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### APCO Constr., INC. vs. Helix Elec. Of Nev., LLC, 138 Nev. Adv. Op. 31 (May 5, 2022)

Servando Martinez

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#### Recommended Citation

Martinez, Servando, "APCO Constr., INC. vs. Helix Elec. Of Nev., LLC, 138 Nev. Adv. Op. 31 (May 5, 2022)" (2022). *Nevada Supreme Court Summaries*. 1501.

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*APCO Constr., INC. vs. Helix Elec. Of Nev., LLC*, 138 Nev. Adv. Op. 31 (May 5, 2022)<sup>1</sup>

## **APPLICABILITY OF THE COVENANT OF GOOD FAITH AND FAIR DEALING IN DELAYED SUBCONTRACT AGREEMENTS**

### **Summary**

This is an appeal from a district court judgment after a bench trial in a contract action, arising from a dispute regarding delay costs between a contractor and subcontractor. The question considered is whether the district court properly applied the covenant of good faith and fair dealing when it awarded delay damages by signing a waiver and release to receive its retention. The standard for the covenant of good faith and fair dealing “prohibits arbitrary or unfair acts by one party that work to the disadvantage of the other.”<sup>2</sup> The court also interpreted whether the subcontractor waived its right to receive delay damages by signing a waiver and release to receive its retention, pursuant to the provisions of NRS 338.490, which limits any waiver or release to the claimed costs that are the subject of a progress or retainage bill.

The court concluded that the district court properly determined the covenant of good faith and fair dealing applies in this case; that the contract breached the covenant, and that the subcontractor did not waive its delay claims. The court further affirmed the district court’s decision to apply the covenant of good faith and fair dealing.

### **Facts and Procedural History**

The City of North Las Vegas contracted with APCO Construction, Inc., for a construction project involving electrical work that was originally scheduled to be completed on January 9, 2013 but wasn’t sufficiently completed until October 25, 2013. APCO had subcontracted with Helix Electric, Inc. who notified APCO that it reserved the right to receive payment for the

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<sup>1</sup> By Servando Martinez.

<sup>2</sup> *State, Dep’t of Transp. V. Eighth Judicial Dist. Court*, 133 Nev. 549, 555, 402 P.3d 677, 683 (2017).

additional costs incurred due to the delay, to which APCO requested all pertinent documentation for reimbursement purposes. Despite attempts to claim reimbursement, APCO did not pay Helix's delay costs and Helix filed a cause of action, which the district court ruled in Helix's favor finding that Helix's signed waiver did not apply to Helix's claim of delay costs, thus awarding Helix delay damages.

### **Discussion**

The Court begins their analysis by reviewing whether the district court erroneously found Helix was entitled to damages by considering whether Helix correctly received delay damages pursuant to the covenant of good faith and fair dealing and whether the signed, conditional release and waiver precluded Helix from receiving delay damages. The court gave deference to the district court's factual findings, stating "substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion."<sup>3</sup>

#### ***The covenant of good faith and fair dealing allows for Helix to receive delay damages***

APCO primarily argues that (1) the district court erred by applying the covenant of good faith and fair dealing because the subcontract limits Helix's remedy to an extension of time and (2) that by applying the covenant of good faith, the district court superseded the subcontract's provisions. The court asserts that the implied covenant exists in "all contracts,"<sup>4</sup> and that "a plaintiff can recover damages for breach of the covenant of good faith and fair dealing [e]ven if a defendant does not breach the express terms of a contract."<sup>5</sup>

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<sup>3</sup> Weddell v. H20, Inc., 128 Nev. 94, 101, 271 P.3d 743, 748 (2012).

<sup>4</sup> A.C. Shaw Constr., Inc. v. Washoe County, 105 Nev. 913, 914, 784 P.2d 9, 10 (1989).

<sup>5</sup> State, Dep't of Transp., 133 Nev. at 555, 402 P.3d at 683.

*The conditional release and waiver Helix signed does not preclude it from receiving delay damages from APCO*

APCO argues the district court misapplied NRS 338.490 by not enforcing the waiver Helix signed, but the court asserts that the statute does not apply in cases where one subcontractor is owed delay damages as the subject of the release was the retention payment for the work completed prior to the delay costs, constricting the waiver to that one payment.<sup>6</sup>

**Conclusion**

Justice Silver wrote an opinion affirming the district court's decision regarding the covenant of good faith and fair dealing, concluding that APCO breached the covenant by misrepresenting the reasons for CNLV's rejection of Helix's delay costs by settling with CNLV, which effectively waived Helix's claims as Helix did not waive its delay claims. Justices Cadish and Pickering concurred. Therefore, the Court concluded that the district court did not err in properly applying the covenant of good faith and fair dealing.

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<sup>6</sup> NEV. REV. STAT. 338.490 (1999).