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Summary of I. Cox Construction Co. v. CH2 Investments, 129 Nev. Adv. Op. 14

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I. Cox Construction Co. v. CH2 Investments, 129 Nev. Adv. Op. 14 (March 7, 2013)[1]

CIVIL PROCEDURE – TIMELINESS OF MECHANIC'S LIEN

Summary

The Court considered I. Cox Construction Company, LLC's (Cox) appeal from a district court's order releasing Cox's mechanic's lien. Cox challenged the district court's finding that the lien was untimely as clearly erroneous, arguing (1) the court should not have considered the timeliness of the lien in light of parties' failure to raise the issue in pleadings; and (2) the district court incorrectly relied on *Vaughn Materials v. Meadowvale Homes*[2] to find the lien untimely.

Disposition

First, the Court held that Cox gave implied consent to the district court to hear the timeliness issue, thus the district court was not clearly erroneous in considering the lien's timeliness. Second, the court held that the district court's reliance on *Vaughn* was not clearly erroneous because *Vaughn*'s interpretation of "work of improvement" is not inconsistent with NRS 108.226 and NRS 108.22188.

Factual and Procedural History

Respondents Jim Harwin and Safe Shot, LLC (together, Harwin) hired Cox to construct a shooting range. Harwin paid Cox's bills as the construction progressed, but ceased payment after October 8, 2009. By the time Cox left the project at the end of October, the project was mostly complete. In late 2009 and early 2010, following the range's opening, Harwin installed soundproofing in response to several noise complaints. Cox recorded its mechanic's lien in March 2010 – more than ninety days after Cox left the project but less than ninety days after Harwin installed the soundproofing.

In August 2010, Cox filed a complaint against Harwin and Harwin's landlord, CH2 Investments, LLC. Cox sought to foreclose on the property to recover over $40,000 in damages and costs. Cox argued the lien was perfected because it recorded the lien less than ninety days after Harwin installed soundproofing. The district court, relying on *Vaughn* and its interpretation of NRS 108.060, determined that Cox could not "tack" the soundproofing to the work of completing the shooting range.[3] The district court held the lien was not timely and therefore

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[2] 84 Nev. 227, 438 P.2d 882 (1968).

[3] Vaughn held that a lien claimant could not tack certain projects or contracts together to extend a work of improvement. 84 Nev. at 229, 438 P.2d at 823-24.

frivolous,[4] and ordered the lien released. Cox appealed.

Discussion

Chief Justice Pickering wrote the opinion of the Court for the three-justice panel. The question before the Court was whether the district court erred in relying on *Vaughn* to define the scope of "work of improvement" and finding the lien untimely.

First, the Court held that the district court was not clearly erroneous in considering the timeliness of the lien despite it not being raised in the pleadings. The Court concluded that Cox impliedly consented to the court's hearing the issue because Cox presented the issue first, and argued the merits of the issue extensively.[5]

The Court then turned to Cox's argument that the district court erred because it relied on *Vaughn*. A claimant must record a notice of lien within ninety days of the "completion of the work of improvement."[6] *Vaughn* interpreted the scope of "work of improvement" in the context of NRS 108.060. Since the Court decided *Vaughn*, the Legislature replaced NRS 108.060 with NRS 108.226. Cox claimed that NRS 108.226 and its companion, NRS 108.22188, define "work of improvement" more broadly than NRS 108.060 to include work performed by other parties. Thus, the district court's reliance on *Vaughn*'s narrow construction of "work of improvement" was inappropriate.

The Court held that the district court's reliance on *Vaughn* was not clearly erroneous. It concluded that the analysis under the former NRS 108.060 and the current NRS 108.226 has not changed. The Court noted that the definition of "work of improvement"[7] has not been modified since *Vaughn*; it has always been construed broadly to encompass "the entire structure or scheme of improvement as a whole."[8]

The Court then concluded that soundproofing fell outside the scope of "work of improvement." Neither party contemplated soundproofing as part of the project; it was not until the shooting range opened and noise complaints were made that Harwin made the installation. The Court reasoned that adopting Cox's definition of "work of improvement" would enable unforeseen project or repairs to continue the "work of improvement" indefinitely.

Conclusion

The Court affirmed the district court in releasing the lien.

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[4] The Court also held the lien was excessive, however this issue was not reached by the Court as its resolution of timeliness obviated doing so.

[5] Under NRCP 15(b), a court can hear an issue even if parties do not raise it in pleadings if the parties expressly or impliedly consent to it. E.g. Elliot v. Resnick, 114 Nev. 25, 30, 952 P.2d 961, 964-65 (1998).

[6] NRS 108.226(a)(1) (2007).

[7] Defined by NRS 108.22188 (2007).

[8] Peccole v. Luce & Goodfellow, 66 Nev. 360, 378, 212 P.2d 718, 727 (1949).