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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

BRAUN & MELUCCI, LLP,
Plaintiff and Respondent,

v.

ASCENT ELEVATOR SERVICES, INC.,
Defendant and Appellant.

BOARD OF TRUSTEES OF THE
LABORERS HEALTH AND WELFARE
TRUST FUND FOR NORTHERN
CALIFORNIA,
Defendant and Respondent.

A141145

(Alameda County
Super. Ct. No. RG13678822)

This appeal concerns the priority of liens held by appellant Ascent Elevator Services, Inc. (Ascent), Braun & Melucci, LLP (B&M), and the Board of Trustees of the Laborers Trust Fund for Northern California (the Laborers Trust Fund)¹ against payments due to Kudsk Construction, Inc. (Kudsk) from the San Francisco Bay Area Rapid Transit District (BART). On appeal, Ascent challenges the trial court's finding that its lien is subordinate to the liens held by B&M and the Laborers Trust Fund. We hold that the trial court correctly found that Ascent's lien was subordinate to B&M's lien but incorrectly

¹ The Laborers Trust Fund is the Laborers Health and Welfare Trust Fund for Northern California, the Laborers Vacation-Holiday Trust Fund for Northern California, the Laborers Pension Trust Fund for Northern California, and the Laborers Training and Retraining Trust Fund for Northern California.

found that it was subordinate to the Laborers Trust Fund's lien. Accordingly, we affirm in part and reverse in part.

BACKGROUND

In April 2008, Kudsk entered into a contract with BART to serve as the general contractor to build a new utility building and to remodel a freight elevator at the Lake Merritt BART station in Oakland. Two months later, Kudsk entered into a subcontract with Ascent to repair and refurbish the elevator. Under the subcontract, Kudsk was to pay Ascent \$375,000 for its work. Ascent commenced work on the elevator in January 2009, and it was approved for use a few months later.

On August 19, 2009, Ascent served a stop notice on BART under former Civil Code section 3103, asserting that Kudsk had paid Ascent only \$200,000 and still owed it \$110,500 plus interest. The notice demanded BART withhold payment from Kudsk to satisfy this obligation. About a year later, on June 14, 2010, Ascent served an amended stop notice, claiming it was owed \$175,000 plus interest.

In May 2010, Kudsk and Ascent sued each other in Alameda County Superior Court. In case number RG10 513913, Kudsk asserted claims for breach of contract and specific performance, alleging it was assessed liquidated damages because Ascent failed to complete its work on the elevator project in a timely fashion. In case number RG10 515869, Ascent sued Kudsk, BART, and Western Insurance Company, which had provided the payment bond for the project, asserting seven causes of action, including claims for breach of contract against Kudsk, recovery of the payment bond against Western Insurance, and enforcement of the stop notice against BART.² The two actions were later consolidated, and we shall refer to the case as the "consolidated action."

Following a bench trial in the consolidated action, Judge George C. Hernandez, Jr., issued a tentative and then a final statement of decision. Judge Hernandez rejected Kudsk's claim that Ascent delayed the project or was responsible for the assessment of

² The other claims were for violation of Civil Code section 3260, violation of Business and Professions Code sections 7108.5 and 17200 et sequitur, quantum meruit, and open book account, and declaratory relief.

liquidated damages against Kudsk. Instead, Judge Hernandez found that those damages were part of an arrangement between Kudsk and BART to offset BART's payment obligations under the contract. Judge Hernandez concluded that Ascent substantially complied with the terms of its contract and was entitled to \$150,000, plus interest.

The decision, however, did not expressly discuss Ascent's claim to enforce the stop notices. Ascent did not object to either the tentative or the final statement of decision, except to ask unsuccessfully for the court to retain jurisdiction. On April 3, 2013, Judge Hernandez entered judgment in favor of Ascent. On April 12, 2013, Ascent filed a "statement of amount required to satisfy judgment" and an abstract of judgment. According to the statement, \$210,493.15 was required to satisfy the judgment, which included the \$150,000 set forth in the judgment, as well as interest. Ascent requested that BART pay the money due and owing to Kudsk directly to the court, and it also moved for statutory penalties and attorney fees. The court later granted the motion and awarded \$135,600 in statutory penalties and \$103,858 in attorney fees.

While the consolidated action was being litigated in state court, the Laborers Trust Fund also filed a separate unrelated case against Kudsk and its owner, Larry Kudsk, in federal district court. On October 30, 2012, default judgment was entered against Mr. Kudsk and his company in that action, awarding the Laborers Trust Fund unpaid contributions in the amount of \$38,580.41, interest and liquidated damages in the amount of \$22,193.77, and attorney fees and costs in the amount of \$15,613.84. Although the Laborers Trust Fund filed an abstract of judgment with the Alameda County Recorder's Office on November 14, 2012, it did not file a notice of judgment lien until May 13, 2013. Two days later, on May 15, 2013, the Laborers Trust Fund also filed a notice of lien in the consolidated action.

B&M, which represented Kudsk in the consolidated action, also asserted a claim to the withheld BART funds. The law firm had entered into a written fee agreement with Kudsk in 2009, which granted B&M a lien on any and all claims or causes of actions asserted by Kudsk, on any recovery by judgment, and on any and all collateral accounts

receivable, and contract funds due and payable to Kudsk. In January 2012, B&M filed a notice of attorney's lien with the superior court.

With the factual and procedural background of those cases in mind, we come to the litigation giving rise to the present appeal. In May 2013, B&M filed an action for declaratory relief against Ascent and the Laborers Trust Fund to determine the validity and priority of the parties' liens. Although the case was deemed related to the consolidated action and originally assigned to Judge Hernandez, it was eventually reassigned to Judge Delbert Gee.

After the reassignment, the parties filed cross-motions for summary judgment. Judge Gee ruled for B&M and the Laborers Trust Fund and against Ascent, finding Ascent had not demonstrated a right to the withheld funds under the stop notices asserted in the consolidated action. Judge Gee reasoned: "The [April 3, 2013] judgment did not award Ascent any relief against BART, and there is no language in the Statement of Decision indicating that the Court found that Ascent had prevailed on its claim for Enforcement of Stop Notice." Judge Gee also found that, in the absence of a lien based on an enforceable stop notice, Ascent could only assert a claim to the funds based on its status as a judgment creditor under the April 3, 2013 judgment, and that claim was subordinate to both B&M's attorney lien and the Laborers Trust Fund's lien. He also found that B&M's lien had priority over the Laborers Trust Fund's. In February 2014, the court entered a judgment awarding \$87,862 of the subject funds to B&M, \$76,456.77 to the Laborers Trust Fund, and the remaining \$9,935.18 to Ascent.

In March 2014, Ascent filed a motion with Judge Hernandez in the consolidated action for an order setting a further case management conference. Ascent argued that, in light of Judge Gee's ruling on Kudsk's claim for declaratory relief, its claim against BART in the consolidated action remained pending and undecided. Ascent requested Judge Hernandez to order a further case management conference to discuss rendition and entry of judgment on the stop notice claim. Judge Hernandez denied the motion.

Ascent filed this appeal challenging Judge Gee’s ruling in the declaratory relief action. Ascent has not appealed Judge Hernandez’s rulings in the consolidated action.

II. DISCUSSION

Ascent argues that its lien on the withheld BART funds has priority over the liens of B&M and the Laborers Trust Fund based on its stop notice claim. B&M and the Laborers Trust Fund concede a judgment on the stop notice claim would have priority over their liens, but they contend Ascent did not prevail on such a claim. We agree with B&M and the Laborers Trust Fund on this point. Ascent argues in the alternative that even if it did not prevail on its stop notice claim, its judgment lien has priority over the Laborers Trust Fund’s because it was created first in time. We agree with Ascent on this point.

A. The Standard of Review.

Summary judgment must be granted if all the papers and affidavits submitted, together with “all inferences reasonably deducible from the evidence” and uncontradicted by other inferences or evidence, show “there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . .” (Code Civ. Proc., § 437c, subd. (c).)³ We review the trial court’s summary judgment determinations de novo. (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 163.) “We are not bound by the trial court’s stated reasons or rationale. Instead, we review the summary judgment without deference to the trial court’s determination of questions of law. [Citations] We may consider only those facts which were before the trial court, and disregard any new factual allegations made for the first time on appeal.” (*Ibid.*)

³ All statutory references are to the Code of Civil Procedure unless otherwise specified.

B. The Statutory Framework.

When a contractor on a public works project withholds payment, a subcontractor may recover sums due for labor and materials provided by serving a stop notice upon the public entity responsible for the project. (See former Civ. Code §§ 3179-3214.)⁴ Upon receipt of the stop notice, the public agency must withhold monies due the contractor in an amount sufficient to satisfy the amount claimed by the subcontractor in the stop notice. (*Id.*, § 3186.)

To enforce a stop a notice, a claimant must first serve a 20-day preliminary notice, and then serve a stop notice within 30 days after the recordation of the notice of completion or cessation or 90 days after completion of the work if no notice of completion or cessation has been recorded. (Former Civ. Code §§ 3183, 3184.) The stop notice must be in writing and signed and verified by the claimant. (*Id.*, § 3103.) It must also state in general terms the kind of services, equipment or materials furnished, the name of the person to whom the claimant furnished such items, the value of that which was furnished, and the name and address of the claimant. (*Ibid.*)

Unless the claimant brings a legal action to enforce its claim, a stop notice expires after 90 days. (Former Civ. Code, § 3210.) A stop notice also ceases to be effective upon a court's dismissal of the stop notice claim, unless that dismissal is expressly stated to be without prejudice. (*Id.*, § 3213.) Moreover, a court in its discretion may dismiss a stop notice claim where the claim has not been brought to trial within two years after the commencement of proceedings. (*Id.*, § 3212.) A stop notice claim has priority over any assignment by the contractor of money due under the contract, regardless of whether that assignment is made before or after the service of the stop notice. (*Id.*, § 3193.)

⁴ In 2010, the provisions of the Civil Code relating to stop notices were repealed and replaced by Civil Code section 8000 to 9566. (Stats. 2010, ch. 697, § 16.) The current provisions took effect on July 1, 2012. As this case involves notice given and other action taken on a work of improvement prior to July 1, 2012, we must apply the former Civil Code provisions. (Civ. Code, § 8052, subd. (b).) Many aspects of the current statutory scheme are substantially similar to the former provisions, and are "construed as a restatement and continuation thereof and not as a new enactment." (*Id.*, subd. (c).)

C. Ascent Did Not Prevail on Its Stop Notice Claim.

Ascent asserts that Judge Gee erred in finding that the April 3, 2013 judgment failed to demonstrate that Ascent prevailed on all claims brought in the consolidated action, including the stop notice claim. We disagree. The April 3 judgment is silent on the stop notice claim, and nothing in the underlying statement of decision reflects that Ascent prevailed on it.

“The meaning and effect of a judgment is determined according to the rules governing the interpretation of writings generally. [Citations.] ‘ “[T]he entire document is to be taken by its four corners and construed as a whole to effectuate the obvious intention.” ’ [Citations.] ‘ “No particular part or clause in the judgment is to be seized upon and given the power to destroy the remainder if such effect can be avoided.” ’ [Citations.] [¶] Where an ambiguity exists, the court may examine the entire record to determine the judgment’s scope and effect. [Citations.] The court may also ‘ “refer to the circumstances surrounding the making of the order or judgment, [and] to the condition of the cause in which it was entered.” ’ [Citations.] Subsequent actions by the rendering judge may be considered as bearing upon the judgment’s intended meaning and effect.” (*People v. Landon White Bail Bonds* (1991) 234 Cal.App.3d 66, 76.)

If an ambiguity is “due to an oversight and inadvertence on the part of the court . . . the judgment as entered should be liberally construed with a view of giving effect to the manifest intent of the court.” (*In re Gideon* (1958) 157 Cal.App.2d 133, 137.) But under section 1911, we cannot ignore the face of the judgment. Thus, where a judgment is silent on a cause of action, we generally assume the plaintiff failed to meet his or her burden as to that claim. (See *Little v. Smith* (1920) 47 Cal.App. 8, 10.) Further, the judgment must conform to the court’s findings of fact and conclusions of law (*Riggs v. Riggs* (1963) 223 Cal.App.2d 594, 598), which may be used to clarify uncertainties as to the meaning of the judgment (*Nunes v. Nunes* (1964) 62 Cal.2d 33, 39).

The April 3, 2013 judgment here states: “Judgment is for Ascent Elevator Services, Inc. as Defendant in [the consolidated action] on the complaint by Plaintiff

Kudsk Construction, Inc. Defendant does not owe anything to Plaintiff. Defendant is the prevailing party and entitled to cost of suit. [¶] Judgment is for Ascent Elevator Services as Plaintiff in [the consolidated action] consolidated with [the consolidated action] in the amount of \$150,000 plus interest [¶] Ascent is the prevailing party on both actions and is awarded costs, subject to a memorandum of costs.” The judgment does not mention Ascent’s stop notice claim or otherwise refer to BART. Nor is the stop notice claim discussed in the statement of decision, which focuses exclusively on Ascent’s and Kudsk’s competing claims for breach of contract.

Ascent argues that even though the judgment does not specifically refer to its claim for enforcement of stop notices against BART, “the evident intent of the judgment” was to find for Ascent on that claim. Ascent reasons BART was merely a disinterested stakeholder in the action to enforce the stop notices, while the real dispute was between Ascent and Kudsk over entitlement to the funds withheld by BART. According to Ascent, since the judgment was rendered in its favor against Kudsk, there was no need for the judgment to expressly state Ascent prevailed against BART as well. Ascent also contends the last sentence of the judgment, which declares Ascent to be the prevailing party in both actions, would be unnecessary if the court intended only to rule on Ascent’s and Kudsk’s competing breach of contract claims, which were addressed in the prior paragraphs of the judgment.

In our view, however, the judgment’s silence on the stop notice claim does not imply Ascent prevailed on it. The cause of action to enforce stop notices was brought against BART alone, and the judgment does not once refer to BART. Contrary to Ascent’s argument, a finding that it prevailed on its breach of contract claim was not necessarily a ruling against BART on the stop notice claim. In order to prevail on its stop notice claim, Ascent needed to prove not only that it performed on the contract and was entitled to payment but also that it complied with all statutory notice requirements set forth in the Civil Code for enforcing a stop notice. The statement of decision does not contain any factual findings or legal conclusions concerning Ascent’s compliance with

these requirements.⁵ Accordingly, we cannot infer the judgment against Kudsk on Ascent's breach of contract claim is somehow tantamount to a judgment against BART on Ascent's claim to enforce stop notices. "Ordinarily[,] . . . the failure to find upon matters affirmatively alleged in the pleadings gives rise to the presumption that no evidence was offered in support of such affirmative matter." (*Little v. Smith, supra*, 47 Cal.App. at p. 10.) Such is the case here.⁶ To the extent Ascent believed it presented sufficient evidence to prevail on its stop notice claim, it could have requested a statement of decision on that issue or challenged Judge Hernandez's tentative statement of decision. (See § 632.) Additionally, Ascent could have appealed the judgment in the consolidated action, but it did not.

⁵ In fact, Judge Hernandez expressed doubts as to whether Ascent complied with the statutory requirements. At trial, Judge Hernandez issued a tentative ruling, stating Ascent's amended stop notice was void and unenforceable because it was untimely. Ascent moved for reconsideration. Judge Hernandez noted a motion for reconsideration was procedurally inappropriate because his decision was not final, but indicated that he would review the briefing and "think about the decision." No formal ruling was issued on the matter.

⁶ Contrary to Ascent's assertion, *George v. Bekins & Van Storage Co.* (1948) 83 Cal.App.2d 478 does not support its position. In that case, the trial court found that the plaintiffs were entitled to judgment against a corporate defendant, but made no conclusions of law as to their claims against the 14 individual defendants. (*Id.* at p. 479.) The judgment was also silent as to the individual defendants. (*Ibid.*) The trial court later denied plaintiffs' motion for a new trial and amended the conclusions of law and judgment to show that plaintiffs took nothing from the individual defendants. (*Ibid.*) The corporate defendant appealed from the original judgment. (*Id.* at p. 480.) Plaintiffs moved to dismiss on the ground the judgment appealed from was not the final judgment. (*Ibid.*) The motion was denied. (*Id.* at p. 482.) The court reasoned that the original judgment "ascertained and fixed absolutely and finally the rights of plaintiffs" against the corporate defendant. (*Ibid.*) Moreover, the amendment to the judgment was merely a correction of a clerical error. (*Ibid.*) "That [the trial court] intended to [find for the individual defendants] is made manifest by the findings of fact and its subsequent orders." (*Ibid.*) Likewise, in the consolidated action, the trial court's failure to issue conclusions of law or judgment regarding the stop notice claim evidences an intent to find against Ascent on that claim. Moreover, there are no findings of fact that would support a finding in favor of Ascent on the stop notice claim.

Ascent also argues that Judge Hernandez made clear he intended to render judgment in favor of Ascent on the stop notice claim at an April 9, 2014 hearing on Ascent's motion for a further case management conference in the consolidated action. Not so. At the April 9 hearing, Judge Hernandez expressly declined to render an opinion about the disposition of the stop notice claim, stating: "In candor, I would need to know or remember what evidence was provided to the court to support that position one way or the other. . . . If the suggestion is that during the course of the trial there was evidence . . . the court should have considered or reviewed or that disposes of the issue I don't have that in my notes or mind. I don't think that I can at this point, without having some kind of hearing, make that determination." As Ascent points out, Judge Hernandez later stated: "I believe that all of the issues that were submitted to the court . . . were resolved by the judgment that I entered. . . . And the fact that another judge has a different opinion, I can't do anything about that." But in light of Judge Hernandez's previous comments concerning his recollection of the proceedings, his opinion on the nature of the judgment is hardly conclusive. In any event, Judge Hernandez did not opine on how any of the issues presented by the parties were actually resolved.

D. The Stop Notice Claim Is No Longer Pending.

Ascent next argues that if the judgment does not reflect that it prevailed on its claim to enforce the stop notices, then the claim is still pending. Ascent asserts that, under section 579, the trial court had the discretion to render judgment against Kudsk on the breach of contract claims, while leaving the claim to enforce the stop notices to proceed against BART. According to Ascent, so long as the action is pending against BART, the stop notices remain effective, and no party may claim the withheld funds.

We are not persuaded. We recognize that where a case involves multiple defendants, a trial court has the discretion to render judgment against one of them, leaving the action to proceed against the others. (§ 579.) But there is no indication here that the trial court did so in the consolidated action. After entering judgment on April 3, 2013, the court did not set the stop notice claim for a separate trial or entertain further briefing on the issue. To the contrary, at the April 9, 2014 hearing on Ascent's motion

for a further case management conference, the court stated the April 3 judgment resolved all issues submitted to the court.⁷

E. B&M's Attorney Lien Applies to the Withheld Funds.

Ascent argues that B&M's attorney lien does not attach to the withheld BART funds. We disagree. B&M's attorney lien was created by B&M's written fee agreement with Kudsk, which states in relevant part: "[Kudsk] hereby grants [B&M] a lien on any and all claims or causes of action that are asserted by [Kudsk] . . . and on any and all collateral, accounts receivable, and/or contract funds due and payable [to Kudsk.]" There does not appear to be any dispute Kudsk performed work for BART as part of the renovations at the Lake Merritt station, BART agreed to pay Kudsk for that work, and BART withheld certain contract funds. As Ascent did not prevail on its stop notice claim, those funds are now due and payable to Kudsk and are therefore subject to B&M's attorney lien.

Ascent first argues that the funds at issue are not due and payable to Kudsk because BART has a legal duty to continue withholding them. Ascent reasons that under former Civil Code 3213, a stop notice ceases to be effective only upon dismissal of the stop notice claim or entry of judgment against the claimant. But as discussed above, Judge Hernandez effectively entered judgment against Ascent on its stop notice claim by declining to address the claim in the statement of decision and judgment. Moreover, Ascent waived any challenge to Judge Hernandez's ruling by failing to appeal the judgment or otherwise comment on the statement of decision's treatment of the stop

⁷ Even if the stop notice claim remained pending after the entry of judgment in the consolidated action, Ascent effectively waived its right to resurrect the claim. Where a claim for enforcement of stop notices is not brought to trial within two years of the commencement of an action, the trial court has the discretion to dismiss the claim for want of prosecution. (Former Civ. Code § 3212.) In this case, Ascent filed the consolidated action on May 20, 2010, and now claims it attempted to set a trial date for the stop notice claim almost four years later, when it moved for an order setting a further case management conference. While the trial court did not expressly dismiss the stop notice claim for lack of prosecution, it did deny Ascent's 2014 motion.

notice claim. Ascent has pointed to nothing in the statute or the case law that would suggest a stop notice claim remains pending indefinitely in such circumstances.

Next, Ascent argues B&M offered insufficient evidence to prove the withheld funds were due and payable to Kudsk. In support of its motion for summary judgment, B&M introduced a declaration by Mr. Kudsk stating: “During performance of work on the construction project, BART withheld contract payment to Kudsk Construction, Inc. for numerous and varied reasons. After performing a final accounting at the end of the project, BART was holding \$174,254.00 in contract payments due my company. The \$174,254.00 remaining with BART is contract payment[] otherwise due and payable to my company.”⁸ Ascent now argues that because Mr. Kudsk concluded that the funds were “*otherwise* due and payable,” his declaration does not establish they were actually payable to Kudsk. (Original italics.) We have little difficulty rejecting this argument. To the extent Ascent is arguing that the funds are not due and payable to Kudsk on account of its own stop notices, the argument fails for the reasons set forth above. Alternatively, if Ascent is contending that BART owes nothing whatsoever to Kudsk, it is unclear why Ascent has asserted a lien against funds withheld by BART.

F. Ascent’s Judgment Lien Is Superior to the Laborers Trust Fund’s Lien

The trial court found that, in the absence of a claim to the withheld funds based on an enforceable stop notice, Ascent’s lien against Kudsk could be based only on its status as a judgment creditor. The court concluded that Ascent’s judgment lien was subordinate to the Laborers Trust Fund’s because Ascent’s judgment was entered last in time. Ascent argues that the trial court erred because the entry of judgment does not automatically create a lien and thus has no bearing on the priority of competing liens. We agree.

“Other things being equal, different liens upon the same property have priority according to the time of their creation” (Civ. Code, § 2897.) Two types of judgment liens are at issue in the dispute between Ascent and the Laborers Trust Fund:

⁸ Kudsk also asserted no portion of the contract funds withheld by BART was a result of the stop notices filed by Ascent, though that fact appears to be in dispute.

(1) a section 708.730 lien on money owed to a judgment debtor by a public entity; and
(2) a section 697 lien on personal property. A section 708.730 lien may be created by filing an abstract or certified copy of the money judgment, together with an affidavit stating the exact amount required to satisfy the judgment. (§§ 708.730, 708.780.) A section 697 lien on personal property is created by filing a notice of judgment lien in the office of the Secretary of State. (§ 697.510.)

Ascent created a section 708.730 lien on April 12, 2013, when it filed its abstract of judgment, along with a statement of amount required to satisfy the judgment. Although the Laborers Trust Fund filed an abstract of judgment with the Alameda County Recorder's Office on November 14, 2012, it did not create a section 697 lien until May 13, 2013, when it filed a notice of judgment lien on personal property with the Secretary of State. The Laborers Trust Fund also filed a notice of a section 708.410⁹ lien in the consolidated action, but not until May 15, 2013. As Ascent's section 708.730 lien was created first in time, it has priority over the Laborers Trust Fund's liens.

The Laborers Trust Fund argues that Ascent does not have a valid section 708.730 lien because Ascent did not prevail on its stop notice claim, and the Fund suggests Ascent needed to perfect a section 697 lien on Kudsk's personal property to establish a priority claim on the withheld funds. We are not persuaded. Nothing in the statutory scheme suggests a section 708.730 lien may not be created absent a valid stop notice. So long as "money is owing and unpaid to the judgment debtor by a public entity," a judgment creditor may seek to create a section 708.730 lien. (§ 708.730, subd. (a).) Such is the

⁹ Section 708.410, subdivision (a) provides: "A judgment creditor who has a money judgment against a judgment debtor who is a party to a pending action or special proceeding may obtain a lien under this article, to the extent required to satisfy the judgment creditor's money judgment, on both of the following: [¶] (1) Any cause of action of such judgment debtor for money or property that is the subject of the action or proceeding. [¶] (2) The rights of such judgment debtor to money or property under any judgment subsequently procured in the action or proceeding." In order to obtain a section 708.410 lien, a judgment creditor must "file a notice of lien and an abstract or certified copy of the judgment creditor's money judgment in the pending action or special proceeding." (*Id.*, subd. (b).)

case here. There is no dispute that Ascent had a valid judgment against Kudsk. Nor is there any dispute that money was owing and unpaid to Kudsk by BART.

The Laborers Trust Fund contends that Ascent is somehow precluded from asserting a section 708.730 lien because, but for its invalid stop notice claim, BART would not have withheld money from Kudsk and there would be no money owing and unpaid to the judgment debtor by the public entity. But nothing in the statute suggests that a section 708.730 lien is unavailable when a public entity withholds money from a judgment debtor for a particular reason (see §§ 708.730, 708.780), and the Laborers Trust Fund cites no other authority in support of this curious proposition. Even if the Laborers Trust Fund is correct, absent Ascent's stop notice, there would also be no personal property to which their section 869 lien could attach.

Finally, the Laborers Trust Fund argues Ascent waived any arguments concerning the priority of its section 708.730 lien by failing to raise them below and by focusing instead on the priority of the stop notice claim. We agree that Ascent's reliance on its stop notice claim was misdirected. But we may review new theories on appeal where they present questions of law to be applied to undisputed facts. (*Ford Motor Credit Co. v. Hunsberger* (2008) 163 Cal.App.4th 1526, 1531.) Here, there is no dispute concerning the timing of the parties' filings or the legitimacy of the underlying judgments.

Accordingly, we can conclude Ascent's section 708.730 lien takes priority over the Laborers Trust Fund section 869 lien.

III. DISPOSITION

The judgment is affirmed in part and reversed in part. We affirm the trial court's holdings that B&M's lien has priority over Ascent's lien and that Ascent did not prevail on its stop notice claim. We reverse the trial court's determination that Ascent's lien is subordinate to the Laborers Trust Fund's lien. The case is remanded for entry of judgment consistent with this opinion.

The parties are to bear their own costs on appeal.

Humes, P.J.

We concur:

Margulies, J.

Dondero, J.