

IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 78256
District Court Case No. CV 39348

TONOPAH SOLAR ENERGY, LLC,
Petitioner

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Elizabeth A. Brown
Clerk of Supreme Court

v.

The Fifth Judicial District Court, State of Nevada, Nye County, and
the Honorable Steven P. Elliot, Senior Judge,
Respondent

and

BRAHMA GROUP, INC.,
Real Party in Interest.

**COBRA THERMOSOLAR PLANTS, INC. AND AMERICAN HOME
ASSURANCE COMPANY'S OPPOSITION TO BRAHMA GROUP, INC.'S
MOTION TO STRIKE JOINDER TO PETITIONER'S MOTION TO STAY
DISTRICT COURT PROCEEDINGS**

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Third-Party Defendants Cobra Thermosolar Plants, Inc. (“Cobra”) and American Home Assurance Company (“AHAC”) (collectively, for purposes of this pleading, “Cobra”), submit the following Opposition to Brahma Group Inc.’s (“Brahma”) Motion to Strike Cobra and AHAC’s Joinder to the Motion to Stay filed by Petitioner Tonopah Solar Energy, LLC (“TSE”) on January 10, 2020.

Brahma’s Motion to Strike speaks volumes about the procedural mess it has created, and its goal of perpetuating the disorderly status quo, which is unfairly prejudicial to Cobra’s right to defend Brahma’s claims (which are dependent upon Brahma’s claims against TSE). Cobra and TSE seek to effect a consistent and efficient resolution of the dispute between Brahma and TSE over monies Brahma claims are owed by TSE for work, materials and equipment with respect to the Crescent Dunes Solar Energy Facility (the “Plant”), and Brahma’s dependent claim against the Surety Bond that Cobra posted to guarantee the liabilities, if any, that TSE may have to Brahma for work performed at the Plant.

Brahma admits that Cobra is a party to the district court action underlying TSE’s writ petition (the “Nye County Action”), but then contends (without citation to any source of authority), that Cobra is *not* a party to TSE’s writ petition arising out of that same action. (Mot. 2-3.) Turning to TSE, Brahma argues that TSE is not a party to its own writ petition, as a result of an order from a closely related action in federal court (the “Federal Court Action”) enjoining Brahma from litigating its

claims against TSE in any state court. Brahma contends that TSE’s writ petition is either moot or that TSE lacks standing, and invites Cobra to file a *separate* writ petition seeking the same relief as TSE’s pending Motion to Stay. Brahma further contends that a “joinder” to TSE’s writ is not permitted, but admits that a “response” is. (Mot. 3.)

Brahma’s breathless procedural arguments are nothing more than an attempt to obfuscate the common-sense (and completely appropriate from a legal and procedural standpoint) relief sought by TSE and Cobra. Rule 27 of the Nevada Rules of Appellate Procedure clearly provide: “***Any party may file a response to a motion . . . within 7 days after service of the motion.***” NRAP 27(a)(3)(A). TSE served Cobra, as a party to the Nye County Action, with a copy of the Motion to Stay via U.S. Mail on January 10, 2020. *See* Mot. to Stay, at p. 11-12 (“Certificate of Service”). Cobra responded on January 17, 2020 – within the 7-day time period prescribed by the Rules. *See* NRAP 27(a)(3)(A). Cobra’s use of the title “Joinder”—for the sake of clarity where it was not responding in opposition to the Motion to Stay—does not run afoul of any Rule. There is no reason for this Court to disregard Cobra’s response to TSE’s Motion to Stay and endorse Brahma’s attempts to muddy these proceedings in the hope that it can quickly (and unfairly) collect against the Surety Bond in the Nye County Action before it must litigate the claims of fraud

against it pending in the Federal Action and demonstrate the liabilities, if any, that TSE may have to Brahma.

CONCLUSION

For these reasons, this Court should deny Brahma's Motion to Strike, and for the reasons set forth in Cobra's Joinder and TSE's Motion to Stay, stay the underlying Nye County Action pending resolution of TSE's writ petition.

DATED this 31st day of January, 2020.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that I am an employee of Weil & Drage, APC, and that on this 31st day of January, 2020, I filed the foregoing **COBRA THERMOSOLAR PLANTS, INC. AND AMERICAN HOME ASSURANCE COMPANY'S OPPOSITION TO BRAHMA GROUP, INC.'S MOTION TO STRIKE JOINDER TO PETITIONER'S MOTION TO STAY DISTRICT COURT PROCEEDINGS** with the Clerk of the Nevada Supreme Court and served a copy of the same to the addresses shown below (in the manner indicated below):

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**COBRA THERMOSOLAR PLANTS, INC. AND AMERICAN HOME
ASSURANCE COMPANY'S REPLY IN FURTHER SUPPORT OF
JOINDER TO PETITIONER'S MOTION TO STAY THE UNDERLYING
DISTRICT COURT CASE PENDING RESOLUTION OF ITS PETITION
FOR WRIT OF PROHIBITION, OR, ALTERNATIVELY, MANDAMUS**

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Third-Party Defendants Cobra Thermosolar Plants, Inc. (“Cobra”) and American Home Assurance Company (“AHAC”) (collectively, for purposes of this pleading, “Cobra”), submit the following Reply in Further Support of their Joinder to the Motion to Stay filed by Petitioner Tonopah Solar Energy, LLC (“TSE”) on January 10, 2020.

TSE’s Motion to Stay, and Cobra’s Joinder, seek undeniably sensible relief that will avoid duplicative litigation, prevent inconsistent results, and conserve judicial economy by staying the underlying consolidated Case Nos. CV 39348 and CV 39799 in the Fifth Judicial District Court of Nevada (the “Nye County Action”) pending resolution of TSE’s writ petition. A parallel and closely related action is pending in the United States District Court for the District of Nevada, Case No. 2:18-cv-01747-RFB-GWF (the “Federal Action”). The duplicative nature of these proceedings is solely the result of Brahma’s forum shopping effort against TSE. Acknowledging this, the court in the Federal Action enjoined Brahma from litigating its contract claims in the Nye County Action, finding that Brahma “fraudulently filed [the Nye County Action] in an attempt to subvert the removal of a prior case.” (Case No. 2:18-cv-01747, Dkt. 55 at 8-9). As such, Brahma is currently enjoined from litigating its contract claims against TSE in the Nye County Action, and the resolution of the principal issue in all these cases—whether Brahma is entitled to collect *anything* against the Surety Bond—will be resolved in the Federal Action.

Brahma's Response to Cobra's Joinder, and its simultaneously-filed Motion to Strike, seek to maintain two tracks and force Cobra to litigate Brahma's claims against the Surety Bond in the Nye County Action before resolution of its entitlement to its proceeds in the Federal Action (including TSE's allegations of fraud by Brahma thereof). Brahma improperly conflates its right to bring an action against the Surety Bond with a right to collect from the Surety Bond without proving its claims. Importantly, TSE contends that it does not owe any additional money and that much of the money that it had already paid to Brahma was based on fraudulent invoices. Brahma's Response ignores the fact that these hotly contested issues require discovery into facts that are solely within the possession of Brahma and TSE, and which will be adjudicated in the Federal Action (to which Cobra has filed a Motion to Intervene). Each of the arguments in Brahma's Response are irrelevant to the criteria set forth in Nevada Rule of Appellate Procedure 8 and should be rejected.

A. Whether Brahma's Claim Against the Surety Bond is an "Independent Cause of Action" is Irrelevant to Considerations of Efficiency, Potentially Inconsistent Results, and Resulting Injury to Cobra

Brahma spends over three pages of its Response describing how its claims against the Surety Bond in the Nye County Action are an "independent cause of action," that Brahma was "not required" to assert claims against TSE (the debtor) in the same proceeding, and that Brahma is entitled to pursue these "substantive"

claims in the Nye County Action without regard to the parallel Federal Action. (Mot. 2-5.) Brahma, however, cannot dispute that resolution of the primary issue in dispute—namely, whether Brahma is entitled to collect any money from the Surety Bond in light of its fraudulent invoicing—will occur in the Federal Action. Nor can Brahma dispute that refusing to stay the Nye County Action would be inefficient, with parallel proceedings on different tracks and additional procedural motion practice. Most importantly, Cobra will continue to suffer irreparable harm, and face the significant danger of inconsistent judgments. Brahma’s attempt to force the claim against the Surety Bond to a conclusion in the Nye County Action before it litigates claims of fraud in the Federal Action is telling of its true intentions.

B. Cobra Did Not “Volunteer” to Participate in Inefficient and Potentially Inconsistent Proceedings

Brahma contends that Cobra “voluntarily placed [itself] in this position by recording the Surety Bond” and that Cobra can pursue TSE if Brahma obtains judgment on the Surety Bond. (Mot. 5-6.) Regardless of the reason Cobra posted the Surety Bond, it did not consent to the inefficient and potentially inconsistent proceedings resulting from Brahma’s forum shopping. Brahma’s gamesmanship has put Cobra in an unusual and damaging position where it lacks procedural avenues to obtain discovery necessary to its defense to which it would otherwise be entitled. Brahma’s apparent goal is to collect against the Surety Bond before ever defending against TSE’s claims of fraud and proving that it is indeed owed any amounts by

TSE, and put the burden on Cobra to recover its losses should the court in the Federal Action find that Brahma was entitled to no money at all.

C. Compelling Cobra to Overcome Additional Hurdles to Obtain Discovery Compounds, Rather than Eliminates, Prejudice to Cobra

Brahma argues that Cobra is not prejudiced by being forced to litigate the Nye County Action without TSE's participation in discovery because it could obtain documents from TSE in other ways, including (1) moving to compel discovery from TSE; (2) serving TSE with a subpoena; or (3) relying on Brahma to produce documents it receives from TSE in the Federal Action. (Mot. 6-7.)

Brahma's argument ignores the prejudice Cobra is already suffering. TSE has already refused to comply with Cobra's discovery requests in the Nye County Action. Compelling Cobra to incur additional, unnecessary costs to compel the discovery it needs to defend against Brahma's claim would only result in further prejudice. Moreover, in light of the injunction ordered in the Federal Action, the court in the Nye County Action may not be empowered to provide relief. Pursuing parallel tracks at Cobra's expense, rather than allowing this case to proceed in a consolidated, orderly basis with all necessary parties, is nonsensical.

D. Delay and the Present Posture of these Cases is Solely the Result of Brahma's Forum Shopping Efforts

Brahma makes the incredible contention that a stay of the Nye County Action would "reward the Cobra Parties' delay tactics," and complains that it has had to

face “procedural motion after procedural motion” without getting close to a hearing on the merits on its claims. (Mot. 7.) This Court need not look further than the findings of the court in the Federal Action to reveal the insincerity of Brahma’s argument:

The Court finds that there is there is considerable evidence of forum shopping on the part of Brahma here. Brahma filed its complaint asserting its contract claims against TSE in Clark County Court. It was only after receiving a favorable ruling on its motion to expunge in Nye County that Brahma then sought to amend its complaint in this case and reassert those same claims before Judge Elliot in Nye County.

(Federal Action, Case No. 2:18-cv-01747, Dkt. 55 at 8.) The court in the Federal Action went on to enjoin Brahma’s claims against TSE from proceeding in the Nye County Action because it found that was “fraudulently filed in an attempt to subvert the removal of a federal case.” (*Id.* at 9.) All the delay and procedural motions in this case are a result of Brahma’s forum shopping, which are presently preventing its claims from being resolved in an orderly manner in a consolidated proceeding. Brahma’s flippant remarks concerning Cobra’s attempts to streamline these proceedings are astonishing in light of the procedural history of this case.

CONCLUSION

For these reasons, and those set forth in Cobra’s Joinder and TSE’s Motion to Stay, this Court should stay the underlying Nye County Action pending resolution of TSE’s writ petition.

DATED this 31st day of January, 2020.

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