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Nevada Supreme Court Limits Pay-If-Paid Clause Ruling To Contracts Entered Into Before 2003

by Leon F. Mead II, Esq.

The Nevada Supreme Court has limited its June 2008 ruling holding pay-if-paid and mechanics lien waiver provisions void against public policy to those provisions entered into in contracts prior to the 2003 legislative amendments. In *Lehrer McGovern Bovis v. Bullock Insulation*, 124 Nev. Adv. Op. 92 (Oct. 2008), the Supreme Court withdrew its previous opinion at 124 Nev. Adv. Op. 39, 185 P.3d 1055(2008), and attempted to limit both the requirement for a mechanics lien waiver review and the edict declaring pay-if-paid provisions unenforceable to those contracts entered into before 2003. Changes to NRS 108.2453, 108.2457, 624.624 and 624.626 took effect. While the opinion language remains questionable and will allow for some serious arguments on the subject, the changes made will support the general contractor argument that if a pay-if-paid provision protects the subcontractor's right to receive payment from the owner, the provision may be enforceable.

Mechanics Lien Waivers

In order to understand the Nevada Supreme Court's revised option, a review must begin with the analysis of the contractual lien waiver provisions. The Court begins its analysis with a holding that a contractor "has a statutory right to a mechanics' lien for the unpaid balance of the



price agreed upon for labor, materials, and equipment furnished.” The Court then notes that in 2003, the legislature amended NRS Chapter 108 to prohibit lien waivers, unless they comply with the statutory provisions of NRS 108.2453 and 108.2457, but further indicates that those revisions do not apply to the Court’s analysis in this case because the statutory revisions were not retroactive to contracts before 2003. *See* 124 Nev.Adv. op 92, Fn. 39.

The Court then goes on to note that the purpose of Nevada mechanics lien law is to secure payment for those who perform work “to improve the property of the owner” and that similar findings in California support the theme that “public policy strongly supports the preservation of laws which give the laborer ... security for their claims.” Here, the Court references the California law, and notes that “[i]n California, because lien waiver provisions violate public policy, such provisions are valid only if they follow statutory forms. *See* 124 Nev.Adv.Op 92, fn. 43.

The Court then turns to the lien waiver provision in the contract between Bovis and Bullock and declares that since the lien waiver applied regardless of whether Bullock was to receive payment for its work, it was in violation of public policy as it failed to secure payment for Bullock.

Pay-if-Paid Provisions

Next, the Court turns to the pay-if-paid provision in the contract. It should be noted here that the Court does not address a pay-when-paid provision, however, the

analysis of the Court would probably be similar. Once again, the Court begins its analysis indicating that at the time the parties entered into the agreement, the legislature had not declared such provisions unenforceable and the Court had not previously addressed the issue. Here, again, the Court footnotes its discussion to state that the legislature amended Chapter 624 in 2001 to revise NRS 624.624 through 624.626, but changes its previous statement that these provisions rendered pay-if-paid clauses unenforceable. Instead, the Court stated that “Pay-if-paid provisions entered into subsequent to the amendments *are enforceable* only in limited circumstances and are subject to the restrictions laid out in these sections.” *See* 124 Nev.Adv. Op. 92, fn: 50 (emphasis added). Thus, there is an acknowledgement that pay-if-paid provisions are enforceable under certain circumstances. The Court does not, however, specify these circumstances. Nevertheless, within the context of this opinion, it can be determined that the circumstances will be whether the pay-if-paid clause affects the subcontractor’s right to recover payment from the owner.

The Court goes on to provide that because a “pay-if-paid provision limits the subcontractors ability to be paid for work already performed, such a provision impairs the subcontractor’s statutory right to place a mechanics lien on the project.” This determination must be contractually related, though it is not clear from the context of the opinion that is what the Court is referring to. Because public policy



favors securing payment for labor and material contractors, a pay-if paid clause that fails to support that public policy is unenforceable. This analysis is supported by the citation of the Supreme Court in footnote 52, which quotes the Nevada case of *Schofield v. Copeland Lumber* that “the object of the lien statutes is to secure payment to those who perform labor or furnish material to improve the property of the owner.” See 124 Nev.Adv.Op 92, fn: 52.

As such, it seems that the Nevada Supreme Court has revised its opinion to open the door to the possibility of a pay-if-paid provision being effective, so long as the

provision would not violate the ability of a subcontractor to record and perfect its mechanics lien on the project. As such, if a general contractor has not been paid by the project owner, and the pay-if-paid provisions in his subcontracts cannot be read to destroy the subcontractors’ right to such a lien, the pay-if-paid provision may not necessarily violate the Nevada public policy to secure payment to contractors for work benefiting the project owner.

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