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CLERK OF THE COURT

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May 03 2011 12:51 p.m.
Tracie K. Lindeman

NOTC
PATRICK J. SHEEHAN, ESQ.
Nevada Bar No. 003812
DANIEL S. CEREGHINO, ESQ.
Nevada Bar No. 011534
JONES VARGAS
3773 Howard Hughes Parkway
Las Vegas, Nevada 89169
Telephone: (702) 862-3300
Attorney for Peek Construction Company

DISTRICT COURT

CLARK COUNTY, NEVADA

PRIME CONTRACTING, INC., Plaintiff, vs. PEEK CONSTRUCTION CO., a Nevada corporation; and DOES I through X, inclusive,, Defendants.	Case No.: A-11-635174-C Dept. No.: XXXI **NOTICE OF APPEAL**

Notice is hereby given that Defendant PEEK CONSTRUCTION CO. ("Peek") appeals to the Supreme Court of Nevada from the Order and Decision of the Eighth Judicial District Court of the State of Nevada in and for the County of Clark entered on March 31, 2011 ordering Peek pursuant to NRS 338.400 *et seq.* to pay plaintiff Prime Contracting Inc. certain monies.

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JONES VARGAS
3773 Howard Hughes Parkway - Third Floor South
Las Vegas, Nevada 89169
Tel: (702) 862-3300 Fax: (702) 737-7705

Docket 58263 Document 2011-13046

DATED this 28 day of April, 2011.

JONES VARGAS

By: 

PATRICK J. SHEEHAN, ESQ.
Nevada Bar No. 003812
DANIEL S. CEREGHINO, ESQ.
Nevada Bar No. 011534
3773 Howard Hughes Parkway
Las Vegas, Nevada 89169
Telephone: (702) 862-3300
Attorney for Peek Construction Company

By: */s/ Steven Mack*

Steven Mack, Esq.
Nevada Bar # 4000
General Counsel
Peek Construction Co.
2606 E. La Madre Way
North Las Vegas, NV 89081

Attorney for Appellant Peek Construction Co

JONES VARGAS
3773 Howard Hughes Parkway - Third Floor South
Las Vegas, Nevada 89169
Tel: (702) 862-3300 Fax: (702) 737-7705

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing Notice of Appeal has been served via U.S. Mail this 25 day of April, 2011, to the following:

Shan Davis, Esq.
100 N. City Parkway
Suite 1560
Las Vegas, NV 89106
Attorney for Plaintiff

Evelyn M. Pastor

Evelyn M. Pastor, an Employee of Jones Vargas

JONES VARGAS
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Las Vegas, Nevada 89169
Tel: (702) 862-3300 Fax: (702) 737-7705

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CLERK OF THE COURT

ASTA
PATRICK J. SHEEHAN, ESQ.
Nevada Bar No. 003812
DANIEL S. CEREGHINO, ESQ.
Nevada Bar No. 011534
JONES VARGAS
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Las Vegas, Nevada 89169
Telephone: (702) 862-3300
Attorney for Appellant Peek Construction Company

DISTRICT COURT

CLARK COUNTY, NEVADA

PRIME CONTRACTING, INC., Plaintiff, vs. PEEK CONSTRUCTION CO., a Nevada corporation; and DOES I through X, inclusive,, Defendants.	Case No.: A-11-635174-C Dept. No.: XXXI

CASE APPEAL STATEMENT

1. Name of appellant filing this case appeal statement. PEEK CONSTRUCTION CO. hereby submits this Case Appeal Statement.

2. Identify the judge issuing the decision, judgment, or order appealed from. The Honorable District Judge Joanna S. Kishner.

3. Identify all parties to the proceedings in the district court. PRIME CONTRACTING, INC. was the applicant in the original proceedings in the district court. PEEK CONSTRUCTION CO. was the defending party in the original proceedings in the district court and is the Appellant.

4. Identify all parties involved in this appeal. PEEK CONSTRUCTION CO. is the Appellant. PRIME CONTRACTING, INC. is the Respondent.

///

///

JONES VARGAS
100 West Liberty Street - Twelfth Floor
PO Box 281
Reno, Nevada 89504-0281
Tel: (775) 786-5000 Fax: (775) 786-1177

5. Set forth the name, law firm, address, and telephone number of all counsel on appeal and identify the party or parties whom they represent.

Patrick J. Sheehan, Esq.
Nevada Bar # 3412
Daniel S. Cereghino, Esq.
Nevada Bar # 11534
JONES VARGAS
3773 Howard Hughes Parkway
Third Floor South
Las Vegas, NV 89169
Telephone: (702) 862-3000

Steven Mack, Esq.
Nevada Bar # 4000
General Counsel
Peek Construction Co.
2606 E. La Madre Way
North Las Vegas, NV 89081

Attorneys for Appellant PEEK CONSTRUCTION CO.

Shan Davis, Esq.
Nevada Bar # 9323
DUANE MORRIS LLP
100 North City Parkway
Suite 1560
Las Vegas, Nevada 89106
Telephone: (702) 868-2607

Attorneys for Respondent PRIME CONTRACTING, INC.

6. All attorneys are licensed to practice in the State of Nevada.

7. Appellant was represented by retained counsel in district court.

8. Appellant is represented by retained counsel on appeal.

9. Appellant was not granted leave to proceed in forma pauperis.

10. Indicate the date the proceedings commenced in the district court. Prime Contracting, Inc. filed its Application for Order to Show Cause Pursuant to NRS 338.635 in district court on February 10, 2011

///

JONES VARGAS
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Tel: (775) 786-5000 Fax: (775) 786-1177

11. Description of the nature of the action and result in district court. This action involves Prime Contracting's application under NRS 338 for a determination as to the justification of Peek Construction's withholding of certain monies. Prime Contracting applied for an Order to Show Cause. Peek Construction appeared at the noticed date and time. The district court granted Prime Contracting's requested relief with a set-off.

12. This case has not been the subject of a previous appeal.

13. This case does not involve child custody or visitation.

14. The appeal has the potential of settlement.

DATED this 28 day of April, 2011.

JONES VARGAS

By: _____
PATRICK J. SHEEHAN, ESQ.
Nevada Bar No. 003812
DANIEL S. CEREGHINO, ESQ.
Nevada Bar No. 011534
JONES VARGAS
3773 Howard Hughes Parkway
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By: */s/ Steven Mack*
Steven Mack, Esq.
Nevada Bar # 4000
General Counsel
Peek Construction Co.
2606 E. La Madre Way
North Las Vegas, NV 89081

Attorney for Appellant Peek Construction Co.

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Tel: (775) 786-5000 Fax: (775) 786-1177

CERTIFICATE OF SERVICE

I certify that I am an employee of Jones Vargas, and that on this date, pursuant to NRAP 5 (b), I am serving a true copy of the attached CASE APPEAL STATEMENT on the party(s) set forth bellow in the U. S. Mail adressed as follows:

Shan Davis, Esq.
Nevada Bar # 9323
DUANE MORRIS LLP
100 North City Parkway
Suite 1560
Las Vegas, Nevada 89106
Telephone: (702) 868-2607

Attorneys for Respondent Prime Contracting, Inc.

DATED this 28 day of April, 2011.

An Employee of Jones Vargas

JONES VARGAS
100 West Liberty Street - Twelfth Floor
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CLERK OF THE COURT

MOT
PATRICK J. SHEEHAN, ESQ.
Nevada Bar No. 003812
DANIEL S. CEREGHINO, ESQ.
Nevada Bar No. 011534
JONES VARGAS
3773 Howard Hughes Parkway
Las Vegas, Nevada 89169
Telephone: (702) 862-3300
Attorney for Peek Construction Company

DISTRICT COURT

CLARK COUNTY, NEVADA

PRIME CONTRACTING, INC.,

Plaintiff,

vs.

PEEK CONSTRUCTION CO., a Nevada corporation; and DOES I through X, inclusive.,

Defendants.

Case No.: A-11-635174-C
Dept. No.: XXXI

MOTION TO STAY PENDING APPEAL

Hearing Date:
Hearing Time:

COMES NOW Defendant PEEK CONSTRUCTION CO. ("Peek"), by and through its counsel of record, the law firm of Jones Vargas, and hereby files this Motion to Stay Pending Appeal. This Motion is made and based upon the following Memorandum of Points and Authorities and any oral arguments of counsel made at the hearing of this matter.

DATED this 28 day of April, 2011.

JONES VARGAS

By: _____
PATRICK J. SHEEHAN, ESQ.
Nevada Bar No. 003812
DANIEL S. CEREGHINO, ESQ.
Nevada Bar No. 011534
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Las Vegas, Nevada 89169
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NOTICE OF MOTION

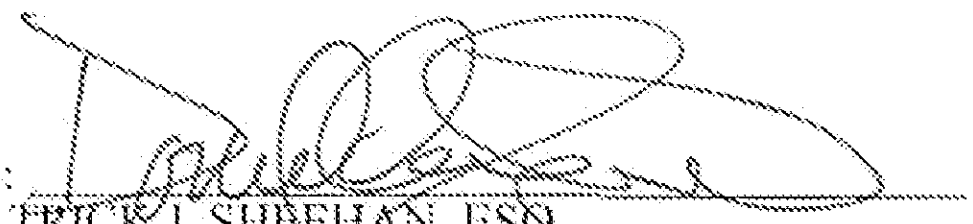
TO: ALL PARTIES; and

TO: THEIR ATTORNEYS OF RECORD;

PLEASE TAKE NOTICE that the undersigned will bring the foregoing **MOTION FOR STAY PENDING APPEAL** on for hearing on the 3 day of June, 2011, at the hour of 9 a.m. of said day in Department XXXI of the above-entitled Court, or as soon thereafter as counsel may be heard.

DATED this 4th day of April, 2011.

JONES VARGAS

By: 
PATRICK J. SHIBEHAN, ESQ.
Nevada Bar No. 003812
DANIEL S. CEREGHINO, ESQ.
Nevada Bar No. 011534
3773 Howard Hughes Parkway
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Telephone: (702) 862-3300
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MEMORANDUM OF POINTS AND AUTHORITIES

An appellant is entitled to a stay if it posts a supersedeas bond. NRCP 62(d) ("When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay …"). So long as it posts a bond in accordance with NRCP 62(d), the appellant is entitled to a stay as a matter of right. *Am. Mfrs. Mut. Ins. Co. v. Am. Broadcasting-paramount Theatres, Inc.*, 87 S.Ct. 1, 3 (1966).[1] The stay takes effect on the filing of the supersedeas bond.

In this case, Peek is willing to immediately post a supersedeas bond in the amount identified in the Order ($49,412.48) plus $500.00, or whatever amount this Court deems appropriate, for costs. *See* NRAP 7(b).

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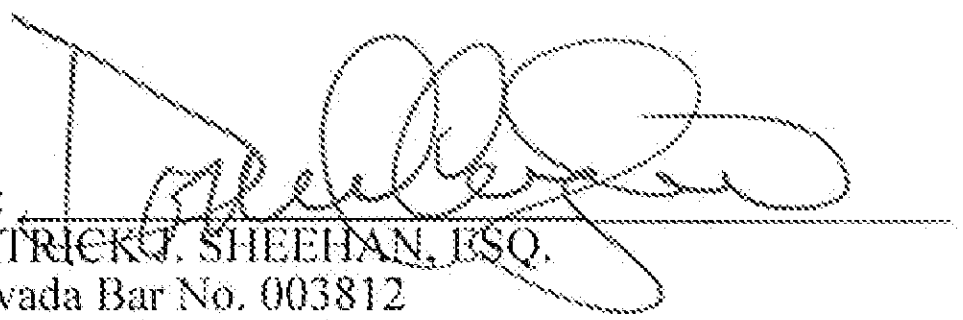
[1] "[The Nevada Supreme Court has] previously recognized that federal decisions involving the Federal Rules of Civil Procedure provide persuasive authority when this court examines its rules." *Nelson v. Heer*, 121 Nev. 832, 834, 122 P.3d 1252, 1253 (2005).

CONCLUSION

Based on the foregoing, Peek Construction respectfully requests this Court approve its filing of a supersedeas bond and grant this Motion for Stay Pending Appeal.

DATED this 5th day of April, 2011.

JONES VARGAS

By: 

PATRICK J. SHEEHAN, ESQ.
Nevada Bar No. 003812
DANIEL S. CEREGHINO, ESQ.
Nevada Bar No. 011534
3773 Howard Hughes Parkway
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DEPARTMENT 31

CASE SUMMARY

CASE NO. A-11-635174-C

Prime Contracting Inc, Plaintiff(s)	§	Location:	**Department 31**
vs.	§	Judicial Officer:	**Kishner, Joanna**
Peek Construction Company, Defendant(s)	§	Filed on:	**02/10/2011**
	§	Conversion Case Number:	**A635174**
	§		

CASE INFORMATION

Case Type: **Other Civil Filing**
Sub Type: **Other Civil Matters**

Case Flags: **Appealed to Supreme Court**

DATE — CASE ASSIGNMENT

Current Case Assignment

Case Number	A-11-635174-C
Court	Department 31
Date Assigned	02/10/2011
Judicial Officer	Kishner, Joanna

PARTY INFORMATION

		Lead Attorneys
Plaintiff	**Prime Contracting Inc**	**Anderson, Dominica C., ESQ** *Retained* 7028682600(W)
Defendant	**Peek Construction Company**	**Sheehan, Patrick John** *Retained* 7027342220(W)

DATE	EVENTS & ORDERS OF THE COURT	INDEX
02/10/2011	Application Filed By: Plaintiff Prime Contracting Inc *Prime Contracting, Inc.'s Application and Affidavit for Order to Show Cause Pursuant to NRS 338.635*	
02/10/2011	Case Opened	
02/16/2011	Supplement Filed by: Plaintiff Prime Contracting Inc *Supplement to Prime Contracting, Inc.'s Application and Affidavit for Order to Show Cause Pursuant to NRS 338.635*	
02/24/2011	Order to Show Cause Filed by: Plaintiff Prime Contracting Inc *Order Directing Peek Construction Company to Appear and Show Cuase Purusant to NRS 338.635*	
02/25/2011	Certificate of Service Filed by: Plaintiff Prime Contracting Inc *Certificate of Service*	
02/28/2011	Notice of Entry of Order Filed By: Defendant Peek Construction Company *Notice of Entry of Order*	

CASE SUMMARY

CASE NO. A-11-635174-C

03/03/2011	Supplement Filed by: Plaintiff Prime Contracting Inc *Second Supplement to Prime Contracting, Inc.'s Application and Affidavit for Order to Show Cause Pursuant to NRS 338.635*
03/03/2011	Response Filed by: Defendant Peek Construction Company *Defendant Peek Construction Co.'s Response to Prime Contracting's Application for Order to Show Cause Pursuant to NRS 338.635*
03/04/2011	Errata Filed By: Defendant Peek Construction Company *Erratum/Addendum to Defendant Peek Construction Co.'s Response to Prime Contracting's Application for Order to Show Cause Pursuant to NRS 338.635.*
03/04/2011	Reply Filed by: Plaintiff Prime Contracting Inc *Prime Contracting, Inc.'s Reply to Peek Construction Co.'s Response to Application and Affidavit for Order to Show Cause Pursuant to NRS 338.635*
03/07/2011	Initial Appearance Fee Disclosure Filed By: Plaintiff Prime Contracting Inc *Initial Appearance Fee Disclosure*
03/07/2011	**Show Cause Hearing** (9:00 AM) (Judicial Officer: Kishner, Joanna) **03/07/2011, 03/09/2011** Events: 02/24/2011 Order to Show Cause *Show Cause Hearing Pursuant to NRS 338.635*
03/07/2011	Errata Filed By: Plaintiff Prime Contracting Inc *Errata to Prime Contracting, Inc.'s Application and Affidavit for Order to Show Cause Pursuant to NRS 338.635*
03/09/2011	Initial Appearance Fee Disclosure Filed By: Defendant Peek Construction Company *Initial Apparance Fee Disclosure*
03/09/2011	Association of Counsel Filed By: Defendant Peek Construction Company *Association of Counsel*
03/16/2011	**Decision** (3:00 AM) (Judicial Officer: Kishner, Joanna) **03/16/2011, 03/23/2011** *Show Cause Hearing*
03/31/2011	Order Filed By: Defendant Peek Construction Company *Decision And Order*
04/13/2011	**Motion for Attorney Fees** (3:00 AM) (Judicial Officer: Kishner, Joanna) *Plaintiff's Motion for Attorney Fees*
04/20/2011	Motion

	Filed By: Plaintiff Prime Contracting Inc *Prime Grading Contracting, Inc.'s Motion to Correct Mistake in Decision and Order Pursuant to NRCP 60(b)*
04/20/2011	Memorandum Filed By: Plaintiff Prime Contracting Inc *Prime Grading Contracting, Inc.'s Verified Memorandum of Costs and Interest Pursuant to NRS 18.110*
04/21/2011	Certificate of Service Filed by: Plaintiff Prime Contracting Inc *Certificate of Service*
04/28/2011	Opposition to Motion Filed By: Defendant Peek Construction Company *Defendant Peek Construction Co.'s Opposition to Prime Contracting's Motion to Correct Mistake in Decision and Order pursuant to NRCP 60(b)*
04/28/2011	Opposition Filed By: Defendant Peek Construction Company *Defendant Peek Construction Co.'s Opposition to Prime Contracting's Memorandum of Costs*
04/28/2011	Motion to Stay Filed By: Defendant Peek Construction Company *Motion to Stay Pending Appeal*
04/28/2011	Notice of Appeal Filed By: Defendant Peek Construction Company *Notice of Appeal*
04/28/2011	Case Appeal Statement Filed By: Defendant Peek Construction Company *Case Appeal Statement*
05/02/2011	Certificate of Mailing Filed By: Plaintiff Prime Contracting Inc *Certificate of Mailing of Motion to Stay Pending Appeal*
05/23/2011	**Motion** (9:00 AM) (Judicial Officer: Kishner, Joanna) Events: 04/20/2011 Motion *Prime Grading Contracting, Inc.'s Motion to Correct Mistake in Decision and Order Pursuant to NRCP 60(b)*
06/03/2011	**Motion to Stay** (9:00 AM) (Judicial Officer: Kishner, Joanna) Events: 04/28/2011 Motion to Stay *Motion to Stay Pending Appeal*

DATE	FINANCIAL INFORMATION	
	Defendant Peek Construction Company	
	Total Charges	247.00
	Total Payments and Credits	247.00
	Balance Due as of 5/2/2011	**0.00**
	Plaintiff Prime Contracting Inc	
	Total Charges	270.00

CASE SUMMARY

CASE NO. A-11-635174-C

Total Payments and Credits	270.00
Balance Due as of 5/2/2011	**0.00**

CIVIL COVER SHEET

Clark County, Nevada

Case No. _____
(Assigned by Clerk's Office)

I. Party Information

Plaintiff(s) (name/address/phone): PRIME CONTRACTING, INC. Attorney (name/address/phone): Shan Davis 100 N. City Parkway, Suite 1560 Las Vegas, NV 89106; (702) 868-2600	Defendant(s) (name/address/phone): PEEK CONSTRUCTION CO. Attorney (name/address/phone): Unknown

II. Nature of Controversy (Please check applicable bold category and applicable subcategory, if appropriate)

☐ **Arbitration Requested**

Civil Cases

Real Property

☐ **Landlord/Tenant**
- ☐ Unlawful Detainer

☐ **Title to Property**
- ☐ Foreclosure
- ☐ Liens
- ☐ Quiet Title
- ☐ Specific Performance

☐ **Condemnation/Eminent Domain**

☐ **Other Real Property**
- ☐ Partition
- ☐ Planning/Zoning

Torts

Negligence

☐ **Negligence – Auto**

☐ **Negligence – Medical/Dental**

☐ **Negligence – Premises Liability** (Slip/Fall)

☐ **Negligence – Other**

☐ **Product Liability**
- ☐ Product Liability/Motor Vehicle
- ☐ Other Torts/Product Liability

☐ **Intentional Misconduct**
- ☐ Torts/Defamation (Libel/Slander)
- ☐ Interfere with Contract Rights

☐ **Employment Torts** (Wrongful termination)

☐ **Other Torts**
- ☐ Anti-trust
- ☐ Fraud/Misrepresentation
- ☐ Insurance
- ☐ Legal Tort
- ☐ Unfair Competition

Probate

Estimated Estate Value: _____

☐ **Summary Administration**

☐ **General Administration**

☐ **Special Administration**

☐ **Set Aside Estates**

☐ **Trust/Conservatorships**
- ☐ Individual Trustee
- ☐ Corporate Trustee

☐ **Other Probate**

Other Civil Filing Types

☐ **Construction Defect**
- ☐ Chapter 40
- ☐ General

☐ **Breach of Contract**
- ☐ Building & Construction
- ☐ Insurance Carrier
- ☐ Commercial Instrument
- ☐ Other Contracts/Acct/Judgment
- ☐ Collection of Actions
- ☐ Employment Contract
- ☐ Guarantee
- ☐ Sale Contract
- ☐ Uniform Commercial Code

☐ **Civil Petition for Judicial Review**
- ☐ Foreclosure Mediation
- ☐ Other Administrative Law
- ☐ Department of Motor Vehicles
- ☐ Worker's Compensation Appeal

☐ **Appeal from Lower Court** *(also check applicable civil case box)*
- ☐ Transfer from Justice Court
- ☐ Justice Court Civil Appeal

☐ **Civil Writ**
- ☐ Other Special Proceeding

☒ **Other Civil Filing**
- ☐ Compromise of Minor's Claim
- ☐ Conversion of Property
- ☐ Damage to Property
- ☐ Employment Security
- ☐ Enforcement of Judgment
- ☐ Foreign Judgment – Civil
- ☐ Other Personal Property
- ☐ Recovery of Property
- ☐ Stockholder Suit
- ☒ Other Civil Matters

III. Business Court Requested (Please check applicable category; *for Clark or Washoe Counties only.*)

☐ NRS Chapters 78-88
☐ Commodities (NRS 90)
☐ Securities (NRS 90)
☐ Investments (NRS 104 Art. 8)
☐ Deceptive Trade Practices (NRS 598)
☐ Trademarks (NRS 600A)
☐ Enhanced Case Mgmt/Business
☐ Other Business Court Matters

2/10/11
Date

Signature of initiating party or representative

See other side for family-related case filings.

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DISTRICT COURT

CLARK COUNTY, NEVADA

PRIME CONTRACTING, INC., Plaintiff, vs. PEEK CONSTRUCTION CO., a Nevada Corporation; and DOES I through X, inclusive, Defendant	CASE NO.: A-11-635174 DEPT. XXXI **DECISION AND ORDER**

BACKGROUND FACTS

On February 10, 2011, Plaintiff Prime Contracting, Inc. ("Prime") filed an Application and Affidavit for an Order to Show Cause pursuant to NRS 338.635 ("Application"). The hearing on the matter was originally heard on March 7, 2011, but was continued for further argument to March 9, 2011. Present at both hearings were Shan Davis, Esq., attorney for Prime Contracting, Inc.; Daniel S. Cereghino, Esq., attorney for Peek Construction Company ("Peek"); and Steve Mack, General Counsel for Peek Construction Co.

This action involves the purchase of aggregate materials for several public works construction projects in Clark County from approximately June of 2010 until December of 2010. During the applicable time period, according to the Complaint, Peek purchased a total of $49,412.48, worth of aggregate materials from Prime divided among various Public Works Projects as follows:

Name of Project	Amount Owed
Craig and Rainbow:	$300.00
McCarran Airport:	$4,870.31

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Owens Park:	$1,310.31
Paradise:	$2,161.60
Paradise Sierra Vista:	$5,178.07
Paradise Twain	$1,411.16
Paradise/Spring Mountain:	$2,861.36
Park/Bruce	$123.10
Tropical Breeze	$11,715.14
Tropical/Bruce:	$7,022.23
Tropicana/Topaz:	$6,667.26
Tropicana/Boulder Highway:	$456.79
Tropicana/Endover:	$966.17
Subtotal	$46,832.05
Finance Charges:	$1,987.68
Yard:	$592.85
Total	$49,412.48

(Application, Exhibit A and Exhibit G.) Prime has alleged and Peek has not disputed that it has not paid the full amount of the materials purchased for the various projects. The amount that has been paid and the amount that should be paid, however, is in dispute. Whether the aggregate was sold as part of one master contract or individual contracts is also in dispute.

Prime asserts that after it did not receive payment from Peek, it sent a series of demand letters starting in October, 2010, and then retained counsel who also sent a demand letter. (Application, Exhibits C, D, E and G, thereto.) Prime also contends that Peek originally agreed to pay the outstanding sum and then later did not pay it. Peek disputed the amount owed and asserted that "Type 1B Material" which had been provided by Prime had failed to pass a Nevada Department of Transportation ("NDOT") test for the Tropicana/Topaz Project and as such had to be replaced at a

cost of $18,236.00, in labor, equipment and materials (Application, Exhibit H). Peek also presented at the hearing a copy of a canceled check in the amount of $5,197.97, which it asserted was partial payment for the amounts owed. (Court Exhibit 6A.)

DISCUSSION

In the present case, the dispute arose in the construction of Public Works projects. In Nevada, a "Public Work" has been defined as "any project for the new construction, repair or reconstruction of: (a) A project financed in whole or in part from public money for: (1) Public buildings; (2) Jails and prisons; (3) Public roads; (4) Public highways; (5) Public streets and alleys; (6) Public utilities; (7) Publicly owned water mains and sewers; (8) Public parks and playgrounds; (9) Public convention facilities which are financed at least in part with public money; and (10) All other publicly owned works and property. (b) A building for the Nevada System of Higher Education of which 25 percent or more of the costs of the building as a whole are paid from money appropriated by this State or from federal money." NRS 338.010(15).

Prime asserts that it was an aggregate supplier. A "supplier" on a Public Works project is defined as "a person who provides materials, equipment, or supplies for a construction project." NRS 338.010(20).

Pursuant to NRS 338.635, Prime, as a subcontractor or supplier, can seek a court judgment that the amount withheld was unjustified or excessive. *Id.* Additional relief was sought under NRS 338.640, which provides for the award of reasonable attorney's fees to the prevailing party, when an action is sought pursuant to NRS 338.635.

A. Due Process

Peek requested that the Court defer ruling so that it could engage in full litigation discovery. NRS 338.635, however, sets forth the specific procedure for the Court to follow. Although there was no case cited by either party directly interpreting the statute's application, the Court's review of the legislative history, consistent with the language of the statute and argument of counsel, demonstrates that the purpose of the statute was to allow for expedited proceedings in these types of cases. Given the nature of the statute and its purpose as well as the opportunity for both parties to have a full hearing on the issue, the Court does not find that Peek's due process rights are impinged

and the Court DENIES Defendant's request for a stay or delay of its ruling to allow three months of discovery, since such procedure is not set forth in the statute.

B. Laches

Peek also asked the Court to find that Prime's failure to bring the action closer to the time the payment was owed has caused Peek prejudice and thus laches would apply. The doctrine of laches in Nevada requires the following: "(1) there was an inexcusable delay in seeking the petition; (2) an implied waiver arose from petitioner's knowing acquiescence in existing conditions; and (3) there were circumstances causing prejudice to the respondent." *Buckholt v. Second Judicial District Court, In and For Washoe County*, 94 Nev. 631, 633, 584 P.2d 672, 674 (1978) (rev'd on other grounds).

In the present matter, the invoices from Prime begin in July of 2010 and continue until October of 2010. The written demands for payment commenced in October, 2010, and at least one references verbal communications between the parties regarding the outstanding balance. Peek provided partial payment via check on or about October 29, 2010. There were subsequent demands for payment during the November through January time period. The Application was filed on February 10, 2011. Given the facts of this case, the Court does not find that the elements of laches are met. The short time period does not evidence inexcusable delay given the communications and partial payment between the parties. Further, given the statements in the correspondence, there is no evidence of an implied waiver. Lastly, it does not appear as though prejudice was caused to Peek in this matter, as Peek was well aware that the Prime was seeking payment for the materials that were purchased and Peek withheld payment. Given these facts, the Court FINDS laches does NOT apply to the case at bar.

C. Contractor's License

Peek next argued that NRS 624.320 prevents Prime from prevailing in the instant matter because Prime's contractor's license was revoked. The facts demonstrate, however, that Prime was not acting in the capacity of a contractor for purposes of the Tropicana/Topaz Project but instead was acting as a supplier. Although Prime held a contractor's license, its only role with respect to the contract(s) at issue was to provide aggregate. As a supplier of aggregate, Prime did not perform

actual work on the job site, was not contracted to perform the duties of a contractor and the very statement of withholding lists Prime as a supplier. Other exhibits provided also list Prime as a supplier of aggregate. Based on the facts, Prime was a material supplier rather than a contractor as defined by NRS 624.020(1). As such NRS 624.020(3) and NRS 338.635 are the controlling statutes and Prime's claims should be addressed on their merits.

D. The Contract(s) Between the Parties

In order to determine whether the amount withheld was proper, or the withholding of any amount is proper, the Court first addressed whether each project listed by Prime constituted its own unique contract or whether the total supply of aggregate provided by Prime to Peek during the time frame was a single agreement between the parties. Several factors demonstrate that each project was its own contract. Specifically, the definition of a Public Work project indicates that each project is distinct. Further, the invoice and withholding letter set forth a project number and job number specific to the Tropicana/Topaz Project, NDOT 3392. Additionally, the Affidavit of Steven Mack, attached as Exhibit 1 to the Erratum/Addendum to Defendant Peek Construction Co.'s Response ("Erratum/Addendum"), sets forth that "prior to ordering any product from Plaintiff for the Project known as NDOT 3392 located at Tropicana and Topaz..." (*See* Erratum/Addendum, Exhibit 1, paragraphs 2, 3 and 4.) Importantly, it is undisputed that Prime was only asked to provide aggregate to the Tropicana/Topaz Project after the aggregate supplied by Desert failed the NDOT test. As Prime was not originally contracted to provide aggregate to the Tropicana/Topaz Project and given the affidavit of Peek, the aggregate supplied cannot be part of a global contract entered into by the parties several months before, as contended by Peek. Accordingly, the Court FINDS that based on the evidence provided, Prime provided aggregate to Peek for use on the Tropicana/Topaz Project pursuant to a distinct contract for that project.

E. The Tropicana/Topaz Project

Given Prime supplied aggregate to the Tropicana/Topaz Project pursuant to a distinct contract in accordance with the statute, any amount withheld by Peek must be based on the contract price for aggregate for that specific project and cannot be withheld from sums owed on other projects. Based on the evidence, a total of $6,667.26, was billed by Prime on the project. Although

it is disputed what amount of aggregate failed the NDOT test, there was no other evidence that the amount of aggregate provided by Prime was more than that which was billed. Therefore, as each project constituted an independent contract, the Court FINDS the greatest amount which could have been withheld by Peek as a withholding for purported non-compliant aggregate is $6,667.26. Anything more than that amount does not comply with NRS 338.600[1] and would be improper.

F. Use of Specified Materials

Prime contends that Peek had no foundation to withhold any amount since Prime provided the type of aggregate requested, Type II. Prime set forth that it does not sell Type 1B aggregate and thus Peek could not have contracted for Type 1B. Peek responded that if the plasticity content of the aggregate in Type II is low enough, the County will allow Type II in place of Type 1B and hence they are interchangeable. Here, Peek provided evidence that NDOT approved "Prime Contracting Inc. Recycled Concrete" via a fax dated November 2, 2010. (*See* Exhibit 7 to Defendant Peek Construction Co.'s Response to Prime Contracting's Application for Order to Show Cause Pursuant to NRS 338.635 ("Response").) It further contends that the Type II that had been provided in August had a plasticity count that was too high and thus it failed. While aggregate provided by Prime at the Tropicana/Topaz Project failed the NDOT test, the evidence does not establish whether Peek ordered the wrong product or Prime provided the wrong product in August, since the approval was not obtained until November, 2010. Given the analysis set forth herein, this unresolved matter is not fatal to Prime's claims.

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[1] In its Application, Plaintiff asserted that Peek's notice of withholding was non-compliant with NRS 338.560(3)(b). The Court finds reliance on NRS 338.600 rather than NRS 338.560 to be applicable to the facts at hand. Pursuant to Exhibit A of the Supplement to Prime Contracting Inc.'s Application and Affidavit for Order to Show Cause Pursuant to NRS 338.635 ("Supplement"), Peek was a subcontractor on the project rather than a contractor (*see* Contract dated February 10, 2010 included in Exhibit A; *see also,* Erratum/Addendum at p. 5). Given Peek was a subcontractor, any withholding would be pursuant to NRS 338.600, rather than to NRS 338.560, since the former applies to subcontractors and the later to contractors. Since the language of the two provisions are very similar, however, the analysis of the requirements Peek was to undertake are correct and the differences in the sections do not affect what Peek was required to do as applied to the facts of this case.

The amount of aggregate provided that needed to be removed is also in dispute. Prime asserted that the cost of the tonnage of aggregate that failed the test equated to approximately $404.00. Peek contends that it cost them $18, 236.00, to remove and replace the aggregate and that the amount of aggregate was significantly more than contended by Prime. Exhibits that were attached to the pleadings and introduced in Court included Peek's back charge documentation of the tonnage of aggregate that was used to replace what it asserted failed, as well as the tonnage amount that had been provided by Desert, the first aggregate provider (Application, Exhibits H and M). The Court finds that the proper amount of tonnage of aggregate which is at issue would be similar to the amounts provided by the first and third aggregate providers, which is approximately 700 tons and thus the replacement cost based on Exhibit H would be $3,448.52.

Prime also contended that Peek was unable to withhold any amounts pursuant to statute, since it did not comply with the terms of that provision. NRS 338.600 allows a subcontractor to withhold from "a progress payment or retainage payment an amount sufficient to pay the expenses the subcontractor reasonably expects to incur..." NRS 338.600(1). That provision also requires that written notice must be given within 10 days of the amount withheld and a detailed explanation thereof provided. NRS 338.600(2) and (3). Here, the notice was not signed, and Peek failed to comply with other provisions of the statute based on the evidence. The Court finds that Peek's non-compliance with the statute precludes Peek from having the authority to withhold amounts from Prime's payment pursuant to the statute.[2] This determination is specific to the facts provided to the Court including, but not limited, to the fact that (a) the evidence did not establish that Prime agreed to provide either Type 1B or Type II with a plasticity index applicable to the project as of August, 2010; (b) the evidence did not show that prior to the demand letters being sent by Prime there was any written notice given to Prime that Peek was withholding any amounts on the Tropicana/Topaz Project due to failure of the aggregate provided; (c) the back charge form sets forth that it was for Type 1B material; and (d) and the other facts presented. Accordingly, in accordance with NRS

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[2] Nothing herein is intended to preclude Peek from pursuing any avenues it deems appropriate as the Court's ruling is limited to whether Peek properly withheld any sum pursuant to NRS 338.635(6)(a).

338.635, the Court finds that no amount should have been withheld by Peek.

G. Offset of Payments by Peek to Prime[3]

At the hearing, Peek introduced evidence of a payment to Prime in the amount of $5,197.97, which was provided to the Plaintiff via a check that was dated October 29, 2010, and drawn on an account at Nevada State Bank. (Court Exhibits 6A-6C.) The check was for the payment for work which was performed from July 2, 2010, to July 23, 2010, pursuant to the invoices listed. (Court Exhibit 6B.) Additionally, Peek provided an indication that the payment was deposited by Prime on November 3, 2010. (Court Exhibit 6A.) Since at no time during the hearing did counsel for Prime dispute that the check was either cashed or received, the Court will accept the undisputed nature of the payment made from Peek to Prime in the finality of its decision. Given the invoices attached to the check, the Court does not find that the payment applies to sums owing for the Tropicana/Topaz Project.

H. Award of Attorney's Fees

NRS 338.640(1), states "[t]he court or arbitrator shall award to a contractor, subcontractor or supplier who is the prevailing party in a civil action or an arbitration proceeding to recover an amount that was required to be paid to him or her pursuant to the provisions of NRS 338.400 to 338.645, inclusive, his or her reasonable costs and attorney's fees." NRS 338.640(1). The Court did not receive any response to Prime's request for fees and costs. The fees and costs submitted to the Court, however, do not indicate that they were provided to Peek. Thus, the Court will permit Peek until end of day on August 5, 2011, to provide any objections to the request for fees and costs. If no response is provided, the Court will rule based on the information provided on its April 6, 2011, Chambers Calendar.

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[3] Peek also provided argument that it had questions regarding Prime's billing practices. Such issue, however, was not before the Court, based on the evidence provided and, thus, is not set forth in this Order.

CONCLUSION

Based on the forgoing , the Court FINDS as follows: In accordance with NRS 338.400 to 338.645 inclusive, Peek's withholding of payment of $49,412.48, due to its contention that aggregate provided on the Tropicana/Topaz Project failed NDOT testing was not proper. Given Peek treated the series of contracts as a single contract for purposes of its withholding payment of the entire sum owed, the Court treats the entire amount as being pursuant to NRS 338.635 and ORDERS the amount of $49,412.48 less the $5,197.97 already tendered be paid to Plaintiff Prime. The Court further ORDERS, in accordance with NRS 338.400 through NRS 338.645, that the Court will rule on Prime's motion for fees and costs on its Chambers Calendar set for April 6, 2011.

Dated this 31st day of March, 2011.

JOANNA S. KISHNER
DISTRICT JUDGE

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Civil Filing	COURT MINUTES	March 07, 2011

A-11-635174-C Prime Contracting Inc, Plaintiff(s)
vs.
Peek Construction Company, Defendant(s)

March 07, 2011 **9:00 AM** **Show Cause Hearing**

HEARD BY: Kishner, Joanna **COURTROOM:** RJC Courtroom 12D

COURT CLERK: Shelly Landwehr

RECORDER:

REPORTER:

PARTIES PRESENT:

Cereghino, Daniel, ESQ	Attorney
Davis, Shan D.	Attorney

JOURNAL ENTRIES

- Steven Mack, general counsel for Deft., present.

Mr. Davis argued regarding back charge. Upon arguments by Mr. Mack' Mr. Davis objected to Mr. Mack making an argument as there was no opposition filed. Further, Mr. Davis advised there is no counsel of record for Deft., and no objection has been made. Mr. Davis requested a continuance if an objection was being made. Mr. Mack advised Pltf. served resident agent, knowing Deft. had general counsel. Mr. Mack further stated he had only one day to reply to this.

Colloquy regarding discovery. Colloquy regarding evidentiary hearing. Colloquy regarding summary judgment motion. COURT DIRECTED counsel to file motion to associate counsel and ORDERED matter CONTINUED.

03/09/11 01:00 PM SHOW CAUSE HEARING

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Civil Filing	COURT MINUTES	March 09, 2011

A-11-635174-C Prime Contracting Inc, Plaintiff(s)
vs.
Peek Construction Company, Defendant(s)

March 09, 2011 **1:00 PM** **Show Cause Hearing**

HEARD BY: Kishner, Joanna COURTROOM: RJC Courtroom 14D

COURT CLERK: Shelly Landwehr

RECORDER:

REPORTER: Robert Cangemi

PARTIES PRESENT:

Cereghino, Daniel, ESQ	Attorney
Davis, Shan D.	Attorney

JOURNAL ENTRIES

- Steven Mack, general counsel for Deft., present.

Colloquy regarding specific projects and back charges related to the Topaz project. Colloquy regarding the difference between Type-1B material and Type-II Aggregate base material. Mr. Cereghino stated their client is a supplier. Pltf. is a licensed contractor who had their license revoked and are precluded from seeking compensation for any work performed after the date their license was revoked.

Mr. Davis argued Deft's product failed and the are unable to determine, from the statement, if the expenses are justified with respect to the back charges. Further, documents submitted by Deft. are inadmissible. Mr. Mack argued regarding back charge and Type- II Aggregate which failed and resulted in delays to the project and
additional expenses. Colloquy regarding quantity of material and difference between the costs. Further, Mr. Mack argued Pltf. is supplying Type-II and if they knew this material would not meet the specifications, then we have misrepresentation and fraud issues. Colloquy regarding discovery. Exhibits presented. Colloquy regarding fees and costs. Mr. Mack stated the total cost for the removal and correction effort was $18,236.00.

Court stated it would consider all documents provided and ORDERED matter CONTINUED for DECISION.

03/16/11 09:00 AM DECISION (CHAMBER CALENDAR)

CLERK'S NOTE: Matter reported by Robert Cangemi.

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Civil Filing	COURT MINUTES	March 23, 2011

A-11-635174-C Prime Contracting Inc, Plaintiff(s)
vs.
Peek Construction Company, Defendant(s)

March 23, 2011 **3:00 AM** **Decision**

HEARD BY: Kishner, Joanna COURTROOM:

COURT CLERK: Shelly Landwehr

RECORDER:

REPORTER:

PARTIES
PRESENT:

JOURNAL ENTRIES

- Please see Decision and Order filed 3/31/11.

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Civil Filing	COURT MINUTES	April 13, 2011

A-11-635174-C Prime Contracting Inc, Plaintiff(s)
vs.
Peek Construction Company, Defendant(s)

April 13, 2011 **3:00 AM** **Motion for Attorney Fees**

HEARD BY: Kishner, Joanna COURTROOM:

COURT CLERK: Shelly Landwehr

RECORDER:

REPORTER:

PARTIES
PRESENT:

JOURNAL ENTRIES

- On March 9, 2011, arguments were held regarding Prime Contracting, Inc s Application and Affidavit for Order to Show Cause Pursuant to NRS 338.635. In accordance with statute, Plaintiff sought attorney fees in the amount of $1,995.00. Since it was unclear whether Peek Construction had an appropriate opportunity to respond, the Court noted in its Decision and Order as well as a follow up Minute Order that it deferred ruling on the fee request until April 12, 2011 to provide Peek an opportunity to respond to the fee request, if it wished. As of April 12, 2011, no Objections or other response has been provided to the Court and thus the Court GRANTS Plaintiff s request for fees in the amount of ONE THOUSAND, ONE HUNDRED AND NINETY FIVE DOLLARS ($1,195.00). If Prime Contracting, Inc. wishes to have the Court consider costs in this matter, Prime is to appropriately file a Memorandum of Costs and Disbursements with the Court.

EIGHTH JUDICIAL DISTRICT COURT CLERK'S OFFICE

NOTICE OF DEFICIENCY

ON APPEAL TO NEVADA SUPREME COURT

PATRICK J. SHEEHAN, ESQ.
3773 HOWARD HUGHES PKWY.
LAS VEGAS, NV 89169

DATE: May 2, 2011
CASE: A635174

RE CASE: PRIME CONTRACTING, INC. vs. PEEK CONSTRUCTION COMPANY

NOTICE OF APPEAL FILED: April 28, 2011

YOUR APPEAL HAS BEEN SENT TO THE SUPREME COURT.

PLEASE NOTE: DOCUMENTS **NOT** TRANSMITTED HAVE BEEN MARKED:

☒ $250 – Supreme Court Filing Fee
- If the $250 Supreme Court Filing Fee was not submitted along with the original Notice of Appeal, it must be mailed directly to the Supreme Court. The Supreme Court Filing Fee will not be forwarded by this office if submitted after the Notice of Appeal has been filed.

☐ $24 – District Court Filing Fee (Make Check Payable to the District Court)

☒ $500 – Cost Bond on Appeal (Make Check Payable to the District Court)
- NRAP 7: Bond For Costs On Appeal in Civil Cases

☐ Case Appeal Statement
- NRAP 3 (a)(1), Form 2

☐ Order

☒ Notice of Entry of Order

NEVADA RULES OF APPELLATE PROCEDURE 3 (a) (3) states:

"The district court clerk must file appellant's notice of appeal despite perceived deficiencies in the notice, including the failure to pay the district court or Supreme Court filing fee. **The district court clerk shall apprise appellant of the deficiencies in writing**, and shall transmit the notice of appeal to the Supreme Court in accordance with subdivision (e) of this Rule with a notation to the clerk of the Supreme Court setting forth the deficiencies. Despite any deficiencies in the notice of appeal, the clerk of the Supreme Court shall docket the appeal in accordance with Rule 12."

Please refer to Rule 3 for an explanation of any possible deficiencies.

Certification of Copy

State of Nevada
County of Clark } **SS:**

I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, does hereby certify that the foregoing is a true, full and correct copy of the hereinafter stated original document(s):

NOTICE OF APPEAL; CASE APPEAL STATEMENT; MOTION TO STAY PENDING APPEAL; DISTRICT COURT DOCKET ENTRIES; CIVIL COVER SHEET; DECISION AND ORDER; DISTRICT COURT MINUTES; NOTICE OF DEFICIENCY

PRIME CONTRACTING, INC.,

Plaintiff(s),

vs.

PEEK CONSTRUCTION COMPANY,

Defendant(s),

Case No: A635174
Dept No: XXXI

now on file and of record in this office.

IN WITNESS THEREOF, I have hereunto
Set my hand and Affixed the seal of the
Court at my office, Las Vegas, Nevada
This 2 day of May 2011.

Steven D. Grierson, Clerk of the Court

Heather Ungermann, Deputy Clerk