

IN THE SUPREME COURT OF THE STATE OF NEVADA

LARRY ROTHMAN,
Appellant,

No. 51769

vs.

BISON CONSTRUCTION; JOHN
MARTIN; AND RHONDA MARTIN,
Respondents.

LARRY ROTHMAN,
Appellant,

No. 52173

vs.

BISON CONSTRUCTION; JOHN
MARTIN; AND RHONDA MARTIN,
Respondents.

FILED

JAN 11 2010

THOMAS K. LINDEMAN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

These are proper person appeals from district court orders entering judgment in favor of respondents in a breach of contract action (No. 51769), and awarding respondents attorney fees and costs (No. 52173). Ninth Judicial District Court, Douglas County; Michael P. Gibbons, Judge.

In this appeal, appellant challenges an interlocutory order denying a request for recusal of Judge Michael P. Gibbons, the district court's judgment, and the attorney fees and costs award.

Appellant's recusal motion

Disqualification or recusal is appropriate when a judge's impartiality might reasonably be questioned. PETA v. Bobby Berosini, Ltd., 111 Nev. 431, 436, 894 P.2d 337, 340 (1995), overruled in part on other grounds by Towbin Dodge, LLC v. Dist. Ct., 121 Nev. 251, 112 P.3d 1063 (2005). Here, appellant did not articulate any grounds for recusal, except that Judge Gibbons entered summary judgment against him in the first case and, in the first appeal, this court reversed and remanded. That

argument is insufficient to warrant recusal. In re Petition to Recall Dunleavy, 104 Nev. 784, 789-90, 769 P.2d 1271, 1275 (1988). Thus, appellant's motion for recusal was properly denied.

The district court's judgment in favor of respondents

When the district court's findings of fact and conclusions of law are supported by substantial evidence, they will not be set aside unless clearly erroneous. Sheehan & Sheehan v. Nelson Malley & Co., 121 Nev. 481, 486, 117 P.3d 219, 223 (2005).

A novation is "the substitution of a new obligation for an existing one . . . because the first debt is extinguished and all parties are discharged on the first contract." Zuni Constr. Co. v. Great Am. Ins. Co., 86 Nev. 364, 368, 468 P.2d 980, 982 (1970).

Here, under the second contract, Bentley Hospitality was substituted in place of Charles Baur and ENC, and that contract stated that it superseded all prior negotiations related to the hotel's construction. The second contract contained material changes, including a reduction in the contractor's fee, a fixed maximum price, and a different work change order policy, which the district court found to be new consideration. Zhang v. Dist. Ct., 120 Nev. 1037, 1041, 103 P.3d 20, 23 (2004) (novation generally applies if the new agreement involves a substituted debtor and new consideration), abrogated on other grounds by Buzz Stew, LLC v. City of N. Las Vegas, 124 Nev. ___, 181 P.3d 670 (2008); United Fire Insurance Co. v. McClelland, 105 Nev. 504, 508, 780 P.2d 193, 195 (1989) (setting forth the elements for a novation). The changes reflected in the second contract and the parties' conduct with respect to payment and completion of the hotel demonstrated an intent to relieve Charles Baur of liability, see Pink v. Busch, 100 Nev. 684, 689-90, 691 P.2d 456, 460 (1984), and it extinguished the first contract by implicit novation. See Walker v.

Shrake, 75 Nev. 241, 339 P.2d 124 (1959); see also United Fire Insurance Co., 105 Nev. at 508, 780 P.2d at 195 (consent to novation may be implied from the circumstances of the transaction and by the subsequent conduct of the parties). Thus, substantial evidence supports the district court's finding that a substitute contract was entered into and its conclusion that an implied novation was given.

Attorney fees and costs award

When the district court considers the appropriate factors in determining whether to award attorney fees and costs under NRCP 68, this court will not overturn the district court's decision absent a clear abuse of discretion. LaForge v. State, University System, 116 Nev. 415, 423, 997 P.2d 130, 136 (2000); Beattie v. Thomas, 99 Nev. 579, 589, 668 P.2d 268, 274 (1983). Having considered appellant's arguments and the record before us, we conclude that the district court considered the appropriate factors in awarding fees and costs, and we perceive no abuse of discretion in the district court's decision. See Beattie, 99 Nev. at 589, 668 P.2d at 274; NRS 18.005(5) (district court may award expert witness fees in excess of \$1,500 if supported by findings that the expert's testimony necessitated the larger fee); Arnold v. Mt. Wheeler Power, 101 Nev. 612, 615, 707 P.2d 1137, 1139 (1985) (the amount of expert witness fees is a matter within the sound discretion of the trial judge). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Hardesty, J.
Hardesty

Douglas, J.
Douglas

Pickering, J.
Pickering

cc: Hon. Michael P. Gibbons, District Judge
Larry Rothman
Walsh, Baker & Rosevear, P.C.
Douglas County Clerk