

IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 78092

Tonopah Solar Energy, LLC,
Appellant

v.

Brahma Group, Inc.,
Respondent

Electronically Filed
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Elizabeth A. Brown
Clerk of Supreme Court

Appeal
Fifth Judicial District Court
The Honorable Steven P. Elliott
Case No. CV 39348

**APPELLANT'S APPENDIX
VOLUME 6**

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10 **FIFTH JUDICIAL DISTRICT COURT**
11 **NYE COUNTY, NEVADA**

12 TONOPAH SOLAR ENERGY, LLC, a Delaware
13 limited liability company,

14 Plaintiff,

15 vs.

16 BRAHMA GROUP, INC., a Nevada corporation,

17 Defendant.

18
19 BRAHMA GROUP, INC., a Nevada corporation,

20 Counterclaimant/Lien Claimant,

21 vs.

22 TONOPAH SOLAR ENERGY LLC, a Delaware
23 limited liability company; BOE BONDING
24 COMPANIES I through X; DOES I through X;
25 ROE CORPORATIONS I through X; and TOE
TENANTS I through X, inclusive,

26 Counterdefendant,
27
28

CASE NO. : CV 39348

DEPT. NO. : 2

NOTICE OF ENTRY OF ORDER

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1 BRAHMA GROUP, INC., a Nevada corporation,

2 Third-Party Plaintiff,

3 vs.

4 COBRA THERMOSOLAR PLANTS, INC., a
5 Nevada corporation; AMERICAN HOME
6 ASSURANCE COMPANY, a surety; BOE
7 BONDING COMPANIES I through X; DOES I
8 through X; ROE CORPORATIONS I through X,
9 inclusive,

10 Third-Party Defendants.

11 **NOTICE OF ENTRY OF ORDER**


12 PLEASE TAKE NOTICE that an Order Denying Tonopah Solar Energy, LLC's Motion to
13 Expunge Brahma Group, Inc.'s Mechanic's Lien was filed on **October 29, 2018** a copy of which
14 is attached as Exhibit A.

15 **AFFIRMATION PURSUANT TO NRS 239B.030**

16 The undersigned does hereby affirm that the proceeding document does not contain the
17 social security number of any persons.

18 Dated this 30th day of October, 2018.

19 **PEEL BRIMLEY LLP**

20 

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CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b), I certify that I am an employee of PEEL BRIMLEY LLP and that on this 1st ^{November} day of ~~October~~, 2018, I caused the above and foregoing document entitled **NOTICE OF ENTRY OF ORDER** to be served as follows:

- ☒ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or
- ☐ Wiznet, the Court's electronic filing system;
- ☐ pursuant to EDCR 7.26, to be sent **via facsimile**;
- ☐ to be hand-delivered; and/or
- ☒ other – electronic mail

to the party(ies) and/or attorney(s) listed below at the address and/or facsimile number indicated below:

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EXHIBIT A

AA000475

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FILED
FIFTH JUDICIAL DISTRICT

OCT 29 2018

Nye County Clerk
AMY DOWERS Deputy

FIFTH JUDICIAL DISTRICT COURT

NYE COUNTY, NEVADA

11 TONOPAH SOLAR ENERGY, LLC, a Delaware
12 limited liability company,

CASE NO. : CV 39348
DEPT. NO. : 2

13 Plaintiff,

14 vs.

15 BRAHMA GROUP, INC., a Nevada corporation,

**ORDER DENYING TONOPAH
SOLAR ENERGY, LLC'S MOTION
TO EXPUNGE BRAHMA GROUP,
INC.'S MECHANIC'S LIEN**

16 Defendant.

17 This matter came on for hearing September 12, 2018 (the "Hearing") before the
18 Honorable Senior Judge Steven Elliott on the Motion to Expunge ("Motion") filed by Plaintiff
19 TONOPAH SOLAR ENERGY, LLC ("TSE"). D. Lee Roberts, Esq., and Colby L. Balkenbush, Esq.
20 of WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC appeared on behalf of TSE. Eric
21 B. Zimbelman, Esq., Richard Peel, Esq. and Ronnie Cox, Esq. of PEEL BRIMLEY LLP
22 appeared on behalf of BRAHMA GROUP, INC. ("Brahma").

23 The Court having considered all the pleadings and papers on file, and having heard
24 argument of counsel, hereby ORDERS as follows, having rendered its oral decision from the
25 bench on September 12, 2018:

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1 **I. SUMMARY OF STANDARD OF PROOF.**

2 TSE commenced this proceeding by filing the present motion pursuant to NRS 108.2275
3 seeking an order to expunge Brahma's original notice of lien and the several amendments thereto
4 (collectively, the "Notice of Lien"), recorded by Brahma against the Crescent Dunes Solar
5 Energy Facility in Tonopah, Nevada (the "Work of Improvement"). NRS 108.2275(6) requires
6 the Court to "make an order releasing the lien" if the Court determines "the notice of lien is
7 frivolous and was made without reasonable cause." Because the Court finds the Notice of Lien
8 (i) was not frivolous, and (ii) was made with reasonable cause, the Court denies the Motion.

9 **II. THE COURT'S DECISION.**

10 In its moving papers and at the Hearing, TSE made the following arguments in support
11 of its Motion, each of which the Court rejects for the following reasons:

12 A. Brahma's Notice of Right to Lien was Properly Given.

13 1. NRS 108.245 generally requires a lien claimant who claims the benefit of
14 NRS 108.221 to 108.246, inclusive (hereinafter, the "Lien Statute" or the "Statute") to deliver in
15 person or by certified mail to the owner of the property a notice of right to lien in the form
16 prescribed by the Statute.

17 2. In its briefing and at the Hearing TSE argued that:

- 18 • Brahma failed to give a Notice of Right to Lien to the Bureau of Land
- 19 Management ("BLM"); and
- 20 • Brahma's Notice of Right to Lien is void because Brahma identified
- 21 Solar Reserve as the party with whom it contracted, rather than TSE.

22 3. In its Supplement to its Opposition, Brahma provided copies of and
23 demonstrated that it timely gave its Notice of Right to Lien (by certified mail, return receipt
24 requested) to: (i) the BLM, the fee simple interest owner of certain parcels of land on which the
25 Work of Improvement was constructed, and (ii) TSE, the fee simple interest owner of certain
26 other parcels of land that comprise the Work of Improvement, as well as owner of the Work of
27 Improvement.

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1 4. At the Hearing, (i) TSE's counsel admitted that Solar Reserve (identified
2 on the Notice of Right to Lien as the "person who contracted such labor, services, equipment or
3 material") has an indirect ownership interest in TSE and shared the same address as TSE in Santa
4 Monica, California to which the Notice of Right to Lien was mailed by certified mail, return
5 receipt requested,¹ and (ii) the Court confirmed that the Notice of Right to Lien identifies the
6 "Project Owner" of the Work of Improvement as "Tonopah Solar Energy c/o Solar Reserve" at
7 that same address.

8 5. Based on the foregoing, Brahma demonstrated that it timely and properly
9 caused it's Notice of Right to Lien to be given as required by the Statute.

10 B. Brahma's Notice of Lien is not Barred by the Statute.

11 1. NRS 108.22188 identifies a "work of improvement" as: "[T]he entire
12 structure or scheme of improvement as a whole, including, without limitation, all work, materials
13 and equipment to be used in or for the construction, alteration or repair of the property or any
14 improvement thereon, whether under multiple prime contracts or a single prime contract."

15 2. NRS 108.229(1) permits a lien claimant to "record an amended notice of
16 lien to correct or clarify the lien claimant's notice of lien" "at any time before or during the trial
17 of any action to foreclose a lien." The Statute further provides that a "variance between a notice
18 of lien and an amended notice of lien does not defeat the lien and shall not be deemed material
19 unless the variance: (a) Results from fraud or is made intentionally; or (b) Misleads an adverse
20 party to the party's prejudice, but then only with respect to the adverse party who was
21 prejudiced." NRS 108.229(1).

22 3. In its Motion, TSE initially argued that "[t]he Property on which the
23 [Work of Improvement] is located consists of the following parcels: 012-031-04, 012-131-03,
24 012-131-04, 012-140-01, 012-141-01, 012-150-01, 012-151-01, 012-431-06, 612-141-01." In its
25 supplemental briefing and at the Hearing, TSE then argued that the Property on which the Work
26 of Improvement is located consists of the following two BLM owned parcels: 012-141- 01, 012-
27 151-01, and without providing any proof (ii), that the remaining Assessor's Parcel Numbers

28 ¹ The address to which notice was sent is the address identified in the TSE/BGI Services Agreement to which BGI
 was to send notices.

1 (“APNs”) against which Brahma’s Lien were recorded were a) parcels owned by TSE purely for
2 water rights on which Brahma never performed any work, and/or b) not parcels of land on which
3 the Work of Improvement was constructed, but rather APNs associated with rights of
4 way/easements, and/or c) parcels of land on which Brahma never performed any work that were
5 owned by third parties.

6 4. In its Motion and at the Hearing, TSE also argued that:

7 • Brahma’s Notice of Lien was “void” and cannot be amended because
8 it attempted to illegally lien federally owned land (specifically land owned by the BLM), on
9 which some of the improvements that are the subject of the Work of Improvement were
10 constructed;

11 • Because Brahma “intentionally” liened BLM land, its Notice of Lien
12 could not be amended. Specifically, TSE relies on the fact that the original Notice of Lien,
13 identifies one of the “owners of the property” to be liened as “Bureau of Land Management and
14 Tonopah Solar Energy, LLC” and Exhibit A to the Notice of Lien, identifies the Land to be
15 encumbered as including APNs 012-141-01, 012-015-01, which belong to the BLM; and

16 • Brahma had no right to lien three parcels owned by TSE to which,
17 TSE contends, Brahma furnished no work, materials, or equipment.

18 5. In response, Brahma:

19 • Disputed that its original Notice of Lien was intended to attach to
20 BLM land and that it simply completed the statutory form required in NRS 108.226;

21 • Argued that its Notice of Lien (i) also attached to land owned by TSE,
22 and (ii) to the Work of Improvement, including improvements constructed on land owned by the
23 BLM;

24 • The Notice of Lien also identifies the “property to be charged with the
25 lien” as “Crescent Dunes Solar Energy Project more fully described in Exhibit A.” Further, as
26 Brahma argued at Hearing, the Exhibit A more specifically identifies the improvements as
27 follows: “The Crescent Dunes Solar Energy Project is a 110 MW plant constructed on the Land
28 in Tonopah, Nevada.” By necessity, the “Land” on which the Project was constructed is then

1 identified by parcel number and legal description; and

2 • Demonstrated that it caused its original Notice of Lien to be amended
3 several times to, among other things, clarify that Brahma's lien did not attach BLM land.

4 6. The Court concludes as follows:

5 • Brahma did not "intentionally" attach BLM land such that it is
6 precluded from amending its Notice of Lien;

7 • TSE is estopped from arguing that the Notice of Lien is void simply
8 because the BLM's land was allegedly implicated in the Notice of Lien; and

9 • Whether or not Brahma worked on the TSE-owned parcels is
10 irrelevant because the Statute permits a lien claimant to record a notice of lien against the Work
11 of Improvement as a whole.

12 C. Brahma's Notice of Lien is not Barred by Sovereign Immunity.

13 1. At the Hearing, TSE contended that:

14 • Brahma's Notice of Lien is barred by the doctrine of sovereign
15 immunity because the United States Department of Energy ("DOE") provided a \$737 Million
16 loan guarantee, and is, through PNC Bank as its collateral agent, the beneficiary of a
17 Construction Deed of Trust pledging all of TSE's right, title, and interest in the Project, and
18 therefore, the DOE has a financial stake in the Project's continued successful operation by TSE;
19 • "[A] proceeding against property in which the United States has an
20 interest is a suit against the United States." *United States v. Alabama*, 313 U.S. 274, 282, 61 S.Ct.
21 1011 (1941).

22 2. In response, Brahma demonstrated that:

23 • "[N]ot every lien or action will be void/barred just because it
24 tangentially affects a federal government security interest." *United States v. Rural Elec.*
25 *Convenience Co-op. Co.*, 922 F.2d 429, 436 (7th Cir. 1991); and

26 • Nevada law (among other states) recognizes that governmental
27 immunity does not preclude a mechanic's lien against a leasehold interest on land owned by the
28 federal government. *Basic Refractories, Inc. v. Bright*, 72 Nev. 183, 298 P.2d 810, 59 A.L.R.2d

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457 (1956). See also *Crutcher v. Block*, 19 Okl. 246, 91 P. 895, 14 Ann.Cas. 1029 ("it is immaterial that the legal title to the land in question is in the United States").

3. The Court concludes that:

- No-one is suing the United States in this action and neither the BLM's fee simple interest in certain parcels that comprise the Work of Improvement, nor is the DOE's security interest impaired by Brahma asserting a Notice of Lien; especially if (as TSE contends) the DOE has first priority over Brahma's Notice of Lien;

- Even if Brahma were to eventually foreclose on its Notice of Lien, the Work of Improvement could still be operated as a solar electric facility; and

- The doctrine of sovereign immunity does not bar Brahma's Notice of Lien.

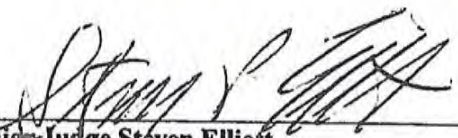
III. CONCLUSION.

1. Based on the foregoing, the Court concludes that Brahma's Notice of Lien is not frivolous nor was it made without reasonable cause and therefore denies TSE's Motion.

2. Nothing in this Order shall prevent or preclude Brahma from applying for an award of attorney's fees and costs pursuant to NRS 108.2275(6)(c).

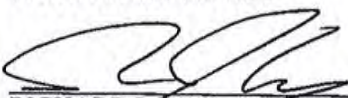
NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that TSE's Motion to Expunge Brahma's Notice of Lien is DENIED.

Dated this 17 day of October, 2018.



Senior Judge Steven Elliott

Respectfully submitted by:
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