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Dayside Inc. v. District Court, 119 Nev. Adv. Op. No. 48
(August 29, 2003)

MANDAMUS - CERTIORARI – MECHANIC’S LIENS

Summary

General contractor’s petition for writ of mandamus or certiorari against partial summary judgment granted by the First Judicial District Court, State of Nevada, dismissing mechanic’s lien against property owner.

Disposition/Outcome

Petition for writ of mandamus or certiorari denied. Petitioner did not demonstrate the district court engaged in extra-jurisdictional acts or manifest abuse of discretion warranting such extraordinary relief.

Factual and Procedural History

In May 1999, the Petitioner, Dayside Inc., (Dayside) and the real party in interest, Parkway Manor, Inc. (Parkway), executed a preprinted form contract requiring Dayside to construct an apartment building on Parkway’s real property for \$9,165,226 in monthly installments. The parties agreed, among other things, that Dayside would “not file a mechanic’s or materialman’s lien against Parkway...on account of any work done, labor performed or materials furnished under this Contract...” The parties expressly crossed out language imposing the waiver on subcontractors and further wrote Dayside’s waiver of lien rights was valid “to the extent such waiver is in accordance with Nevada law.”

Despite the lien-waiver provision, Dayside recorded a mechanic’s lien against Parkway and joined a subcontractor already in litigation against Parkway after Parkway’s failure to pay “large sums of money owed.” Dayside pled various contractual and tort claims against Parkway, including foreclosure of the mechanic’s lien. Dayside alleged, among other things, such a waiver is void as against public policy; there was insufficient consideration in support of the waiver; Parkway’s nonpayment constituted a failure of consideration; and the waiver was entered involuntarily.

In June 2002, District Court Judge William Maddox granted partial summary judgment for Parkway against Dayside and dismissed the lien, ruling the contract’s express lien-waiver provision was clear and not contrary to Nevada law.

In December 2002, Dayside challenged the partial summary judgment and dismissal by petitioning the Nevada Supreme Court for a writ of mandamus or certiorari. Nevada Supreme Court Justices Robert Rose, Mark Gibbons, and William Maupin, in a *per curiam* decision, denied the petition as the contractual waiver provisions did not violate public policy and the district court did not abuse its discretion.

Discussion

Writs of mandamus are available to compel the performance of an act arising from a duty required by law of an office, trust, or station, or to remedy a manifest abuse of discretion.¹ Writs of certiorari serve to remedy jurisdictional/judicial excesses by an inferior tribunal.² Both are

¹ See Nev. Rev. Stat. § 34.160; see also *Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 637 P.2d 534 (1981).

² Nev. Rev. Stat. § 34.020(2).

extraordinary remedies and generally unavailable if the petitioner has adequate legal remedy available.³ Despite the availability of Dayside to appeal any final judgment, including the partial summary judgment, because this petition raises an issue of first impression on an important issue of law and public policy (the waiver of statutory protections for materialmen and laborers), the court shall exercise its discretion and invoke its original jurisdiction to consider issuing a writ of mandamus or certiorari to clarify the law and better serve public policy.⁴

Nevada's legislative enactments are silent as to whether waivers of statutory rights to mechanic's liens are against public policy.⁵ It is well settled in some states that clear and unambiguous contractual waivers of rights to mechanic's liens are valid and binding.⁶ Some state legislatures have declared a lien waiver as against public policy,⁷ whereas other states expressly permit such waivers.⁸ The Nevada Supreme Court found that, absent a prohibitive legislative proclamation, waivers of mechanic's lien rights are not contrary to public policy.

As to Dayside's failure of consideration argument, the court held that Parkway's failure to pay had no effect on the lien-waiver provision. Once waived, the contractor is limited to normal common-law remedies such as breach of contract for failure to pay.⁹ Inadequate payment is an event anticipated by the contract, rather than a failure of consideration.

The court rejected Dayside's contention that there was inadequate consideration to support the waiver clause in the first place. The court determined the mutual promises and negotiations of Dayside to build and Parkway to pay for the construction were sufficient consideration in support of the contract¹⁰ and the waiver provision was a bargained for part of that contract.¹¹

The court did not reach to Dayside's contention the lien rights were waived involuntarily because the risks were "unknown, unquantified and...potentially the price of the entire job." Because Dayside did not make this argument to the district court, the Supreme Court had no evidentiary record to determine whether the waiver was made knowingly and voluntarily.

Conclusion

Dayside did not demonstrate the extraordinary relief requested is warranted. The district court did not engage in an extra-jurisdictional act or a manifest abuse of its discretion in granting summary judgment dismissing the lien. Accordingly, Dayside's petition for a writ of mandamus or certiorari is denied.

³ Nev. Rev. Stat. § 34.020(2); Nev. Rev. Stat. § 34.170; *State v. Dist. Ct. (Ducharm)*, 118 Nev. ----, ----, 55 P.3d 420, 423 (2002) (mandamus); *Dangberg Holdings v. Douglas Co.*, 115 Nev. 129, 137-38, 978 P.2d 311, 316 (1999) (certiorari); *Karow v. Mitchell*, 110 Nev. 959, 962, 878 P.2d 978, 981 (1994) (denying a petition for a writ of mandamus or prohibition because the petitioner had taken an appeal from the challenged order).

⁴ See *Diaz v. Dist. Ct.*, 116 Nev. 88, 93, 993 P.2d 50, 54 (2000).

⁵ See Senate Bill (SB) 206, § 26, 72d Leg. (Nev. 2003). SB 206, enacted June 10, 2003, strictly circumscribes attempts to waive or impair the lien rights of a contractor, subcontractor or supplier, but is applicable only to agreements consummated on or after October 1, 2003.

⁶ J.A. Bock, Annotation, *Validity and Effect of Provision in Contract Against Mechanic's Lien*, 76 A.L.R.2d 1087, 1089 (1961); see, e.g., *Durant Const., Inc. v. Gourley*, 125 Mich.App. 695, 336 N.W.2d 856 (1983); see also *Landvatter Ready Mix, Inc. v. Buckey*, 963 S.W.2d 298, 301 (Mo.Ct.App.1997)(recognizing that "[i]t has long been the rule that a mechanic's lien claim may be waived...").

⁷ See, e.g., 770 Ill. Comp. Stat. Ann. 60/1.1 (West 2001) ("An agreement to waive any right to enforce or claim any lien under this Act...either express or implied...is against public policy and unenforceable.").

⁸ See, e.g., 49 Pa. Cons.Stat. Ann. § 1401 (West 2001) ("A contractor or subcontractor may waive his right to file a claim by a written instrument...or by any conduct which operates equitably to estop such contractor or subcontractor from filing a claim.").

⁹ *Pero Bldg. Co., Inc. v. Smith*, 6 Conn.App. 180, 504 A.2d 524, 527 (1986); see also 56 C.J.S. *Mechanic's Liens* § 252, at 288 (1992) ("When a contractor waives his right to a lien, he agrees not to rely on the statutory remedy, but to rely only on his common-law remedies against the owner of the property.").

¹⁰ See *Pink v. Busch*, 100 Nev. 684, 688, 691 P.2d 456, 459 (1984).

¹¹ See *G.R. Sponaugle & Sons, Inc. v. McKnight Const. Co.*, 304 A.2d 339, 344 (Del.Super.Ct.1973)(observing that the consideration underlying a provision waiving lien rights in a construction contract is the same consideration supporting the entire contract.); *Torres v. Meyer Paving Co.*, 423 N.E.2d 692, 696 (Ind.Ct.App.1981)(finding a no-lien agreement supported by the consideration underlying the parties' contemporaneous construction contract).