

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

DOUG WHITE, DIRECTOR)	CASE NO. CV 04 548887
THE OHIO DEPARTMENT OF)	(Consolidated with Cases 559117,
COMMERCE,)	560633, 558095, 559879, 564814,
)	569073, 592402)
Plaintiff)	
)	JUDGE JOSE A. VILLANUEVA
-vs-)	
)	<u>OPINION AND ORDER</u>
JOANNE C. SCHNEIDER, <i>et al.</i>)	<u>REGARDING THE PRIORITY</u>
)	<u>OF LIENS</u>
Defendants)	

I. INTRODUCTION

This matter comes before the court on the various motions for summary judgment¹ filed on behalf of certain parties to this litigation who claim secured status in connection with several lots of real property. By previous court orders² the motions for summary judgment were specifically limited to priority issues related to the following: claims of various mechanics lien holders; claims of a creditor bank; claims of the municipality where the real estate is located; claims of the subsequent purchaser of the parcels of real property in question; and the previously court ordered ten per cent secured creditor allocation granted to the court appointed receiver.

¹ *Parma Heights Land Development LLC'S Motion for Summary Judgment*, filed January 27, 2009; *GQ Contracting Company LLC's Motion for Partial Summary Judgment*, filed February 27, 2009; *Harrington Electric Company's Motion for Summary Judgment*, filed February 27, 2009; *Cleveland Construction Inc.'s Motion for Summary Judgment*, filed February 27, 2009; *The Home Savings and Loan Co. of Youngstown's Motion for Summary Judgment on the Issue of Priority Over the Alleged Mechanics' Liens*, filed February 27, 2009; *The Home Savings and Loan Co. of Youngstown's Motion for Summary Judgment Relating to the Validity and Priority of the Assessment of the City of Parma Heights*, filed February 27, 2009; *The City of Parma Heights' Motion for Summary Judgment as to the Validity and Priority of its Cornerstone Properties* filed, February 27, 2009; *Lorain Glass Co.'s Motion for Partial Summary Judgment*, filed March 3, 2009; *Northern Valley Contractors, Inc.'s Motion for Partial Summary Judgment as to Priority*, filed March 4, 2009; *Tycor Roofing, Inc. fka Hal Jones Construction Company's Motion for Partial Summary Judgment*, filed March 4, 2009.

² See the court's journal entries dated September 19, 2008 and December 22, 2008.

The court has carefully considered all of the motions for summary judgment filed by the various parties to this case, the arguments contained therein, the case law cited and all of the Rule 56 evidence properly submitted for review. A discussion and disposition of these motions follows below.

II. DISCUSSION

A. Priority Of Liens As Between The Court Appointed Receiver And All Other Parties Claiming Secured Creditor Status On The Cornerstone Properties³

The court previously established a ten percent secured creditor allocation for the benefit of the receivership. The reasons for the allocation were set forth in the December 21, 2007 Court's Findings and Order of Distribution. Finding no reason to restate its rationale for the allocation as provided therein, nor need to revisit the legal basis for the allocation, the court simply directs the parties to the relevant order. To the extent that any of the parties to this litigation in their motions for summary judgment have questioned either the need or legal authority for the secured creditor allocation, such arguments are hereby specifically rejected.⁴

The court hereby determines that the secured creditor allocation shall have priority over all other parties claiming a secured interest in this litigation. The efforts of the receiver on behalf of the court and on behalf of the receivership estate have in numerous ways benefited all parties to this litigation, including those parties claiming secured status. Additionally, the court has inherent power authority pursuant to R.C. §§ 2735.01 and 2735.04 to make such orders and give a receiver such powers as in its judgment are lawful and equitable. *State, ex rel. Celebreeze, v. Gibbs* (1991), 60 Ohio St.3d 69, 73-74, 573 N.E.2d 62.

³ The real property in question is composed of a number of permanent parcels located in the city of Parma Heights and unless otherwise specifically required for clarity in subsequent discussions shall be referred to as the "*Cornerstone Properties*".

⁴ Certainly, at this point the court's orders respecting the secured creditor allocation represent the law of the case. The court shall not revisit these arguments further and instructs the parties to desist from attempting to do so either specifically or by implication in any future filings.

B. Priority Of Recorded Liens As Between Home Savings and Loan Company And The Various Mechanics and Materialmen's Lien Holders

In order to accurately discuss the issues related to the priority of liens between Home Savings and Loan Company and the various mechanics lien holders⁵ involving the Cornerstone Properties, it is necessary that the parcels be more specifically identified. Thus, these properties are further identified as the “*Ruby Property*” (Permanent Parcel No. 473-24-014), the “*Garnet Property*” (Permanent Parcel No. 473-23-086), and the “*Pearl Property*” (Permanent Parcel Nos. 473-25-001, 473-25-005, and 473-25-008).⁶

(1) Determining Priority of Liens by Application of R.C. Section 1311.14

On July 10, 2003, Home Savings and Loan Company recorded a mortgage on the Cornerstone Properties. As part of the transaction related to this mortgage, Home Savings and Loan Company satisfied two pre-existing mortgages that previously encumbered the Ruby Property and the Garnet Property.⁷ Home Savings and Loan Company argues that it is entitled to “super priority” of its lien as against all others claiming liens pursuant to R.C. § 1311.14 and as to all the parcels making up the Cornerstone Properties.

Ohio Revised Code Section 1311.14 provides as follows:

(A) Except as provided in this section, the lien of a mortgage given in whole or in part to improve real estate, or to pay off prior encumbrances thereon, or both, the

⁵ Mechanics lien holders recorded Affidavits of Mechanics Liens between late 2004 and early 2005. Lorain Glass Co. recorded its affidavit on November 20, 2004. GQ Contracting Company recorded its original affidavit on November 23, 2004, a first amended affidavit on November 24, 2004, and a second amended affidavit on December 22, 2004. Northern Valley Contractors Company recorded its affidavit on November 24, 2004. Cleveland Construction, Inc. recorded its original affidavit on December 2, 2004 and a second on December 13, 2004. Harrington Electric Company recorded its affidavit December 15, 2004. Tycor Roofing recorded its affidavit December 16, 2004. Tomco Metal Fabricating recorded its affidavit February 23, 2005. Best Supply, Inc. and Donley's, Inc. have been named in previous pleadings as mechanics lien holders who continue to assert a priority lien position over the Home Savings mortgage, but neither filed a motion for summary judgment or a response to a motion for summary judgment. Therefore, the date on which they recorded an Affidavit of Mechanics Liens was not provided by these parties.

⁶ See February 27, 2009 *Memorandum Of The City Of Parma Heights Ohio In Support Of Its Motion For Summary Judgment As To The Validity And Priority Of Its Lien On The Cornerstone Properties And In Opposition To The Cross-Motion For Summary Judgment Of Parma Heights Land Development, LLC* at footnote 1 at page 1.

⁷ The pre-existing mortgages that were satisfied are the JAM Pearl mortgage and JAM Laundale mortgage.

proceeds of which are actually used in the improvement in the manner contemplated in sections 1311.02 and 1311.03 of the Revised Code, or to pay off prior encumbrances, or both, and which the mortgage contains therein the correct name and address of the mortgagee, together with a covenant between the mortgagor and mortgagee under this section, shall be prior to all mechanic's, materialmen's, and similar liens and all liens provided for in this chapter that are filed for record after the improvement mortgage is filed for record, to the extent that the proceeds thereof are used and applied for the purposes of and pursuant to this section.

A careful consideration of the Rule 56 evidence submitted in this case establishes that Home Savings and Loan Company obtained a mortgage lien and is entitled to priority as against all subsequently filed mechanic's liens, material supplier's liens and all similar liens provided for in Chapter 1311 of the Ohio Revised Code, but only as to the Ruby Property and the Garnet Property.⁸ Home Savings and Loan Company is entitled to priority of its lien irrespective of when any work was commenced at the two properties in question. *Wayne Bldg. & Loan Co. v. Yarborough* (1967), 11 Ohio St.2d 195, 228 N.E.2d 841; *Barr v. Masterpiece Homes* (July 21, 1994), Cuyahoga County App. No. 65835; *Guernsey Bank v. Milano Sports Enterprises, LLC* (2008), 177 Ohio App.3d 314, 894 N.E.2d 715.

However, the Pearl Property was not encumbered by the mortgages in question.⁹ Thus, Home Savings and Loan Company cannot claim the benefits of R.C. § 1311.14 on the basis that its funds were used to extinguish prior encumbrances as to that real estate. Nor does the record establish that Home Savings and Loan Company funds were used for improvements at the Pearl

⁸ Home Savings and Loan Company's priority would also apply as to any liens for public improvements. See R.C. § 1311.25-38.

⁹ In this regard, Home Savings and Loan Company on May 20, 2009 filed a *Supplement Of Defendant The Home Savings And Loan Company Of Youngstown, Ohio To the Motion Of Defendant The Home Savings And Loan Company Of Youngstown, Ohio, For Summary Judgment On The Issue Of Priority Over The Alleged Mechanics' Liens* correcting its previous incorrect assertions that the mortgages it satisfied encumbered the Pearl Property.

Property. Indeed, Home Savings and Loan Company does not rely on this alternate basis to support its claim of priority.¹⁰

(2) Determining Priority of Liens by Application of R.C. Section 1311.13

In determining the priority of liens as they relate to the Pearl Property the court must instead consider the provisions of R.C. § 1311.13. The statute provides as follows:

(A)(1) Liens under sections 1311.01 to 1311.22 of the Revised Code for labor or work performed or materials furnished prior to the recording of the notice of commencement¹¹ pursuant to section 1311.04 of the Revised Code are effective from the date the first visible work or labor is performed or the first materials are furnished by the original contractor, subcontractor, materialman, or laborer at the site of the improvement.¹²

Two parties, Cleveland Construction, Inc. and Harrington Electric Company have filed virtually identical briefs claiming priority of their liens pursuant to R.C. § 1311.13.¹³ (For purposes of clarity, in the ensuing discussion the court shall refer to Cleveland Construction, Inc., Harrington Electric Company and all other contractors, subcontractors, materialmen, or laborers, making priority claims as the “Lienholders”.) Lienholders claim that visible construction work commenced at the Cornerstone Properties before Home Savings and Loan

¹⁰ Of particular relevance in this regard are the statements of counsel for Home Savings and Loan Company at the April 06, 2009 Final Pretrial conference. Counsel represented at that time that for purposes of priority it would not seek to establish that its funds were specifically used for construction or improvements to the Cornerstone Properties.

¹¹ The myriad briefs filed in this case contain many arguments as to various other issues. One such issue is whether Home Savings and Loan Company complied with the requirements set forth in R.C. §1311.04 pertaining to a Notice of Commencement. The court rejects any arguments by Home Savings and Loan Company in purported reliance on its “execution” of a Notice of Commencement. It is apparent that a Notice of Commencement was never **“record[ed] in the office of the county recorder...in which the real property to be improved is located..”** R.C. §1311.04(A)(1) (emphasis added). The law unambiguously requires that such a document must be recorded. None of the Rule 56 evidence submitted in this case nor a careful reading of the deposition of Home Savings and Loan Company’s 30(B)(5) representative, Keith Ziegler, support a contrary conclusion.

¹² A number of amendments were made to R.C. §1311.03 in 2007 subsequent to the filing of the instant litigation. Those amendments do not substantively affect the language relevant to the instant dispute.

¹³ All other parties who are claiming priority on the basis of recorded mechanics, subcontractors, materialman’s or laborer’s liens have filed motions for summary judgment in which they seek to adopt and incorporate the legal arguments contained in the aforementioned motions for summary judgment submitted by Cleveland Construction, Inc. and Harrington Electric Company. The legal and factual arguments being advanced are essentially identical and will be treated as such in this opinion.

Company recorded its mortgage documents. Home Savings and Loan Company has vigorously opposed the motions.

(a) **The Affidavit of Julie Tindera**

Prior to discussing the substantive merits of the parties' arguments, the court must first address the March 18, 2009 *Motion Of Defendant The Home Savings And Loan Company Of Youngstown, Ohio In Limine To Exclude And To Strike Evidence Attached To And Referenced In The Motions For Summary Judgment Filed By Plaintiff Cleveland Construction, Inc.; Defendant Harrington Electric Company; Defendant GQ Contracting Company, LLC; Defendant Lorain Glass Co., Inc.; Defendant Tycor Roofing, Inc.; and Defendant Northern Valley Contractors, Inc.* In support of their arguments, Lienholders have attached the affidavit of an individual named Julie Tindera to their motions for summary judgment. They rely heavily on her testimony in support of their position. In her affidavit, Ms. Tindera purports to have at one time been employed by Broadway Contracting, Inc., a now defunct company, and offers specific details of that enterprise's involvement with the Cornerstone Properties.

Home Savings and Loan Company has moved to strike the affidavit of Ms. Tindera for a number of reasons, asserting as one of the bases to strike her testimony Cleveland Construction, Inc.'s and Harrington Electric Company's bad faith in now presenting her as a witness on behalf of Broadway Contracting, Inc.¹⁴ Home Savings and Loan Company has a compelling basis to seek such relief. The court notes that on January 14, 2009, it was obliged to conduct an "emergency" telephone conference to resolve, among other discovery matters, Home Savings and Loan Company's attempt to take the deposition of Ms. Tindera. Counsel for Lienholders were aggressively opposing the deposition. They took the position that Ms. Tindera was not a

¹⁴ Home Savings and Loan Company also notes as a reason for not permitting consideration of Ms. Tindera's testimony the fact Lienholders in discovery responses neglected to identify her as an individual with knowledge.

proper party to be deposed on behalf of Broadway Contracting, Inc., asserting she had not been authorized to testify for the entity in question. They clearly intimated her testimony would be of little or no value. Counsel for lienholders adamantly refused to permit Ms. Tindera's testimony to proceed under any circumstances. After much debate the court ruled in favor of Lienholders' counsel.¹⁵

As it turns out, Lienholders' counsel have been disingenuous with respect to this witness.¹⁶ Tindera's affidavit itself establishes this beyond doubt. She identifies herself as "an estimator, as well as the General Manager for Broadway Contracting, Inc." at the time in question. At *paragraph 4* she states that she **prepared the proposal** accepted by Pearl Development, L.L.C. and at *paragraph 12* she claims to have "**worked closely with CCI on the Cornerstone Project** beginning no later than June 25, 2003, and continuing into 2004." (emphasis added.) Lienholders' argument that they secured the testimony of Ms. Tindera through superior lawyering rings hollow. Ms. Tindera's affidavit and the exhibits offered along with her testimony are hereby stricken and shall not be considered.

(b) Priority Under R.C. Section 1311.13

Case law interpreting R.C. § 1311.13 is limited. The briefs filed in this case focus on two leading appellate level opinions that have had occasion to interpret the version of the statute applicable in this case.

Lienholders rely on the case of *Guernsey Bank v. Milano Sports Enterprises, LLC* (2008), 177 Ohio App.3d 314, 894 N.E.2d 715. In *Guernsey* electrical improvements were to be made to

¹⁵ See the court's January 14, 2009 *nunc pro tunc* entry memorializing the substance of the telephone conference and the court's determination.

¹⁶ Unfortunately, this represents yet another example of overreaching by Cleveland Construction, Inc.'s counsel during this litigation.

an existing building.¹⁷ The court held that the delivery of two aerial work platforms to the work site, without more, was sufficient to satisfy the “**first materials...furnished**” requirement of R.C. § 1311.13. *Id.* at 330.

Home Savings and Loan Company and the Receiver urge the court to follow the analysis set forth in *Schalmo Builders, Inc. v. Malz* (1993), 90 Ohio App.3d 321, 629 N.E.2d 52. *Schalmo* follows a traditional approach developed over time and that has remained relatively consistent even as changes were made to earlier versions of the statute. The test articulated therein focuses on the commencement of the actual construction of improvements to real property.

Under *Schalmo*, mere preparation for construction work does not suffice to meet the “**first visible work**” requirement of R.C. § 1311.13. *Schalmo* represents a line of cases that also hold the construction must ultimately become a component part of the structure. *Id.* at 324. Therefore, the court in *Schalmo* rejected the builders’ claim that merely staking out the foundation for a planned building and performing soil testing were sufficient to give it priority over a mortgage bank.

In support of their motions for summary judgment Lienholders offer the affidavit of Steve Williams, an employee of Cleveland Construction, Inc. Mr. Williams testified to records he said were kept by in the ordinary course of business. These records principally document expenditures incurred by Cleveland Construction, Inc. in its capacity as project manager/general contractor for the Cornerstone Project prior to July 10, 2003.¹⁸ The court has also considered the

¹⁷ In *Guernsey*, as in this case, the bank failed to comply with the requirements set forth in R.C. §1311.04 pertaining to a Notice of Commencement. This is discussed more fully in footnote 11, of this opinion, *supra*.

¹⁸ As noted earlier, the affidavit and exhibits offered by Julie Tindera have been stricken and not considered. Home Savings and Loan Company has also moved to strike the affidavit of Steve Williams and the exhibits attached thereto. A variety of objections are raised among them that Mr. Williams is not the “custodian” of the records in question. This objection is overruled in that Mr. Williams need only be a witness with knowledge under the Civil Rules which, in fact, he appears to be. Home Savings and Loan Company has moved to strike certain paragraphs of

deposition testimony of Keith Ziegler, Vice President of construction for Cleveland Construction, Inc. and the deposition testimony of Mayor Martin K. Zanotti.

Taken as a whole, the evidence establishes that the Cornerstone construction project was divided into phases. The initial phase would have included pre-construction activity. This would have included demolition of existing structures. Mr. Ziegler identified Broadway Contracting, Inc. as the entity chosen to conduct this phase of the project. Prior to the July 11, 2003 groundbreaking ceremony, Broadway Contracting, Inc. had conducted "selective demolition" of a building on site that had formerly housed a Tops grocery store. This consisted of preparatory work required before the building could actually be torn down. The process included disconnecting or capping utilities supplying the structure, salvaging copper pipes and copper wire, and removing drywall to facilitate exterior wall demolition. Fixtures that were left behind and other equipment were removed. However, the actual demolition of the building in question could not have taken place without the issuance of a permit. The demolition permit was issued on July 11, 2003.

Site clearing activities also had taken place prior to July 10, 2003. This included the removal of trees and brush. Chain link fence was installed around the perimeter of the properties. Keys and locks for the fences would have been installed. Guardrails were constructed and board on board fencing was also erected in various locations. Silt fences to prevent erosion and to promote sanitation control were also installed. Seventy-five sandbags were delivered to the site, presumably to support structures such as fencing.

A 12' x 60' trailer was transported to the property to serve as an operations center. Furniture was placed in the trailer. Other pieces of equipment such as a generator, an excavator,

Mr. Williams' affidavit including among them *paragraph 12*. Home Savings and Loan Company's request is well taken as the emails are impermissible hearsay. Otherwise, Mr. Williams' affidavit and the invoices he identified as business records would generally be admissible as evidence at trial.

four or five dumpsters and a number of portable toilets were also brought to the site. In addition, a variety of signage was installed in the area.

On July 11, 2003, a groundbreaking ceremony was held at the Cornerstone Properties. Mayor Zanotti presided over the festivities. At deposition, he acknowledged that there had been a number of preparations for development of the site. He had observed that various pieces of equipment were delivered to the site and that the area had been fenced off. However, he also testified that no actual construction had commenced as of that date, explaining that neither demolition nor other such construction work could take place until permits were issued by the city of Parma Heights. The first permit, for demolition of the Tops building, was approved on July 11, 2003.

In attempting to reconcile the different results reached in the *Schalmo* and *Guernsey* cases one factor is apparent. The statute is in the disjunctive, providing that “*Liens...for labor or work performed or materials furnished...are effective from the date the first visible work or labor is performed OR the first materials are furnished.*” (emphasis added.) Each court, therefore, focuses its analysis on a different part of the statute. *Schalmo* can be said to be a “*first visible work*” case; *Guernsey* is a “*first materials...furnished*” case.

The approach taken in each case produces dramatically different outcomes. The *Guernsey* court in discussing R.C. §1311.13 emphasized that it was focusing on the language in the statute as rewritten after it had undergone significant amendment. Under the modern version of the statute, those asserting mechanics, materialmen’s, laborers’ liens and so forth may now simply rely on the furnishing of materials to obtain priority. *Id.* at 331. *Guernsey* applies the “first materials furnished” language of the statute in a literal manner. Yet, it can hardly be faulted for interpreting legislative changes to the law in a straightforward fashion.

Nevertheless, this court observes serious limitations in the manner in which the *Guernsey* court applied the “first materials furnished” language.¹⁹ For example, *Guernsey* makes no distinction between “equipment” and “materials”. By its terms, it does not require that any work whatsoever actually be done. Apparently, no use of the equipment or materials brought to a construction site need be shown. Most significantly, *Guernsey* ignores the fundamental basis for the body of law in this area: **notice**. In point of fact, but for the delivery of the two aerial platforms to an already existing structure, nothing else would have identified the site to a third party as a construction site.²⁰

Notwithstanding the aforementioned limited facts upon which the *Guernsey* court relied, its interpretation of the law as amended appears correct. The *Schalmo* analysis takes too limited a view of a statute that has been modernized and on its face appears to call for less stricture.

Returning then to the case at bar, the Rule 56 evidence discussed above at pages 8-10, *supra*, clearly demonstrates that the Cornerstone Properties had openly and obviously become a construction site by the time Home Savings and Loan Company²¹ recorded its mortgage on the Pearl Property. Accordingly, as to those parcels only, Lienholders are entitled to priority of their claims as against Home Savings and Loan Company by operation of R.C. §1311.13.

¹⁹ The observation of the Reciever that pursuant to *Guernsey* the mere delivery of a lawn mower to a field converts it into a “construction site”, thus defeating all mortgage liens, does not miss the mark by much. More to the point, this court can think of no situation where “materials” as defined by the *Guernsey* court would not likely become the principal future focus in this type of litigation. Thus, to the extent *Guernsey* is widely adopted it may very well eviscerate the first visible work test. One might perhaps ask, why would a mechanic, materialman, laborer or anyone seeking priority of a similar lien ever bother to argue his lien has priority on the basis that he has met the “first visible work” standard when all that needs to be done is to point to the truck stationed in the parking lot or the tools that were delivered to the work site?

²⁰ One who lends money against real estate and makes reasonable inspection of the physical characteristics and conditions of the realty should be able to readily ascertain that it is a construction site or has work activity thereon. Thereafter precautions to insure the soundness of an anticipated investment can be taken while at the same time men and women who have already expended their labor can be fully protected.

²¹ Home Savings and Loan Company offers an additional legal proposition in support of its position. It asks the court to recognize its priority on the theory of equitable subrogation. The doctrine comes into play in situations of fraud or mistake. *ABN AMRO Mortgage Group, Inc. v. Kangah* (2010), 126 Ohio St. 3d 425, 934 N.E.2d 924. Under the facts of this case, the doctrine is not applicable.

C. The City of Parma Heights' Claim of Priority Based On Its October 16, 2006 Special Assessment

The City of Parma Heights (hereinafter, the "City") maintains that it is entitled to priority of its claims as against all others asserting secured status. The City bases its claim on legislation enacted on May 22, 2006 and thereafter certified to the Auditor of Cuyahoga County on October 16, 2006 imposing a Special Assessment against the Cornerstone Properties.²² Parma Heights Land Development, LLC has filed a brief in opposition. Lienholders Cleveland Construction, Inc. and Harrington Electric Company have also weighed in against the City's position.²³ The Receiver also discusses the matter in a *Supplemental Memorandum*.²⁴ Home Savings and Loan Company filed a separate motion for summary judgment relating to the City's claim of priority of its assessment.²⁵

For a variety of reasons, the City of Parma Heights is not entitled to assert a claim of priority as against Home Savings and Loan Company or Lienholders.²⁶ Putting aside for the moment the question whether the City's effort to impose its assessments is void as a matter of law, the City cannot unilaterally achieve retroactive super priority over other liens previously recognized in law.²⁷

²² *Motion For Summary Judgment By The City Of Parma Heights*, filed February 27, 2009.

²³ *Parma Heights Land Development LLC's Brief In Opposition To The City Of Parma Heights, Ohio's Motion For Summary Judgment*, filed March 27, 2009. *Harrington Electric Company's Brief In Opposition To The City Of Parma Heights' Motion For Summary Judgment*, filed March 27, 2009. Lienholders addressed the City's motion in *Cleveland Construction, Inc. and Harrington Electric Company's Joint Response To Parma Heights Land Development LLC's Motion For Summary Judgment*, at pages 8 and 9. Defendant GQ Contracting Company also opposed the City's, among other parties, Motion for Summary Judgment in *GQ Contracting Company, LLC's Brief in Opposition*, filed March 27, 2009.

²⁴ *Receiver's Supplemental Memorandum In Support Of The Receiver's Proposed Distribution Of Sale Proceeds To Non-Investors*, filed March 26, 2009, pages 7-10.

²⁵ *Motion For Summary Judgment Filed On Behalf Of The Home Savings And Loan Bank Of Youngstown, Ohio Relating To The Validity And Priority Of The Assessment Of The City Of Parma Heights*, filed February 27, 2009.

²⁶ As it relates to the Receiver's secured creditor allocation, the court has already set forth its basis for affording the allocation priority as against all others making claims as secured creditors. See discussion in section II.A. , *supra*.

²⁷ The question of the **validity** of liens is a matter bifurcated from the court's determination as to priority, the only issue before the court at this time pursuant to the various motions for summary judgment. (See Final Pretrial Conference entry dated April 6, 2009.) However, as pointed out in the briefs filed on this issue, the city's

As noted above in the court's discussion, pages 3-11, *supra*, the lien claims of Home Savings and Loan Company or Lienholders clearly predate the City's October 16, 2006 Special Assessment. The fact that the City had a contractual arrangement with the previous owners, the Schneiders who were operating a Ponzi scheme, is immaterial and does not affect in any way the priority of claims subsequently perfected before the City took any action of its own.²⁸

D. Parma Heights Land Development, LLC's Request For A Release Of Liens Due To The October 16, 2001 Special Assessment Of The City of Parma Heights

Parma Heights Land Development, LLC requests that the court order it be released from the Special Assessment sought by the City of Parma Heights and has filed a Motion for Summary judgment for the Court's consideration.²⁹ Briefs in opposition to this motion were filed by the City of Parma Heights. Lienholders also filed a joint brief in opposition.³⁰

Parma Heights Land Development, LLC's Motion for Summary Judgment is denied. Although the court did allow the sale and transfer of the Cornerstone Properties free and clear of all liens, there are questions of law and fact remaining with respect to this issue. As agreed to by

assessment is fraught with legal questions. Firstly, it appears to violate the most fundamental principles relating to the manner in which special assessments may be levied. *Donohue v. Brotherton* (1900), 10 Ohio Dec. 47, 7 Ohio N.P. 367. In enacting the Special Assessment the City may have violated a number of statutory provisions set forth in Chapter 727 of the Ohio Revised Code. The City, contrary to law, may also be overreaching in the fashion in which it seeks to collect the monies allegedly due under its Special Assessment. See R.C. § 727.06.

²⁸ On December 23, 2010 and without leave of court, the City filed *City Of Parma Heights, Ohio's Notice Of Supplemental Authority In Support Of Its Motion For Summary Judgment As To The Validity And Priority Of Its Lien On The Cornerstone Properties* along with two exhibits. "Exhibit A" is a two sentence Journal Entry citing no facts or law issued by a Cuyahoga County Court of Common Pleas judge. "Exhibit B" is a *Crains Cleveland Business* article about the case in question. The former is not helpful for lack of detail. The latter is inappropriate for consideration as Rule 56 evidence and is hereby stricken. Nevertheless, the Receiver filed its *Receiver's Response To City Of Parma Heights, Ohio's Notice Of Supplemental Authority In Support Of Its Motion For Summary Judgment As To The Validity And Priority Of Its Lien On The Cornerstone Properties* and has been considered by the court.

²⁹ *Motion For Summary* filed by Parma Heights Land Development, LLC, filed January 27, 2009.

³⁰ *Memorandum Of The City Of Parma Heights, Ohio In Support Of Its Motion For Summary Judgment As To The Validity And Of Its Lien On The Cornerstone Properties, And In Opposition To The Cross-Motion For Summary Judgment Of Parma Heights Land Development, LLC and Cleveland Construction, Inc.'s And Harrington Electric Company's Joint Response To Parma Heights Land Development LLC's Motion For Summary Judgment*, filed February 27, 2009.

all the parties to this action, issues of priority were to be resolved first, after which the court would take up questions pertaining to the validity of liens prior to the disbursement phase.³¹

III. CONCLUSION

For all the reasons set forth above, the court rules as follows:

Parma Heights Land Development LLC'S Motion for Summary Judgment, filed January 27, 2009 is denied; *GQ Contracting Company LLC's Motion for Partial Summary Judgment*, filed February 27, 2009 is denied in part and granted in part; *Harrington Electric Company's Motion for Summary Judgment*, filed February 27, 2009 is denied in part and granted in part; *Cleveland Construction Inc.'s Motion for Summary Judgment*, filed February 27, 2009 is denied in part and granted in part; *The Home Savings and Loan Co. of Youngstown's Motion for Summary Judgment on the Issue of Priority Over the Alleged Mechanics' Liens*, filed February 27, 2009 is denied in part and granted in part; *The Home Savings and Loan Co. of Youngstown's Motion for Summary Judgment Relating to the Validity and Priority of the Assessment of the City of Parma Heights*, filed February 27, 2009 is granted as to the issue of priority only; *The City of Parma Heights' Motion for Summary Judgment as to the Validity and Priority of its Cornerstone Properties* filed, February 27, 2009 is denied; *Lorain Glass Co.'s Motion for Partial Summary Judgment*, filed March 3, 2009 is denied in part and granted in part; *Northern Valley Contractors, Inc.'s Motion for Partial Summary Judgment as to Priority*, filed March 4, 2009 is denied in part and granted in part; *Tycor Roofing, Inc. fka Hal Jones Construction Company's Motion for Partial Summary Judgment*, filed March 4, 2009 is denied in part and granted in part.

³¹ See Final Pretrial Conference entry dated April 6, 2009.

The court hereby schedules a Pretrial Conference on June 17, 2011 at 11:00 A.M. The conference shall be for the purpose of addressing all remaining issues related to this litigation, including the disbursement of funds in the control of the Receiver, and establishing a framework for resolving all other outstanding factual and legal matters.

IT IS SO ORDERED.




JOSE A. VILLANUEVA, JUDGE

Dated: May 16, 2011

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GERALD E. FUERST, CLERK
By  Deputy

CERTIFICATE OF SERVICE

A copy of the foregoing **Opinion and Order Regarding the Priority of Liens** was sent by ordinary U.S. Mail this 16th day of May, 2011 to:

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