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4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA

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7 YWS ARCHITECTS, LLC dba YWS DESIGN
8 & ARCHITECTURE, a Nevada limited liability
9 company,

10 Plaintiff,

11 v.

12 ALON LAS VEGAS RESORT, LLC, a
13 Delaware limited liability company; ALON LAS
14 VEGAS LANDCO, LLC, a Delaware limited
15 liability company; TISHMAR, LLC, a Nevada
16 limited liability company;

17 Defendants.

18 ALON LAS VEGAS RESORT, LLC, a
19 Delaware limited liability company; ALON
20 LEISURE MANAGEMENT, LLC, a Delaware
21 limited liability company;

22 Counter-Claimants

23 v.

24 YWS ARCHITECTS, LLC dba YWS DESIGN
25 & ARCHITECTURE, a Nevada limited liability
26 company; TOM WUCHERER, an individual;
27 DOES 1 through 10; ROE CORPORATIONS 11
28 through 20;

Counter-Defendants.

Case No. 2:17-cv-01417-RFB-VCF

ORDER

Motion to Expunge Mechanic's Lien
(ECF No. 31)

Report and Recommendation
(ECF No. 83)

Motion to Certify Questions to
Nevada Supreme Court
(ECF No. 86)

Stipulation and Order to
Extend Time to File Reply
(ECF No. 94)

I. INTRODUCTION

Before the Court is Alon Las Vegas Resort, LLC and Alon Leisure Management LLC's (collectively, "Alon") Motion to Expunge YWS Architects, LLC's Mechanic's Lien ("Motion to Expunge"). ECF No. 31. United States Magistrate Judge Cam Ferenbach entered a Report and

1 Recommendation, which recommends denying the Motion to Expunge. ECF No. 83.

2 Also before the Court is Alon's subsequent Motion to Certify Questions to the Nevada
3 Supreme Court ("Motion to Certify Questions"). ECF No. 86. Alon and YWS Architects, LLC
4 ("YWS") filed a Stipulation and Order to Extend Time to File Reply in Support of Motion to
5 Certify Questions to the Nevada Supreme Court ("Stipulation"). ECF No. 94. The Court grants
6 the Stipulation *nunc pro tunc* and considers the remaining matters below.

7 8 **II. FACTUAL AND PROCEDURAL BACKGROUND**

9 After conducting a *de novo* review of the record in this matter, the Court adopts and
10 incorporates the Magistrate Judge's Factual Background for the purpose of this order.

11 The Court makes the additional factual findings. YWS recorded a mechanic's lien on
12 September 19, 2016. ECF No. 31-2. YWS released the lien on October 7, 2016. ECF No. 31-3.
13 After mediation between the parties failed, YWS recorded a second mechanic's lien on November
14 21, 2016 for the same work. ECF No. 31-4. C.

15 Alon moved to expunge the second lien under Nevada Revised Statute ("NRS") 108.2275
16 on October 12, 2017. ECF No. 31. YWS opposed the Motion to Expunge, and Alon filed a reply.
17 ECF Nos. 36, 47. The Magistrate Judge held an evidentiary hearing on the Motion to Expunge on
18 January 12, 2018. ECF No. 67; see also ECF No. 68 (Evidentiary Hearing Transcript). The parties
19 then filed supplemental briefing. ECF Nos. 64, 80, 82.

20 After the briefing was complete, the Magistrate Judge issued his Report and
21 Recommendation. ECF No. 83. Alon objected to the Report and Recommendation, and YWS
22 filed a response. ECF Nos. 85, 91. Alon then moved to certify questions to the Nevada Supreme
23 Court. ECF No. 86. YWS opposed the Motion to Certify, and Alon replied. ECF Nos. 92, 95.

24 25 **III. REPORT AND RECOMMENDATION**

26 The Court first turns to the Magistrate Judge's Report and Recommendation and Alon
27 Group's Motion to Expunge. A district court "may accept, reject, or modify, in whole or in part,
28 the findings or recommendations made by the magistrate." 28 U.S.C. § 636(b)(1). A party may

1 file specific written objections to the findings and recommendations of a magistrate judge. 28
2 U.S.C. § 636(b)(1); LR IB 3-2(a). When written objections have been filed, the district court is
3 required to “make a de novo determination of those portions of the report or specified proposed
4 findings or recommendations to which objection is made.” 28 U.S.C. § 636(b)(1); see also LR IB
5 3-2(b). Where a party fails to object, however, a district court is not required to conduct “any
6 review,” *de novo* or otherwise, of the report and recommendations of a magistrate judge. Thomas
7 v. Arn, 474 U.S. 140, 149 (1985).

8 The Magistrate Judge made the following findings in his Report and Recommendation:
9 (1) NRS 108.2275 places the burden on Alon to prove that the mechanic’s lien is frivolous and
10 made without reasonable cause; (2) there is no requirement for visible construction before a
11 mechanic’s lien may be asserted for preconstruction services; (3) YWS recorded both liens in a
12 timely manner under NRS 108.226(1); (4) YWS could rerecord a mechanic’s lien; and (5) YWS
13 did not irrevocably release its rights when it released the first mechanic’s lien.

14 Alon objected to the Report and Recommendation on nine bases: (1) NRS 108.2275 places
15 the burden on YWS to prove the mechanic’s lien is not frivolous or made without good cause;
16 (2) the Magistrate Judge violated Nevada Rule of Appellate Procedure (“NRAP”) 36(c) by
17 applying an unpublished Nevada Supreme Court decision that was decided in 2013; (3) the
18 Magistrate Judge improperly concluded that Iliescu v. Steppan, 394 P.3d 930 (Nev. 2017) does
19 not apply; (4) the Magistrate Judge improperly concluded that 2003 amendments to the mechanic’s
20 lien statutes removed any visible construction requirement; (5) the Magistrate Judge improperly
21 concluded that visible construction is relevant to only priority issues regarding mechanic’s liens;
22 (6) the Magistrate Judge misapplied NRS 108.22188 by concluding the Alon Sales Center project
23 and the Alon Resort project were one project without any evidence to support the conclusion;
24 (7) the Magistrate Judge improperly concluded that Alon could not have reasonably believed that
25 mediation was consideration for the release of the first lien without reservation of YWS’ rights;
26 (8) the Magistrate Judge improperly concluded a lien could be rerecorded based on the construction
27 of NRS Chapter 108 and persuasive case law; and (9) the Magistrate Judge’s conclusions constitute

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1 a creation of state law and, thus, the issues should be certified to the Nevada Supreme Court. The
2 court addresses each objection in turn.

3 **a. Burden under NRS 108.2275**

4 To begin, the Court finds the Magistrate Judge properly concluded NRS 108.2275 places
5 the burden on a party challenging the mechanic’s lien to prove it is frivolous or made without
6 reasonable cause. NRS 108.2275 states:

7 The debtor of the lien claimant or a party in interest in the property subject to the
8 notice of lien who believes the notice of lien is frivolous and was made without
9 reasonable cause, or that the amount of the notice of lien is excessive, may apply
10 by motion to the district court for the county where the property or some part thereof
is located for an order directing the lien claimant to appear before the court to show
cause why the relief requested should not be granted.

11 Nev. Rev. Stat. § 108.2275(1). While the statute does not explicitly indicate that the burden for
12 challenging a lien falls on the challenging party, the Nevada Supreme Court recognized that
13 legislative history indicates that the burden is on the party challenging the mechanic’s lien. J.D.
14 Constr. v. IBEX Int’l Grp., 240 P.3d 1033, 1042–43 (Nev. 2010) (“The legislative history of S.B.
15 434 states: ‘Looking to the *level of proof required to show the claim is frivolous*, Senator Adler
16 pointed out the burden is such that the *[party opposing the lien] must show there is absolutely no*
17 *basis for a claim.*’) (emphasis in original). Thus, the Court adopts the Magistrate Judge’s finding
18 that Alon had the burden to prove that the mechanic’s lien is frivolous and made without reasonable
19 cause under NRS 108.2275.

20 **b. NRAP 36(c)(2)**

21 Alon next argues that the Magistrate Judge violated NRAP 36(c) by relying on an
22 unpublished Nevada Supreme Court decision that was decided in 2013: Magnum Opes
23 Construction v. Sanpete Steel Corporation, No. 60016, 2013 WL 7158997 (Nev. Nov. 1, 2013)
24 (holding a mechanic’s lien can be perfected without any visible construction). NRAP 36(c)
25 provides: “A party may cite for its persuasive value, if any, an unpublished disposition issued by
26 the [Nevada] Supreme Court on or after January 1, 2016.” Nev. R. App. P. 36(c)(3). The Court
27 recognizes that the Nevada Supreme Court regularly refuses to consider its pre-2016 unpublished
28 decisions even as persuasive authority. See Comstock Residents Ass’n v. Lyon Cty. Bd. of

1 Commissioners, 414 P.3d 318, 322 n. 1 (Nev. 2018); Las Vegas Dev. Grp., LLC v. Blaha, 416
2 P.3d 233, 237, n. 6 (Nev. 2018). However, the Court need not rely on Magnum Opes Construction
3 to adopt the Magistrate Judge’s finding that the NRS Chapter 108 does not require visible
4 construction prior to the assertion for preconstruction services.

5 In J.E. Dunn Northwest, Incorporated v. Corus Construction Venture, LLC, the Nevada
6 Supreme Court explained that the statutory authority determining the existence of a lien is
7 “separate” from the statutory basis for determining priority of liens or other encumbrances on a
8 property. 249 P.3d 501, 507 (2011) (“However, under the current statutory scheme, whether work
9 is entitled to a mechanic’s lien pursuant to NRS 108.22184 and whether it is entitled to priority
10 over other encumbrances pursuant to NRS 108.225 are two entirely separate issues.”). NRS
11 108.222 provides:

12 [A] lien claimant has a lien upon the property, any improvements for which the
13 work, materials and equipment were furnished or to be furnished, and any
14 construction disbursement account established pursuant to NRS 108.2403, for:
15 (a) If the parties agreed, by contract or otherwise, upon a specific price or method
16 for determining a specific price for some or all of the work, material and equipment
17 furnished or to be furnished by or through the lien claimant, the unpaid balance of
the price agreed upon for such work, material or equipment, as the case may be,
*whether performed, furnished or to be performed or furnished at the instance of the
owner or the owner’s agent[.]*.

18 Nev. Rev. Stat. § 108.222(1)(a) (emphasis added). Further, NRS 108.22184 defines work
19 as including “the planning, design, ... labor and services provided by a lien claimant for the
20 construction, alteration or repair of any improvement, property or work of improvement whether
21 the work is completed or partially completed.” Nev. Rev. Stat. § 108.22184. NRS 108.2214
22 explicitly includes “any person who performs services as an architect” as a person qualifying as a
23 lien claimant. Nev. Rev. Stat. § 108.2214(1). Unlike NRS 108.225, which requires visible
24 construction for a mechanic’s lien to have priority over another encumbrance, neither NRS
25 108.222 or NRS 108.22184 requires visible construction before a mechanic’s lien may be asserted.
26 The Court therefore adopts, without relying on the Magnum Opes Construction, the Magistrate
27 Judge’s finding “that there is no visible construction requirement for YWS to assert its mechanic’s
28 lien in this case.”

1 **c. Non-Application of Iliescu v. Steppan**

2 The Court now turns to Alon’s challenge that the Magistrate Judge erred by concluding
3 Iliescu, a 2017 Nevada Supreme Court decision, does not apply to this matter because it “dealt
4 with an architect hired by a ‘prospective buyer’ of the property rather than the landowner, and
5 therefore is inapplicable[.]” Alon argues that the Iliescu Court held that “actual notice was not
6 enough to waive visibility” requirements for a mechanic’s lien. ECF No. 85 at 9. The Court
7 disagrees. The question presented in Iliescu, and therefore its holding, is more narrow than Alon
8 asserts. See 394 P.3d 930. The Nevada Supreme Court identified the question as “whether the
9 actual notice exception applies to offsite work and services performed by an architect hired by a
10 prospective buyer when no onsite work has been performed on the property.” Id. at 934. The
11 Court held that the actual notice exception does not apply to such offsite work and services when
12 no onsite work has been performed on the property. Id. at 932, 934. The Court further emphasized
13 that allowing an alternative holding would prejudice the property owner by requiring the property
14 owner to “assume[] the risk of payment of a prospective buyer’s architectural services for a project
15 that may never be constructed[.]” Id. at 935. However, the actual notice exception applies when
16 “the owner has supervised work by the third party, reviewed billing statements from the third party,
17 or any other means that would make the owner aware that the third-party claimant was involved
18 with *work performed on its property.*” Id. at 934. Thus, the Iliescu holding does not apply to the
19 circumstances of this matter.

20 **d. 2003 Amendments**

21 Alon next argues that the Magistrate Judge improperly concluded that the 2003
22 amendments to NRS Chapter 108 removed the visible construction requirement despite the
23 amendments not including any such language. However, the Magistrate Judge did not make such
24 a finding. The Magistrate Judge instead recognized that a bankruptcy court found—prior to the
25 2003 amendments—that “mechanics’ liens do not attach to property until the priority requirements
26 of Nevada’s mechanics’ lien statute (NRS 108.225) have been met[.]” in contravention to the
27 Nevada Supreme Court’s 2011 acknowledgement in J.E. Dunn Northwest, Incorporated that issues

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1 regarding a lien's existence are distinct from issues regarding a lien's priority. The Court therefore
2 overrules Alon's objection on this asserted basis.

3 **e. Visible Construction**

4 Alon's fifth objection again asserts that visible construction is relevant to the validity of a
5 mechanic's lien rather than just its priority. For the reasons discussed above, the Court overrules
6 this objection. The Court also denies Alon's request to certify this issue to the Nevada Supreme
7 Court for the reasons discussed in Section IV below.

8 **f. One Project Versus Two Projects**

9 Alon next takes issue with the Magistrate Judge finding the Sales Center project and the
10 Alon Resort project were a single project. The Court agrees with the Magistrate Judge that nothing
11 in the record indicates a separate contract existed to divide the work into two projects. The Court
12 does not find based upon the record that it would be reasonable to infer that the agreement between
13 the parties was broken up into two contracts and two projects.

14 **g. Mediation as Consideration**

15 In its seventh objection, Alon contends the Magistrate Judge improperly concluded that
16 Alon could not have reasonably believed that mediation was consideration for the release of the
17 first lien without reservation of YWS' rights. While the Court recognizes that Alon may have
18 believed it attending mediation in good faith was consideration for the release of YWS' rights
19 without reservation, this is not dispositive of the issue of whether there was such an agreement
20 between the parties. Upon review of the record, the Magistrate Judge correctly held that "[t]here
21 was no meeting of the minds" to allow for Alon's attendance at mediation to serve as consideration;
22 Counter Defendant Tom Wucherer ("Wucherer"), the owner of YWS, testified he would have
23 never released the first lien if YWS' rights could not have been protected in the event mediation
24 was unsuccessful. Wucherer's testimony in conjunction with the language contained in the Letter
25 of Intent supports the finding that YWS did not intend to irrevocably release its rights under the
26 mechanic's lien.

27 **h. Rerecording of Second Lien**

28 Alon also argues that the Magistrate Judge improperly concluded a mechanic's lien could

1 be rerecorded. The Court disagrees. The Magistrate Judge found that YWS had the right to
2 rerecord its mechanic's lien because it did not irrevocably release its rights when releasing the first
3 lien. Alon cites to J.D. Construction, for the proposition that allowing a lien to be recorded,
4 released, and rerecorded without additional construction work constitutes an unlawful taking. J.D.
5 Construction, however, requires that due process principles be satisfied in the context of enforcing
6 a mechanic's lien. The Court finds no due process violations occurred in this matter as Alon has
7 been afforded an evidentiary hearing and an opportunity to submit supplemental briefing before
8 the Magistrate Judge entered his Report and Recommendation. See J.D. Constr., 240 P.3d at 1040–
9 41 (finding due process rights were satisfied under NRS Chapter 108).

10 **i. Creation of State Law**

11 In its final objection, Alon argues the Magistrate Judge's conclusions constitute a creation
12 of state law and, thus, the issues should be certified to the Nevada Supreme Court. The Court
13 overrules this objection and denies the request for certification for the reasons stated in Section IV
14 below.

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16 **IV. MOTION TO CERTIFY QUESTIONS**

17 The Court now turns to Alon's Motion to Certify Questions. Under Rule 5 of the Nevada
18 Rules of Appellate Procedure ("Rule 5"), a United States District Court may certify a question of
19 law to the Nevada Supreme Court "upon the court's own motion or upon the motion of any party
20 to the cause." Nev. R. App. P. 5(a)—(b). The Nevada Supreme Court has the power to answer
21 such a question that "may be determinative of the cause then pending in the certifying court and
22 ... [where] it appears to the certifying court there is no controlling precedent in the decisions of the
23 Supreme Court of this state." Nev. R. App. P. 5(a). Rule 5 also provides that a certification order
24 must specifically address each of six requirements:

- 25 (1) The questions of law to be answered; (2) A statement of all facts relevant to the
26 questions certified; (3) The nature of the controversy in which the questions arose;
27 (4) A designation of the party or parties who will be the appellant(s) and the party
28 or parties who will be the respondent(s) in the Supreme Court; (5) The names and
addresses of counsel for the appellant and respondent; and (6) Any other matters
that the certifying court deems relevant to a determination of the questions certified.

1 Nev. R. App. P. 5(c).

2 Alon first seeks to certify the question of whether the release of a mechanic’s lien without
3 reservation of rights eliminates the ability to record a subsequent lien if there is no additional work
4 performed after the release. Id. Alon also seeks to certify the question of whether an architect’s
5 performance of preconstruction services without commencement of visible construction can be the
6 basis for a mechanic’s lien against the owner’s property when no priority dispute exists. Id.

7 The Court finds the Motion to Certify Questions premature as it would necessarily require
8 the Court to assume facts regarding the substantive claims that have not yet been established.
9 Facts needing resolution, for example, include: the terms of specific agreements entered into by
10 the parties; whether the parties entered into a single contract or multiple contracts for the work
11 provided on the Alon Sales Center project and the Alon Resort project; and whether the first
12 mechanic’s lien was released with or without a reservation of YWS’ rights. Upon the submission
13 of dispositive motions with the evidence that generally accompanies such motions, the Court
14 would then been in a position to make the factual findings that might support the certification of
15 the aforementioned questions. Thus, the Court denies the Motion to Certify without prejudice,
16 finding it is premature at this point in the litigation.

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18 **III. CONCLUSION**

19 **IT IS ORDERED** that United States Magistrate Judge Cam Ferenbach Report and
20 Recommendation [ECF No. 83] is ACCEPTED and ADOPTED as outlined herein.

21 **IT IS FURTHER ORDERED** that Alon Las Vegas Resort, LLC and Alon Leisure
22 Management LLC’s Motion to Expunge YWS Architects, LLC’s Mechanic’s Lien [ECF No. 31]
23 is DENIED accordingly.

24 **IT IS FURTHER ORDERED** that Alon Las Vegas Resort, LLC and Alon Leisure
25 Management LLC’s Motion to Certify Questions to the Nevada Supreme Court [ECF No. 86] is
26 DENIED without prejudice.

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IT IS FURTHER ORDERED that the parties' Stipulation and Order to Extend Time to File Reply in Support of Motion to Certify Questions to the Nevada Supreme Court [ECF No. 94] is GRANTED *nunc pro tunc*.

DATED: September 26, 2018.



RICHARD F. BOULWARE, II
UNITED STATES DISTRICT JUDGE