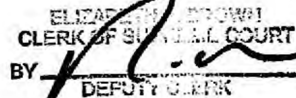
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ASCENT CONSTRUCTION, INC., A UTAH CORPORATION,
Appellant,
vs.
SONOMA SPRINGS LIMITED PARTNERSHIP, A NEVADA LIMITED PARTNERSHIP,
Respondent.

No. 77947-COA



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ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY DEPUTY CLERK

ORDER OF AFFIRMANCE

Ascent Construction, Inc., appeals from a district court order reducing Ascent's mechanics' lien under NRS 108.2275. Sixth Judicial District Court, Humboldt County; Michael Montero, Judge.

In connection with a dispute arising from a June 2015 contract for construction work (the Agreement), Ascent recorded an amended notice of lien in the amount of $634,618.55 against a property owned by Sonoma Springs Limited Partnership.[1] Ascent alleged that though Sonoma had paid a substantial amount of the original contract price ($4,039,294.82 out of $4,541,834.00 originally agreed upon), it failed to tender full payment for additional work due to "additional or changed work, materials and equipment" which brought the total amount to $4,673,913.37. In response to the notice of lien, Sonoma took two steps. First, Sonoma filed an application under NRS 108.2275 for Ascent to show cause why its lien was neither frivolous or excessive, and the district court scheduled a hearing. Then, Sonoma obtained a surety bond under NRS 108.2415, which released the lien from the property and transferred it to the bond. After the show cause

[1]We do not recount the facts except as necessary to our disposition.

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hearing, the district court concluded that Ascent's lien was excessive because it requested additional fees for work that was already within the scope of the Agreement.[2] The district court further concluded that because Ascent failed to establish that Sonoma waived certain provisions in the Agreement, Ascent also could not include the additional fees in its lien under a theory of quantum meruit. The district court's order reduced Ascent's lien to $231,850.86.

On appeal, Ascent argues that: (1) the district court lacked authority to reduce its lien under NRS 108.2275 after Sonoma filed a surety bond; (2) the district court erred by finding that the Agreement's mediation provisions barred Ascent from challenging the decision to deny additional fees; (3) the district erred by improperly interpreting the Agreement's scope of work provisions; (4) the district court's decision that Sonoma did not waive the drawings/specifications and written change order requirement was not supported by substantial evidence; and (5) the district court did not reduce Ascent's lien by the proper amount.

The district court has authority under NRS 108.2275 to reduce or exonerate the lien

First, Ascent contends that the district court erred as a matter of law when it reduced Ascent's mechanics' lien under NRS 108.2275, even though Sonoma had already obtained a surety bond for the full amount pursuant to NRS 108.2415. Ascent argues that once a property owner obtains a surety bond and releases the lien from the property, the district court lacks authority to utilize NRS 108.2275's expedited hearing procedure because the

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[2]The Honorable William G. Rogers, Senior Judge, presided over the show cause hearing.

statute is reserved only for liens that are on real property.[3] For the reasons set forth below, we disagree and decline to give NRS 108.2275 that construction.

"[A] dispute over the interpretation of a lien statute is one of statutory construction" and is reviewed de novo. *J.D. Constr., Inc. v. IBEX Int'l Grp.*, 126 Nev. 366, 375, 240 P.3d 1033, 1039 (2010). This court looks first to the plain language of the statute, and if it is plain and unambiguous, the court may not look beyond the statute itself. *Id.* at 375, 240 P.3d at 1039-40. Further, "this court interprets provisions within a common statutory scheme harmoniously with one another in accordance with the general purpose of those statutes to avoid unreasonable or absurd results and give effect to the Legislature's intent." *Simmons Self-Storage Partners, LLC v. Rib Roof, Inc.*, 130 Nev. 540, 546, 331 P.3d 850, 854 (2014) (internal quotation marks omitted).

In Nevada, a party wishing to challenge a mechanics' lien against real property has remedies under two statutes: NRS 108.2275 and NRS 108.2415. Under NRS 108.2275,

> [t]he debtor of the lien claimant or a party in interest in the property subject to the notice of lien who believes the notice of lien is frivolous and was made without reasonable cause, or that the amount of the notice of lien is excessive, *may apply* by motion to the district court . . . *for an order* directing the lien

[3]Sonoma alleges that Ascent waived this argument when it failed to initiate its own appeal from the district court's June 2018 order. However, because the district court's decisions were not appealable until after its order reducing the mechanics' lien, and Ascent timely appealed that order, we find that Ascent preserved this issue for appeal. *See* NRS 108.2275(8) (permitting an appeal only after a district court enters an order resolving a show cause application on a mechanics' lien).

> claimant to appear before the court *to show cause why the relief requested should not be granted.*

NRS 108.2275(1) (emphasis added). "After a hearing, the district court shall make one of three determinations: (1) that the notice of lien is frivolous and made without reasonable cause, (2) that the lien amount is excessive, or (3) that the notice of lien is not frivolous or excessive and made with reasonable cause." *J.D. Constr.*, 126 Nev. at 372, 240 P.3d at 1038 (citing NRS 108.2275(6)(a)-(c)). If the district court determines that the lien is frivolous and made without reasonable cause, it must make an order releasing the lien. NRS 108.2275(6)(a). If the district court finds that the lien is excessive, it has discretion to reduce the notice of lien to an appropriate amount. NRS 108.2275(6)(b). Any proceedings carried out under the statute "do not affect any other rights and remedies otherwise available to the parties." NRS 108.2275(7).

Alternatively, "[u]nder NRS 108.2413, a lien claimant's lien rights or notice of lien may be released upon the posting of a surety bond in the manner provided in NRS 108.2415 to 108.2425, inclusive." *Simmons Self-Storage,* 130 Nev. at 551, 331 P.3d at 857 (internal quotation marks omitted).

> *To obtain the release of a lien* for which notice of lien has been recorded against the property, the principal and a *surety must execute a surety bond* in an amount equal to 1.5 times the lienable amount in the notice of lien . . . [and] the recording and service of the surety bond pursuant to [NRS 108.2415(1)] *releases the property* described in the surety bond from the lien and the surety bond shall be deemed to replace the property as security for the lien.

NRS 108.2415(1), 6(a) (emphasis added).

Here, because NRS 108.2415 and 108.2275 are within the same statutory scheme, we must construe them harmoniously, and give effect to

each of their parts. Under the plain text of the statutes, neither statute's language supports the theory that NRS 108.2275 limits a property owner's statutory right to only one remedy and excludes the right to exercise other remedies simultaneously. To the contrary, NRS 108.2275(7) expressly permits a property owner to pursue other available rights and remedies. Although NRS 108.2415 does not contain a similar express provision, nothing in its text suggests that it was intended to be an exclusive remedy.

Ascent argues that the statutes cannot apply because once Sonoma obtained a bond, the bond effectively extinguished the liens and the property was thereafter no longer encumbered by any lien. While it is true that, at least initially, a lien must encumber real property[4] in order for a property owner to move for its exoneration or reduction, the act of obtaining a surety bond does not wipe the lien totally from existence. Rather, the lien still exists but some of the lienholder's rights and duties have now been transferred to another entity through the bond. Moreover, because the surety bond amount is determined by the lien amount, a property owner obligated to pay the bond fees is not barred from further challenging the lien amount simply because it sought to bond the property first. To say that a subsequent surety bond precludes any inquiry into the validity of a lien would mean that the lien was not just released, but also ceases to exist, and we decline to follow that construction. NRS 108.2415 merely releases the lien from the real property and converts the lien holder's interest in the real property into an interest in the surety bond. Thus, it follows that the district court still has

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[4]The Legislature originally enacted NRS 108.2275 "to bring certainty into the statute and to avoid the need for litigation in every instance where liens are placed against property." *J.D. Constr.*, 126 Nev. at 373, 240 P.3d at 1038 (internal quotation marks omitted).

authority to reduce or exonerate the lien even after the property owner obtains such a bond. This conclusion has also been adopted by at least one other court. *See YWS Architects, LLC v. Alon Las Vegas Resort, LLC*, 2018 WL 5085809, at *3 (D. Nev. Feb. 21, 2018), *report and recommendation adopted*, 2018 WL 4615983 (D. Nev. Sept. 26, 2018) (finding that a property owner's subsequent surety bond did not render its motion to expunge the lien claimant's lien moot). Therefore, we conclude that the district court did not err by reducing the lien amount after the lien was released from the real property and transferred to a surety bond.[5]

The district court did not err in interpreting the Agreement's provisions

Next, Ascent argues the district court erred by finding that the Agreement's mediation provisions required a party to seek mediation within 30 days when the provision stated that a party "*may* file for mediation of an initial decision within 30 days." (Emphasis added.) Ascent further argues that the district court improperly interpreted the Agreement's scope of work provisions when it concluded that additional work Ascent performed was already included within scope of the original Agreement.

"Contract interpretation is subject to a de novo standard of review." *May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005). "A basic rule of contract interpretation is that '[e]very word must be given effect if at all possible.'" *Musser v. Bank of Am.*, 114 Nev. 945, 949, 964 P.2d 51, 54 (1998) (alteration in original) (quoting *Royal Indem. Co. v. Special Serv.*

[5]This court has also carefully considered Ascent's due process argument and concludes that it does not warrant relief because NRS 108.2275's hearing procedure already satisfies due process and a surety bond does not upset the due process protections already in place. *See J.D. Constr.*, 126 Nev. at 372, 240 P.3d at 1037.

Supply Co., 82 Nev. 148, 150, 413 P.2d 500, 502 (1966)). "A court should not interpret a contract so as to make meaningless its provisions." *Phillips v. Mercer*, 94 Nev. 279, 282, 579 P.2d 174, 176 (1978). The court "shall effectuate the intent of the parties, which may be determined in light of the surrounding circumstances if not clear from the contract itself." *Davis v. Nev. Nat'l Bank*, 103 Nev. 220, 223, 737 P.2d 503, 505 (1987).

Here, Article 15.2.1 of the Agreement provides that the project's Architect is the initial decision maker for claims arising under the Agreement. Further, Article 15.2.5 states that the Architect's initial decision is "final and binding on the parties but subject to mediation." Finally, Article 15.2.6 (supplemented) states "[e]ither party may file for mediation of an initial decision within 30 days after that decision is made." The use of the word "may" instead of "shall" demonstrates that the parties intended mediation to be optional in some sense. However, under the Agreement, mediation is the only way to challenge any decision of the Architect. The word "may" as used in Article 15.2.6 means that no party must seek mediation, but if any party is aggrieved by and wishes to challenge the Architect's decision, the party must do so by requesting mediation within 30 days of the decision.[6] Consequently, the district court did not err by finding that the Agreement required a party to seek mediation within 30 days of an initial decision if it sought to challenge that decision.

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[6]Ascent alleges that only Article 15.2.6.1 of the Agreement makes mediation mandatory. Under Article 15.2.6.1, mediation is required if either party demands within 30 days, in writing, that the other party file for mediation. We disagree and find that construing Article 15.2.5 and Article 15.2.6 (supplemented) also supports a similar assertion.

As an initial matter, Ascent only sent a demand for mediation to the Architect after the litigation began on January 17, 2018, over five months after the Architect's decision, and thus it did not timely seek mediation to challenge the Architect's decision. But even if we were to consider the merits of the Architect's decision, we conclude that the district court did not err by agreeing with the Architect that the Agreement's scope of work provisions included everything described in the designs, specifications, and schedule of values, and thus Ascent was not entitled to charge separate fees for those work items. The Agreement unequivocally states that the scope of work means "the construction and services required by the Contract Documents" and the contract documents include the very drawings, specifications, and schedule of values for which Ascent requested separate fees. Ascent asks this court to consider the surrounding circumstances along with the Agreement's plain language when interpreting the parties' intent. But this was precisely the kind of argument Ascent should have asserted in mediation. Moreover, this court may not consider parol evidence lying outside of the four corners of the Agreement as extrinsic evidence of the intent of the parties if the plain language of the Agreement itself is clear, and we conclude that it is. *Davis*, 103 Nev. at 223, 737 P.2d at 505.

Substantial evidence supports the district court's determination that Sonoma did not waive it rights under the Agreement

Although Ascent did not timely challenge the Architect's decision through mediation, it argued below that it was nonetheless entitled to relief because Sonoma waived its right to assert certain terms of the Agreement. We now consider whether substantial evidence supports the district court's finding that Ascent failed to prove Sonoma waived the scope of work and written change order provisions at issue. Ascent contends that Sonoma orally agreed to compensate Ascent for the additional work and thereby waived the

Agreement's provision that required any modifications to the contract be by written change order. Sonoma maintains that it never waived those contract provisions.

We "will not disturb the district court's factual determinations if substantial evidence supports those determinations." *J.D. Constr.*, 126 Nev. at 380, 240 P.3d at 1043. "Substantial evidence is that evidence which a reasonable mind might accept as adequate to support a conclusion." *Id.* (internal quotation marks omitted). Thus, the district court's findings will only be set aside if they are clearly erroneous. *Id.* at 381, 240 P.3d at 1043. Whether a party has waived a contract provision is a question typically reserved for the trier of fact. *Mahban v. MGM Grand Hotels, Inc.*, 100 Nev. 593, 596, 691 P.2d 421, 424 (1984).

While a mechanics' lien is generally limited to the amount of the contract, in certain circumstances a lien claimant may include in the lien amount fees for additional work performed, materials expended, and supplies used that were not embodied within the contract. *See Cal. Commercial Enters. v. Amedeo Vegas I, Inc.*, 119 Nev. 143, 146-47, 67 P.3d 328, 331 (2003). In those cases, recovery for the additional amount is based upon quantum meruit, and recovery is limited to two situations: (1) where substantial changes have been made to the property such that the original contract is deemed abandoned, *id.* at 147, 67 P.3d at 331; *Paterson v. Condos*, 55 Nev. 134, 134, 28 P.2d 499, 500 (1934); *or* (2) where a property owner orally approves work outside the scope of the parties' contract, promises to compensate, and that promise is relied upon, ultimately waiving any part of the contract that conflicts, *Cal. Commercial*, 119 Nev. at 147, 67 P.3d at 331; *Udevco, Inc. v. Wagner*, 100 Nev. 185, 187-90, 678 P.2d 679, 681-82 (1984) (recognizing that the extra work performed outside the contract was "of such

character and magnitude that the idea that the parties intended [the subcontractor] to do so without additional compensation would be highly unreasonable").

Ascent argues that Sonoma orally approved work outside the scope of the Agreement, and thereby waived the scope of work and written change provisions. Ascent contends that its August 14, 2015 letter to Sonoma, which stated that Ascent's scope of work included only tasks listed on the schedule of values, evidences Sonoma's waiver of the drawing and specifications as also being included in Ascent's tasks. Ascent also contends that at a meeting between both parties, Sonoma orally agreed to waive the requirement that all modifications to the Agreement be by written order because Sonoma did not want to "scare the lender" with large additional fee requests early in the project.

In its order, the district court explicitly stated that it put "little weight" on Ascent's assertions. The district court found Ascent's August 2015 unilateral letter insufficient to bind Sonoma and show Sonoma's intent to waive. It also concluded that a note Ascent wrote on the schedule of values was inadequate because the language of the note did not clearly state what Ascent asserted that it did, namely, that only certain tasks listed were within the scope of work. We agree.

Further Ascent's own conduct as shown in the record also contradicts its waiver arguments. Ascent failed to challenge the Architect's denial of additional fees for services deemed within the scope of the work. Ascent confirmed that it had used the plans and specifications when a task listed on the initial schedule of values did not correspond with the specifications and designs, demonstrating that the plans and specifications did contain, at least in part, some traces of Ascent's scope of work tasks. In

view of all this, we conclude that substantial evidence supports the district court's determination that Sonoma did not waive the scope of work provisions or the written change order requirement.

Substantial evidence supports the district court's determination that the lien was excessive

Lastly, we consider whether the district court properly reduced Ascent's mechanic's lien to $231,850.86. Ascent argues that this amount was in error because: (1) it accounted for 12 change orders, even though Ascent did not sign and approve change order numbers 9 through 12 and (2) it deducted delay penalties from the lien amount in violation of NRS 108.239(7). Because Ascent failed to timely challenge change order numbers 9 through 12 by mediation, they cannot now be contested. Moreover, the Agreement specifically provides that Ascent's signature was not needed on any construction change directives before becoming effective.

We also conclude that the district court properly reduced the lien by the delay penalty amount. NRS 108.239(7) expressly bars lien claimants from recovering consequential damages under a notice of lien, and because only Sonoma claimed delay penalties the statute is not applicable here. Moreover, the delay penalties were approved by change orders and became a part of the Agreement.[7]

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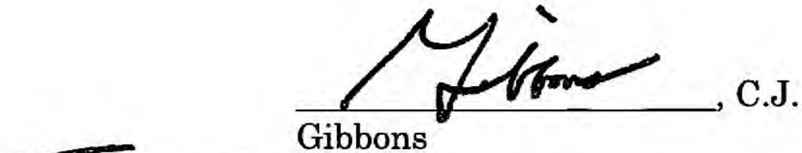
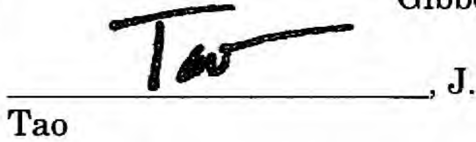
[7]We note that although the district court properly reduced the delay penalty from the lien, it misstated NRS 108.239(7) and improperly concluded that the statute disallowed Ascent's lien to be reduced by Sonoma's delay penalty under the circumstances. However, because the district court reached the right result, we still affirm. *See Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010) ("This court will affirm a district court's order if the district court reached the correct result, even if for the wrong reason.").

Based on the foregoing, we

ORDER the judgment of the district court AFFIRMED.



________________________, C.J.
Gibbons



________________________, J.
Tao

________________________, J.
Bulla

cc: Hon. Michael Montero, District Judge
Robert L. Eisenberg, Settlement Judge
Laxalt & Nomura, Ltd./Reno
Snow Christensen & Martineau/St. George
Holley, Driggs, Walch, Fine, Puzey, Stein, Thompson/Reno
Humboldt County Clerk