

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2 APCO CONSTRUCTION, INC.,
3 NEVADA CORPORATION,

4 Cross Appellant/Respondent,

5 vs.

6 HELIX ELECTRIC OF NEVADA, LLC

7 Cross Respondent/Appellant.

Case No. 77320

District Court Case No. A006129

Electronically Filed
Aug 30 2019 12:50 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

8 **RESPONDENT/ CROSS-APPELLANT APCO CONSTRUCTION, INC.'S**
9 **STATUS REPORT AND RESPONSE TO ORDER TO SHOW CAUSE**

10 **FENNEMORE CRAIG, P.C.**

11 John Randall Jefferies, Esq.

Nevada Bar No. 3512

12 Christopher H. Byrd, Esq.

Nevada Bar No. 1633

13 300 South 4th Street, 14th Floor

Las Vegas, Nevada 89101

14 Telephone: (702) 692-8000

Facsimile: (702) 692-8099

15 Email: rjeffries@fclaw.com

cbyrd@fclaw.com

10 **MARQUIS AURBACH COFFING**

11 Micah S. Echols, Esq.

Nevada Bar No. 8437

12 Cody S. Munteer, Esq.

Nevada Bar No. 11220

13 Tom W. Steward, Esq.

Nevada Bar No. 14280

10001 Park Run Drive

Las Vegas, NV 89145

14 Telephone: (702) 382-0711

Facsimile: (702) 382-5816

15 Email: mechols@maclaw.com

cmunteer@maclaw.com

16 tstewart@maclaw.com

17
18 *Attorneys for Respondent/Cross-Appellant APCO Construction, Inc.*

INTRODUCTION

Appellant/Cross-Respondent Helix Electric of Nevada, LLC (“Helix”) filed its notice of appeal in Docket No. 76276 on June 28, 2018, challenging the judgment entered by the district court in the underlying action on its claims against Respondent/Cross-Appellant APCO Construction, Inc. (“APCO”). Thereafter, on October 25, 2018, Helix filed an amended notice of appeal, challenging the direct court’s order awarding APCO attorney fees and costs, which was separately docketed as this matter. APCO filed its notice of cross appeal in this docket on October 26, 2018. The appeals and cross appeal in Docket Nos. 76276 and 77320 arise from the same underlying district court action **Docket No. 76276**.

Helix’s appeal in Docket No. 76276 was dismissed by this Court based on Helix’s failure to meet its burden to show appellant jurisdiction. Helix had ample opportunity to meet its this burden. Helix filed a docketing statement, an amended docketing statement, and a second amended docketing. After Helix filed its third docketing statement, this Court entered an Order to Show Cause why it should not dismiss the appeal for lack of jurisdiction, noting that “[a]lthough appellant Helix Electric of Nevada has filed an amended docketing statement and second amended docketing statement, it does not appear that it

1 has provided all information required.” *See* March 21, 2019, Order to Show
2 Cause.

3 Helix filed a response to the Order to Show Cause, but again failed to
4 provide all information required by NRAP 14.¹ This Court thereafter entered an
5 Order Dismissing Appeal, concluding that “appellant fail[ed] to demonstrate
6 that the district court has entered a final judgment in the constituent case.” July
7 12, 2019, Order Dismissing Appeal.

8 After this Court dismissed its appeal, Helix filed a motion in the district
9 court asking the district court to reopen the case and issue a new order or NRCP
10 54(b) certification to allow Helix to file a new notice of appeal. APCO opposed
11 Helix’s motion on the basis that a final judgment had already been entered and
12 Helix should not be allowed to circumvent the sanction of dismissal entered by
13 this Court for its failure to comply with NRAP 14 by requesting that a
14 procedurally improper order be entered from which Helix can file a new notice
15 of appeal.

16 **Docket No. 77320**

17 As with the related appeal in Docket No. 76276, Helix was provided

18 ¹Helix notes in its Status Report and Response to Order to Show Cause, filed
19 August 29, 2019, that APCO did not respond to this Court’s March 21, 2019,
Order to Show Cause. The Order to Show Cause was directed solely to Helix
and required no response by APCO.

1 every opportunity to meet its burden to show appellate jurisdiction in this appeal
2 and failed to do so. In fact, Helix never even filed a docketing statement in this
3 appeal.² Helix's docketing statement was initially due on January 24, 2019, and
4 when it failed to meet this deadline, this Court directed Helix to file its
5 docketing statement no later than March 18, 2019. *See* March 4, 2019, Order.
6 When Helix again failed to meet this second deadline, this Court gave Helix
7 seven days to file and serve its docketing statement. *See* April 3, 2019, Order to
8 File Document.

9 In response, Helix filed a motion requesting that briefing be suspended
10 pending the outcome of the Order to Show Cause in Docket No. 76276. This
11 Court granted the motion but directed that within seven days of the filing of an
12 order resolving the jurisdictional issue in Docket No. 76276, Helix must file a
13 status report. *See* June 26, 2019, Order Granting Motion. Helix again failed to
14 comply with this Court's deadline, and on August 16, 2019, this Court entered
15 its Order giving both Helix and APCO 14 days to file and serve status reports
16 and to show cause why the appeal and cross-appeal should not be dismissed for
17 lack of jurisdiction. *See* August 16, 2019, Order.

18 On August 27, 2019, APCO filed a Motion for Leave to File Amended

19 ²Respondent/Cross-Appellant APCO Construction, Inc. did file a docketing statement in support of its cross appeal.

1 Docketing Statement, submitting with the Motion its Amended Docketing
2 Statement in this appeal.

3 **DISCUSSION**

4 **1. This Court Has Jurisdiction to Decide APCO's Cross Appeal.**

5 The Amended Docketing Statement submitted by APCO on August 27,
6 2019, demonstrates that all the claims pending in the underlying district court
7 action have been resolved and that this Court has jurisdiction to consider
8 APCO's cross appeal challenging the district court's post-judgment order
9 involving attorney fees and costs. NRAP 3A(b)(8) (allowing an appeal to be
10 taken from "[a] special order entered after final judgment"); *Smith v. Crown Fin.*
11 *Servs. of Am.*, 111 Nev. 277, 280 n.2, 890 P.2d 769, 771 n.2 (1995) ("The order
12 of the district court awarding attorney fees and costs is a special order made
13 after final judgment"). APCO's cross appeal should not be dismissed for lack of
14 jurisdiction.

15 APCO's Amended Docketing Statement includes a chart setting forth all
16 of the claims that were asserted in the underlying district court case and
17 demonstrating how each of those claims was resolved. *See* Exhibit 3 to APCO's
18 Amended Docketing Statement. The final judgment resolving all the remaining
19 claims was entered by the district court on July 19, 2018, prior to the filing of

1 APCO's notice of cross appeal. *See* Exhibit 3 (chart of claims) and Exhibit 33
2 (July 19, 2018, Order Granting Motion to Deposit Bond Penal Sum With Court,
3 Exoneration of Bond, and Dismissal) to APCO's Amended Docketing
4 Statement.

5 **2. Helix's Appeal in Docket No. 77320 Should Be Dismissed.**

6 In its status report and response to this Court's order to show cause, Helix
7 makes no argument that this Court has jurisdiction to consider its appeal and
8 instead requests that this Court dismiss its appeal in this matter on the same
9 basis that this Court dismissed its appeal in Docket No. 76276. APCO has no
10 objection to Helix's request.

11 It was Helix's burden to establish appellate jurisdiction in Docket No.
12 76276. *Moran v. Bonneville Square Assocs.*, 117 Nev. 525, 527, 25 P.3d 898,
13 899 (2001) (stating that the burden of establishing appellate jurisdiction lies
14 with the appellant). Despite filing three docketing statement and a response to
15 this Court's Order to Show Cause, Helix was never able to meet its burden. In
16 its Order Dismissing Appeal, this Court recounted the history of Helix's
17 incomplete attempts to show jurisdiction, stating:

18 "When review of appellant's amended docketing
19 statement revealed that it was incomplete, this court
ordered appellant to file and serve an amended docketing

1 statement that contained a complete response to item 23.
2 Appellant filed a second amended docketing statement
3 but that document still did not contain all required
4 information . . . Appellant was directed to provide
5 specific information regarding each claim, counterclaim,
6 third-party claim, and complaint in intervention asserted.

7 Having reviewed appellant's response, as well as the
8 attached exhibits, appellant fails to demonstrate that the
9 district court has entered a final judgment in the
10 constituent case."

11 July 12, 2019, Order Dismissing Appeal in Docket No. 76276.

12 Helix incorrectly asserts both in this Court and the district court that "this
13 Court has heard and considered the issue and ruled that the Order challenged in
14 Docket No. 76276 was not appealable as a final judgment." Appellant/Cross-
15 Respondent's Status Report and Order to Show Cause, filed August 28, 2019 in
16 Docket No. 77320. A review of this Court's Order Dismissing Appeal shows
17 that this Court made no such conclusion. Rather, the Order Dismissing Appeal
18 concluded that Helix failed to show that a final judgment had been entered in
19 the underlying district court action.

20 This Court's Order Dismissing Appeal states, "appellant fails to
21 demonstrate that the district court has entered a final judgment in the constituent
22 case." The Order Dismissing Appeal then goes on to state, "it appears that this
23 appeal is not appealable as a final judgment", based on Helix's failure to meet

1 its burden to show appellate jurisdiction. Nowhere does this Court's Order
2 Dismissing Appeal conclude that a final judgment had not been entered in the
3 underlying district court case. Rather, the Order Dismissing Appeal concludes
4 that Helix was required to show that a final judgment had been entered, and,
5 because Helix failed make such a showing, it appeared that this Court lacked
6 jurisdiction.

7 This Court cited to *Moran v. Bonneville Square Assocs.* in its Order
8 Dismissing Appeal. 117 Nev. 525, 527, 25 P.3d 898, 899 (2001). In *Moran*,
9 this Court held—where the appellant failed to provide complete and accurate
10 responses to the docketing statement—that:

11 “Since this court is one of limited, appellate jurisdiction,
12 we may not presume that we have jurisdiction over a
13 docketed appeal. Rather, the burden rests squarely upon
14 the shoulders of a party seeking to invoke our
jurisdiction to establish, to our satisfaction, that this
court does in fact have jurisdiction.”

15 *Moran*, 117 Nev. at 527-28, 25 P.3d at 899.

16 The *Moran* opinion discusses the admonition provided on the first page
17 of this Court's docketing statement, which states that this Court may impose
18 sanctions on counsel or appellant if the information provided in the docketing
19 statement is incomplete or inaccurate, and that “[f]ailure to attach documents as

1 requested in this statement, completely fill out the statement, or to fail to file it
2 in a timely manner, will constitute grounds for the imposition of sanctions,
3 including a fine and/or dismissal of the appeal.” *Moran*, 117 Nev. at 528, 25
4 P.3d at 900. The opinion explains that when docketing statements are not filed
5 or essential information is not provided, “this court is needlessly forced to
6 allocate its limited resources in an effort to address the deficiencies . . . This
7 process consume[s] untold hours and needlessly delay[s] resolution of the
8 appeal.” *Id.*

9 Helix committed each and every one of the acts warned against in *Moran*
10 and the admonition on the front page of the docketing statement as quoted in
11 *Moran*. Helix failed to attach documents required by the docketing statement
12 and failed to completely fill out the docketing statement in Docket No. 76276.
13 Both of these failures are noted in this Court’s Order Dismissing Appeal in that
14 matter (“A review of appellant’s amended docketing statement revealed that it
15 was incomplete . . . Appellant filed a second amended docketing statement but
16 that document still did not contain all the required information.”). Helix also
17 failed to timely file its docketing statement in Docket No. 77320, even after
18 repeated orders of this Court directing that the docketing statement be filed.

19 NRAP 14 is clear that failure to timely and completely comply with its

1 requirements can result in the imposition of sanctions, including dismissal of the
2 appeal. Helix's appeal in Docket No. 76276 has already been dismissed as a
3 result of its failure to comply with NRAP 14, and rather than provide a
4 compliant docketing statement in this appeal Helix requests that this Court
5 dismiss its appeal. APCO agrees that, as the result of this Court's prior
6 dismissal of Helix's appeal in Docket 76276 and based on NRAP 14 and the
7 holding in *Moran*, dismissal of Helix's appeal in this docket is also warranted.

8 APCO's cross appeal should not be dismissed, however. APCO has
9 complied with the requirements of NRAP 14, filing a docketing statement and
10 now submitting an amended docketing statement that provides all the required
11 information and documents that Helix failed to provide and shows that this
12 Court has jurisdiction to consider the cross appeal. APCO's cross appeal should
13 be allowed to move forward.

14 **3. Helix Incorrectly Asserts That Counterclaims Remain Pending in the**
15 **District Court.**

16 In its status report and response to order to show, Helix refers to the
17 arguments it has raised in the district court in support of its request that a "new
18 final judgment" be entered to allow it a second chance to appeal. In short, Helix
19 argues that judgments entered by the district court that do not specifically list

1 and dispose of all of the counterclaims raised by the parties to the judgment
2 cannot have disposed of all the claims between those parties. This argument is
3 incorrect.

4 The finality of an order is determined by what the order does. *See Valley*
5 *Bank of Nevada v. Ginsburg*, 110 Nev. 440, 446, 874 P.2d 729, 733-34 (1994).

6 In the underlying district court action, subcontractors, as plaintiffs-in-
7 intervention, brought contract claims against several contractors, and one of the
8 contractors (Camco Pacific Construction) answered and asserted contract-based
9 counterclaims. The district court entered orders resolving the contract claims in
10 favor of the plaintiffs-in-intervention, which also addressed and fully resolved
11 Camco's counterclaims. *See KDI Sylvan Pools, Inc. v. Workman*, 107 Nev. 340,
12 342, 810 P.2d 1217, 1219 (1991) (finding that where a court's decision fully
13 resolves a counterclaim and/or renders it moot, the decision can be considered a
14 final judgment as to the counterclaim). The fact that the district court's
15 judgments did not specifically list each of the claims and counterclaims resolved
16 does not mean that any of those claims remain pending in light of the district
17 court's judgment. *See Valley Bank of Nev.*, 110 Nev. at 446, 874 P.2d at 733-34
18 (holding that the finality of an order or judgment depends on "what the order or
19 judgment actually does").

1 To be final, an order or judgment must “dispose [] of all the issues
2 presented in the case, and leave[] nothing for the future consideration of the
3 court, except for post-judgment issues such as attorney’s fees and costs.” *Lee v.*
4 *GNLV Corp.*, 116 Nev. 424, 426, 996 P.2d 416, 417 (2000). A judgment is not
5 final if there are potential matters for the court’s consideration. *Valley Bank of*
6 *Nev.*, 110 Nev. at 446, 874 P.2d at 733-34. Where the district court’s order
7 leaves nothing for consideration regarding a competing counterclaim or renders
8 the counterclaim moot, the order fully resolves the counterclaim. *Id.*

9 Helix asserted in the district court that the below claims remain pending
10 because Helix alleges that Camco did not pursue them at trial. This is not
11 correct.

12 1. Abuse of Process (Helix and Cactus Rose Only).

13 Camco brought an Abuse of Process counterclaim against Helix and
14 Cactus Rose, alleging that Helix and Cactus Rose contracted directly with
15 Gemstone (the project owner) and that neither Helix nor Cactus Rose therefore
16 had viable claims against Camco. *See* Exhibits 9 and 13 to APCO’s Amended
17 Docketing Statement. However, the district court found in its Findings of Fact
18 and Conclusions of Law, as to the claims of Helix and Cactus Rose, that there
19 were in fact viable claims against Camco by both Helix and Cactus Rose. *See*

1 Exhibits 30 and 32 to APCO's Amended Docketing Statement. Camco's Abuse
2 of Process counterclaims therefore failed as a result of the district court's order
3 and as there is nothing further for the district court to consider, the claims are
4 resolved.

5 2. Breach of Contract (Heinaman, Helix and Cactus Rose).

6 Camco's breach of contract counterclaims against Heinaman, Helix and
7 Cactus Rose alleged that the subcontractors breached an implied agreement
8 between the parties that contained a provision that the subcontractors would
9 only be paid if Camco was paid, known as "pay-if-paid provision". *See* Exhibits
10 9, 13 and 14 to APCO's Amended Docketing Statement. These counterclaims
11 were resolved by this the district court's January 2, 2018, Order Granting Peel
12 Brimley Lien Claimants' Motion for Partial Summary Judgment Precluding
13 Defenses Based on Pay-If-Paid Agreements and by the district court's finding in
14 its Findings of Fact and Conclusions of Law as to the claims of Heinaman,
15 Helix and Cactus Rose rejecting Camco's argument that it was not required to
16 pay the plaintiffs-in-interest because it never received payment from the owner.
17 *See* Exhibits 30, 31, and 32 to APCO's Amended Docketing Statement and
18 **Exhibit 1** hereto (January 2, 2018, Order). These counterclaims were fully
19 resolved.

1 3. Breach of Covenant of Good Faith and Fair Dealing (Heinaman,
2 Helix and Cactus Rose).

3 Camco alleged in its breach of covenant of good faith and fair dealing
4 counterclaims that the plaintiffs-in-intervention breached this implied covenant
5 by failing to abide by the same terms of the parties' agreement discussed in its
6 breach of contract claim. *See* Exhibits 9, 13 and 14 to APCO's Amended
7 Docketing Statement. Thus, this counterclaim was resolved by the district court
8 order resolving the Camco's breach of contract counterclaim. *See* Exhibits 30,
9 31, and 32 to APCO's Amended Docketing Statement.

10 4. Declaratory Relief (Helix and Cactus Rose Only).

11 In its counterclaim for declaratory relief, Camco requested that the district
12 court interpret the agreements between Camco and Helix and Cactus Rose
13 regarding the terms of the agreements; what Helix and Cactus Rose were
14 entitled to under the agreements; and whether the agreements were enforceable.
15 *See* Exhibits 9 and 13 to APCO's Amended Docketing Statement. The district
16 court made findings of fact and conclusions of law regarding the terms of the
17 agreements, what Helix and Cactus Rose were entitled to under the agreements,
18 and that the agreements were enforceable. *See* Exhibits 30 and 32 to APCO's
19 Amended Docketing Statement. These counterclaim against Helix and Cactus

1 Rose were therefore fully addressed and resolved by the district court and are
2 not pending.

3 5. Attorneys' Fees (Helix and Cactus Rose Only).

4 Likewise, Camco requested that it be awarded its attorney fees and costs
5 based on bringing its counterclaim for Declaratory Relief. *See* Exhibits 9 and
6 13 to APCO's Amended Docketing Statement. This request was contingent on
7 successfully pursuing its declaratory relief claim, not an independent claim for
8 relief. As Camco was not successful on its declaratory relief counterclaims, as
9 discussed above, the claims for fees were likewise resolved and do not remain
10 pending in the district court.

11 As shown in APCO's Amended Docketing Statement and herein, there
12 are no counterclaims—or any other claims—that remain pending in the underlying
13 district court action. This Court therefore has jurisdiction over APCO's cross
14 appeal.

15 ///

16
17 ///

18 ///

1 **CONCLUSION**

2 APCO respectfully requests that this Court allow its cross appeal to move
3 forward. APCO further requests that this Court grant Helix's request that its
4 appeal be dismissed.

5 Dated this 30th day of August, 2019.

6 **FENNEMORE CRAIG, P.C.**

7 */s/Christopher H. Byrd, Esq.*

8 By: _____

John Randall Jefferies, Esq.

Nevada Bar No. 3512

9 Christopher H. Byrd, Esq.

Nevada Bar No. 1633

10 300 South 4th Street, 14th Floor

Las Vegas, Nevada 89101

11 *Attorney for Respondent/Cross-Appellant*

1

2

6

I

7

I

8

0

7

1

3

4

Exhibit 1

Exhibit 1

ORIGINAL

Steven D. Grierson

1 **ORDR**
2 ERIC B. ZIMBELMAN, ESQ.
3 Nevada Bar No. 9407
4 RICHARD L. PEEL, ESQ.
5 Nevada Bar No. 4359
6 **PEEL BRIMLEY LLP**
7 3333 E. Serene Avenue, Suite 200
8 Henderson, NV 89074-6571
9 Telephone: (702) 990-7272
10 Fax: (702) 990-7273
11 ezimbelman@peelbrimley.com
12 rpeel@peelbrimley.com
13 *Attorneys for Various Lien Claimants*

14 **DISTRICT COURT**

15 **CLARK COUNTY, NEVADA**

16 APCO CONSTRUCTION, a Nevada
17 corporation,

18 Plaintiff,

19 vs.

20 GEMSTONE DEVELOPMENT WEST, INC.,
21 Nevada corporation; NEVADA
22 CONSTRUCTION SERVICES, a Nevada
23 corporation; SCOTT FINANCIAL
24 CORPORATION, a North Dakota
25 corporation; COMMONWEALTH LAND
26 TITLE INSURANCE COMPANY; FIRST
27 AMERICAN TITLE INSURANCE
28 COMPANY and DOES I through X,

Defendants.

CASE NO.: A571228

DEPT. NO.: XIII

Consolidated with:
A571792, A574391, A577623, A580889,
A583289, A584730, and A587168

**ORDER GRANTING PEEL BRIMLEY
LIEN CLAIMANTS' MOTION FOR
PARTIAL SUMMARY JUDGMENT
PRECLUDING DEFENSES BASED
ON PAY-IF-PAID AGREEMENTS**

AND ALL RELATED MATTERS.

This matter came on for hearing November 16, 2017, before the Honorable Mark Denton in Dept. 13 on the Peel Brimley Lien Claimants' ("PB Lien Claimants")¹ Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements ("the Motion"). Joinders were filed by Zitting Brothers, Construction, Inc., William A. Leonard/Interstate Plumbing and Air Conditioning LLC, National Wood Products, Inc., E&E Fire Protection LLC, and United Subcontractors, Inc. (collectively, "the Joining

¹ The Peel Brimley Lien Claimants are: Cactus Rose Construction, Fast Glass Inc., Heinaman Contract Glazing, Helix Electric of Nevada, LLC, SWPPP Compliance Solutions, LLC, and Buchele, Inc. The Peel Brimley law firm has since withdrawn from representation of Buchele, Inc.

PEEL BRIMLEY LLP
3333 E. SERENE AVENUE, STE. 200
HENDERSON, NEVADA 89074
(702) 990-7272 ♦ FAX (702) 990-7273

RECEIVED

DEC 27 2017

DISTRICT COURT DEPT# 13

Subcontractors”) APCO Construction (“APCO”) and Camco Pacific Construction, Inc. (“Camco”) opposed the Motion. The issues having been well-briefed and argued and the Court being fully advised in the premises, the Court is persuaded that the Motion has merit and should be granted.

A. Findings of Fact.

Specifically, but without limitation, there are no genuine issues of material fact as follows:

1. This action arises out of a construction project in Las Vegas, Nevada known as the Manhattan West Condominiums Project (“the Project”) located at West Russell Road and Rocky Hill Street in Clark County Nevada, APNs 163-32-101-003 through 163-32-101-005, 163-32-101-010 and 163-32-101-014 (the “Property” and/or “Project”), owned by Gemstone Development West, Inc. (“Gemstone” or the “Owner”).

2. The Owner hired APCO and, subsequently, Camco as its general contractors, who in turn entered into subcontract agreements with various subcontractors including the PB Lien Claimants and the Joining Subcontractors. In December 2008 the Owner suspended the Project and advised the various contractors that the Owner’s lender did not expect to disburse further funds for construction. Numerous contractors, including the PB Lien Claimants, the Joining Subcontractors, APCO and Camco recorded mechanic’s liens against the Property.

3. After several years of litigation and a Writ Action to determine the priority of the various lienors (during which the Property was sold, the proceeds of the same held in a blocked account and this action was stayed), the Nevada Supreme Court ruled that the Owner’s lenders had priority over the proceeds of the sale of the Property, holding that the NRS Ch. 108 mechanic’s liens were junior to the lenders’ deeds of trust. The Court subsequently ordered the proceeds be released to the lender. Thereafter, the stay was lifted and the PB Lien Claimants, Joining Subcontractors and others continued to pursue claims for non-payment from APCO and Camco.

///

///

1 4. APCO and Camco assert defenses to the various subcontractor claims based on
2 so-called "pay-if-paid agreements" (hereinafter referred to generally as "Pay-if-Paid").
3 Specifically but without limitation, APCO and Camco rely on language in the APCO
4 Subcontract Agreement that was adopted by way of a Ratification Agreement between Camco
5 and some of the subcontractors, that APCO and Camco have no obligation to pay the
6 subcontractors for the work materials and equipment they furnished to the Project ("the Work")
7 unless and until the Owner pays APCO and Camco for the Work. APCO and Camco claim that
8 they have not been paid, in whole or in part, for the Work and/or that the Owner by-passed them
9 by making or intending to make payments to subcontractors through a voucher control
10 company, Nevada Construction Services ("NCS"). Among other provisions, APCO and Camco
11 rely upon the following:

12 *3.4 Any payments to Subcontractor shall be conditioned upon receipt of the*
13 *actual payments by Contractor from Owner. Subcontractor herein agrees to*
14 *assume the same risk that the Owner may become insolvent that Contractor*
 has assumed by entering into the Prime Contract with the Owner.

15 *3.5 Progress payments will be made by Contractor to Subcontractor within 15*
16 *days after Contractor actually receives payment for Subcontractor's work from*
17 *Owner. Any payments to Subcontractor shall be conditioned upon receipt of*
18 *the actual payments by Contractor from Owner. Subcontractor herein agrees*
 to assume the same risk that the Owner may become insolvent that Contractor
 has assumed by entering into the Prime Contract with the Owner.

19 *3.8 The 10 percent withheld retention shall be payable to Subcontractor upon,*
20 *and only upon the occurrence of all the following events, each of which is a*
21 *condition precedent to Subcontractor's right to receive final payment*
22 *hereunder and payment of such retention: ... (c) Receipt of final payment by*
 Contractor from Owner.

23 *3.9 Subcontractor agrees that Contractor shall have no obligation to pay*
24 *Subcontractor for any changed or extra work performed by Subcontractor*
 until or unless Contractor has actually been paid for such Work by the owner.

25 *4.2 The Owner's payment to Contractor of extra compensation for any such*
26 *suspension, delay, or acceleration shall be a condition precedent to*
27 *Subcontractor's right, if any, to receive such extra compensation from*
28 *Contractor.*

///

1 5. Each of these provisions represents or contains Pay-if-Paid such that, if enforced,
2 may allow APCO and Camco to deny payment to their subcontractors for work performed on
3 the grounds that APCO and Camco have not been paid.

4 6. Any finding of fact herein that is more appropriately deemed a conclusion of law
5 shall be treated as such.

6 **B. Conclusions of Law.**

7 As discussed below, Pay-if-Paid is void and unenforceable in Nevada and, as a result,
8 the Motion to Preclude Defenses based on Pay-if-Paid Agreements in GRANTED.

9 1. In 2008 the Nevada Supreme Court declared Pay-if-Paid void and unenforceable
10 as against Nevada's public policy because "Nevada's public policy favors securing payment for
11 labor and material contractors." *Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.*, 124
12 Nev. 1102, 1117-18, 197 P.3d 1032, 1042 (Nev. 2008). The *Bullock* Court noted that "because
13 a pay-if-paid provision limits a subcontractor's ability to be paid for work already performed,
14 such a provision impairs the subcontractor's statutory right to place a mechanic's lien on the
15 construction project." 124 Nev. at 1117 n. 51 (citing *Wm. R. Clarke Corp. v. Safeco Ins. Co.*, 15
16 Cal. 4th 882, 64 Cal. Rptr. 2d 578, 938 P.2d 372, 376 (Cal. 1997))

17 2. Nevada's statutory schemes designed to secure payment to contractors and
18 subcontractors in the construction industry as a whole are remedial. *See Hardy Companies, Inc.*
19 *v. W.E. O'Neil Const. Co.*, 245 P.3d 1149, 1155 (Nev. 2010) (citing *Las Vegas Plywood v. D &*
20 *D Enterprises*, 98 Nev. 378, 380, 649 P.2d 1367, 1368 (1982)). As stated in *Bullock*:

21 Underlying the policy in favor of preserving laws that provide contractors secured
22 payment for their work and materials is the notion that contractors are generally in a
23 vulnerable position because they extend large blocks of credit; invest significant time,
24 labor, and materials into a project; and have any number of workers vitally depend
25 upon them for eventual payment. *We determine that this reasoning is persuasive as it*
26 *accords with Nevada's policy favoring contractors' rights to secured payment for*
27 *labor, materials, and equipment furnished.*

28 *Bullock*, 124 Nev. at 1116 (emphasis added).

///

///

///

1 3. Despite the fact that the *Bullock* decision involved mechanic's liens, the Court
2 rejects as without merit the argument that the public policy rationale of *Bullock* is limited to the
3 concept of security or does not apply when there is no security such as in the present case, where the
4 Property has been sold and the proceeds have been released to senior lienors. Among other things,
5 the term "secured payment" utilized by *Bullock*, at 1116, uses "secured" as an adjective and
6 "payment" as a noun.

7 4. By way of a footnote, the *Bullock* Court noted that the Nevada Legislature
8 "amended NRS Chapter 624 to include the prompt payment provisions contained in NRS 624.624
9 through 624.626. Pay-if-paid provisions entered into subsequent to the Legislature's amendments
10 are enforceable only in limited circumstances and are subject to the restrictions laid out in these
11 sections." 124 Nev. at 1117 n. 50. No such "limited circumstances" exist in this case.

12 5. NRS 624.624(1) provides for the obligation of prompt payment by a higher-tiered
13 contractor (such as APCO and Camco) to a lower-tiered subcontractor (such as the PB Lien
14 Claimants), as follows:

15 Except as otherwise provided in this section, if a higher-tiered contractor enters into:

16 (a) A written agreement with a lower-tiered subcontractor that includes a schedule for
17 payments, the higher-tiered contractor shall pay the lower-tiered subcontractor:

18 (1) On or before the date payment is due; or

19 (2) Within 10 days after the date the higher-tiered contractor receives payment
20 for all or a portion of the work, materials or equipment described in a request
21 for payment submitted by the lower-tiered subcontractor,

22 ↪ whichever is earlier.

23 (b) A written agreement with a lower-tiered subcontractor that does not contain a
24 schedule for payments, or an agreement that is oral, the higher-tiered contractor shall
25 pay the lower-tiered subcontractor:

26 (1) Within 30 days after the date the lower-tiered subcontractor submits a
27 request for payment; or

28 (2) Within 10 days after the date the higher-tiered contractor receives payment
for all or a portion of the work, labor, materials, equipment or services
described in a request for payment submitted by the lower-tiered subcontractor,

↪ whichever is earlier.

NRS 624.624(1) (emphasis added).

///

///

6. Stated simply, if there is a "schedule of payments" in an otherwise enforceable written agreement, the higher-tiered contractor must pay the lower-tiered subcontractor – at the latest – on the date payment is due. If there is no enforceable written agreement containing a schedule of payments, the payment is due to the lower-tiered subcontractor – at the latest - within 30 days of its request for payment. Under either circumstance it has been approximately nine years since payments on the Project ceased to be made.

6. The Court also rejects the argument that the "schedule of payments" delays the obligation of payment until "within 15 days after Contractor actually receives payment for Subcontractor's work from Owner." Because the expiration of 15 days is itself dependent upon payment being received from the Owner, this is not a "schedule of payments" but rather simply another form of Pay-if-Paid.

7. Any conclusion of law herein that is more appropriately deemed a question of fact shall be treated as such.

IT IS THEREFORE ORDERED as follows:

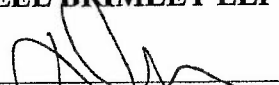
1. The Peel Brimley Lien Claimants' Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements GRANTED; and
2. APCO and Camco may not assert or rely upon any defense to their payment obligations, if any, to the PB Lien Claimants and the Joining Subcontractors that is based on a pay-if-paid agreement.

IT IS SO ORDERED this 29th day of December, 2017.


DISTRICT COURT JUDGE

Submitted by:

PEEL BRIMLEY LLP


ERIC B. ZIMBELMAN, ESQ. (9407)
RICHARD L. PEEL, ESQ. (4359)
3333 E. Serene Avenue, Suite 200
Henderson, NV 89074-6571
Attorneys for Various Lien Claimants.