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### Summary of Hardy Companies, Inc. v. SNMARK, LLC, 126 Nev. Adv. Op. No. 49

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## **Summary**

This case involves an appeal from a district court’s order expunging mechanics’ liens.

## **Disposition/Outcome**

The district court erred in granting summary judgment against O’Neil and Hardy because pre-lien notice is unnecessary if SNMARK had actual knowledge of O’Neil or Hardy’s work.

## **Factual and Procedural History**

Wickes Furniture Company (“Wickes”) leased property from ECT Holding, LLC (“ECT”), in March 2007. The lease required Wickes to improve the property with build-out plans and a general contractor approved by ECT. ECT approved Wickes use of O’Neil Industries Inc. (“O’Neil”) as its general contractor. After the execution of the lease, pursuant to NEV. REV. STAT § 108.234 , ECT recorded a notice of non-responsibility with the Clark County Recorder’s Office, but failed to deliver notice to O’Neil and Wickes.

In April 2007, ECT transferred the shopping center by quitclaim deed and assigned all of its rights under the lease to SNMARK. Mizrachi, manager of both companies, executed the document on behalf of both entities. In July 2007, Wickes and O’Neil entered into a contract for \$5,527,416 to complete the tenant work and O’Neil subcontracted work to Hardy.

During construction, SNMARK, through Mizrachi, was involved in O’Neil’s construction. Mizrachi directed O’Neil on several aspects of the construction, made fifteen to twenty site visits to monitor O’Neil’s progress, and participated in meetings between Wickes and O’Neil. Additionally, Mizrachi directed O’Neil to work on electrical panels for the entire shopping center and to work on common areas that SNMARK was responsible to maintain.

O’Neil completed construction on Wickes’ store in November 2007. Between July and September 2007 SNMARK paid O’Neil \$2,150,001. Additionally, Wickes paid O’Neil \$1,145,064 in October 2007.<sup>2</sup> On January 18, 2008, O’Neil recorded a mechanic’s lien against the property for \$2,133,620 and listed SNMARK as the owner. However, O’Neil never gave notice of right to lien pursuant to NEV. REV. STAT. § 108.245. Hardy also failed to give SNMARK a notice of right to lien pursuant to NEV. REV. STAT. 108.245. Hardy gave notice of right to lien to Wickes and O’Neil and then recorded a mechanic’s lien on December 18, 2007, listing Wickes as the owner.

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<sup>1</sup> By Tim Mott.

<sup>2</sup> On February 3, 2008, Wickes filed for bankruptcy and vacated the property.

On January 25, 2008, Hardy filed an action against SNMARK, Wickes, and O'Neil. Then, a month later Hardy filed to foreclose the mechanic's lien. O'Neil asserted cross-claims against SNMARK to foreclose its mechanic's lien and also filed an action against SNMARK on April 1, 2008.<sup>3</sup>

SNMARK motioned to expunge the mechanics' liens and lis pendens, as well as for partial summary judgment. The district court granted SNMARK's motion in all respects because SNMARK was not served with any Notice of Right to Lien as required by NEV. REV. STAT. § 108.245. This appeal followed.

## **Discussion**

### *Standard of Review*

Writing for the Court, Justice Douglas established that statutory interpretation is a question of law that receives de novo review.<sup>4</sup> Second, the court established that summary judgment orders receive de novo review.<sup>5</sup> Summary judgment is proper if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law.<sup>6</sup>

Finally, the Court established that NRS § 108.2453(1)<sup>7</sup> is ambiguous because it may correctly be interpreted multiple ways. SNMARK argued that the NEV. REV. STAT. 108.2453(1) requires strict compliance with the technical obligations of the statute. However, contrary to SNMARK's assertion, the Court stated that the statute could be interpreted as voiding conditions, stipulations, or provisions of a contract that require a lien claimant to waive lien rights. The Court then stated that they must look to legislative history to harmonize NEV. REV. STAT. § 108.2453 and NEV. REV. STAT. § 108.245.

### *Nevada's Mechanic's Lien Law*

The Court proceeded by explaining Nevada's mechanic's lien law. The law requires that a lien claimant serve the owner of the property with preliminary notice of right to lien (pre-lien notice).<sup>8</sup> Notice is required to provide the owner with knowledge that work is being incorporated into the

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<sup>3</sup> The district court consolidated both of these cases.

<sup>4</sup> A.F. Constr. Co. v. Virgin River Casino, 118 Nev. 699, 703, 5 P.3d 887, 890 (2002).

<sup>5</sup> Yeager v. Harrah's Club, Inc., 111 Nev. 830, 833, 897 P.2d 1093, 1094 (1995).

<sup>6</sup> NEV. R. CIV. P. 56(c).

<sup>7</sup> NEV. REV. STAT. § 108.2453(1) states: "Except as otherwise provided in NEV. REV. STAT. 108.221 to 108.246, inclusive, a person may not waive or modify a right, obligation or liability set forth in the provision of NEV. REV. STAT. 108.221 to 108.246, inclusive."<sup>8</sup> NEV. REV. STAT. § 108.245. Wickes is an owner because an owner includes anyone possessing less than a fee simple estate.

<sup>8</sup> NEV. REV. STAT. § 108.245. Wickes is an owner because an owner includes anyone possessing less than a fee simple estate.

property. The mechanic's lien statute is remedial and construed liberally.<sup>9</sup> "[S]ubstantial compliance with the statutory requirements is sufficient to perfect the lien if the property owner is not prejudiced."<sup>10</sup>

NEV. REV. STAT. § 108.245's pre-lien requirement is satisfied when the property owner has actual knowledge of the potential lien claim and is not prejudiced.<sup>11</sup> Failure to fully or substantially comply will render the mechanic's lien invalid.<sup>12</sup> The Court followed this explanation by addressing SNMAR's argument that the Legislature's amendments in 2003<sup>13</sup> abrogated the substantial compliance doctrine and now requires strict compliance in order for a lien claimant to perfect its claim. The Court presumes that the legislature does not intend to overturn a law unless expressly stated or necessitated by the reading of the statute.<sup>14</sup> The legislative history behind NEV. REV. STAT. § 108.2453 demonstrated that the 2003 amendment was to facilitate payments to lien claimants, not to overrule Nevada case law that allows substantial performance to perfect a lien. In 2005, the Legislature amended Nevada's mechanic's lien laws<sup>15</sup> and again did not overrule Nevada's substantial performance doctrine.

The court then concluded that NEV. REV. STAT. § 108.2453(1) did not overrule *Fondren* and *Durable Developers*. NEV. REV. STAT. 108.2453(1) "voids conditions, stipulations, or provisions in a contract that require a lien claimant to waive lien rights."<sup>16</sup> The rule "that actual knowledge on the part of the property owner constitutes substantial compliance, remains good law."<sup>17</sup>

### *Rules Articulated from Fondren*

After establishing that *Fondren* is still good law, the Court proceeded by explaining *Fondren* and the rules that it established. A property owner that negotiates a lease knowing that substantial improvements need to be made has actual knowledge of potential lien claims on the property.<sup>18</sup> Additionally, if the property owner or his agent regularly inspects the project, the property owner will have actual knowledge.<sup>19</sup> The Court ultimately concluded "that actual knowledge requires that the owner has to have been reasonably made aware of the identity of the third party seeking to record and enforce a lien."<sup>20</sup>

### *Summary Judgment Against O'Neil*

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<sup>9</sup> Las Vegas Plywood . D & D Enters., 98 Nev. 378, 380, 649 P.2d 1367, 1368, (1982).

<sup>10</sup> *Id.*

<sup>11</sup> Bd. of Trustees v. Durable Developers, 102 Nev. 401, 410, 724 P.2d 736, 743 (1986).

<sup>12</sup> Schofield v. Copeland Lumber, 101 Nev. 83, 86, 692 P.2d 519, 521 (1985).

<sup>13</sup> NEV. REV. STAT. 108.2453 was adopted in 2003.

<sup>14</sup> 73 Am. Jur. 2d. Statutes § 97 (2001).

<sup>15</sup> See 2005 Nev. Stat. 427, § 25, at 1913-14.

<sup>16</sup> Hardy Co., Inc. v. SNMARK, LLC, 126 Nev., Adv. Op. No. 49 at 15.

<sup>17</sup> *Id.*

<sup>18</sup> Fondren v. K/L Complex, Ltd., 106 Nev. 705, 709, 800 P.2d 719, 721 (1990).

<sup>19</sup> *Id.*

<sup>20</sup> Hardy, 126 Nev., Adv. Op. No. 49 at 16.

The Court concluded that there was a genuine issue of material fact as to whether SNMARK had actual knowledge of O'Neil's potential lien claims and therefore the district court erred in granting summary judgment. There was a genuine issue of material fact because O'Neil claimed that SNMARK knew the property required substantial remodeling when SNMARK negotiated the lease with Wickes. Moreover, O'Neil claimed SNMARK had actual knowledge because of their constant monitoring at the work site. Thus, the district court erred in granting summary judgment.

#### *Summary Judgment Against Hardy*

The Court concluded that the district court erred in granting summary judgment against Hardy because an issue of material fact existed as to whether SNMARK had actual knowledge of Hardy's potential lien claim. However, the Court first dismissed several of Hardy's arguments. First, service to one owner does not give notice to other owners of the potential claim. Second, notice must be given to the right person or entity and failure to provide such notice cannot be cured by NEV. REV. STAT. § 108.229(3). Finally, actual knowledge does not occur when the property owner merely has knowledge of construction occurring on its property. Actual knowledge requires the owner to know the identity of the third person with whom he has no contact. There must be some means to make the owner aware that the third-party claimant was involved with work performed on the property. Further, courts will not impute knowledge when there is no evidence showing the lessee or lessor knew the existence and identity of additional third parties.

Although the Court disagreed with many of Hardy's arguments, the Court concluded that issues of material fact existed as to whether SNMARK had actual knowledge of Hardy's potential lien claim.

#### **Conclusion**

NEV. REV. STAT. § 108.2453 does not abrogate Nevada's substantial compliance doctrine. However, notice must be given to the party whose interest the lien claimant is seeking to affect. Additionally, notice to one owner is not sufficient to affect the interest of other owners. Finally, actual knowledge requires the owner to actually know the identity of the lien claimant. The district court's grant of summary judgment against O'Neil and Hardy was reversed and remanded for further proceedings.