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JD Construction v. IBEX Int'l Group, 126 Nev. Adv. Op. No. 36 (October 7, 2010)
PROPERTY - MECHANIC'S LIENS – CIVIL PROCEDURE

Summary

J.D. Construction, Inc. (“J.D. Construction”) placed a mechanic’s lien on property owned by IBEX International Group, LLC (“IBEX”). IBEX sought to expunge the lien, pursuant to NRS 108.2275, arguing that the lien was frivolous and/or excessive. The district court concluded the lien was excessive and expunged the lien. J.D. Construction appeals.

Disposition/Outcome

In affirming the district court’s order, the Court addresses the proper scope and nature of NRS 108.2275 proceedings where a property owner seeks to expunge a frivolous or excessive lien, and concludes the following:

- (1) When a property owner seeks to remove a lien under NRS 108.2275, the district court must determine the material facts in order to reach a conclusion regarding whether the lien is frivolous or excessive
- (2) In making these factual determinations, the district court is not required to hold a full evidentiary hearing, but may base its decisions on affidavits and documentary evidence submitted by the parties
- (3) The procedure outlined above meets due process requirements, however, if a hearing is necessary, it must be held within 15 to 30 days of the court’s order, though there is no requirement that the district court resolve the matter within this time-frame
- (4) In evaluating whether a lien is excessive, the district court must use a preponderance-of-the-evidence standard, and the burden is on the lien claimant to prove the lien and the amount claimed.

Factual and Procedural History

The dispute arises from a contract between J.D. Construction and IBEX Int’l Group for J.D. Construction to build a medical facility for \$5,000,000. J.D. Construction was to be paid in installments based upon the percentage completed. The parties later modified the amount to \$5,438,761.88. J.D. Construction stopped working on the project on January 25, 2008, claiming IBEX failed to pay as agreed upon by the parties. On January 21, 2008, Valley Construction Services, Inc. (VCS), the company designated by the parties to determine the percentage of the project that was complete, sent its inspector, Gary Parrish, to calculate the percentage of completion. Parrish determined the project was 23.09 percent completed.

J.D. Construction then recorded a lien on the property in the amount of \$1,450,497.90. IBEX subsequently filed a complaint, alleging breach of contract, among other claims, and requested that the court expunge the lien. IBEX then filed a motion to expunge or reduce J.D. Construction's allegedly frivolous and/or excessive lien, pursuant to NRS 108.2275.

The district court held a hearing on the motions in July 2008, and ordered the parties to conduct discovery regarding the percentage completed. In addition to deposing VCS's inspector, Parrish, J.D. Construction submitted a supplemental brief by its own expert stating that the percentage completed was between 52 to 55 percent as of January 21, 2008. At the continued hearing in September 2008, the district court granted IBEX's motion to expunge, finding the lien was not frivolous, but was excessive, based on VCS's calculation, and therefore the project was 23.09 percent complete upon J.D. Construction's departure from the project. J.D. Construction now appeals.

Discussion

Under NRS 108.2275, a party in interest to a property subject to a lien can move to dismiss the lien if the lien is frivolous or excessive. The party seeking to expunge the lien must submit affidavits and documentary evidence in support of its motion. If the court orders a hearing, the party seeking to expunge the lien must give the lien claimant notice. Furthermore, any hearing must be held within 15-30 days of the court's order for a hearing. After the hearing, the judge must issue one of the following decisions: (1) the lien is frivolous and made without reasonable cause; (2) the lien is excessive; or (3) the lien is not frivolous or excessive and made with reasonable cause.

Scope of an NRS 108.2275 hearing

Justice Douglas, writing for the court, considered first whether the district court can make factual determinations at a hearing regarding whether a lien is excessive and/or frivolous.

Legislative History

The Legislature enacted NRS 108.2275 to avoid the need for litigation in every instance where liens are placed against property, and to bring Nevada in line with sister states in terms of competitiveness and in continuity of economic investments. In a hearing regarding 108.2275, the Legislature acknowledged the potential due process issues in having a speedy hearing requirement, and extended the time frame from 6-10 days to 15-30 days in which to have the hearing. The Legislature also acknowledged that the lien should not be expunged as frivolous as long as there is any showing of good faith on the lien claimant's part. Finally, in formulating

these changes to Nevada's mechanic's lien laws, the Legislature looked to at statutes from Arizona, California, Oregon and Washington.

Competing Views Regarding the Scope of a Mechanics Lien

The court considered two different approaches regarding the scope of a hearing to expunge a mechanic's lien. The approach adopted by California allows the judge to make a determination of the material facts based on affidavits even without an evidentiary hearing. However, the approach adopted by Washington limits the ability of the court to make factual findings at an evidentiary hearing.

The court then adopted the California approach based on the plain language of NRS 108.2275, which requires the district court to decide whether the lien is excessive or frivolous. In order for the judge to determine whether a lien is excessive, the judge must make material findings of fact.

Nature and Timing of an NRS 108.2275 hearing

The court next recognized a mechanics lien is a taking, which requires some form of due process. To determine whether the process set out in NRS 108.2275 satisfies the notice and opportunity to be heard requirements of due process, the court considered the three prong test in *Mathews*.¹ This three part test balances (1) the private interest that will be affected by the state action; (2) the risk of an erroneous deprivation; and (3) the government's interest.²

The court first recognizes that the California Supreme Court has found that a speedy hearing on the probable validity of the lien satisfies due process.³ The court agrees with the California Supreme Court that a lien, while not de minimis, is of "relatively minor effect" on the owner. Furthermore, applying the 3-prong *Mathews* test, the court found that the property owner does have significant interest in having his or her property free of encumbrances, but on the other hand the state does have a significant interest in securing property for those who improve the owner's property. In addition, the lien claimant has an equally strong interest in ensuring there are adequate assets available to collect from.

However, the court ultimately determines that a full evidentiary hearing is not mandatory in these situations because of the low chance of an erroneous taking. Furthermore, under the procedure described in NRS 198.2275, both the property owner and the lien claimant are provided a meaningful opportunity to present their case, which satisfies both parties right to due

¹ *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

² *Id.*

³ *Connolly Develop, Inc. v. Sp. Ct. of Merced Cty.*, 553 P.2d 637, 644 (Cal. 1976).

process. This is especially true because the statute requires a hearing on the motions if there is a possibility the judge will expunge the lien. Therefore, the court concluded that NRS 108.2275, as well as the NRCP, do not require an evidentiary hearing; instead, a decision based on affidavits and deposition testimony can satisfy due process.

The court also held that in order to satisfy due process, any hearing held by the district court must be held within 15 to 30 days of the court's order for a hearing. However, the statute does not require the district court to resolve the matter within that time frame.

Standard of proof and sufficiency of evidence

Because NRS 108.2272 does not address the standard of proof to be used, the Court looks to reason and public policy to determine the Legislature's intent.⁴ After determining that the legislative history did not assist in determining the level of proof required to show a lien is excessive, the court concluded that since that preponderance of the evidence is the general civil standard⁵, it is proper to determine whether a lien is excessive. Specifically, the court should decide which party has shown the greater weight of evidence regarding the proper amount for the lien. Finally, the court recognized that although it did not agree with the district court's reasoning about the credibility of the expert testimony, J.D. Construction nevertheless failed to prove by a preponderance of the evidence that its lien was not excessive.

Conclusion

In order for a judge to determine whether a mechanics lien is excessive or frivolous, the judge must make findings of material facts. Furthermore, a full evidentiary is not required in order for a judge to make this decision; a decision based on the affidavits and deposition testimony satisfies due process. Finally, a party must prove by a preponderance of the evidence that its lien is not excessive or frivolous, otherwise the judge may expunge the lien.

⁴ Crestline Inv. Group v. Lewis, 119 Nev. 365, 368, 75 P.3d 363, 365 (2003).

⁵ Irving v. Irving, 122 Nev. 494, 497, 134 P.3d 718, 720 (2006).