up there, and so we still had all of our resources in that trailer. [¶] Q. But you weren't doing any more work on the project? [¶] A. No, we weren't doing any work on the project. [¶] Q. What were you doing by an [*sic*] large in the trailer. [¶] A. We were pulling all of the files and jobs and equipment out and transferring it to the office -- our main office, which was in San Francisco. [¶] Q. A task -- you performed that after completion of the job? [¶] A. Correct. [¶] Q. Were you undertaking activity unrelated to the 360 network site? [¶] A. Yes. [¶] Q. After June 20th? [¶] What activities were those? [¶] A. At that point we were both assigned to other projects, projects that were closing out and completing that they needed some of our assistance on."

Lastly, BBIC notes that a meeting took place at the site on June 26, at which the closeout work was inspected and reviewed. According to Nehrenheim, at the meeting "[w]e just reviewed work that we had done, work that we had completed; what was in the building, if there was anything left; on the outside to be addressed, cleaned up and signed off what we had done." The June 26 meeting with BBIC provides no basis for concluding that Wright had not *substantially* performed its obligations by June 19.

At bottom, substantial evidence does not support the finding that non-trivial work required by the Design-Build Agreement continued until June 26, 2001. The court erred in concluding that the Design-Build Agreement was not completed, for purposes of section 3115, by June 19, and that the recordation of Wright's claim of lien on June 20 was premature. Consequently, it was error to grant BBIC's motion for judgment, and the matter must be remanded for determination on the merits based on the evidence admitted at the trial.

III. DISPOSITION

The judgment is reversed and the matter is remanded for further proceedings consistent with this opinion. Wright shall recover its costs on appeal from BBIC.

STEVENS, J.

We concur.

JONES, P.J.

SIMONS, J.

Trial Judge:	Hon. William A. McKinstry
Trial Court:	Alameda County Superior Court
Counsel for Plaintiff and Appellant:	Farella Braun & Martel, Jeffrey A. Sykes, Anthony D. Giles, McQueen, Ashman & Mollis, James A. McQueen, Brian E. Bisol,
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