

IN THE SUPREME COURT OF THE STATE OF NEVADA

TIMOTHY ALLEN POOLE,
Appellant,
vs.
SUSAN MEYER,
Respondent.

No. 47009

FILED

NOV 07 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT

BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a post-judgment order denying a motion for attorney fees. Eighth Judicial District Court, Clark County; Jessie Elizabeth Walsh, Judge.

The sole issue in this appeal is whether the district court abused its discretion when it denied appellant Timothy Poole's motion for attorney fees after Poole successfully moved for summary judgment. We conclude that the district court did not abuse its discretion in denying Poole's motion and therefore affirm. The parties are familiar with the facts and we do not recount them except as necessary to our discussion.

This court generally reviews a district court's decision regarding attorney fees for an abuse of discretion.¹ "Attorney's fees are not recoverable absent an enabling statute or rule or a provision for such fees in a contract between the parties."² In this appeal, Poole alleges that

¹Allianz Ins. Co. v. Gagnon, 109 Nev. 990, 993, 860 P.2d 720, 722 (1993); see also National Tow v. Integrity Ins. Co., 102 Nev. 189, 191, 717 P.2d 581, 583 (1986) (abuse of discretion standard applies where this court reviews a district court order denying attorney fees).

²James Hardie Gypsum, Inc. v. Inquipco, 112 Nev. 1397, 1405, 929 P.2d 903, 908 (1996), overruled on other grounds by Sandy Valley Assocs. v. Sky Ranch Estates, 117 Nev. 948, 955, 35 P.3d 964, 968 (2001).

he is entitled to attorney fees under the terms of the land sale contract and, in the alternative, pursuant to NRS 18.010(2).

Land sale contract

Poole first argues that the district court abused its discretion by failing to award him attorney fees pursuant to Paragraph 33 of the land sale contract. Paragraph 33 provides that “[i]n the event either party shall prevail in any legal action commenced to enforce this agreement or any term thereof, the prevailing party shall be entitled to all costs including reasonable attorney fees.”

The complaint in this case essentially alleges two causes of action against Poole: fraud and violations of the statutory disclosure requirements of NRS Chapter 113. We conclude that neither of these causes of action seeks to enforce the land sale contract nor any of its terms.

In the complaint, Meyer alleged that Poole, as the seller of the property, failed to disclose a number of material defects relating to the construction of the cabin. In Campbell v. Nocilla, we held that “[w]here a contract provision purports to allow attorney’s fees in an action arising out of the terms of the instrument, we will not construe the provision to have broader application.”³ If Meyer had brought an action for breach of contract, clearly Paragraph 33 of the land sale contract would justify an award of fees. Here, however, Meyer was not seeking to assert her rights under the contract, but rather hold Poole responsible for his allegedly

³101 Nev. 9, 12, 692 P.2d 491, 493 (1985).

tortious behavior. Accordingly, we conclude that Meyer's fraud claim was not commenced to enforce the land sale contract.

Meyer's other cause of action against Poole alleges statutory violations of NRS Chapter 113. Under NRS 113.120 and NRS 113.130, sellers of real property are required to complete and serve a disclosure form containing an evaluation of the property and disclosing any known defects prior to the close of escrow. Meyer alleged in her complaint that Poole violated these statutes by providing an incomplete and inaccurate disclosure form and claimed an entitlement to treble damages under NRS 113.150(4).⁴

Poole contends that the disclosure form is itself part of the land sale contract and, therefore, Meyer's statutory claims seek to enforce a term of the contract. We disagree. Meyer's cause of action did not seek to hold Poole liable for any act or omission committed in violation of the terms of the purchase agreement. Instead, she asserted that Poole violated his statutory duty under NRS 113.130 to reveal known defects. The Legislature, by enacting NRS 113.150, has provided a statutory

⁴NRS 113.150(4) provides, in relevant part:

[I]f a seller conveys residential property to a purchaser without complying with the requirements of NRS 113.130 . . . and there is a defect in the property of which the seller was aware before the property was conveyed to the purchaser . . . , the purchaser is entitled to recover from the seller treble the amount necessary to repair or replace the defective part of the property, together with court costs and reasonable attorney's fees.

remedy to redress violations of NRS 113.130. Accordingly, it appears that Meyer's claim was brought to assert a statutory right, not to enforce a term of the contract.

For the reasons stated above, we conclude that Poole is not contractually entitled to attorney fees because the underlying action was not commenced to enforce the terms of the land sale contract. Thus, the district court did not abuse its discretion in denying Poole's motion for attorney fees on this basis.

NRS 18.010(2)

Since Poole cannot rely upon the land sale contract in order to recover attorney fees, he must point to a statute authorizing such an award.⁵ Poole claims that the district court should have awarded him attorney fees under subsections (a) and (b) of NRS 18.010(2). We disagree.

NRS 18.010(2)(a) permits the district court to award attorney fees to a prevailing party who "has not recovered more than \$20,000." We have held that the recovery of a money judgment is a prerequisite to an award of attorney fees under this section.⁶ There were no money damages awarded in this case; therefore, Poole is not entitled to an award of attorney fees pursuant to NRS 18.010(2)(a).

NRS 18.010(2)(b) permits the district court to award attorney fees where the claim or defense of the adverse party "was brought or

⁵See Rowland v. Lepire, 99 Nev. 308, 315, 662 P.2d 1332, 1336 (1983) (holding that attorney fees are not recoverable unless authorized by statute, rule, or contractual provision).

⁶Smith v. Crown Financial Services, 111 Nev. 277, 285, 890 P.2d 769, 774 (1995).

maintained without reasonable ground or to harass the prevailing party.” In assessing a motion for attorney fees under NRS 18.010(2)(b), we have held that the district court must “determine whether the plaintiff had reasonable grounds for its claims,” based upon the circumstances of the case.⁷

Applying this standard, we conclude that the district court did not abuse its discretion when it determined that Meyer’s claim was neither frivolous nor brought in order to harass Poole. Although the district court eventually granted Poole’s motion for summary judgment, it appears from the record that Meyer had at least a colorable claim at the time of filing. As a result, the district court did not err when it refused to award Poole fees pursuant to NRS 18.010(2)(b).

Conclusion

The district court did not abuse its discretion when it denied Poole’s motion for attorney fees.⁸ Poole was not entitled to an award of

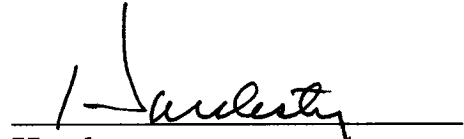
⁷Semenza v. Caughlin Crafted Homes, 111 Nev. 1089, 1095, 901 P.2d 684, 688 (1995) (quoting Bergman v. Boyce, 109 Nev. 670, 675, 856 P.2d 560, 563 (1993)).

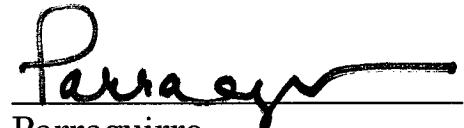
⁸Poole also contends that the district court’s failure to include explicit findings of fact in its dispositional order constitutes a per se abuse of discretion. We disagree. Although in our previous cases we have indicated that a failure to include the grounds for an award of attorney fees is an abuse of discretion, the rationale behind the rule is that, absent a stated basis for an award of fees, this court is unable to engage in meaningful appellate review. Integrity Ins. Co. v. Martin, 105 Nev. 16, 19, 769 P.2d 69, 70 (1989). In this case, the district court’s reasons for denying Poole’s motion are clearly evident from the transcript of the January 23, 2006, hearing, included in the record on appeal. Although it is preferable that the district court recount the reasons for its decision in a

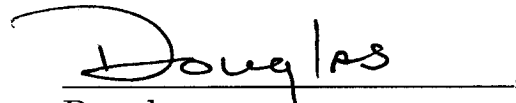
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fees under the land sale contract because Meyer's suit was not commenced to enforce the terms of the contract. Nor was Poole statutorily entitled to an award of fees under NRS 18.010(2). Accordingly, we

ORDER the judgment of the district court AFFIRMED.


Hardesty, J.


Parraguirre, J.


Douglas, J.

cc: Hon. Jessie Elizabeth Walsh, District Judge
William F. Buchanan, Settlement Judge
Leavitt Sully & Rivers
Susan Meyer
Eighth District Court Clerk

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dispositional order, we will not reverse where, as here, the rationale for the district court's decision is evident from the record.