

IN THE SUPREME COURT OF THE STATE OF NEVADA

APCO CONSTRUCTION, INC., A
NEVADA CORPORATION,

Appellant,

vs.

ZITTING BROTHERS
CONSTRUCTION, INC.,

Respondent.

No. 75197

FILED

SEP 19 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER TO SHOW CAUSE

This is an appeal from a district court order granting a motion for partial summary judgment, purportedly certified as final under NRCP 54(b), an order denying a motion for reconsideration of that order, an order awarding attorney fees, costs, and prejudgment interest and an oral order granting a motion in limine. Our initial review of the docketing statement, amended docketing statement, and documents before this court reveals potential jurisdictional defects.

First, it appears that the summary judgment order may not be properly certified as final. *See Taylor Const. Co. v. Hilton Hotels Corp.*, 100 Nev. 207, 209, 678 P.2d 1152, 1153 (1984) (noting that the district court “cannot create finality when [an] order is not amenable to certification”). NRCP 54(b) allows an order to be certified as final where the order completely removes a party from the action. NRCP 54(b) and drafter’s note (2004 amendment); *Mallin v. Farmers Ins. Exch.*, 106 Nev. 606, 610, 797 P.2d 978, 981 (1990) (“[C]ertification [may be] based on the complete removal of a party from the action in the district court.”). Appellant states that claims involving itself remain pending in the district court. And it appears that claims involving respondent may also remain pending. It is not clear whether the summary judgment order finally resolves

respondent's claim for breach of contract and breach of the implied covenant of good faith and fair dealing asserted against Gemstone Development West, Inc. in district court case A-09-589195-C. These claims were not pleaded in the alternative and the summary judgment order does not mention Gemstone. It is also unclear whether respondent's claims for foreclosure of a mechanic's lien in district court case A-09-589195-C have been fully resolved. See NRS 108.239; *Simmons Self-Storage v. Rib Roof*, 127 Nev. 86, 247 P.3d 1107 (2011) (discussing final judgments in mechanic's lien actions). The summary judgment order does not resolve priorities and lienable amounts, enter judgment, or direct a sale of the property. In addition, even if respondent's claims in case A-09-589195-C have been fully resolved, it is not clear whether all claims asserted by or against respondent in the 16 cases consolidated with case A-09-589195-C have been resolved. See *Mallin*, 106 Nev. at 609, 797 P.2d at 980 (consolidated cases "become one case for all appellate purposes;" an order resolving fewer than all of the claims in consolidated actions is not a final judgment). Accordingly, it appears that claims involving both appellant and respondent may remain pending in the district court and the summary judgment order was not amenable to certification under NRCP 54(b).

Second, assuming that the above-identified claims have been fully resolved, it appears that the NRCP 54(b) certification may have been unnecessary. Although appellant represents in its docketing statement that several claims in the consolidated cases proceeded to trial and are awaiting judgments from the district court, it appears from the district court docket sheet that several judgments were entered after the conclusion of trial. Thus, it appears that the claims appellant asserts remain pending may have been resolved by the district court. If all claims in all the

consolidated cases were resolved prior to entry of the July 30, 2018, certification order, the certification order is unnecessary, and an appeal would be proper from the order resolving the last claim in all of the consolidated cases. See NRAP 3A(b)(1) (allowing an appeal from a final judgment); *Lee v. GNLV Corp.*, 116 Nev. 424, 426, 996 P.2d 416, 417 (2000) (defining a final judgment); *Mallin*, 106 Nev. at 609, 797 P.2d at 980. *But see Hall v. Hall*, 584 U.S. ___, 138 S. Ct. 1118 (2018) (holding that when a constituent consolidated case is finally decided, that case is immediately appealable).

Accordingly, appellant shall have 45 days from the date of this order to show cause why this appeal should not be dismissed for lack of jurisdiction.¹ In responding to this order, appellant should identify and, if it has not already done so, provide copies of each claim, cross-claim, counterclaim, third-party claim, and claim in intervention asserted in each of the consolidated cases in the district court, even if those claims do not involve appellant or respondent, specify the date of resolution of each claim, cross-claim, counterclaim, third-party claim, and claims in intervention, and provide copies of all orders, stipulations, or notices dismissing or resolving all claims, cross-claims, counterclaims, third-party claims, and claims in intervention. Appellant shall specifically discuss how respondent's claims for foreclosure, breach of contract and breach of the

¹We note that the other orders identified in the notice of appeal may be subject to review on appeal from the final judgment. See *Arnold v. Kipp*, 123 Nev. 410, 168 P.3d 1050 (2007); *Consolidated Generator v. Cummins Engine*, 114 Nev. 1304, 1312, 971 P.2d 1251, 1256 (1998). However, in the absence of final judgment or judgment properly certified as final under NRCP 54(b), it does not appear that these orders are subject to review or independently appealable.

implied covenant of good faith and fair dealing in district court case A-09-589195-C were resolved. Appellant shall also identify any claims, cross-claims, counterclaims, third-party claims, and claims in intervention that remain pending in the district court, and the case number in which those claims remain. If appellant believes that no claims remain pending, it shall identify the order resolving the last remaining claim in the consolidated cases and discuss the timeliness of the notice of appeal from service of notice of entry of that order. Respondent may file any reply within 20 days of service of appellant's response. We caution that failure to demonstrate that this court has jurisdiction may result in the dismissal of this appeal.

Briefing of this appeal is suspended pending further order of this court.²

It is so ORDERED.

_____, C.J.

cc: Marquis Aurbach Coffing
Spencer Fane LLP/Las Vegas
Spencer Fane LLP/Phoenix
Wilson, Elser, Moskowitz, Edelman & Dicker, LLP/Las Vegas

²Given this order, the August 30, 2018, motion for an extension of time to file the opening brief is denied as moot.