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**In re Resort at Summerlin Litigation, 122 Nev. Adv. Op. 15, 127 P.3d 1076,
(Feb. 9, 2006)¹**

PROPERTY – LIEN PRIORITY & RECOVERY OF LITIGATION COSTS

Summary

Appeal and cross-appeal from a district court order granting a holder of a deed of trust priority over holders of mechanic's liens but denying deed of trust holder's request for costs.

Disposition/Outcome

Affirmed. A holder of a deed of trust who records first maintains priority over holders of mechanic's liens when the deed of trust holder does not elect to be bound by NRS Chapter 106. A deed of trust holder may not recover costs under NRS 108.239(6) and 108.237(3) since the statutes apply only to lien claimants.

Factual and Procedural History

In December 1997, The Resort at Summerlin, Inc. (Resort) contracted with J.A. Jones Construction Company (Jones) to construct a five-star casino property in Las Vegas. Wilmington Trust Company (Wilmington) acted as lead agent and holder of the deed of trust for the various lenders. The deed of trust was signed on December 31, 1997, and recorded January 2, 1998.

Work began on the project in January 1998. Disputes then arose between the Resort and Jones over change orders and construction schedules. Jones and others then filed mechanic's liens against the property and eventually sought foreclosure of their liens in district court. In November 2000, the district court action was suspended when the Resort filed Chapter 11 bankruptcy proceedings.

On January 31, 2001, the bankruptcy court lifted the automatic stay so that the state district court could determine the priority of the future advances under Wilmington's deed of trust against several mechanic's lien claimants. The district court ruled that NRS 106.360² was a "safe harbor" statute that a party must elect to be bound by. Since Wilmington did not elect to be bound by the statute, the district court ruled that common law applied. After a bench trial, the district court ruled that Wilmington's entire deed of trust had priority over the mechanic's liens since Wilmington recorded its deed of trust first.

After the court entered its judgment, it held a hearing on Wilmington's motion for costs. The district court indicated that NRS Chapter 108, rather than NRS Chapter 18, controlled the award of costs in this matter and interpreted Chapter 108 to allow a cost award only for a lien claimant. Since Wilmington was not a lien claimant, the court denied its request for costs.

Jones and other lien claimants appealed the district court's priority determination, and Wilmington appealed the costs determination.

¹ By Bryan Lindsey

² NEV. REV. STAT. § 106.360 (2003).

Discussion

Priority Determination

The Nevada Supreme Court first determined that NRS 106.360 did not set forth mandatory requirements for future advance instruments.³ Furthermore, NRS 106.350 clearly states that if a party desires to opt-in to the safe harbor provisions of NRS 106.300 to NRS 106.400, that party must expressly state that it is governed by the statutory scheme.⁴ Since Wilmington's deed of trust documents failed to reference NRS Chapter 106, the deed of trust was not subject to its provisions.

Since the statute did not apply, the court looked to the common law to evaluate the priority issue. Under common law principles, obligatory future advances "date back to the original date of recordation."⁵ Here, the language from the deed of trust when combined with the credit agreement clearly demonstrated that the advances were obligatory. Therefore, the court held that the district court did not err in determining that Wilmington's deed of trust advances maintained priority over the mechanic's lien claimants.

Costs under NRS Chapter 108

NRS Chapter 18 allows for the prevailing party in an action to be awarded its costs.⁶ However, NRS 108.239(6), although similar to NRS Chapter 18, more specifically refers to lien claimants.⁷ The court determined that where a general statutory provision and a specific provision cover the same subject matter, the specific provision controls.⁸ Thus, the more specific statute, NRS 108.239(6), controls over the more general provisions of NRS Chapter 18. Since Wilmington is the representative of deed of trust lenders and not a lien claimant, the court held that it may not recover costs under NRS 108.239(6). Therefore, the district court did not err in denying the costs requested by Wilmington.

Additionally, Wilmington argued that it should be awarded attorney fees pursuant to NRS 108.237(3).⁹ However, the statute provides for fees in the context of representation of a lien

³ NEV. REV. STAT. § 106.360 provides for the execution, contents and amendment of an instrument that encumbers real property as security for future advances:

1. A borrower may execute an instrument encumbering his real property to secure future advances from a lender within a mutually agreed maximum amount of principal.
2. The instrument must state clearly:
 - (a) That it secures future advances; and
 - (b) The maximum amount of principal to be secured.
3. The maximum amount of advances of principal to be secured by the instrument may increase or decrease from time to time by amendment or the instrument.

⁴ NEV. REV. STAT. § 106.350 states that the provisions "apply only to an instrument or supplement or amendment to an instrument that states clearly that it is to be governed by those provisions."

⁵ *Southern Trust v. K & B Door Co.*, 104 Nev. 564, 566 n. 1, 763 P.2d 353, 354 n. 1 (1988).

⁶ NEV. REV. STAT. §§ 18.005–18.180.

⁷ NEV. REV. STAT. § 108.239(6).

⁸ *Nevada Power Co. v. Haggerty*, 115 Nev. 353, 364, 989 P.2d 870, 877 (1999).

⁹ NEV. REV. STAT. § 108.237(3).

claimant, which Wilmington is not. Therefore, the court held the district court properly refused to award attorney fees to Wilmington.

Concurring/Dissenting Opinions

HARDESTY, J., concurring in part and dissenting in part:

Justice Hardesty concurred in the majority's decision on the priority of Wilmington's deed of trust, but dissented from the denial of Wilmington's cost award. He argued that a lien priority dispute between mechanic's lien claimants and the holder of a deed of trust is ancillary and distinct from the priority determination contemplated by the mechanic's lien statutes.¹⁰ Thus, NRS Chapter 108 did not apply and Wilmington should have been awarded costs under NRS Chapter 18.

Conclusion

The court affirmed the district court's finding that in order to be bound by NRS Chapter 106, a party's written instrument must expressly state its intention to be bound by the statute. Since Wilmington's deed of trust did not do so, common law applied. The court then found that under common law, Wilmington's deed of trust advances maintained priority over the mechanic's lien claimants because it was recorded first. The court also affirmed the district court's denial of costs to Wilmington. The court concluded that Wilmington was not entitled to recover costs under NRS 108.239(6) or attorney fees under NRS 108.237(3) because Wilmington was not a lien claimant.

¹⁰ See *A.F. Construction Co. v. Virgin River Casino*, 118 Nev. 699, 705, 56 P.3d 887, 891 (2002).