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J.E. Dunn Northwest, Inc. v. Corus Construction Venture, LLC.
127 Nev. Adv. Op. No. 10 (Mar. 3, 2011)¹

CIVIL PROCEDURE - MECHANIC'S LIEN PRIORITY ACTION

Summary

The Court considered an appeal from a district court order granting summary judgment in a mechanic's lien priority action.

Disposition/Outcome

The Court affirmed the district court's summary judgment and held that the Corus Bank's recorded deed of trust had priority over appellant Dunn's preconstruction mechanic's lien because the preconstruction work was not visible, and visibility is a requirement under NRS § 108.22112² for the establishment of a mechanic's lien priority. The Court further held that the 2003 amendments to NRS § 108.225, which expanded the definition of "work" to preconstruction services, does not vitiate the requirement that the work is visible to gain priority over subsequently recorded deeds of trust. The court also held that this statutory visibility requirement cannot be waived even if the lender has constructive or actual knowledge of preconstruction services, and that removing power lines, placing signs, or other forms of perfunctory services does not satisfy the visibility requirement of NRS § 108.22112.³

Factual And Procedural History

Midbar Condo ("Midbar") hired appellant J.E. Dunn Northwest, Inc. ("Dunn") to perform preconstruction services that totaled \$1,000,000 between August 2005 and March 2006. On March 16, 2006, Corus Construction Venture, LLC ("Corus Bank") gave Midbar a construction loan after a site inspection, where the site inspector concluded that aside from removing power lines and placing architectural signage, no work was performed on the property.

Subsequently, Corus Bank agreed to use Dunn for the contracting work, and acknowledged Dunn's preconstruction services for the project. During initial negotiations with Dunn, Corus Bank attempted to introduce a subordination clause in Dunn's contract which Dunn did not agree to, and which was not included in the final draft of the contract. Dunn began work on March 20, 2006, and the project was completed in June 2008. After completion of the

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² NRS § 108.22112 defines the commencement of construction, in relevant part, as the date when "(1) work is performed; or (2) Materials or equipment furnished in connection with a work of improvement, is visible from a reasonable inspection of the site."³ *Id.*

³ *Id.*

project, Dunn properly perfected its mechanic's lien on September 8, 2008 for the portion of the contract that remained unpaid. Midbar subsequently defaulted on the loan, giving rise to a priority dispute between Corus and Dunn.

In October 2008, Dunn filed a motion for declaratory judgment and a subsequent summary judgment motion in the district court. Corus Bank opposed the declaratory judgment and the summary judgment motion. Both Dunn's and Corus Bank's motions for summary judgment were dismissed. Corus Bank filed a renewed motion for summary judgment in March 2009. The district court granted this motion because there were "no genuine factual issues indicating that Dunn provided any visible construction work on the property at the time Corus' deed of trust was recorded."⁴ Dunn then filed this appeal before the Nevada Supreme court.

Discussion

The Nevada Supreme Court previously held that a mechanic's lien will take priority over a subsequently recorded deed of trust on a construction project, as long as the actual construction work is visible.⁵ Dunn raised several concerns regarding the visibility requirement in the mechanic's lien statutes in Nevada. The Nevada Supreme Court reviews the lower court's grant of summary judgment *de novo*.⁶

The Term "Commencement of Construction" Plainly Requires Visibility for Both Work Performed and Materials or Equipment Furnished for a Work of Improvement

First, Dunn argued that NRS § 108.225 is ambiguous because of a perceived inconsistency in the statute due to a "flush line arrow" (=>) and the placement of a "comma" in NRS § 108.22112(2).⁷ NRS § 108.22112(2) defines the "commencement of construction" but Dunn maintained that the placement of the flush line and the comma make the statute unclear.⁸ NRS § 0.025(2)(c) explains that an arrow symbol (=>) defines an area representing a "flush line" and contrary to what Dunn proposed, this arrow did not support a finding that the Legislature intended to change the statute to eliminate a visibility requirement. The Court held that several canons of statutory construction support a reading that the visibility requirement in mechanic's lien priority statutes is not confused by the inclusion of a flush line arrow. The Court rejected Dunn's proposed reading of the statute because the statute is clear on its face and adopting Dunn's version of interpretation would render the paragraph grammatically incorrect

⁴ J.E. Dunn Northwest, Inc., v. Corus Construction Venture, LLC, 127 Nev. Adv. Op. 5, pg. 5 (citations omitted).

⁵ NRS § 108.22184 defines *work* as "the planning, design, geotechnical and environmental investigations, surveying, labor and services provided by a lien claimant for the construction, alteration or repair of any improvement, property or work of improvement whether the work is completed or partially completed."

⁶ The court uses a *de novo* standard of review for cases where summary judgment is granted. *See* George L. Brown Ins. v. Star Ins. Co., 126 Nev. __, 237 P.3d 92, 96 (2010)(citations omitted).

⁷ NRS § 108.22112(2) reads, "[m]aterials or equipment furnished in connection with a work of improvement, => is visible from a reasonable inspection of the site."

⁸ *See id.*

The Legislative Expansion of NRS § 108.22184, which Defines Lienable “work,” did not Affect the Priority of Liens

The Court held that NRS § 108.22184, which grants lienable rights to preconstruction services, is compatible with NRS § 108.22112 because having the right to lien on a property is not the same as establishing the priority of that lien. The Court began by explaining that “actual work” on a site is necessary before a mechanic’s lien will take priority over a subsequently recorded deed of trust.⁹

Next, the Court discussed that in 2003, the Legislature removed the definition of “commencement of construction” from NRS § 108.225 and merged it with the holding from *Aladdin*¹⁰ to form NRS § 108.22112. The Legislature added the new provision of NRS § 108.22184 which defined “work.” There was no indication that the visibility requirement was no longer an essential element of a mechanic’s lien.

The Court next looked to other jurisdictions where “similar conclusions” have been found regarding the “distinction between lienable work and priority among lien claimants.” The Court held that if the Legislature intended to change the visibility requirement, it would have drafted the 2003 statutes in such a manner.

Finally, the Court relied on a public policy argument that supported the visibility requirement, stating that prudent lenders would stop providing construction loans to developers if they were exposed to the risks of unknown superior liens on a project prior to financing. The visibility requirement exists to “inform prospective lenders inspecting the premises that liens had attached.”¹¹

The Visibility Requirement is not Waivable

The Court next examined Dunn’s assertion that the requirements laid forth in NRS § 108.225 were waived by Corus Bank because Corus Bank had actual knowledge that Dunn was performing preconstruction work. The Court rejected this line of reasoning by distinguishing the holding in *Kirkwold Construction*,¹² where having actual knowledge of preconstruction work waived the visibility requirement needed for superior priority because the Nevada statutes do not address issues of notice for priority.¹³ Nevada statutes plainly require the commencement of construction.¹⁴

⁹ *Aladdin Heating v. Trustees*, Cent. States, 93 Nev. 257, 260, 563 P.2d 82, 84 (1977).

¹⁰ *Id.*

¹¹ *Aladdin Heating v. Trustees*, Cent. States, 93 Nev. 257, 260, 563 P.2d 82, 84 (1977).

¹² *Kirkwold Construction v. M.G.A. Construction*, 513 N.W.2d 241 (Minn. 1994).

¹³ *See In re L. Bruce Nybo, Inc.*, 247 B.R. 294, 300 (Bankr. D. Nev. 2000).

¹⁴ *See Aladdin*, 93 Nev. at 260, 563 P.2d at 84.

Dunn's Work was not Visible

The Court held that Dunn's work was merely preparatory work and not visible. This was not sufficient to put Corus Bank on notice that their recorded deed of trust would not have senior priority. The Court relied on the holding in *Aladdin* where "actual on-site construction" is required to signal the commencement of construction on a site, not simply performing preparatory "architectural, soil testing, or survey work."¹⁵ Therefore, Dunn's lien was subordinate to Corus Bank's recorded deed of trust.

Conclusion

The "commencement of construction" as defined in NRS § 108.22112 is a necessary element to establish the priority of a lien. The visibility of the work is a necessary element to the "commencement of construction."¹⁶ The "visibility requirement" of the statute cannot be waived.

¹⁵ *Id.*

¹⁶ *See* NRS § 108.22112 (2007).