IN THE SUPREME COURT OF THE STATE OF NEVADA

U.S. HOME CORPORATION; AND GREYSTONE HOMES, INC., Appellants, vs. ALLIED BUILDING MATERIALS, INC., A NEVADA CORPORATION, Respondent.	No. 47459
U.S. HOME CORPORATION; AND GREYSTONE HOMES, INC., Appellants/Cross-Respondents, vs. ALLIED BUILDING MATERIALS, INC., A NEVADA CORPORATION, Respondent/Cross-Appellant.	No. 47834

FILED

FEB 14 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Appeal from a district court summary judgment finding mechanic's liens to be valid and timely. Appeal and cross-appeal from a district court judgment awarding attorney fees. Eighth Judicial District Court, Clark County; Kenneth C. Cory, Judge.

In October 2002, appellant US Home Corporation ("US Homes") entered into a Contractor Base Agreement ("CBA") with subcontractor Amen Masonry. The CBA permitted Amen Masonry to bid on specific projects for US Homes but did not authorize Amen Masonry to do any work. Instead, US Homes and Amen Masonry entered into a separate extra purchase order ("EPO") each time Amen Masonry was selected as a subcontractor. US Homes selected Amen Masonry to build walls at its Providence Park, Copper Fields, Steeplechase, Palazzo Monte, and Heritage Highlands subdivisions. US Homes entered into EPOs for

work to be done on individual lots in those subdivisions. The CBA also contained a provision that waived Amen Masonry's right to file liens against US Homes' property or any other items furnished by US Homes.

In 1999, Amen Masonry began purchasing masonry supplies for the walls it was constructing at all five US Homes subdivisions from respondent Allied Building Materials ("Allied"). Allied supplied materials to Amen Masonry as it requested them. Allied's invoices reflect that it shipped materials to US Homes subdivisions as a whole and not in connection with individual lots in particular subdivisions. In addition, the materials that Amen purchased from Allied were delivered to the appropriate US Homes subdivision by third parties; Allied did not keep track of the specific lots on which its materials were used.

As it completed work on the walls it was constructing, Amen Masonry signed final lien releases. Allied likewise signed a number of lien releases. However, the lien releases that Allied signed were marked with the dates through which they were valid, whereas Amen Masonry's lien releases were not similarly marked.

In fall 2002, Amen Masonry began falling behind on its payments to Allied and by the end of 2002, Amen Masonry stopped paying Allied entirely. At that point, Amen Masonry owed Allied a total of $115,850.11 for materials used in US Homes projects.

In mid-2002, Allied filed a number of pre-lien notices against US Homes projects. Jim Turner ("Turner"), the Vice President of US Homes, responded by suggesting a payment plan to address the situation. Allied agreed to the terms of the payment plan and received three payments from US Homes, thereby reducing the amount that Amen Masonry owed to Allied to approximately $83,418.71. In early 2003, Allied

requested written confirmation of the agreed upon payment plan from US Homes. However, according to Christopher Craft, attorney for Allied, US Homes refused such acknowledgment. On January 14, 2003, Allied recorded mechanic's liens against the Providence Park, Steeplechase, and Heritage Highlands projects. On February 18, 2003, it recorded mechanic's liens against the remaining two US Homes projects.

US Homes filed a complaint in which it requested Allied's liens be declared frivolous and alleged slander of title. Allied subsequently released most of its liens.[1] On April 30, 2003, Allied and US Homes entered into a stipulation in which Allied released its remaining liens and US Homes agreed to pay any amount due under those liens from its own accounts. Allied then counterclaimed, demanding that US Homes pay Amen Masonry's past due invoices. It also filed a motion for partial summary judgment on the issue of the validity of its liens; US Homes filed a cross motion for summary judgment. The district court denied US Homes' motion and granted Allied's motion, finding that Allied's liens were both valid and timely. It also denied US Homes' petition for rehearing on the issue of the validity of Allied's liens. In addition, the district court denied Allied's motion for summary judgment on US Homes' slander of title claim.

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[1]The original blanket liens that Allied recorded against the five US Homes projects claimed an amount of $115,850.21 and covered 548 individual parcels. Once Allied released the majority of its liens, it only had liens covering 28 parcels which are the subject of this litigation. None of the 28 parcels are in the Heritage Highlands subdivision. Thus, only parcels in four of the five US Homes subdivisions are relevant to this case.

Allied filed another motion for summary judgment on March 21, 2006 but the district court did not rule on the motion. Instead, Allied and US Homes entered into, and the district court approved, a limited Stipulation and Order for Dismissal of Claims without Prejudice, in which US Homes agreed to dismiss its slander of title claim. Allied also requested attorney fees, costs and interest accrued in enforcing its liens and defending against US Homes' slander of title claims. The district court, however, only awarded Allied the attorney fees, costs, and interest accrued in enforcing its liens. US Homes timely filed this appeal contesting Allied's liens and the district court's award of attorney fees. Allied cross-appeals on the issue of attorney fees related to slander of title.

Validity and timeliness of the liens

Orders granting summary judgment are reviewed by this court de novo. Specifically, "[a] summary judgment motion should be granted when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law."[2] Therefore, we review the issues of the validity and timeliness of Allied's liens de novo.

US Homes contends that Allied should have filed mechanic's liens against the individual lots on which its materials were used and not whole subdivisions, as it did, because Allied's materials did not benefit US

[2]Kahn v. Morse & Mowbray, 121 Nev. 464, 473-74, 117 P.3d 227, 234 (2005).

Homes projects in their entirety.[3] We conclude that Allied properly filed liens against entire US Homes subdivisions. NRS 108.221 provided, at the time Allied filed its liens, that "unless the context otherwise requires, 'work of improvement' or 'improvement' means the entire structure or scheme of improvement as a whole."[4] We held in Schultz v. King[5] that four lots constituted a single work of improvement when a painting project "was not restricted to a single one of the units but embraced all of them."[6] There, we concluded that "'[t]he phrase "work of improvement" and the word "improvement" as used in this act are each hereby defined to mean

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[3]US Homes also argues that a blanket lien is only proper when there is an overarching contract between the contractor and the subcontractor. However, we do not evaluate this argument because Nevada has not adopted the contract based theory that US Homes advances. Instead, Nevada has adopted the notion that in the case of a continuous arrangement or transaction, like the one that existed here, even if completed under multiple contracts, justifies a blanket lien. See Vaughn Materials v. Meadowvale Homes, 84 Nev. 227, 438 P.2d 822 (1968); Skyrme v. Occidental Mill and Mining Co., 8 Nev. 219 (1873). In addition, "it is not necessarily the contract, but rather the furnishing and use of the materials and the putting of the same into the building. . . , that constitutes grounds for the lien." Gaston v. Avansino, 39 Nev. 128, 137-38, 154 P. 85, 88-89 (1915).

[4]We note that NRS 108.22188, which was enacted in 2003, alters the definition of "work of improvement." However, given that NRS 108.22188 did not go into effect until after Allied filed its liens, we hold that it does not apply here.

[5]68 Nev. 207, 228 P.2d 401 (1951).

[6]Schultz, 68 Nev. at 212-13, 228, P.2d at 403-04.

the entire structure or scheme of improvement as a whole . . .'"[7] Accordingly, under the rule of Schultz, a work of improvement that benefits multiple parcels justifies a blanket lien as opposed to individual ones. Because Allied's building materials were used to construct perimeter walls that benefited entire US Homes subdivisions, we conclude that the rule of Schultz applies and Allied's blanket liens were valid. We also conclude that it is consistent with Nevada lien law to place the burden of due diligence, or objecting to the bulk delivery of materials, on the contractor and not the materialman as US Homes suggests.[8]

US Homes also argues that Allied's liens were untimely. In this, US Homes claims that because there was no overarching contract between US Homes, Amen Masonry, and Allied, the completion date of individual lots determines whether Allied's liens were timely. However, according to NRS 108.226, a lien may be timely filed:

> (a) Within 90 days after the completion of the work of improvement;
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> (b) Within 90 days after the last delivery of material by the lien claimant; or
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> (c) Within 90 days after the last performance of labor by the lien claimant, whichever is later.[9]

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[7]Id. at 212, 228 P.2d at 404-05 (quoting N.C.L., § 3739, 1943-49 Supp.).

[8]See In re Thomas A. Cary, Inc., 412 F. Supp. 667, 674 (E.D. Va. 1976). US Homes makes a number of arguments responding to In re Cary. However, we conclude that they are inapposite here.

[9]2003 Nev. Stat., ch. 427, § 30, at 2597.

In the instant case, there was a continuing contract between Allied and Amen Masonry for the sale of masonry supplies. We have repeatedly held that in instances in which a continuing contract exists, the 90 day period for filing a lien begins running at the end of the date of completion, last delivery of material, or last performance of services.[10] Given that all of Allied's liens were filed within 90 days of the date of its last delivery of materials to Amen masonry, we conclude that Allied's liens were timely.[11]

Waiver of right to file liens

US Homes further argues that Allied waived its right to file liens against the five US Homes subdivisions because the waiver provision in the CBA applied to both the subcontractor, Amen Masonry, and the subcontractor's supplier, Allied. It further contends that Allied waived its right to file liens against parcels for which it signed final lien releases. We conclude that Allied did not waive its right to file liens against US Homes. Initially, waiver of lien provisions are enforceable as a matter of public policy in Nevada.[12] However, we have only upheld waiver of lien provisions that are "a bargained for part of [the] contract."[13] Here,

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[10]Gaston, 39 Nev. at 140, 154 P. at 89; Peccole, 66 Nev. at 378, 212 P.2d 718 at 727.

[11]US Homes also argues that Allied only had 40 days to file its liens because US Homes filed notices of completion as described in NRS 108.226(2). However, because US Homes failed to serve Allied with the notices of completion as required by NRS 108.228(5), Allied had a full 90 days within which to file its liens.

[12]Dayside, Inc. v. Dist. Ct., 119 Nev. 404, 75 P.3d 384 (2003).

[13]Id. at 409, 75 P.3d at 387.

because Allied did not bargain with US Homes for the waiver of lien provision in the CBA, we conclude that Allied did not waive its right to file liens against US Homes. Further, we agree with Allied's assertion that the final lien releases were for progress payments and were therefore limited in their scope. As a result, Allied did not waive its right to file liens by signing the so-called final lien releases.

Attorney fees

US Homes contests the district court's order awarding Allied prevailing party attorney fees. In this, it claims that Allied failed to provided sufficient documentation or adequate evidence in support of its request for attorney fees. US Homes further contends that Allied's request for attorney fees was unreasonable because the supporting documentation that Allied provided was late-filed. US Homes also asserts that Allied was required to file a verified memorandum of costs within five days of the entry of judgment but failed to do so.

We have repeatedly held that "[a]bsent an abuse of discretion, a district court's award of fees and costs will not be disturbed on appeal."[14] US Homes provides no explanation of either the claim that Allied's motion for attorney fees lacked sufficient evidentiary support or that the attorney fees it requested were unreasonable. In addition, US Homes does not specify which documents were allegedly late-filed. Given that Allied provided extensive documentation in support of its request for attorney

[14]Parodi v. Budetti, 115 Nev. 236, 240, 984 P.2d 172, 174 (1999) (citing Nelson v. Peckham Plaza Partnerships, 110 Nev. 23, 866 P.3d 1138 (1994)).

fees and US Homes failed to object to the allegedly late-filed documents at the trial level, we conclude that Allied provided sufficient support for its request for attorney fees. We can also discern no reason that Allied's request for attorney fees was unreasonable. In addition, we have previously addressed the question of when a memorandum of costs must be filed and conclude that, here, the district court either considered Allied's memorandum of costs timely or implied granted Allied additional time to file it. [15] As a result, we hold that the district court did not abuse its discretion in awarding Allied prevailing party attorney fees.

Allied cross-appeals on the issue of attorney fees. Specifically, it claims that it is entitled to attorney fees accrued in defending against US Homes' slander of title claim pursuant to NRS 18.010(2)(b). Under NRS 18.010(2)(b) a district court may award attorney fees to a prevailing party "when the court find[s] that the claim. . . of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party." A groundless claim exists when "the allegations in the complaint . . . are not supported by any credible evidence at trial."[16] Allied's only argument as to why US Homes' slander of title claim was groundless is that US Homes lacked evidence of malice, a requisite element of slander of title. However, given that there is a legitimate dispute in this case as to whether Allied properly filed its liens and US

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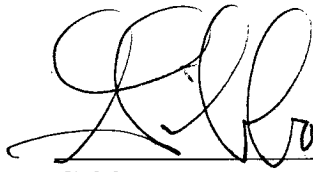
[15]See Eberle v. State ex rel. Redfield Trust, 108 Nev. 587, 836 P.3d 67 (1992).

[16]Allianz Ins. Co. v. Gagnon, 109 Nev. 990, 996, 860 P.3d 720, 724 (1993) (alterations in original) (quoting Western United Realty, Inc. v. Isaacs, 679 P.3d 1063, 1069 (Colo. 1984)).

Homes was never afforded the opportunity to present evidence of malice at trial, we conclude that Allied did not prove that US Homes filed a groundless slander of title claim. Accordingly, we cannot discern any abuse of discretion on the part of the district court.

We therefore conclude that the district court properly found Allied's liens to be valid and timely and did not abuse its discretion in awarding, and denying, attorney fees. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



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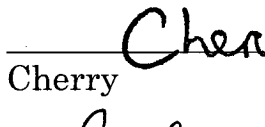

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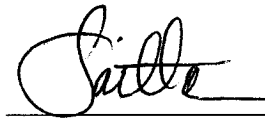

_____, J.
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cc: Hon. Kenneth C. Cory, District Judge
Stephen E. Haberfeld, Settlement Judge
Perry & Spann/Las Vegas
Jolley Urga Wirth Woodbury & Standish
Eighth District Court Clerk