THE SUPREME COURT OF THE STATE OF NEVADA

PROIMTU MMI LLC, a Nevada limited liability company, Appellant, vs. TRP INTERNATIONAL, INC., a foreign corporation, Respondent,	Case No.: 68942 District Court Case No. CV-36431

RESPONDENT TRP INTERNATIONAL, INC.'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record for respondents certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

There are no parent corporations or publicly held companies that own 10% or more of the respondent's stock.

The following is the law firm whose partners or associates have appeared for the respondent (including proceedings in the district court or before an administrative agency) or are expected to appear in this court:

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I. JURISDICTIONAL STATEMENT

This appeal is the result of a petition to expunge a mechanic's lien. Respondent, TRP International, Inc. ("TRP") filed a petition to expunge the mechanics' lien of Appellant, Proimtu MMI LLC ("Proimtu") on December 12, 2014, pursuant to Nev. Rev. Stat. Ann. §108.2275. JA 0001-73. The petition was granted on September 9, 2015 by Judge Elliott in Findings of Fact and Conclusions of Law and Order on Petition to Expunge Lien. JA0409-415. The order expunged Proimtu's mechanics' lien, exonerated the surety bond and awarded TRP attorney's fees and costs. JA04014. Proimtu filed its notice of appeal on October 5, 2015. JA0425-26.

II. ROUTING STATEMENT

It is appropriate for the Court of Appeals to hear and decide this appeal. NRAP 17(b)(3) dictates that appeals in statutory lien cases falling under Nev. Rev. Stat. Chapter 108 should be heard by the Court of Appeals. This is not a case of first impression, and the statutory requirement of providing notice if acting in a capacity greater than "only labor" should guide the Court's decision.

III. STATEMENT OF ISSUES

1. Did the District Court correctly determine that Proimtu's lien was invalid because it failed to comply with the notice requirements of Nev. Rev. Stat. §108.245?

2. Did Proimtu's extensive and independent work under the contract with TRP qualify as "labor only" and thus exempt Proimtu from the notice requirements of Nev. Rev. Stat. §108.245?

IV. STATEMENT OF THE CASE

On December 12, 2014, TRP filed a Petition to Expunge Lien. JA0001-73. TRP argued that Proimtu's lien could not be perfected because a notice of right to lien had not been served upon the owner of the project as required by Nev. Rev. Stat. §108.245. On February 12, 2015, the Petition to Expunge was argued before Judge Kimberly Walker. JA0205-292. Without making a decision, Judge Walker transferred the case to Senior Judge Steven Elliot. JA0296-297. On June 18, 2015, the parties argued the motion before Judge Elliot. JA0301-377.

On September 9, 2015, Judge Elliot ruled in favor of TRP, expunged the lien, and awarded TRP attorneys' fees. JA0414. Proimtu filed its notice of appeal on October 5, 2015. JA0425-26.

V. STATEMENT OF THE FACTS

TRP is a company based in Spain that constructs solar projects. It entered into a contract with the prime contractor, Cobra Thermosolar Plants, Inc. ("Cobra"), to fabricate and erect heliostats on a solar project in Tonopah, Nevada, known as the Crescent Dunes Thermosolar Plant (the "Project").

JA0001-0002. In turn, TRP and Proimtu, both licensed contractors in the state of Nevada, entered into a contract for heliostat assembly and field erection. *Id.* TRP is referred to as the Contractor and Proimtu is referred to as the Subcontractor, in the Contract, with the scope of work including the following:

- Monitoring of the procedure to assemble heliostats;
- Monitoring of all documentary and procedural requirements of the Owner;
- Installation of 10,375 heliostats;
- Establish and incorporate shifts for working staff needed to produce 400 heliostats a week;
- Meet calibrations according to specifications;
- Establish procedures for quality control;
- Transport heliostats from the assembly line to the erection on site;
- Prepare procedures for pedestal and heliostat erection;
- Provide all equipment to perform the work in the scope of the contract;
- Final leveling and alignment of heliostats;
- Re-galvanization of damaged items during the scope of the work;
- Preparation of required Environmental Management Reports;
- Implementation of temporary facilities for OSHA requirements for

health and safety of the subcontractor;

- Providing exterior lighting as necessary;
- Wage requirements in compliance with Davis Bacon Act.

JA0015-18.

The relationship between TRP and Proimtu was unmistakably one of contractor and subcontractor. JA0015. Ultimately, a dispute arose between TRP and Proimtu, with Proimtu making demands for additional payment beyond the contractual amount. JA0059-60. TRP refused to pay the additional sums demanded by Proimtu. Due to the dispute for payment, Proimtu subsequently recorded a mechanics lien in the amount of $2,357,977 against the real property more commonly known as APN Nos. 012-141-01, 012-151-01, 612-141-01, 012-031-04, 012-131-03 and 012-131-04, in Nye County (the "Real Property"). JA0063-68. The lien was recorded on November 12, 2014. *Id.*

In its petition to expunge the lien, TRP argued that argued that the lien was invalid and should be expunged, pursuant to Nev. Rev. Stat. §108.2275, as Proimtu had failed to comply with mandatory statutory requirements for a valid lien by failing to serve a notice of right to lien pursuant to Nev. Rev. Stat. §108.245. JA0421. Proimtu argued that Nev. Rev. Stat. §108.245(1) provides an exception to the requirements of Nev. Rev. Stat. §108.245 to provide a notice of intent to lien if the lien claimant only provides labor to the

construction project and argued that it only provided labor to the Project. In the alternative, Proimtu argued that if the court finds that it did not provide only labor to the Project, thereby exempting it from compliance with Nev. Rev. Stat. §108.245, then "a lien claimant substantially complies with Nev. Rev. Stat. §108.245's pre-lien requirement when the property owner has actual knowledge of the potential lien claim and is not prejudiced."[1] JA 0421. On September 9, 2015, the trial court expunged the lien, exonerated the surety bond, and awarded attorneys' fees and costs to TRP. JA0418-423.

In its findings, the trial court determined that Proimtu was acting as a contractor in its scope of work with TRP pursuant to Nev. Rev. Stat. §624.020 and therefore was required to serve a notice of right to lien to the owner pursuant to Nev. Rev. Stat. §108.245. JA0423. The court found that Proimtu failed to comply with Nev. Rev. Stat. §108.245 by failing to serve a notice of right to lien to the owner. *Id.* The court found that even if Cobra, the general contractor, had actual notice of Proimtu being on the Project, that knowledge cannot be imputed to the owner and was not sufficient to put the owner on actual notice of either the scope of work being performed by Proimtu or the value of the work. *Id*. Additionally, the court found that Proimtu failed to

[1] *Hardy Cos. v. SNMARK, LLC*, 126 Nev. Adv. Rep. 49, 245 P.3d 1149 (2010).

comply with the notice requirements, and there was insufficient evidence to support the claim that owner had actual knowledge. *Id.*

VI. ARGUMENT AND AUTHORITIES

1. SUMMARY OF LEGAL ARGUMENTS

The expungement of Proimtu's mechanics' lien was proper because Proimtu never served the owner with the proper notice of right to lien as required by Nev. Rev. Stat. §108.245 which requires the following:

> 1. Except as otherwise provided in subsection 5, every lien claimant, other than one who performs only labor, who claims the benefit of NRS 108.221 to 108.246, inclusive, shall, at any time after the first delivery of material or performance of work or services under a contract, deliver in person or by certified mail to the owner of the property a notice of right to lien in substantially the following form:
>
> NOTICE OF RIGHT TO LIEN
> To: .....
> (Owner's name and address)
> The undersigned notifies you that he or she has supplied materials or equipment or performed work or services as follows:
> (General description of materials, equipment, work or services)
> for improvement of property identified as (property description or street address) under contract with (general contractor or subcontractor). This is not a notice that the undersigned has not been or does not expect to be paid, but a notice required by law that the undersigned may, at a future date, record a notice of lien as provided by law against the property if the undersigned is not paid.
>
> (Claimant)
>
> A subcontractor or equipment or material supplier who gives such a notice must also deliver in person or send by certified mail a copy of the notice to the prime contractor for information only.

> The failure by a subcontractor to deliver the notice to the prime contractor is a ground for disciplinary proceedings against the subcontractor under chapter 624 of NRS but does not invalidate the notice to the owner.
>
> 2. Such a notice does not constitute a lien or give actual or constructive notice of a lien for any purpose.
>
> 3. No lien for materials or equipment furnished or for work or services performed, except labor, may be perfected or enforced pursuant to NRS 108.221 to 108.246, inclusive, unless the notice has been given.
>
> 4. The notice need not be verified, sworn to or acknowledged.
>
> 5. A prime contractor or other person who contracts directly with an owner or sells materials directly to an owner is not required to give notice pursuant to this section.
>
> 6. A lien claimant who is required by this section to give a notice of right to lien to an owner and who gives such a notice has a right to lien for materials or equipment furnished or for work or services performed in the 31 days before the date the notice of right to lien is given and for the materials or equipment furnished or for work or services performed anytime thereafter until the completion of the work of improvement.

Specifically, Nev. Rev. Stat. §108.245(3) requires that "No lien for materials or equipment furnished or for work or services performed, except labor, may be perfected or enforced pursuant to NRS 108.221 to 108.246, inclusive, unless the notice has been given." Proimtu argues it has substantially complied with the statute because knowledge and notice can be imputed to the

owner through the general contractor. Proimtu relies on a miniscule hardhat logo on a promotional video, a press release, and a two-line email between contractors. In no way has Proimtu demonstrated that the owner had the kind of specific knowledge of Proimtu's work that Nevada law requires pursuant to Nev. Rev. Stat. §108.245(1) which requires the notice of right to lien to include a "general description of materials, equipment, work or services." Simply acknowledging an entity named Proimtu may be on the construction site does not provide the owner with the requirements mandatory in Nev. Rev. Stat. §108.245(1).

Additionally, Proimtu fails to qualify for the "labor only" exception of Nev. Rev. Stat. §108.245(1) because it was hired and worked as a subcontractor. Proimtu performed a multitude of services including monitoring, inspections, testing, installation, establishing protocols and procedures, providing equipment, and others. Proimtu was never hired as an employee, but as a contracted partner on the project. JA0015-18. Proimtu's subcontractor status excludes it from the "labor only" exception of Nev. Rev. Stat. §108.245(1).

2. LAW AND ARGUMENT

A. Proimtu failed to substantially comply with NRS 108.245 to perfect its lien.

Nevada has established that substantial compliance will be sufficient to

create a lien when the owner of the property receives actual notice of the potential lien claim and is not prejudiced.[2] Promitu argues that it meets the standard of substantial compliance with lien requirements as a basis for this Court to reverse the findings of the district court.

However, while case law supports that substantial compliance may suffice in certain circumstances, the Supreme Court of Nevada has stated that, "…we do not think that a notice of lien may be so liberally construed as to condone the total elimination of a specific requirement of the statute."[3] "The general rule is that … the failure to give a prelien notice is fatal."[4] In this case, there was no preliminary notice provided by Proimtu. The total elimination of a requirement does not meet substantial compliance standard established by *Schofield*.

B. <u>The Owner did not have knowledge of Proimtu's work, and therefore Proimtu was required to give notice in order to perfect its lien.</u>

In order to perfect a mechanics' lien, a party must deliver notice of right

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[2] *Fondren v. K/L Complex*, 106 Nev. 705, 709, 800 P.2d 719, 721, (1990)

[3] *Schofield v. Copeland Lumber Yards*, 101 Nev. 83, 84-85, 692 P.2d 519, 520 (1985)

[4] *In re Stanfield*, 6 B.R. 265, 268 (9th Cir. 1980).

to lien to the owner. Nev. Rev. Stat. §108.245. If a party fails to fully or substantially comply with the mechanic's lien requirements of Nev. Rev. Stat. §108.245, then the lien is invalid as a matter of law.[5] It is the purpose of the pre-lien notice requirement "to put the owner on notice of work and materials furnished by third persons with whom he has no direct contract."[6] A party is determined to have substantially complied with the notice requirement only if the property owner has actual knowledge and is not prejudiced.[7] One way for an owner to have actual knowledge of a subcontractor's work, they must receive regular progress updates from an agent who has inspected the premises.[8]

In addition, as established in *Hardy:*

> [A]n owner's actual knowledge is more than mere knowledge of construction occurring on its property. Actual knowledge requires that the owner have knowledge as to the identity of the third person with whom he has no direct contract. In cases of actual knowledge for mechanics' liens, it is a question of fact as to whether the owner had actual or constructive knowledge as to the existence of the third party and the third party's identity. Actual knowledge may be found where the owner has supervised work by the third party, reviewed billing statements from the third party, or any other means that would make the owner aware that the third-party

[5] *Schofield v. Copeland Lumber,* 101 Nev. 83, 86 (1985).

[6] *Board of Trustees v. Durable Developers,* 102 Nev. 401, 410 (1986).

[7] *Id.*

[8] *Hardy Companies, Inc. v. SNMARK, LLC,* 126 Nev. 245, 245 P.3d 1149, 1157 (2010).

claimant was involved with work performed on its property.[9]

Proimtu fails to establish that the owner supervised its work, reviewed billing statements from Proimtu, or any other means that would make the owner actually aware of the work that Proimtu was performing on this huge construction project.

i. An email fails to establish the owners had actual notice.

Proimtu alleges three ways in which the owner gained actual knowledge of Proimtu's work. The first is through an email sent from TRP International to Cobra, the general contractor, which requested approval to hire Proimtu for work on the site. JAA0137-139. This brief email contained only generalities and stated Proimtu would provide "assembly-related" services. *Id.* There is no mention of the scope of the contracted work, the cost, when work would start or how long it would last, or any other information that would give the owner actual knowledge of Proimtu's work. Furthermore, this email was communication between TRP and Cobra. Cobra is not the owner, but is a general contractor acting under the terms of a contract. This single email does not satisfy the requirement that "the property owner received regular

[9] *Hardy Cos. v. SNMARK, LLC*, 245 P.3d 1149, 1158, 126 Nev. Adv. Rep. 49 (2010)

updates…" as specified in *Hardy Companies,* and there is nothing to substantiate that the owner had actual knowledge.[10]

ii. The video fails to establish the owners had actual notice.

Second, Proimtu points to the owner's video containing board members Brian Painter, and Kevin Smith. JA00167. In the video, Mr. Painter and Mr. Smith are interviewed at the construction site about the progress and magnitude of the project. *Id.* Proimtu believes that this is comparable to *Fondren*, where that owner was determined to have actual knowledge because her authorized agent regularly inspected the restaurant space.[11]

Conversely, the present case deals with a construction site of approximately 1600 acres, not a restaurant of a few thousand square feet. JA0073. While Proimtu may have been on the site during this time, it has failed to present any evidence that Mr. Painter or Mr. Smith had actual knowledge of their presence or knew of the "general description of materials, equipment, work or services" being supplied by Proimtu as required in Nev. Rev. Stat. §108.245(1). Unlike *Fondren*, where the agent performed detailed inspections of the construction site, Mr. Smith and Mr. Painter were only there to film the

[10] *Id.*

[11] *Fondren v. K/L Complex, Ltd.,* 106 Nev. 705, 710 (1990).

promotional video. JA00167. Proimtu argues that the presence of their company logo on one of the hard hats seen on the video should qualify as notice. JA0341. However, this miniscule logo is so small that the trial court judge had to ask several times what exactly Proimtu's counsel was attempting to show him. JA0338-339. Difficulty to discern the logo aside, Proimtu has offered no definitive proof that Mr. Smith had any knowledge of their presence, and has failed to show Mr. Smith had direct knowledge of its identity as a result of his visit.

iii. The hearsay evidence fails to establish the owners had actual notice.

Finally, Proimtu makes the convoluted claim that the owner had notice because of the business relationship between SolarReserve, and Cobra Group, the parent company of general contractor Cobra Thermosolar. JA0085. In making the argument that the owners had actual knowledge, Proimtu only offers non-admissible, hearsay evidence in the form of a press release, and a website detailing SolarReserve's chain of command. JA0168-176. Proimtu does nothing to establish actual or imputed knowledge of its work between the general contractor Cobra Thermosolar and the owner. The evidence it offers is hearsay, and justifiably failed to persuade the trial court.

The trial court correctly determined that the email, promotional video,

and website charts were not enough to put the owner on notice of Proimtu's involvement on the Project nor does this provide the owner with the "general description of materials, equipment, work or services" being supplied by Proimtu as required in Nev. Rev. Stat. §108.245(1). Proimtu has failed to establish that the owner was provided the kind of regular progress updates required by *Hardy*. Proimtu failed to substantially comply with the notice requirements of Nev. Rev. Stat. §108.245, and the trial court was correct to expunge the invalid lien.

C. Because Proimtu was hired as, and performed the work of, a subcontractor, it is ineligible for the "only labor" exemption in Nev. Rev. Stat. §108.245.

Nev. Rev. Stat. §108.245 requires all lien claimants to give notice except for those who perform "only labor." The term labor is not defined in Nev. Rev. Stat. Chapter 108, but a look at California's mechanic's lien law provides some insight. Sec. 8200 of the California Civil Code states:

> a) Except as provided by statute, before recording a lien claim…a claimant shall give preliminary notice to the following persons: 1) the owner or reputed owner…
> e) notwithstanding the foregoing subdivisions: 1) a laborer is not required to give preliminary notice.

Sec. 8200 Cal. Civ. Code. The California Civil Code also defines who a "laborer" is for the purposes of this law.

> a) "Laborer" means **a person who**, **acting as an employee**, performs labor upon, or bestows skill or other necessary services on, a work of

improvement.

Sec. 8024 Cal. Civ. Code. (emphasis added). Used in exactly the same way as Nevada's, California's notice exception for labor indicates that such an exception is only available for those who act "as an employee."

There is no question that Proimtu acted, not as an employee, but as a subcontractor. Proimtu is specifically defined in their contract as "Subcontractor." JA0015. The contract also stated that Proimtu was an "independent contractor," not an employee. JA0035. Black's Law Dictionary defines employee as:

> a person in the service of another…where the employer has the power or right to control and direct the employee in the material details of how the work is to be performed…However, 'employee' must be distinguished from 'independent contractor.[12]

While the contract dictated the terms of Proimtu's services, it is clear that Proimtu was left free to operate according to its own desires. Proimtu controlled who it hired, and were even given the ability to hire a subcontractor themselves. JA0033. Because, the language of the contract makes it clear that Proimtu would be hired as and perform the work of an independent subcontractor, Proimtu does qualify for the "labor" exemption of Nev. Rev. Stat. §108.245.

[12] *Black's Law Dictionary,* 6th Ed. At 535. (1990).

VII. CONCLUSION

The district court correctly determined that Proimtu failed to comply, or even substantially complied, with the lien notice requirements of Nev. Rev. Stat. §108.245. Nevada law states that substantial compliance can only occur where an owner has actual knowledge of a third parties work and owner is provided with regular progress updates. Proimtu has failed to offer any evidence that proves the owner had actual knowledge. Additionally, Proimtu was hired as an independent subcontractor and does not qualify as performing "only labor."

Therefore, this Court should affirm the district court's Order on Petition to Expunge Lien.

Dated this 2nd day of March, 2016.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Time New Roman 14 point font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

[X] Proportionately spaced, has a typeface of 14 points or more, and contains 3,342 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: March 2, 2016

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 2, 2016, she served a copy of the foregoing **Answering Brief** to be served by submission to the electronic filing service for the Nevada Supreme Court upon the following to the email address on file:

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