

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN BABCOCK,  
Appellant,  
vs.  
REDA GUDEN,  
Respondent.

No. 47928

**FILED**

MAY 06 2008

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND  
REMANDING

This is an appeal from a district court partial summary judgment, certified as final under NRCP 54(b), in a real property contract action and an order awarding attorney fees and costs. Eighth Judicial District Court, Clark County; Kenneth C. Cory, Judge.

The parties are familiar with the facts, and we do not recount them except as pertinent to our disposition.

Appellant John Babcock argues that the district court erred in granting respondent Reda Guden's motion for partial summary judgment because there are genuine issues of material fact in this case. Babcock also contends that the district court erred in awarding Guden attorney fees and costs under NRCP 68.<sup>1</sup>

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<sup>1</sup>We have considered the parties remaining arguments on appeal and conclude that they are without merit.

## Summary judgment

This court reviews an order granting summary judgment de novo.<sup>2</sup> “While the pleadings and other proof must be construed in a light most favorable to the nonmoving party, that party bears the burden to ‘do more than simply show that there is some metaphysical doubt’ as to the operative facts in order to avoid summary judgment being entered in the moving party’s favor.”<sup>3</sup> “The nonmoving party ‘must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial or have summary judgment entered against him.’”<sup>4</sup>

In this case, Babcock argues that summary judgment is not appropriate because there are genuine issues of material fact regarding: (1) whether Guden’s actions were contrary to the terms of the agreement; (2) whether Babcock provided buyer Sandra Harvey with the required real estate disclosure documents; and (3) whether Guden knew that Harvey would be unable to qualify for a mortgage. We disagree and conclude that Babcock fails to set forth genuine issues of material facts concerning these allegations.

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<sup>2</sup>Pegasus v. Reno Newspapers, Inc., 118 Nev. 706, 713, 57 P.3d 82, 87 (2002) (citing Tore, Ltd. v. Church, 105 Nev. 183, 185, 772 P.2d 1281, 1282 (1989)).

<sup>3</sup>Wood v. Safeway, Inc., 121 Nev. 724, 732, 121 P.3d 1026, 1031 (2005) (quoting Matsushita Electric Industrial Co. v. Zenith Radio, 475 U.S. 574, 586 (1986)).

<sup>4</sup>Id. (quoting Bulbman, Inc. v. Nevada Bell, 108 Nev. 105, 110, 825 P.2d 588, 591 (1992)).

In each instance, Babcock attempts to cast doubt on Guden's motion for partial summary judgment by arguing that something was wrong with the way that "all these transactions went down." Babcock explained that Guden's actions were designed to frustrate and prevent Babcock from receiving the escrow money. By merely casting a doubt, Babcock has not created a triable issue of material fact.<sup>5</sup> To succeed on Guden's motion for partial summary judgment, Babcock was required to "do more than simply show that there is some metaphysical doubt' as to the operative facts."<sup>6</sup> Accordingly, we conclude that the district court properly granted Guden's motion for partial summary judgment.<sup>7</sup>

Attorney fees and costs

Turning to whether the district court erred in awarding Guden attorney fees and costs, we review the district court's decision for "a manifest abuse of discretion."<sup>8</sup> "Both NRCP 68 and NRS 17.115 allow for an award of attorney fees to a party that makes an offer of judgment that is refused by the other party, and then subsequently obtains a more favorable judgment."<sup>9</sup> Prior to awarding fees and costs under NRCP 68,

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<sup>5</sup>See Michaels v. Sudeck, 107 Nev. 332, 334, 810 P.2d 1212, 1213 (1991).

<sup>6</sup>Wood, 121 Nev. at 732, 121 P.3d at 1031 (quoting Matsushita Electric Industrial Co., 475 U.S. at 586).

<sup>7</sup>While we conclude that Babcock fails to set forth genuine issues of material fact, we also conclude that this argument is not frivolous. Accordingly, we deny Guden's request for sanctions under NRAP 38.

<sup>8</sup>Collins v. Murphy, 113 Nev. 1380, 1383, 951 P.2d 598, 600 (1997).

<sup>9</sup>RTTC Communications v. Saratoga Flier, 121 Nev. 34, 40-41, 110 P.3d 24, 28 (2005); NRCP 68(f)(2) (providing that "the offeree shall pay the  
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the district court must consider the following four factors articulated in Beattie v. Thomas:

(1) whether the plaintiff's claim was brought in good faith; (2) whether the defendants' offer of judgment was reasonable and in good faith in both its timing and amount; (3) whether the plaintiff's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith; and (4) whether the fees sought by the offeror are reasonable and justified in amount.<sup>10</sup>

When "the court has failed to consider these factors, and has made no findings based on evidence that the attorney's fees sought are reasonable and justified, it is an abuse of discretion for the court to award the full amount of fees requested."<sup>11</sup>

The record does not reflect what, if any, analysis was made by the district court of the Beattie factors. While we have previously affirmed a district court's award of attorney fees, even after it failed to make express findings regarding the Beattie factors, the record must, nevertheless, reflect that the district court considered the Beattie factors.<sup>12</sup> Nothing in the record suggests that the district court took the

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offeror's post-offer costs, applicable interest . . . and reasonable attorney's fees").

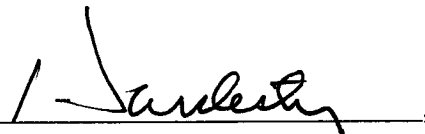
<sup>10</sup>99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983).

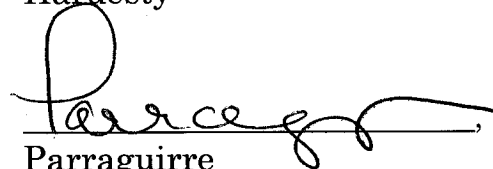
<sup>11</sup>Id.

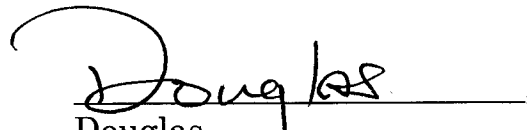
<sup>12</sup>See Schwartz v. Estate of Greenspun, 110 Nev. 1042, 1049-51, 881 P.2d 638, 642-44 (1994); Uniroyal Goodrich Tire v. Mercer, 111 Nev. 318, 324, 890 P.2d 785, 789 (1995).

Beattie factors into consideration. Consequently, we reverse the district court's judgment as to attorney fees and costs, and remand this matter to the district court to address the issue of attorney fees and costs under NRCP 68 and NRS 17.115. Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.

  
\_\_\_\_\_, J.  
Hardesty

  
\_\_\_\_\_, J.  
Parraguirre

  
\_\_\_\_\_, J.  
Douglas

cc: Hon. Kenneth C. Cory, District Judge  
Janet Trost, Settlement Judge  
Albert D. Massi, Ltd.  
Bourassa Law Group, LLC  
Eighth District Court Clerk