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# Cashman Equipment Co. v. West Edna Assocs., 132 Nev. Adv. Op. 69 (Sep. 29, 2016)

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Contracts; contractors; mechanic's lien

**Summary**

The Court determined that (1) NRS 108.2457(5)(e) precludes enforcement of an unconditional release from a bottom-tiered contractor to a higher-tiered contractor, when the higher-tiered contractor properly paid the middle-tiered contractor, but the middle-tiered contractor failed to pay the bottom-tiered contractor; and (2) that equitable fault analysis may not be used to reduce an award in a mechanic's lien case.

**Background**

Mojave Electric, (Mojave), was chosen to be the electrical subcontractor for the new Las Vegas City Hall construction project. Subsequently, Cashman Equipment Company, (Cashman), submitted a winning bid to Mojave to provide specialty materials for the emergency standby power for the building. However, the general contractor, Whiting Turner Contracting, required that Mojave involve disadvantaged business entities ("DBE") in the project. In order to comply with the general contractor's mandate, Mojave did not contract with Cashman directly. Instead, Cashman contracted with Cam (who was brought in to satisfy the cities DBE requirement). Cam then contracted directly with Cashman.

As agreed, Mojave paid Cam for the labor and services that Cashman provided. In turn, Cam issued two different checks to Cashman in exchange for Cashman's unconditional release of both Cam and Mojave. However, Cashman was ultimately unable to receive any payment as Cam stopped payment on the first check, and the second was returned for insufficient funds. In response, Cashman then filed a mechanic's lien for \$755,893.89 and filed suit. The district court awarded \$197,051.87 to Cashman for foreclosure of security interest and \$86,600 for unjust enrichment to be paid once Cashman entered the required codes into the electrical system. However, the district court refused to enforce Cashman's mechanic's lien and upheld the unconditional release despite the fact that Cashman had not received payment for its work. Cashman appealed.

**Discussion**

*Whether the district court erred in denying recovery to Cashman on its mechanic's lien claim by enforcing an unconditional waiver*

The significance of the statutory right to a mechanic's lien was addressed in *Lehrer McGovern Bovis, Inc. v. Bullock Insulation Inc.*<sup>2</sup> A mechanic's lien is favored by Nevada's public policy as a means to ensure payment to those who labor, or furnish material, to improve a property for its owner.<sup>3</sup> Because contractors typically invest a significant amount of time, money, labor, and materials into a project, they and their employees are in a particularly vulnerable

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<sup>1</sup> By Andrew Hart.

<sup>2</sup> 124 Nev. 1102, 197 P.3d 1032. (2008)

<sup>3</sup> *Id.* at 1115, 1041.

position if their payment is not secured.<sup>4</sup> Therefore, the remedial nature of a Mechanic's lien statutes should be liberally construed.<sup>5</sup>

Though it is possible to waive the statutory right to enforce a mechanic's lien, it is contrary to Nevada's preferred public policy. Consequentially, districts courts are required to engage in a "public policy analysis," particular to each situation in which they are asked to enforce a lien waiver provision.<sup>6</sup>

The issue of whether or not an unconditional release can be used to waive the statutory right to enforce a mechanic's lien has not yet been determined by this Court. However, in *Lehrer* the Court held that "pay-if-paid" provisions in a contract violate public policy.<sup>7</sup> Like those provisions, the unconditional release that Cashman signed would prevent a subcontractor from being paid for work that had already been performed. Therefore, the conclusions of *Lehrer* can be applied to determine that enforcing the unconditional release in this case would similarly violate Nevada's public policy.

Additionally, the district court erred in finding that Mojave's payment to Cam constituted a payment to Cashman. Though Cashman's check to Cam cleared, Cam never paid Cashman. Cashman did not execute the release because Mojave paid Cam, but because Cashman received a check from Cam. At that time Cashman believed that the release would not be enforceable if the check failed to clear. The district court's reasoning that the release was enforceable because Mojave's check to Cam had cleared is contrary to Nevada's public policy which is to ensure that lower-tiered subcontractors are paid.

Also, Cashman's unconditional release to Mojave and Cam is statutorily unenforceable. NRS 108.2457(5)(e) specifically precludes enforcing a waiver when the payment offered for the release is in the form of a check that fails to clear the bank for any reason.<sup>8</sup> In the present case, Cam paid Cashman for the release with a check that failed to clear the bank and is therefore void.

The unconditional release is void and the district court's decision is reversed.

*Whether the district court erred in reducing Cashman's award on its mechanic's lien and resulting security interest claim using an equitable fault analysis*

Whether equitable fault can be used to reduce a security interest or a mechanic's lien is an issue of first impression in Nevada. The district court had conducted an equitable fault analysis when calculating the contract damages owed to Cashman. Using that analysis, the district court concluded that Mojave was thirty-three percent responsible, and Cashman sixty-seven percent, for Cam's failure to pay. Hence, the award was reduced to \$197,051.87. Cashman argues that the district court erred when it applied equitable fault analysis in calculating contract damages.

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<sup>4</sup> *Id.* at 1116, 1041.

<sup>5</sup> *Id.* at 1115, 1041.

<sup>6</sup> *Id.* at 1116, 1041.

<sup>7</sup> *Id.* at 1117-18, 1042.

<sup>8</sup> NRS 108.2457(5)(e).

This case is similar to that of *Lamb v. Goldfield Lucky Boy Mining Co.*<sup>9</sup> In that case the Court considered whether a mining property lessor could have a mechanic's lien enforced against his property for materials and labor performed at the request of the lessee.<sup>10</sup> The lessor was aware that the lien claimant was providing materials to benefit the property but was not a party to the contract between the lessee and the lien claimant.<sup>11</sup> Initially, the district court declined to enforce a lien against an owner unless the work was done for that owner himself.<sup>12</sup> This Court later reversed that order; holding that "equity jurisprudence" "ha[s] no place" in determining the rights of a mechanic's lienholder.<sup>13</sup>

The present case is similar to *Lamb*, and its holding applies. Just like the lessor and lienholder in *Lamb* had no contract, Cashman does not have a contract with Mojave or any of the other respondents in this matter. However, the work and materials that Cashman provided benefited Mojave, similar to how the contributions made by the lienholder benefited the lessor's mine in *Lamb*. Also, the relationship between Cashman and Mojave is less tenuous than the relationship between the lienholder and lessor in *Lamb*. Cashman had originally intended to contract directly with Mojave who accepted Cashman's bid. Cam was only inserted as an afterthought in order to fulfill the city's DBE requirement.

Additionally, the legislature has clearly chosen to protect bottom-tiered contractors who have provided labor and material to improve a property over the interests of a higher-tiered contractor; even when the higher-tiered contractor has fully performed its contractual obligations to the middle-tiered contractor. Though both Mojave and Cashman are innocent parties in this matter, the Court cannot limit, nor supplement, either party's rights as they are outlined in NRS Chapter 108. To enforce the unconditional lien would require the Court to legislate, as it is a remedy that is beyond the interpretation of the statute.

Other jurisdictions have likewise required higher-tiered contractors to pay twice when a lower-tiered contractor takes a lien against a project. Connecticut settled the issue over a hundred and fifty years ago in *Barlow Bros. Co. v. John W. Gaffney & Co.*,<sup>14</sup> and has since reaffirmed the issue in *Seaman v. Climate Control Corp.*<sup>15</sup> Similarly, Florida's law has led courts to parallel results.<sup>16</sup> Though Nevada's own lien notice Statute, NRS 108.226, is not as direct in its language as Florida's statute, the result is the same.

Therefore, equity jurisprudence provides no basis for offsetting a security interest foreclosure.

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<sup>9</sup> 37 Nev. 9, 138 P. 902 (1914).

<sup>10</sup> *Id.* at 12, 903.

<sup>11</sup> *Id.* at 10–11, 902.

<sup>12</sup> *Id.* at 11, 903.

<sup>13</sup> *Id.* at 16–18, 904–05.

<sup>14</sup> 55 A. 582 (Conn. 1903).

<sup>15</sup> 436 A.2d 271 (Conn. 1980).

<sup>16</sup> *Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Hart*, 390 So.2d 367, 369 (Fla. Dist. Ct. Ap. 1980).

*Whether the district court erred in denying recovery to Cashman on its payment-bond claim by applying the defense of impossibility*

The Court will not set aside a district court's factual findings, except when those findings are unsupported by "substantial evidence."<sup>17</sup> The defense of impossibility is available when performance is made impossible by the occurrence of an unforeseen contingency unless the contingency is one that the promisor should have foreseen.<sup>18</sup> Mojave failed to present any evidence at trial that paying Cashman was impossible or that Cam's failure to pay Cashman was unforeseen. Therefore, the district courts finding are set aside.

*Whether the district court's preliminary injunction requiring Cashman to provide code is moot and, if so, whether this court should nonetheless consider this issue pursuant to the exception to the doctrine of mootness*

After granting Mojave's motion for a mandatory injunction which ordered Cashman to install the codes necessary for the backup power systems to function, the district court then granted Cashman's motion to stay preliminary injunction. In its subsequent order, the district court awarded Cashman \$86,000 for unjust enrichment as long as Cashman installed the necessary codes. Cashman argues that the district court erred when it granted Mojave's motion for a preliminary injunction. More importantly Cashman argues that the injunction is now moot because the district court held that Cashman had terminated its performance under the contract when it didn't receive payment. Additionally, Cashman argues that the district courts order gave it the discretion to provide the codes if it accepted the \$86,600 from Mojave.

The district court's preliminary injunction, as well as its order staying that injunction, are moot as the district court's holding supplants both previous orders. The Court declines to consider the issue of whether it was an abuse of the district courts discretion to issue the preliminary injunction because any conclusion would not affect the rights of either party.

Additionally, Cashman's second argument that the district court's order allowed it the choice to enter the codes dependent on whether it accepted the unjust enrichment award from Mojave is unpersuasive. There was no ambiguity in the district court's order. Cashman must enter the codes and will then be paid the \$86,600. The award outlines the sequence in which the two events will occur but does not create an "if/then" scenario based on Cashman's discretion.

## **Conclusion**

The Court concluded that even though Mojave, (the top-tier contractor), paid Cam, (the middle-tier contractor); NRS 108.2457(5)(e) precludes enforcement of Cashman's unconditional release to Mojave and Cam, because Cam had failed to pay Cashman, (the bottom-tier contractor). Additionally, equitable fault analysis could not be used to reduce Mojave's liability to Cashman in this case. Therefore, the Court reversed the district court's decision and remanded the case to the district court with instructions that the unconditional release is void and Mojave's liability to Cashman is to be recalculated.

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<sup>17</sup> McDuffie Real Estate, Inc. v. Villa Fiore Dev., LLC, 130 Nev., Adv. Op. 83, 335, P.3d 211, 213 (2014).

<sup>18</sup> Nebaco, Inc. v. Riverview Realty Co., Inc., 87 Nev. 55, 57, 482 P.2d 305, 307 (1971).