

IN THE SUPREME COURT OF THE STATE OF NEVADA

BARBARA J. WARREN; ROY A.
WARREN; LAWRENCE KAIN; ROBERT
HOSHAW; MARCELLA HOSHAW; LOIS
MENDREK; AND PENNY STEGEMEN,
Appellants,

vs.

BANCTECH LLC, A NEVADA LIMITED
LIABILITY COMPANY; AND LAS
VEGAS COMMERCIAL REALTY, INC.,
A NEVADA CORPORATION,
Respondents.

BARBARA J. WARREN; ROY A.
WARREN; LAWRENCE KAIN; ROBERT
HOSHAW; MARCELLA HOSHAW; LOIS
MENDREK AND PENNY STEGEMEN,
Appellants,

vs.

PARADISE SPA HOMEOWNERS
ASSOCIATION, INC., A NEVADA NON-
PROFIT CORPORATION,
Respondent.

No. 48731

FILED

APR 30 2009

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

No. 48845

ORDER REVERSING AND REMANDING

These are consolidated appeals from district court post-judgment orders awarding attorney fees and costs in a dispute arising from an offer to purchase a condominium complex. Eighth Judicial District Court, Clark County; David Wall, Judge.

Because we conclude that the district court abused its discretion by failing to make factual findings supporting the award of attorney fees in this matter, we reverse the judgment of the district court and remand this matter to the district court for proceedings consistent with this order.

Factual and procedural history

The underlying case arises out of an unauthorized sale action filed in the Eighth Judicial District Court. Appellants filed a complaint against their homeowners association, Paradise Spa Homeowners Association, Inc. (Paradise), individual board members of Paradise, Las Vegas Commercial Realty, Inc. (Realty) and Banctech. The complaint alleged eight causes of action that all arose out of the alleged unauthorized sale, from Paradise to Realty, of the common space and individual units of the Paradise Spa apartment complex.

After filing their complaint, appellants moved in district court for a preliminary injunction on order shortening time. The district court ultimately denied appellants' motion. Thereafter, appellants filed an amended complaint which added an assertion of class status.

After appellants filed their amended complaint, Banctech and Realty filed a motion to dismiss the amended complaint. The individual board member defendants and Paradise joined in the motion. This motion was heard by the district court and the court granted the motion to dismiss in part and denied the motion in part. At this same hearing, the district court reserved its right to make a ruling on the remaining causes of action and gave appellants the opportunity to come forth with substantive evidence to support their claims. If appellants were unable to produce such evidence, the district court instructed that the remainder of the case would be dismissed and a motion for fees would be entertained.

At the time set for appellants to produce evidence supporting their claims, appellants instead asked that all pending motions be taken off of the district court's calendar because they had agreed to voluntarily dismiss the litigation. To confirm the voluntary dismissal, appellants' counsel circulated an order to dismiss the action without prejudice.

Respondents refused to sign this order, and appellants failed to dismiss the litigation as per their representation to the court.

Because no further action was taken in the case for almost 11 months, Paradise filed a motion to dismiss and/or for summary judgment and for sanctions, in which Banctech and Realty joined. At a hearing on this motion, the district court dismissed the amended complaint without prejudice. In dismissing the amended complaint, the district court advised respondents that a motion for attorney fees may be filed.

Thereafter, Paradise filed a motion for attorney fees and costs in which Banctech and Realty joined. On December 4, 2006, and January 19, 2007, the district court entered written orders granting Banctech, Realty, and Paradise's requests for attorney fees and costs. However, the district court failed to make findings of fact to support its award of attorney fees. These consolidated appeals follow.

Discussion

Appellants contend that the district court erred in granting respondents' motion for attorney fees because respondents cited NRS 18.010(2)(b) as the basis for the fee award, but the district court never made a finding of fact based on this statute. In support of this contention, appellants argue that because the district court issued no order finding that the claims were brought or maintained without reasonable ground or to harass respondents, the award of attorney fees under NRS 18.010(2)(b) was improper. We agree.

We will not disturb a district court's award of attorney fees and costs absent an abuse of discretion. See Valley Elec. Ass'n v. Overfield, 121 Nev. 7, 11, 106 P.3d 1198, 1200 (2005); Parodi v. Budetti, 115 Nev. 236, 240, 984 P.2d 172, 174 (1999). However, we have held that "where a district court exercises its discretion in clear disregard of the

guiding legal principles, this action may constitute an abuse of discretion.” Allianz Ins. Co. v. Gagnon, 109 Nev. 990, 993, 860 P.2d 720, 722-23 (1993) (citing Franklin v. Bartsas Realty, Inc., 95 Nev. 559, 562-63, 598 P.2d 1147, 1149 (1979)). “Attorney fees are only available when authorized by rule, statute or contract.” Henry Prods., Inc. v. Tarmu, 114 Nev. 1017, 1020, 967 P.2d 444, 446 (1998) (citing Flamingo Realty v. Midwest Development, 110 Nev. 984, 991, 879 P.2d 69, 73 (1994)). “The failure of a district court to state a basis for the award of attorney fees is an arbitrary and capricious action and, thus, is an abuse of discretion.” Id. at 1020, 967 P.2d at 446 (citing Integrity Ins. Co. v. Martin, 105 Nev. 16, 19, 769 P.2d 69, 70 (1989)).

NRS 18.010(2)(b) states, in pertinent part, that a district court may make an allowance of attorney fees to the prevailing party “when the court finds that the claim . . . of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party.”

We have held that when a district court assesses a motion for attorney fees under NRS 18.010(2)(b), it must make a determination as to whether the claim brought by the plaintiff was based on reasonable grounds. Bergmann v. Boyce, 109 Nev. 670, 675, 856 P.2d 560, 563 (1993). This analysis is dependent on the actual circumstances of the case itself. Id. In looking at the actual circumstances of a case, we have directed the district court to make factual findings on four factors:

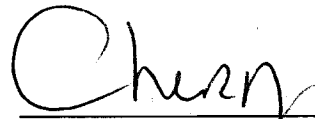
- (1) the qualities of the advocate: his ability, his training, education, experience, professional standing and skill;
- (2) the character of the work to be done: its difficulty, its intricacy, its importance, time and skill required, the responsibility imposed and the prominence and character of the parties where they affect the importance of the litigation;
- (3) the work actually performed by the lawyer: the


skill, time and attention given to the work; (4) the result: whether the attorney was successful and what benefits were derived.

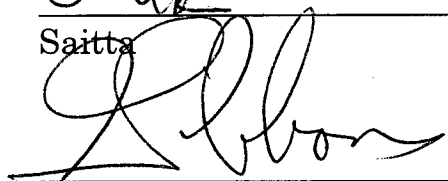
Brunzell v. Golden Gate Nat'l Bank, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969).

We conclude that the district court abused its discretion by failing to issue findings of fact that stated the basis for its award of attorney fees under NRS 18.010(2)(b). In awarding attorney fees, the district court failed to make a determination on the record as to whether appellants' claims were based on reasonable grounds or were brought to harass respondents. Without such a finding, we are unable to determine whether an award of attorney fees was proper in this case. As such, we instruct the district court to vacate its orders awarding attorney fees and make findings on the record consistent with this order. We reiterate the importance of a district court making factual findings, because without such findings on the record a reviewing court cannot make a proper determination on the issues presented by the appealing parties. Accordingly we,

REVERSE the judgment of the district court and REMAND this matter to the district court for proceedings consistent with this order.


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Hon. David Wall, District Judge
Hon. Susan Johnson, District Judge
William C. Turner, Settlement Judge
Law Offices of Barry Levinson, P.C.
Gordon & Rees, LLP
Jeffrey J. Whitehead
Eighth District Court Clerk