IN THE SUPREME COURT OF THE STATE OF NEVADA

GAY M. CLAYMORE; AND VICKY CLAYMORE,
Appellants,
vs.
RENAISSANCE POOLS & SPAS, INC., A NEVADA CORPORATION,
Respondent.

No. 50790

FILED

JUN 30 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from a district court judgment in a breach of contract action and a postjudgment order awarding attorney fees. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.[1]

On appeal, appellants Gay and Vicky Claymore challenge the district court findings supporting its conclusion that they breached their contract with respondent Renaissance Pools & Spas, Inc. for the installation of a pre-fabricated swimming pool. Separately, the Claymores challenge the district court's award of attorney fees.

For the following reasons, we agree that attorney fees were improperly awarded to Renaissance, but conclude that the district court's findings regarding the Claymores' breach of contract are supported by substantial evidence. Accordingly, we affirm the judgment in part and reverse in part and remand this matter for reconsideration of the fees

[1]The Honorable Kristina Pickering, Justice, did not participate in the decision of this matter.

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award. The parties are familiar with the facts and we do not recount them here except as necessary to our disposition.

Breach of contract

The Claymores assert that the findings supporting the district court's conclusion that they breached the installation contract were not supported by substantial evidence. See Pombo v. Nevada Apartment Ass'n, 113 Nev. 559, 562, 938 P.2d 725, 727 (1997). We disagree.

Specifically, the district court concluded that the Claymores breached the installation contract by (1) withholding a scheduled progress payment and (2) threatening to shoot Renaissance's project superintendent Chuck Bihm. Despite the Claymores' assertions, the record supports each of these challenged findings.

With respect to the progress payment, having read the installation contract "page-for-page," and having reviewed the payment provisions with Renaissance personnel, the Claymores presumably understood that the contract required payment upon completion of the excavation. Moreover, despite evidence supporting the Claymores' complaints that the excavated hole was mislocated, over-dug, and plumbed incorrectly, substantial conflicting evidence exists to doubt the legitimacy of the Claymores' complaints, all of which were largely predicated on Gay's personal, and purportedly superior, excavation expertise.[2] See id. at 562, 938 P.2d at 727.

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[2]For the same reasons, we disagree that the district court erred in not ruling that Renaissance materially breached the installation contract first. Because there was conflicting evidence that the Claymores' complaints were unfounded, nothing compelled the district court to rule

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Moreover, contrary to the Claymores' attempt to soften the statement, Gay stated to Jimmy Conklin, a Renaissance salesperson, that he was "dead serious," he would "shoot" Bhim if he returned to his property. Although Gay recounted telling Bhim only that trespassers could be shot, when questioned during his deposition whether he stated that he would shoot Bhim if he returned, Gay responded: "[t]hat's a possibility. He's not going to come on my property again."

Further corroborating the threatening nature of Gay's statement, Renaissance instructed Bhim not to return to the property, thus demonstrating Renaissance's perception that Gay was sincere, an understandable reaction given Gay's well-documented pattern of hostile interactions with Renaissance personnel. Based on this evidence, we conclude that the district court was justified in construing Gay's statement that "trespass[ers] . . . could be shot" to be a threat rather than a disinterested observation.

Accordingly, we decline to disturb the district court's conclusion that Gay's threatening statement discharged Renaissance from further performance,[3] see Cladianos v. Friedhoff, 69 Nev. 41, 45, 240 P.2d 208, 210 (1952) ("[P]erformance is excused when performance has in effect

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. . . continued

that the Claymores were discharged from making the scheduled progress payment.

[3]As Renaissance office manager Heather Sage testified, no superintendents were available to replace Bhim, leading the district court to rule that Gay's threat ultimately prevented Renaissance from further performance under the contract.

been prevented by the other party to the contract."), or its determination that the Claymores materially breached the installation contract by refusing to make the scheduled progress payment.

Attorney fees

The Claymores assert that the district court abused its discretion by awarding Renaissance $50,000 of its $62,076 in requested attorney fees based on a conclusory affidavit and without making the required findings under Brunzell v. Golden Gate Nat'l Bank, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969). We agree.

Here, having concluded that Renaissance was entitled to recover its attorney fees under a provision in the installation contract, the district court requested that Renaissance demonstrate the sum of its fees "by affidavit." In the affidavit, Renaissance's trial counsel claimed $62,076 in trial-related fees, notably neglecting to present the number of hours billed or counsel's hourly rate.[4]

Here, despite the limited record before it, the district court awarded Renaissance $50,000, but failed to justify the reasonableness of this amount as required under Brunzell by making specific findings

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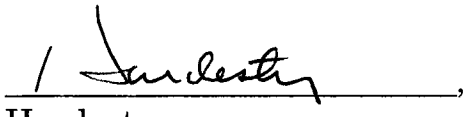
[4]While NRS 18.010(3) permits attorney fees to be awarded at the conclusion of trial without any "additional evidence," without a more detailed itemization of the work performed on Renaissance's behalf, we cannot determine with any certainty that the Brunzell factors were actually considered. Moreover, while Renaissance expresses doubt as to whether Brunzell's factors apply to attorney fees awarded under a contractual provision, it fails to cite any authority justifying its skepticism. See, e.g., State, Dep't of Mtr. Vehicles v. Rowland, 107 Nev. 475, 479, 814 P.2d 80, 83 (1991) ("[U]nsupported arguments are summarily rejected on appeal.").

concerning the quality of the advocacy, the character of the work to be done, the work actually performed, and the result. Id.; see Barney v. Mt. Rose Heating & Air, 124 Nev. ___, ___, 192 P.3d 730, 735-36 (2008) Shuette v. Beazer Homes Holdings Corp., 121 Nev. 837, 865, 124 P.3d 530, 549 (2005). Accordingly, we conclude that the district court's award of attorney fees was an abuse of discretion.

Conclusion

Based on the above, we conclude that substantial evidence supports the district court's challenged findings, but conclude that the attorney fees award was improper. We therefore reverse the amount of the award of attorney fees and remand this issue for reconsideration under Brunzell's enumerated factors. 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.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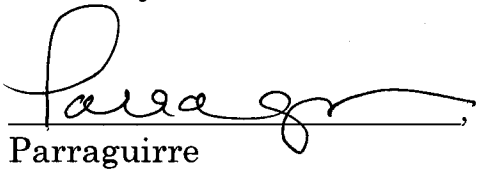
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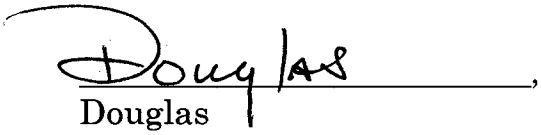
, J.
Douglas

cc: Hon. Elissa F. Cadish, District Judge
Kristina Pickering, Settlement Judge
Hutchison & Steffen, LLC
Michael R. Mushkin & Associates, P.C.
Backus Carranza
Eighth District Court Clerk