

IN THE SUPREME COURT OF THE STATE OF NEVADA

FARMER BROTHERS DEVELOPMENT,
CHTD., A NEVADA CORPORATION,
Appellant/Cross-Respondent,

vs.

SUCCESSOR TRUSTEE OF THE PATRICIA
J. HAMILTON LIVING TRUST AND THE
PATRICIA J. HAMILTON LIVING TRUST,
Respondents/Cross-Appellants.

No. 48416

FILED

JUL 20 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

This is an appeal and cross-appeal from a district court amended judgment in a real property action. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge; J. Charles Thompson, Judge.

FACTS

Appellant/cross-respondent Farmer Brothers Development, Chtd. (contractor) agreed to construct an addition to a Mount Charleston, Nevada, cabin owned by respondent/cross-appellant Patricia J. Hamilton Living Trust (homeowner¹). After paying \$4,000 of the amount agreed to, the homeowner disputed the quality of the construction work performed. In January 2001, the homeowner offered to pay the remaining contract amount of \$11,000, which the contractor refused to accept, assertedly because the amount did not include \$2,850 in charges for extra work that

¹For purposes of this appeal, "homeowner" refers collectively to the Living Trust and respondent/cross-appellant successor trustee to the Living Trust.

it had performed. The contractor then recorded a notice of mechanic's lien for \$14,612.91, which included \$2,850 in extra work charges and \$681.91 in interest. The contractor also filed a district court complaint, asserting breach of contract and unjust enrichment and requesting that the court enforce the mechanic's lien, direct a foreclosure sale of the property, enter judgment against the homeowner, and award attorney fees and costs. The homeowner counterclaimed for breach of contract, breach of the implied covenant of good faith and fair dealing, negligent construction, and negligence per se, claiming that the construction was defective, was not fully completed, and did not meet contractual or industry standards. The homeowner sought compensatory and, in relation to its breach of the implied covenant claim, punitive damages, and attorney fees and costs.

Following a bench trial, the district court concluded that the contractor was owed \$12,850 under the contract and for extra work performed at the homeowner's request, before deductions were taken. After offsetting \$1,213.60 for unperformed work and \$6,700 for repairs due to negligent construction, the court awarded the contractor a total of \$4,936.40, but denied its request for costs and attorney fees under the mechanic's lien statute, summarily stating that the lien was invalid and the amount was due pursuant to the contract only. The court also denied the homeowner's request for punitive damages, as it found that neither party had acted maliciously. The district court awarded the homeowner \$10,245 for attorney fees and \$2,081.93 in costs, apparently under the offer of judgment protocol, which when combined with the contractor's award, brought the net award to the homeowner to \$7,390.53.

Both the contractor and the homeowner have timely appealed from the court's judgment. The contractor also challenges the order

granting attorney fees to the homeowner. The contractor argues that the district court erred in refusing to find that it had a valid mechanic's lien and denying it interest, attorney fees, and costs under the mechanic's lien statute. As a result, the contractor claims, the district court incorrectly concluded that the homeowner's offer of judgment was more favorable than the amount due to the contractor, leading to an erroneous application of the offer of judgment protocol and award of attorney fees and costs to the homeowner. The homeowner, on the other hand, disagrees, contending also that the district court erred in failing to grant it punitive damages under NRS 42.005, because the contractor maliciously recorded a mechanic's lien in excess of the amount to which it was entitled and used a derogatory term to describe the homeowner in its accounting records. We will address the homeowner's assertion first.

DISCUSSION

Punitive damages

Subject to specified limits, NRS 42.005 allows punitive damages "in an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud or malice, express or implied." It is within the district court's discretion to determine whether a party's conduct warrants punitive damages. Winchell v. Schiff, 124 Nev. ___, ___, 193 P.3d 946, 953 (2008). Although we review the district court's determination regarding punitive damages for an abuse of discretion, legal issues are reviewed de novo. Clark County v. Sun State Properties, 119 Nev. 329, 334, 72 P.3d 954, 957 (2003).

Here, the homeowner claims that the district court abused its discretion in failing to award it punitive damages under NRS 42.005,

because the contractor acted with malice by filing an excessive notice of lien, which included an 18 percent finance charge that was not specified in the parties' contract. The homeowner claims that the contractor clearly evidenced malice toward her by referring to her as "Hell Bitch" in its accounting records.

The homeowner's request for punitive damages, however, ignores the plain language of NRS 42.005(1), which states that punitive damages may be allowed "in an action for the breach of an obligation not arising from contract." (Emphasis added.) Because this is a breach of contract case and the homeowner has not alleged or shown a tortious breach of the implied covenant of good faith and fair dealing, punitive damages are not available. NRS 42.005(1); Great American Ins. v. General Builders, 113 Nev. 346, 354-55, 934 P.2d 257, 263 (1997). And even if they were, the district court did not abuse its discretion in determining that the described actions did not rise to the level of malice necessary to impose punitive damages. See NRS 42.001(1) and (3) (defining "conscious disregard" and "malice, express or implied"); Countrywide Home Loans v. Thitchener, 124 Nev. ___, ___, 192 P.3d 243, 255 (2008) (interpreting NRS 42.001 to "plainly require[] evidence that a defendant acted with a culpable state of mind," such that it "denotes conduct that, at a minimum, must exceed mere recklessness or gross negligence"). In any case, to the extent that the contractor's lien claim was found frivolous or excessive, the homeowner's remedy would be an award of attorney fees and costs under NRS 108.2275(6)(a) or NRS 108.237(3), not punitive damages. Consequently, we conclude that the district court did not abuse its discretion in denying the homeowner's request for punitive damages.

Mechanic's lien

The contractor challenges the district court's lien invalidity determination and the award of attorney fees to the homeowner.

Validity of mechanic's lien

NRS 108.222(1) provides in relevant part that "a lien claimant has a lien upon the property [and] any improvements for which the work, materials and equipment were furnished or to be furnished," for the unpaid balance of the price agreed upon or for the fair market value of any additional or changed work, including a reasonable allowance for overhead and profit. Here, the contractor claims that the district court erred in stating that the contractor had no valid lien under NRS 108.222. The homeowner, however, contends that due to incomplete and negligent work and added interest, the recorded lien amount was incorrect, and it points out that the district court expressly "did not find the mechanic's lien to be valid," even though the court found that \$4,936.40 was due from the homeowner under the parties' contract.²

Although the district court did not award the entire amount claimed by the contractor in its notice of lien, it appears that the amount awarded was for work, materials, or equipment furnished to the property. Additionally, the district court made no findings as to any impropriety in recording the lien. Accordingly, we conclude that the district court erred in stating that the contractor had no valid mechanic's lien and in refusing

²The homeowner also argues that the mechanic's lien was invalid because the contractor intentionally recorded a notice of lien in an amount that the homeowner never agreed to, citing to NRS 108.100(1). As this statutory provision was repealed, we find no merit to the homeowner's argument.

to award costs under NRS 108.237 on that basis. NRS 108.22132; NRS 108.22136; NRS 108.222(1).

Costs under NRS 108.237

Under the mechanic's lien statutes, NRS 108.237(1) requires the court to award reasonable costs, including attorney fees and interest, to a "prevailing lien claimant." NRS 108.22156 defines a "prevailing lien claimant" as "a lien claimant to whom an amount is found due by a trier of fact on a notice of lien[.]" As a result, this court has held that a lien claimant prevails even if it receives less than the amount claimed. Parodi v. Budetti, 115 Nev. 236, 242, 984 P.2d 172, 176 (1999). Nevertheless, in awarding costs under NRS 108.237, the district court has discretion to account for the circumstances of the award. Id. at 242, n.4, 984 P.2d at 176, n.4.

Interest

As the prevailing party, the contractor claims that it was entitled to an award of interest under NRS 108.237(1). Although the contractor submitted an invoice dated March 26, 2001, claiming an amount due of \$14,612.91, the homeowner disputed the charges, including a finance charge for \$681.91. The homeowner offered, however, to pay the \$11,000 remaining express contract balance before litigation commenced, but the contractor refused payment. In its amended judgment, the district court concluded that "[i]nterest would not be appropriate for at least the Contract price because the Contract price was offered and rejected by [the contractor]."

Given these circumstances, we conclude that the district court did not err in refusing to award prejudgment interest to the contractor.

Award of attorney fees and costs

A prevailing lien claimant is further entitled under NRS 108.237(1) to an award of the costs of proceedings, including “reasonable” attorney fees. The reasonable value of attorney fees is determined by the factors enunciated in Brunzell v. Golden Gate National Bank, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969) (listing elements to be considered in determining the reasonable value of an attorney’s services), and the court must provide sufficient reasoning and support for its award. Barney v. Mt. Rose Heating & Air, 124 Nev. ___, 192 P.3d 730 (2008).

Here, as the contractor had a valid lien, the district court erred in failing to award the attorney fees and costs mandated by NRS 108.237(1) to the contractor as the prevailing lien claimant. Accordingly, the case is remanded to the district court so that it can determine, under the circumstances of this case, the amount of reasonable attorney fees and costs to award to the contractor. See Parodi, 115 Nev. at 242, n.4, 984 P.2d at 176, n.4.

Attorney fees under the offer of judgment provisions

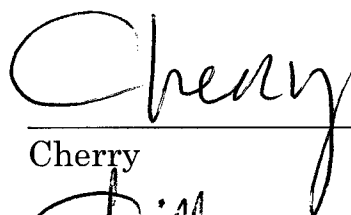
In light of this order remanding the case for a determination of attorney fees and costs to the contractor under NRS 108.237, we necessarily reverse the award of attorney fees and costs to the homeowner under the offer of judgment provisions of NRCP 68 and NRS 17.115. Additionally, we need not address the issue of whether the mechanic’s lien took priority over the offer of judgment, due to the contractor’s assertion that the judgment, but not the lien, could be subject to a homestead claim by the homeowner under NRS 115.010(3). Once the district court has determined an amount to award under NRS 108.237(1), attorney fees and

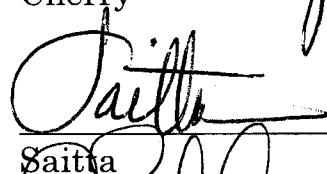
costs under NRCP 68 and NRS 17.115 may be revisited in the district court, if appropriate.

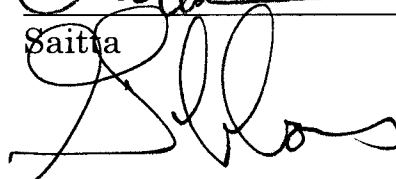
CONCLUSION

Accordingly, we affirm the portion of the district court's judgment denying punitive damages to the homeowner and interest to the contractor, reverse the portion of the judgment holding that the contractor had no valid mechanic's lien and awarding attorney fees to the homeowner, and remand this matter for further proceedings consistent with this order.

It is so ORDERED.³


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Chief Judge, Eighth Judicial District
Hon. Douglas Herndon, Judge
Hon. J. Charles Thompson, Senior Judge
Carolyn Worrell, Settlement Judge
William L. McGimsey
Kravitz, Schnitzer, Sloane, Johnson & Eberhardy, Chtd.
Eighth District Court Clerk

³To the extent that, in its brief, the homeowner asks this court to impose sanctions under NRAP 38, that request is denied.