

IN THE SUPREME COURT OF THE STATE OF NEVADA

DIRECT GRADING & PAVING, L.L.C., a Nevada
limited liability company,

Petitioner,

v.

THE EIGHTH JUDICIAL DISTRICT COURT, in and
for the County of Clark, State of Nevada; and
THE HONORABLE ROB BARE, District Judge,

Respondents,

and

CENTURY COMMUNITIES OF NEVADA, L.L.C, a
Nevada limited liability company,

Real Party in Interest.

Case No. 81933

District Court Case No. A-18-775139-C
Dept. No.: XXXII
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**OPPOSITION TO EMERGENCY MOTION UNDER NRAP 27(e) TO STAY
PROCEEDINGS UNTIL A RESOLUTION OF THE WRIT OF
MANDAMUS HAS BEEN REACHED BY NOVEMBER 6, 2020**

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Defendants CENTURY COMMUNITIES OF NEVADA, LLC (“*Century*”) and ARGONAUT INSURANCE COMPANY (“*Argonaut*”) (collectively referred to as “*Century*” or the “*Defendants*”), submit the following Opposition to the Emergency Motion under NRAP 27(e) to Stay Proceedings until a Resolution of the Writ of Mandamus has been Reached by November 6, 2020 (the “*Motion to Stay*”).

I. INTRODUCTION

Direct Grading & Paving LLC (“*Direct*”) seeks a stay pending a decision on the Petition for a Writ of Mandamus (the “*Petition*”) Direct recently filed (on October 14, 2020). In the Petition, Direct challenged the District Court’s February 20, 2020 Order Regarding Defendants’ Motion for Provisional Relief under NRS 38.222 in Order to Expunge Liens and Release Bonds in Accordance with NRS 108.2275 and NRS 108.2421 and to Dismiss Direct’s Claims or, in the alternative, Motion for Appointment of a New Arbitrator (the “*Order*”).

There is no emergency warranting a stay. Direct waited approximately **eight months** from the entry of the Order (and nearly nine months from the oral pronouncement of the District Court’s ruling on January 24, 2020) to file the Petition and now, on the eve of the evidentiary hearing, hopes to delay this matter further. Direct has known since January 24, 2020 that the District Court decided it had jurisdiction over Century’s request for sanctions. Since that time, the parties have briefed several issues in the District Court and also participated in a number of

hearings before the District Court regarding the evidentiary hearing (which the District Court scheduled back on May 14, 2020). The parties have also participated in discovery relative to the evidentiary hearing during that time. Yet, Direct sat back for nearly nine months before filing its Petition and ultimately seeking a stay on the eve of the evidentiary hearing. If Direct was going to seek relief by way of extraordinary writ, it should have done so long ago and has offered no legitimate justification for its failure to do so. It is obvious that the object of the stay is to create further undue delay, which is reason alone to deny the motion. Direct seeks delay simply because it hopes to avoid answering for its misconduct, which includes altering federal documents and spoliating evidence.

Direct's egregious misconduct infected both the arbitration and the action pending before the District Court (the "***Lawsuit***"), which Direct initiated in order to foreclose on approximately \$1.7million in mechanic's liens it recorded on projects belonging to Century.¹ The parties selected Donald Williams, Esq., to act as arbitrator given his experience in construction matters. However, what both Century and the

¹ Given the emergency nature of Direct's Motion and the page limitations imposed for this Response under the Nevada Rules of Appellate Procedure, Century cannot provide a complete background or a comprehensive response to the issues raised in the Petition. Century incorporates by reference the arguments and exhibits filed before the District Court and reserves the right to address these issues more fully if directed to answer the Petition. True and correct copies of the Motion for Discovery Sanctions and Appendix filed with the District Court are included with this Response as **Exhibits "A" and "B,"** respectively.

arbitrator initially believed to be a garden-variety construction dispute turned out to be a much more complex matter wrought with significant misconduct on the part of Direct. That misconduct included: (1) altering evidence (federal documents relating to the Bureau of Land Management) in order to conceal fraudulent billing practices; and (2) spoliating evidence to hide the blatant conflict of interest created when Direct secretly placed Century's Land Development Manager on its payroll. It is said that the cover-up is often worse than the crime itself. In this matter, the underlying misconduct was severe and egregious. However, the cover-up, as stated by the Arbitrator, was an "abomination."² The District Court's Order, issued months ago, provides a means to address Direct's abominable conduct.³

The District Court's Order was correct, the Petition is not meritorious, and Direct has provided no legitimate basis for the belatedly-requested emergency relief. Direct's untimely Petition is fundamentally flawed and Direct falls well short of meeting the legal standard for a stay.

II. ANALYSIS

A. The Stay Motion Fails

When considering a stay pending a writ petition, courts generally consider four

² A true and correct copy of the Arbitrator's Order is included with this Response as **Exhibit "C."**

³ A true and correct copy of the District Court's Order is included with this Response as **Exhibit "D."**

factors: (1) whether the object of the writ petition will be defeated if the stay is denied; (2) whether the petitioner will suffer irreparable harm if the stay is granted; (3) whether the respondent will suffer irreparable or serious harm if the stay is granted; and (4) whether petitioner is likely to prevail on the merits of the writ petition. *See* NRAP 8(c); *Hansen v. Eighth Jud. Dist. Ct. ex. rel. Cnty. of Clark*, 116 Nev. 650, 657, 6 P.3d 982, 986 (2000). Direct cannot meet any of these elements.

B. A Stay Is Not Needed for Direct's Petition

The object of Direct's Petition will not be defeated if a stay is denied. If the stay is denied, the parties will proceed with the evidentiary hearing relating to the discovery misconduct and fraud upon the District Court. The District Court will either grant in full, grant in part, or deny the relief Century seeks. Moreover, even if the District Court enters a decision against Direct, Direct will still have appellate review. *See Yellow Cab of Reno v. Dist. Ct.*, 127 Nev. Adv. Op. 52, 262 P.3d 699, 702 (2011) (“[T]he right to appeal, after a final judgment is ultimately entered, will constitute a speed and adequate remedy that precludes extraordinary relief.”). Direct will not be unduly prejudiced in any respect if the hearing is allowed to proceed. Direct will only be sanctioned if the District Court finds, after an evidentiary hearing, that it engaged in misconduct.

C. Direct Will Suffer No Irreparable Harm

Direct can point to no actual irreparable harm. Direct must answer for its

discovery abuses and an evidentiary hearing, as ordered by the District Court, is warranted. The only harm articulated by Direct in the Motion to Stay is predicated upon the District Court interfering with the arbitration proceedings and the expense of the evidentiary hearing. Neither of these arguments establish irreparable harm.

Contrary to Direct's assertion, the District Court is not interfering in the arbitration. Direct fails to acknowledge that this matter involved both the Lawsuit (initiated by Direct) and the arbitration. Thus, this is not a typical dispute where the proceedings are limited to the arbitration forum. Nor is this a case where the fraudulent conduct was limited to the arbitration proceedings. Rather, Direct invoked the jurisdiction of District Court by filing its fraudulent lien foreclosure action **after** Century advised Direct that it had uncovered the falsified evidence and fraudulent billing. Century outlined the altered evidence in a Motion to Compel submitted to the Arbitrator on **March 6, 2018**. Yet, Direct, on **April 19, 2018**—**knowing** that the lien was based on fraudulent evidence, filed its Statement of Facts Constituting a Lien ***with the District Court*** alleging that the full amount of the lien was due and owing—despite the fact that one of the liens was based upon fraudulent invoices, which Direct attempted to conceal by altering the BLM documents.⁴ Thus, it is entirely appropriate and necessary for the District Court to address the fraud and misconduct perpetrated by Direct as Direct brought that same conduct to the District Court by seeking to

⁴ See Compl., dated Apr. 19, 2018, on file in the Lawsuit.

foreclose on the fraudulent and improper liens in the District Court.

Any “expense” caused is the direct result of Direct’s own misconduct – not the District Court’s effort to address that misconduct. The victim of that misconduct is Century, and Century alone, which has been forced to needlessly incur tremendous litigation expense exposing Direct’s fraud and wrongdoing. In fact, the District Court’s action is needed to prevent *further* actual prejudice to Century. Century cannot have a fair hearing and adequately defend itself against Direct’s claim given Direct’s misconduct, alteration of evidence, and discovery abuses. There have to be meaningful consequences for altering evidence to hide fraudulent billing and refusing to comply with discovery orders.

The object of Direct’s Petition and stay motion is to force Century to arbitrate the underlying construction dispute on the merits without meaningfully addressing its blatant spoliation of evidence and violation of discovery orders (including, without limitation, failing to turn over (1) the very computer on which it created the altered federal documents, and (2) the emails between Direct and Century’s Land Development Manager which bear directly on the secret dual agency and conflict of interest that would constitute a material contractual breach by Direct). In short, Century will be deprived of any opportunity to have a fair hearing on the merits without these spoliation issues being first redressed through the imposition of appropriate sanctions. Proceeding with the arbitration, in light of Direct’s pervasive

discovery abuses, would be a sham – as Direct has either altered or concealed the evidence pertinent to the construction dispute. Simply stated, Century could not have a fair hearing on the merits of the construction dispute until these discovery sanction issues are first properly addressed.

D. Direct Is Not Likely to Prevail on the Petition

The District Court has correctly decided the unique issues presented in this matter given Direct’s misconduct. The District Court found it had jurisdiction to address the issues raised in Century’s Motion based upon separate and independent grounds.

First, the District Court has jurisdiction over the Lawsuit Direct commenced before it as Case No. 18-773139. As noted by the District Court, it “has inherent jurisdiction over the lawsuit and authority under NRCP 37 and applicable Nevada jurisprudence.” *See* Ex. D. Direct knew that Century had uncovered the altered evidence when it filed its Statement of Facts Constituting a Lien with the District Court alleging that the full amount of the lien was due and owing—despite the fact that one of the liens was based upon fraudulent invoices, which Direct attempted to conceal by altering the BLM documents. Thus, it is entirely appropriate and necessary for the District Court to address the fraud and misconduct perpetrated by Direct as Direct has brought that same conduct to the District Court by seeking to foreclose on the fraudulent and improper liens in the District Court. *See, e.g., Wyle v. R.J. Reynolds*

Indus., Inc., 709 F.2d 585, 589 (9th Cir. 1983) (stating that when a party has perpetrated a fraud upon the court, the court possesses inherent authority to dismiss the party's action); *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1118-19 (1st Cir. 1989).⁵

Second, the District Court likewise correctly found it had authority under NRS 38.222 to provide provisional relief. The District Court found that, "after considering two lengthy hearings comprised of the arguments of counsel...the elements of NRS 38.222 have been met by Century." *See* Ex. D. Additionally, only the District Court has the jurisdiction to ultimately confirm, modify or adopt any award from the arbitration proceedings. *See* NRS 38.234 and NRS 38.241-242. Direct would ultimately need to come before the District Court to confirm or adopt the award and determine the lienable amount of any mechanic's liens, if any, in accordance with the award. *See* NRS 108.239(9).⁶ Thus, the District Court's Order was correct as was its finding of jurisdiction and setting the evidentiary hearing.

Third, by proceeding further with this action against the liens and the bonds,

⁵ *See, e.g., Stonecreek-AAA, LLC v. Wells Fargo Bank N.A.*, No. 1:12-CV-23850, 2014 WL 12514900, at *3 (S.D. Fla. May 13, 2014) ("It would send a dangerous message to attorneys and parties if I were to allow a party to use fabricated evidence as the basis of its complaint, strike the fabricated evidence and then allow the case to proceed. Such an abuse of the judicial process, and defilement of the judicial temple that is the court, will not be tolerated. Therefore, the appropriate and only sanction – one that will deter similar conduct in the future – is outright dismissal with prejudice of this case.").

⁶ *See* NRS 108.239(9)(b).

Direct waived any argument that only the Arbitrator can address the relief required to remedy Direct's fraud upon the District Court and discovery abuses. This Court has recognized the litigation-conduct waiver as a basis for a court to determine if the parties are bound by an agreement to arbitrate. *See Principal Invs. Inc. v. Harrison*, 366 P.3d 688, 696 (2016) (upholding the trial court's finding that a party had waived its right to arbitrate by proceeding with litigation in justice court). While the parties originally agreed Direct could commence the Lawsuit to preserve certain lien and rights against the bonds, Direct's subsequent filings and recordings of a knowingly-fraudulent lien served as a litigation conduct waiver – particularly when viewed in conjunction with the fabrication of evidence and discovery misconduct Direct has perpetrated in the arbitration proceedings.

Finally, Direct contends that the District Court's finding that it has jurisdiction in this matter creates a res judicata effect with regard to the Arbitrator's rulings. This is utter nonsense. "The general rule of issue preclusion is that if an issue of fact or law was actually litigated and determined by a valid and final judgment, the determination is conclusive in a subsequent action between the parties." *Exec. Mgmt. v. Ticor Title Ins. Co.*, 114 Nev. 823, 835, 963 P.2d 465, 473 (1998). In this matter, the Arbitrator failed to act and deferred any final ruling on the alteration of evidence and the discovery abuses. Thus, his rulings could not be considered "final." Moreover, the Arbitrator has no ability to issue a final judgment. Any award from the arbitrator

would be subject to confirmation, modification or being vacated under NRS Chapter 38 before the District Court. Accordingly, Direct's argument only further confirms the legitimacy of the District Court's Order.

III. CONCLUSION

The law should never countenance a party's attempt to utilize fabricated evidence by allowing that party to proceed once the fabricated evidence has been uncovered. Direct's alteration of evidence renders Century's ability to obtain a fair hearing where the evidence presented can be trusted an absolute impossibility. Given the impact of Direct's conduct on both the arbitration and the Lawsuit and the Arbitrator's inability to act, the District Court rightfully concluded that an evidentiary hearing before the District Court is mandated. Direct is desperately seeking to avoid the District Court shining light on its alteration of evidence and discovery abuses and issuing an appropriate remedy. Due process, equity and justice dictate that the Court remedy the significant prejudice caused directly by Direct's alteration of evidence and discovery abuses *prior* to the parties proceeding with any ultimate hearing on the merits of the construction case. Direct's Motions to Stay should be denied.

DATED this 5th day of November, 2020.

SANTORO WHITMIRE

/s/ Oliver J. Pancheri

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Santoro Whitmire, and pursuant to NRAP 25(b) and NEFR 9(d), that on this 5th day of November, 2020, I electronically filed the foregoing **OPPOSITION TO EMERGENCY MOTION UNDER NRAP 27(e) TO STAY PROCEEDINGS UNTIL A RESOLUTION OF THE WRIT OF MANDAMUS HAS BEEN REACHED BY NOVEMBER 6, 2020** with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Courts E-Filing system (Eflex), Participants in the case who are registered with Eflex as users will be served by the Eflex system. A true and correct copy was also deposited for mailing in the U.S. Mail, postage prepaid and address to the following:

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