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### Helix Electric of Nevada, LLC v. APCO Construction, INC. (Mar. 24, 2022)

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#### Recommended Citation

Dreibelbis, Anna, "Helix Electric of Nevada, LLC v. APCO Construction, INC. (Mar. 24, 2022)" (2022).  
*Nevada Supreme Court Summaries*. 1489.  
<https://scholars.law.unlv.edu/nvscs/1489>

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Helix Electric of Nevada, LLC v. APCO Construction, INC. (Mar. 24, 2022)<sup>1</sup>

Contract Law: When Pay-if-Paid Provisions are Declared Unenforceable

### SUMMARY

This case involved a pay-if-paid provision that allows a contractor to pay the subcontractor only once the contractor received payment from the project developer or owner. The court had previously considered this issue in *Zitting* where they clarified that these provisions are not void per se, but they are unenforceable if they go against NRS 624.<sup>2</sup> The court affirmed the decision of the district court that this conditional subcontractor provision that conditioned payments from earlier progress on the contractor being paid first was unenforceable. Additionally, this court affirms the finding of the district court that the unenforceability of the provision did not invalidate the other conditions for attaining the retention payment. Similarly, this court agrees that since the subcontract was assigned after the original contractor terminated its contract with the developer, the subcontractor cannot get the unpaid retention from the original contractor. For the same reason, the contractor is not entitled to attorney's fees.

### FACTS AND PROCEDURAL HISTORY

Gemstone Development West, Inc. hired APCO Construction Inc. (respondent), as the general contractor for a condominium's construction project. APCO subcontracted with Helix Electric of Nevada, LLC, at Gemstone's request. Helix billed APCO \$505,021 more than they were paid and that remainder was withheld in retention. The pay-if-paid provision of the subcontract (section 3.8) allowed this withheld payment until Gemstone paid APCO. However, the relationship between APCO and Gemstone fell apart. Since Gemstone stopped paying APCO, APCO issued stop work notices for the project. Gemstone then claimed that APCO breached their

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<sup>1</sup> By Anna Dreibelbis.

<sup>2</sup> APCO Constr., Inc. v. Zitting Brothers Constr., Inc., 136 Nev. 569, 569, 473 P.3d 1021, 1024 (2020).

contract and threatened termination of the prime contract if the breach wasn't fixed. Both Gemstone and APCO notified the subcontractors that they individually intended to terminate the contract. APCO left the project at the end of August, and both parties claimed they had terminated the contract.

Gemstone replaced APCO with Camco Pacific Construction Company as acting construction manager. Helix has not terminated the APCO contract but worked under Camco from August to September 2008. Helix did not sign Camco's contract, but Helix billed Camco for remaining fees, including retention earned while Helix worked under APCO. The project lenders withdrew their funding, and the project work was terminated. Camco paid Helix only a portion of the amount they billed, and this payment did not cover retention. APCO, Camco, and Helix recorded liens against the property, and the district court consolidated these cases. The district court granted partial summary judgment for Helix, preventing APCO and Camco from asserting any defenses based on their pay-if-paid provisions. APCO requested attorney fees pursuant to section 18.5 in the contract, but the court awarded APCO attorney fees for less than APCO's requested amount. Helix appealed, challenging the denial of its claims for retention against APCO and the award of attorney fees. APCO cross appeals, challenging the reduction of the requested attorney fees.

## DISCUSSION

*The district court correctly determined that Helix is not entitled to further payment from APCO under the subcontract*

It is common for construction contract to allow the owner or developer to withhold a portion of funds from progress payments to the contractor pending completion of the work. Here, Helix argues that the district court incorrectly determined that the subcontract retention provision's

conditions and the assignment to Gemstone/Camco precluded payment. The Court agrees with the district court that Helix is not entitled to further payment from APCO under the subcontract. In *Lehrer* the Court determined that paid-if-provisions were in violation of public policy and are generally unenforceable.<sup>3</sup> However, they clarified that decision in *Zitting*, where the court stated that if pay-if-paid provisions are not void per se but are unenforceable if they are not compliant with NRS 624 but require a case-by-case analysis.<sup>4</sup>

*The section 3.8 preconditions are valid*

For the same reasons as the case in *Zitting*, here, the preconditions subjecting Helix's right to payment of the retention amount on APCO receiving Gemstone's payment is void. Helix attempted to claim other components of the agreement should be void also, but this Court agrees with the district court, that other than the pay-if-paid provision, the subcontract's retention payment conditions were valid.

*APCO's obligations under the subcontract were assigned*

Helix alleges that APCO's obligation to pay Helix for its work was never assigned, or waived, and therefore APCO must pay Helix the retention it earned. Nevada law favors "the free assignability of rights and frowns on restrictions that would limit or preclude assignability," and a contract right is typically assignable unless the assignment will materially change the contractual terms.<sup>5</sup> The Court found that even if Gemstone's termination did not trigger an assignment under the contract, the APCO-Helix subcontract was assigned to Gemstone/Camco. This Court affirms the decision of the district court in finding that APCO's obligations under the subcontract were assigned after APCO left the project and Camco became the general contractor.

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<sup>3</sup> *Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.*, 124 Nev. 1102, 1117, 197 P.3d 1032, 1042 (2008).

<sup>4</sup> *Zitting*, 136 Nev. at 569, 473 P.3d at 1024.

<sup>5</sup> *Easton Bus. Opportunities, Inc. v. Town Exec. Suites-E. Marketplace, LLC*, 126 Nev 119, 125, 230 P.3d 827, 831 (2010).

*The district court did not abuse its discretion in granting APCO attorney fees pursuant to NRCP 68*

The Court found that the because the APCO-Helix subcontract was assigned to Gemstone and Camco, APCO retains no right to enforce section 18.5 of the subcontract. Therefore, the district court did not err by not awarding APCO attorney fees under the subcontract. The fee award was affirmed.

#### CONCLUSION

The Court used *Zitting* to support its decision regarding retention fees earned by the subcontractor. Therefore, section 3.8's pay-if-paid condition is unenforceable. Helix argues that other conditions in section 3.8 are invalid but fails. The APCO-Helix subcontract was assigned and therefore APCO was not entitled to attorney fees under section 18.5 of the subcontract but was properly awarded attorney fees according to NRCP 68. The Court affirms the district court decision.