

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAYSIDE INC., A NEVADA
CORPORATION,
Petitioner,

vs.

THE FIRST JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR CARSON CITY, AND THE
HONORABLE WILLIAM A. MADDOX,
DISTRICT JUDGE,

Respondents,

and

PARKWAY MANOR INC., A NEVADA
CORPORATION,
Real Party in Interest.

No. 40580

FILED

JAN 15 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richard*
CHIEF DEPUTY CLERK

ORDER DENYING PETITION FOR

WRIT OF CERTIORARI OR MANDAMUS

This is an original petition for a writ of certiorari or mandamus challenging a partial summary judgment that dismissed petitioner's mechanic's lien. We have considered the petition, and we are not satisfied that this court's intervention by way of extraordinary relief is warranted.¹

¹See NRS 34.020(2) (authorizing a writ of certiorari to remedy an extra-jurisdictional act committed by an inferior tribunal, board, or officer exercising judicial functions); NRS 34.160 (authorizing a writ of mandamus to compel the performance of an act which the law requires as a duty resulting from an office, trust or station); Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 637 P.2d 534 (1981) (observing that a writ of mandamus is not available to control discretionary action unless discretion has been manifestly abused).

Petitioner Dayside Inc. does not complain that the district court lacked jurisdiction to dismiss its lien by partial summary judgment. Thus, we review the dismissal for a manifest abuse of discretion.²

First, it is well-settled in other states that a clear and unambiguous provision in a contract whereby a contractor waives its rights to a mechanic's lien or agrees not to file a lien is valid and binding and will preclude the contractor from asserting a right to a lien.³ Absent a prohibitive legislative proclamation, such a waiver of mechanic's lien rights is not contrary to public policy.⁴ Although some state legislatures have declared a lien waiver to be against public policy,⁵ the Nevada legislature has not.

²Danberg Holdings v. Douglas Co., 115 Nev. 129, 138, 978 P.2d 311, 316 (1999) (observing that, on a petition for writ of certiorari, if the challenged act was within the tribunal's jurisdiction, this court's review ends even if the act was erroneous); Round Hill, 97 Nev. at 603-04, 637 P.2d at 536 (stating that mandamus relief is not available absent a manifest abuse of discretion).

³J. A. Bock, Annotation, Validity and Effect of Provision in Contract Against Mechanic's Lien, 76 A.L.R.2d 1087, 1089 (1961); 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").

⁴53 Am. Jur. 2d Mechanics' Liens § 331 (1996); see, e.g., Port City Constr. Co. v. Adams & Douglass, Inc., 273 A.2d 121, 122 (Md. 1971).

⁵See, 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 where the agreement is in anticipation of and in consideration for the awarding of a contract or subcontract, either express or implied, to perform work or supply materials for an improvement upon real property is against public policy and unenforceable.").

Second, consideration to support the instant waiver can be found in the parties' contract, as it contained promises by both parties – Dayside Inc. promised to construct the apartment building and Parkway Manor Inc. promised to pay for that construction – and mutual promises have long been held sufficient consideration to support a contract.⁶ The waiver provision was a bargained for part of that contract.⁷ And as explained by the Connecticut Supreme Court, “the real consideration which moves” a contractor to waive its lien rights “is the expectation that [the property owner] will be put in funds out of which [the contractor] hopes to be paid.”⁸

Third, even if Parkway breached the contract in regard to payment for work performed, such a breach would have no affect on the lien-waiver provision because a mechanic's lien, once waived, cannot be revived by the owner's failure to abide by other independent covenants in

⁶See Pink v. Busch, 100 Nev. 684, 688, 691 P.2d 456, 459 (1984).

⁷See G. R. Sponaugle & Sons, Inc. v. McKnight Constr. 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, and stating that “[n]o single clause of the contract should be tested separately to determine whether an item of consideration can be identified specially with that clause”); 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).

⁸Bialowans v. Minor, 550 A.2d 637, 639 (Conn. 1988) (quotation and emphasis omitted).

the contract.⁹ A waiver provision merely limits the avenues available to a contractor to collect for expended materials or labor in the event the owner fails to pay.¹⁰ Thus, an owner's inadequate payment is an event anticipated by the parties to the contract, rather than a failure of consideration.¹¹

Finally, the instant waiver provision appears clear in its prohibition against mechanic's liens for "any" labor or materials expended on the project. And the parties acknowledged the lien waiver when they wrote into the pre-printed form contract that the waiver is valid to the extent permitted by Nevada law. But we are ill-equipped to determine whether the waiver was knowingly and voluntarily granted.¹² This issue was not presented to the district court, and we cannot resolve it in the first instance.

⁹Bock, supra note 3, at 1089; see also 56 C.J.S. Mechanics' Liens § 254, at 291 (1992) (stating that "where the right to a mechanic's lien is absolutely waived by the contract, the binding effect of such waiver is not defeated by the owner's failure to comply with his own independent covenants and agreements").


¹⁰Pero Building Co., Inc. v. Smith, 504 A.2d 524, 527 (Conn. App. Ct. 1986); see also 56 C.J.S. Mechanics' 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.").


¹¹See Pero, 504 A.2d at 527.

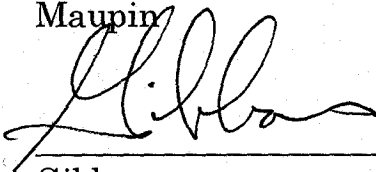
¹²See Round Hill, 97 Nev. at 604, 637 P.2d at 536 (stating that an appellate court is not an appropriate forum in which to resolve factual issues).

Accordingly, we conclude that the dismissal of Dayside's lien was not a manifest abuse of discretion, and we deny the petition.¹³

It is so ORDERED.


_____, J.
Rose


_____, J.
Maupin


_____, J.
Gibbons

cc: Hon. William A. Maddox, District Judge
Richard G. Hill
Hale Lane Peek Dennison Howard & Anderson/Reno
Carson City Clerk

¹³See NRAP 21(b).

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OFFICE OF THE CLERK**

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Real Party in Interest.

Supreme Court No. 40580

District Court Case No. 0100675A

NOTICE OF PROCEDURAL DEFICIENCY

TO: Richard G. Hill

The petition for extraordinary relief filed in this docket was not accompanied by the following requisite item(s):

Proof of service on the respondent district judge. NRAP 21(a)

Please submit the above items to the Clerk of the Supreme Court within 10 days of the date of this notice. An original and 2 copies of all documents are required.

DATE: December 03, 2002

Janette M. Bloom, Clerk of Court

By: *LC*
Deputy Clerk

cc: Hale Lane Peek Dennison Howard & Anderson/Reno
Alan Glover, Carson City Clerk

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RECEIPT FOR DOCUMENTS

TO: William A. Maddox , District Judge
Richard G. Hill
Hale Lane Peek Dennison Howard & Anderson/Reno


You are hereby notified that the Clerk of the Supreme Court has received and/or filed the following:

12/02/02	Voluntary recusal of Justice Leavitt from participation in this matter. Law firm of Hale Lane Peek Dennison Howard & Anderson.
12/02/02	Received Filing Fee. \$200.00 from Richard G. Hill--check no. 5864.
12/02/02	Filed Petition for Writ of Certiorari or Mandamus.

DATE: December 02, 2002

Janette M. Bloom, Clerk of Court

By: _____


Deputy Clerk