

IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 77320
Consolidated with Case No. 80508

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HELIX ELECTRIC OF NEVADA, LLC,

Appellant/Cross-Respondent,

v.

APCO CONSTRUCTION, INC., A NEVADA CORPORATION,

Respondent/Cross-Appellant.

REPLY BRIEF IN SUPPORT OF CROSS-APPEAL

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ARGUMENT

I. THE DISTRICT COURT ERRED IN NOT GRANTING ALL OF APCO'S ATTORNEYS' FEES PURSUANT TO SECTION 18.5 OF THE SUBCONTRACT.

As noted in APCO's Opening Brief on its Cross-Appeal, the district court awarded *only* APCO's attorneys' fees incurred *after* APCO made an offer of judgment pursuant to NRCP 68—disregarding (though explicitly acknowledging) the controlling attorneys' fee provision in Section 18.5 of the Subcontract. 100-JA007281. The district court erred in failing to award APCO all of its requested attorneys' fees under Section 18.5 of the Subcontract.¹ APCO is entitled to such fees despite the subsequent assignment of the Subcontract to Gemstone and/or Camco for several reasons. First, given that Helix sued APCO for breaching the Subcontract, the principle of equitable estoppel warrants applying Section 18.5 to APCO's fee request, which Helix does not contest. Second, Helix sued APCO for alleged breaches of the Subcontract that occurred well before the assignment when

¹ Section 18.5 of the Subcontract provides:

In the event **either party** employs an attorney to institute a lawsuit or to demand arbitration for any cause arising out of the Subcontract Work or the Subcontract, or any of the Contract Documents, the **prevailing party** shall be entitled to all costs, attorney's fees and any other reasonable expenses incurred therein. (Emphasis added) 35-JA002135.

the Subcontract was only in force between Helix and APCO so Section 18.5 applies to APCO's fee claim. The assignment does not completely eradicate APCO's ability to utilize the Subcontract's terms (including Section 18.5) in defending against Helix's breach claims.

A. Helix fails to respond to APCO's equitable estoppel argument.

In APCO's Opening Brief on its Cross-Appeal, APCO argued that equitable estoppel prohibited Helix from contesting Section 18.5's attorneys' fees provision. *See* APCO's Combined Answering Brief on Appeal and Opening Brief on Cross-Appeal at 57–59 (asserting that since Helix alleged the validity of and sought to enforce the Subcontract against APCO, Helix should be equitably estopped from denying APCO the related benefits when APCO certainly would have been liable had it lost). Helix did not respond to APCO's equitable estoppel argument in its Answering Brief. As a result of Helix's failure to respond, it has waived any opposition to APCO's equitable estoppel argument. *See United States v. Dreyer*, 804 F.3d 1266, 1277 (9th Cir. 2015) (“Generally, an appellee waives any argument it fails to raise in its answering brief.”).

Presumably Helix is silent on APCO's equitable estoppel argument because that principle makes sense here. In fact, one of the cases Helix cites, *Oral Roberts University v. Anderson*, 11 F. Supp. 2d 1336 (N.D. Okla. 1997), enforced an attorneys' fees provision in the parties' option contract despite the fact that the court

held the option contract had expired, which is comparable to Helix’s “assignment” argument. *Id.* at 1337–39. The court held such because although the defendant² had lost the right to seek any remedies under the option contract, the defendant *still* sought specific performance and argued that the option had not terminated. *Id.* at 1339. By prevailing in the litigation, the court held that the plaintiff was entitled to recover its attorneys’ fees according to the terms of the option contract. *Id.* The same rationale applies here. Although Helix lost its right to seek its retention against APCO in light of the assignment (among several other reasons, like Section 3.8’s preconditions), it *still* sought such against APCO in this litigation. By prevailing against Helix’s breach of contract claims (for which it sought fees against APCO in multiple filings), APCO is entitled to recover its attorneys’ fees under Section 18.5’s terms.

B. APCO is still entitled to attorneys’ fees under Section 18.5—irrespective of the assignment—because Helix sued APCO for pre-assignment breaches.

In APCO’s Opening Brief on its Cross-Appeal, APCO asserted that Helix’s “assignment” argument “lack[ed] any merit because Helix sued APCO for an alleged breach of the Subcontract that allegedly occurred **during the time the Subcontract was in force between APCO and Helix.**” *See* APCO’s OB on its Cross-Appeal at

² The plaintiff in *Oral Roberts* sought a declaratory judgment that the option contract had expired; the defendant defended the declaratory judgment claim by arguing that the option contract was still enforceable.

56 (emphasis added). In its Answering Brief, Helix does not dispute that it sued APCO for *pre-assignment* breaches—i.e., when the Subcontract was exclusively in effect between APCO and Helix. In fact, Helix does not address its breach of contract claims against APCO at all. Helix’s silence on this issue must mean that Helix agrees that it sued APCO for pre-assignment breaches.

To be sure, Helix sued APCO for alleged breaches of the Subcontract that it alleged occurred before any assignment of the Subcontract to Gemstone and/or Camco as Helix’s Amended Complaint makes clear (shown in **bold** below):

- a. Failing and/or refusing to pay monies owed to Helix for the APCO Work;
- b. **Failing to adjust the APCO Agreement price to account for extra and/or changed work, as well as suspensions and delays of APCO Work caused or ordered by the Defendants and/or their representatives;**
- c. **Failing to promptly recognize and grant time extension to reflect additional time allowable under the APCO Agreement and permit related adjustments in scheduled performance;**
- d. Failing and/or refusing to comply with the APCO Agreement and Nevada law; and
- e. **Negligently or intentionally prevent, obstructing, hindering or interfering with Helix’s performance of the APCO Work.**

JA005789–90 (Helix’s Amended Complaint ¶ 14) (emphases added).³ APCO necessarily had to defend against Helix’s breach of contract claims and, after years of litigation, prevailed. According to the Subcontract, which governs Helix’s pre-assignment breach of contract claims against APCO, APCO is entitled to its attorneys’ fees under Section 18.5: “In the event either party employs an attorney to initiate a lawsuit or to demand arbitration for any cause **arising out of the Subcontract Work or the Subcontract**, or any of the Contract Documents, the prevailing party shall be entitled to all costs, attorney’s fees and any other reasonable expenses incurred therein.” 35- JA002135 (Subcontract § 18.5) (emphasis added).

It is irrelevant that the Subcontract was later assigned to Gemstone and/or Camco such that APCO is not the “current” party to the Subcontract for purposes of performance. APCO had to defend itself against several of Helix’s breach of contract claims that arose out of the Subcontract Work or the Subcontract and concerned the pre-assignment time period when the Subcontract was in effect between APCO and Helix. It would defy logic to hold that Helix could sue APCO

³ For these specified breaches, Helix could have only sued APCO given that an assignee (Gemstone and/or Camco) is not liable for pre-assignment or “past” breaches absent an allegation that the assignee assumed liability for the assignor’s past breaches. *See, e.g., Rittenberg v. Donohoe Const. Co., Inc.*, 426 A.2d 338, 341 (D.C. 1981) (holding that a plaintiff cannot state a cause of action against an assignee for breach of a lease that occurred prior to the assignment because “[a]n assignee is responsible only for obligations of the assignor which he contracts to undertake. If he has not so contracted, no action can be maintained against him.”).

for breaching certain provisions of the Subcontract before the assignment occurred, but simultaneously hold that only one provision of that Subcontract (Section 18.5) cannot apply because of a subsequent assignment.

All of Helix's cited cases (at pages 32–33 of its Answering Brief to APCO's Cross-Appeal) are inapposite. For example, Helix argues that “an assignor retains no rights to enforce the contract after it has been assigned.”⁴ Although that proposition is a true statement in the abstract, it does not apply to the situation here where APCO had to defend itself against several of Helix's breach of contract claims involving conduct that occurred before any assignment. Helix's argument, taken to its logical extension, would mean that Helix could sue APCO for pre-assignment breaches, but APCO would have “no rights to enforce the contract” in defending against Helix's claims and would similarly have “no rights” to enforce Section 18.5 to obtain its attorneys' fees as the prevailing party.

Helix's additional arguments that APCO cannot seek attorneys' fees because it lacks standing to sue or is not a “real party in interest” are similarly not applicable. None of the cases Helix cites support the proposition that APCO cannot seek its attorneys' fees under an assigned contract when it was sued for *pre*-assignment

⁴ Helix cites *Estate of Basile v. Famest, Inc.*, 718 So. 2d 892 (Fla. 4th DCA 1998) for that quote, but that was likely in error because the quoted language is not in *Estate of Basile*. Instead, Helix likely intended to cite to *Lauren Kyle Holdings, Inc. v. Heath-Peterson Const. Corp.*, 864 So. 2d 55, 58 (Fla. Dist. Ct. App. 2003), which itself cited (but did not quote) *Estate of Basile*.

breaches (i.e., when the Subcontract was effective between the parties). *Manko Holdings Ltd. v. Reno Project Management, LLC*, 385 P.3d 43 (Unpublished Decision, Docket No. 70525, September 27, 2016) and *Applied Medical Technologies, Inc. v. Eames*, 44 P.3d 699 (Utah 2002) only hold that an assignor cannot affirmatively sue under the assigned contract because the assignee acquired that interest. That is not the case here. Helix sued APCO and asserted claims that involved conduct occurring *before* the assignment.⁵ To defend itself, APCO is able to enforce any of the Subcontract’s clauses—including Section 18.5’s attorneys’ fees provision. As the prevailing party against Helix’s breach of contract claims, APCO is entitled to its attorneys’ fees under Section 18.5 of the Subcontract.

C. The doctrine of mutuality of remedy justifies APCO’s right to attorneys’ fees under Section 18.5.

Helix argues that the “equitable principle of mutuality of remedy” cannot apply here because “this Court has never adopted the principle of mutuality to require an award of attorney’s fees to a party.” Helix’s Answering Brief to APCO’s Cross-Appeal at 35 (citing *Trustees of Carpenters for S. Nevada Health & Welfare Tr. v. Better Bldg. Co.*, 101 Nev. 742, 747, 710 P.2d 1379, 1382 (1985)). *Trustees*

⁵ Again, Helix could likely *only* sue APCO for pre-assignment breaches because there is no evidence that Gemstone and/or Camco agreed to undertake liability for APCO’s performance before the assignment. *Rittenberg*, 426 A.2d at 341.

of Carpenters has no application here. There, the court held that NRS 18.010(2) could not be a substitute for a unilateral attorney's fees provision in the parties' contract given that NRS 18.010(5) said that subsection 2 cannot apply where there is any contractual attorney's fees provision. Here, however, Section 18.5 is not a unilateral attorneys' fees provision and no party is seeking fees under NRS 18.010(2). Moreover, the court never considered the equitable principle of mutuality of remedy.

Helix also summarily contends without any analysis that APCO's reliance on *Kaintz v. PLG, Inc.*, 147 Wash. App. 782, 197 P.3d 710 (2008) "has no bearing on this action." Helix's Answering Brief to APCO's Cross-Appeal at 36. *Kaintz* held that the principle of mutuality of remedy authorized an attorneys' fees award where a party prevails in an action brought on a contract that contains a bilateral attorney fee clause by establishing the invalidity or unenforceability of the contract. That same principle refutes Helix's claim that *only it* can seek attorneys' fees against APCO because APCO has no right to enforce any provision of the Subcontract as it was later assigned to Gemstone and/or Camco. Given that had Helix prevailed, it certainly would have claimed an entitlement to fees, *Kaintz*'s mutuality of obligation principle warrants that APCO be entitled to its attorneys' fees as well.

CONCLUSION

For the reasons stated above, APCO respectfully requests that the Court (1) reverse the district court's September 27, 2018 Order partially granting APCO's Motion for Attorneys' fees, and (2) remand back to the district court with instructions to award APCO \$447,809.28 for its reasonable attorneys' fees pursuant to Section 18.5 of the Subcontract.

RESPECTFULLY SUBMITTED this 27th day of May, 2021.

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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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman 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:

☒ proportionally spaced, has a typeface of 14 points or more and contains 2813 words; or

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3. Finally, I hereby certify that I have read this 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 this 27th day of May, 2021.

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I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 27th day of May, 2021 and was served on the following by the Supreme Court Electronic Filing System (eFlex):

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