

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES E. KAY, JR.,
Appellant/Cross-Respondent,
vs.
FAMILY MORTGAGE, INC., A NEVADA
CORPORATION,
Respondent/Cross-Appellant.

No. 53739

FILED

DEC 20 2010

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 and cross-appeal from a district court judgment in a tort and breach of contract action and from a post-judgment order denying attorney fees and costs. Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.

Appellant/cross-respondent James Kay, Jr., refinanced his condominium through respondent/cross-appellant Family Mortgage, Inc., and was told he would not incur a transfer tax. However, Kay was charged a transfer tax. Kay maintains that had the tax been properly or fully disclosed, he would have rejected the transaction. Kay initiated proceedings in January 2006, alleging various theories of misconduct resulting from the refinancing transaction. The case was originally heard by an arbitrator, who found in favor of Kay. Family Mortgage subsequently filed a request for trial de novo, and the case was assigned to the short trial program. Following a bench trial, the short trial judge found that Family Mortgage breached its

contract and awarded Kay damages but denied his motion for attorney fees and costs.¹

On appeal, Kay argues that the district court abused its discretion in denying his motion for attorney fees. We agree.²

Under NSTR 27(b), attorney fees shall be allowed following a short trial: (1) pursuant to statute or NRCP 68, or (2) under the provisions of NAR 20(B)(2) if the case enters the short trial program upon request for trial de novo. The award under NSTR 27(b)(2) is “[e]xclusive of any award of fees and costs under subdivision (b)(1).” This court has stated that a similar phrase in NAR 20(B) “makes it clear that subsections (1) and (2) are independent of one another.” Scott v. Zhou, 120 Nev. 571, 573, 98 P.3d 313, 314 (2004). An attorney fees award must be justified under one section or the other, but need not be justified under both. Id.

NAR 20(B)(2) provides that a party is entitled to a separate award of attorney fees if the award is \$20,000 or less, and

¹The parties are familiar with the facts and we do not recount them further except as is necessary for our disposition.

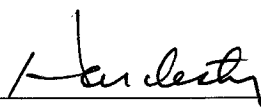
²Kay also argues that Family Mortgage waived its right to appeal by failing to timely pay the fees and costs for the presiding judge in accordance with NSTR 28 and 29. See NSTR 33. In its cross-appeal, Family Mortgage argues that the short trial judge erroneously allowed Kay to recover on a breach of contract cause of action. Having carefully reviewed both contentions, we conclude that they lack merit. Accordingly, we affirm the district court judgment.

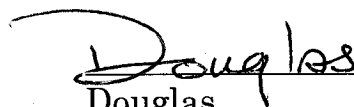
the requesting party fails to obtain a judgment that improves that party's position by at least 20 percent. The attorney fees awarded pursuant to NAR 20(B) may not exceed \$3,000, unless attorney fees are governed by an agreement between the parties. NAR 16(E). Thus, even if the trial judge chooses not to award attorney fees pursuant to a statute, i.e. NRS 18.010, the nonmoving party is still entitled to recover up to \$3,000 in attorney fees if the moving party fails to improve its position by 20 percent. See Scott, 120 Nev. at 573, 98 P.3d at 314.


Here, Family Mortgage moved for a trial de novo but, following the trial, failed to obtain a judgment that reduced its liability by more than 20 percent. Kay's arbitration award was for \$7,292.81. The trial judge reduced the award, but still awarded \$6,740.10 to Kay. The reduction in Family Mortgage's liability was \$552.71, or only 7.58 percent of the original award. Under these circumstances, we conclude that the trial judge abused his discretion by failing to award Kay attorney fees under NSTR 27(b)(2). Regardless of whether the trial judge concluded that attorney fees were warranted under NRS 18.010, attorney fees should have been awarded pursuant to NSTR 27(b)(2). The plain language of the rule allows discretion but requires that attorney fees be awarded if the conditions are satisfied; the conditions were satisfied in this case. See NSTR 27(b)(2). The trial judge abused his discretion by failing to award the required attorney fees. Accordingly, we reverse the district

court's denial of attorney fees and remand for the district court to enter judgment for attorney fees in Kay's favor. 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.
Douglas

 _____, J.
Pickering

cc: Hon. Kathleen E. Delaney, District Judge
J. Mitchell Cobeaga, Short Trial Judge
Paul Schofield, Settlement Judge
Muije & Varricchio
Herbert Sachs
Eighth District Court Clerk