

IN THE SUPREME COURT OF THE STATE OF NEVADA

LAS VEGAS METROPOLITAN POLICE
DEPARTMENT,
Appellant,
vs.
MICHAEL A. BUONO, JR., AND
MICHAEL V. BUONO, SR.,
Respondent.

No. 54106

FILED

DEC 27 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *A. Anderson*
DEPUTY CLERK

ORDER OF REVERSAL

This is an appeal from a district court post-judgment order awarding attorney fees and costs. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Appellant Las Vegas Metropolitan Police Department (LVMPD) was ordered by the district court to pay attorney fees in the amount of \$140,012.50 to respondents Michael V. Buono, Sr., and Michael A. Buono, Jr. (the Buonos). Included in this amount were fees for respondents' original motion for return of property, a writ proceeding before this court, and an ancillary contempt proceeding. LVMPD now appeals the district court's award of attorney fees and costs.

Although LVMPD presents several issues on appeal, we only address the following: (1) whether the district court abused its discretion in awarding attorney fees for the return of property proceeding based on the Buonos' untimely motion, (2) whether NRS 18.010(2)(b) authorizes the district court to award attorney fees for an original writ proceeding before this court, and (3) whether the district court abused its discretion in

awarding attorney fees for the ancillary contempt proceeding.¹ For the reasons below, we reverse.

Facts and Procedural History

In a multiagency operation, LVMPD obtained and executed a search warrant, seizing various personal items belonging to Brandt England and the Buonos. After documenting the seized property and filing a return with the district court, LVMPD transferred the seized property to the Maricopa County Sheriff's Department (MCSD) in Arizona.

England brought a motion under NRS 179.085 for the return of the seized property. The Buonos joined this motion. LVMPD opposed the motion on various grounds, but the district court, after considering the motion and conducting a hearing, ordered LVMPD to return the property within seven days. LVMPD did not appeal the district court's order.

When LVMPD failed to comply with the district court's order, the Buonos sought an order to show cause why a contempt order should not be entered against LVMPD. The district court issued the order to show cause. In response, LVMPD petitioned this court for a writ of mandamus and prohibition. Although we initially entered a stay in the contempt proceeding, we ultimately denied the petition for extraordinary relief.

Our order denying the petition lifted the stay, whereupon the Buonos re-noticed the contempt hearing. However, prior to the hearing, LVMPD was able to secure the property from MCSD and returned the

¹Because we conclude that the district court abused its discretion in awarding attorney fees and costs for the reasons explained in this order, we do not consider the additional issues raised by LVMPD.

property to the Buonos. Accordingly, the district court vacated the contempt hearing. The court also ordered briefing on the issue of attorney fees and costs upon request from the Buonos.

After the district court's order vacating the contempt hearing, the Buonos filed a motion for attorney fees and costs, seeking \$198,000 in attorney fees and \$5,533.51 in costs for all three proceedings. The district court granted the Buonos' motion and ultimately entered an order awarding \$140,012.50 in attorney fees and \$6,210.39 in costs.

Discussion

At the outset, we note that the Buonos' request for attorney fees and costs covered three distinct proceedings. However, the district court's order did not specify an allocation of fees and costs to any particular proceeding.

We review a district court's award of attorney fees for abuse of discretion. Davidsohn v. Steffens, 112 Nev. 136, 139, 911 P.2d 855, 857 (1996). Although the district court is not required to explicitly allocate an award of attorney fees and costs, we will reverse the award in its entirety and remand to the district court for a new determination when appropriate if we determine that a portion of the award was erroneously granted.² Therefore, we consider the award for each proceeding separately.

²While the district court need not provide a detailed accounting of the award, where the amount awarded differs from the amount claimed, the district court must explain how it allocated the award. See Wynn v. Smith, 117 Nev. 6, 13, 16 P.3d 424, 428 (2001); see also Henry Prods. v. Tarmu, 114 Nev. 1017, 1020, 967 P.2d 444, 446 (1998).

Attorney fees and costs for initial proceeding seeking return of property

The district court is authorized to award reasonable attorney fees if it finds that “the claim, counterclaim, cross-claim or third-party complaint or defense of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party.” NRS 18.010(2)(b). However, a request for attorney fees under NRS 18.010(2)(b) must be made within a reasonable time because of the effect such an award may have on the losing party’s decision to appeal. See Davidsohn, 112 Nev. at 139, 911 P.2d at 857. Although the timeliness of a motion for attorney fees is subject to the discretion of the district court, a motion for attorney fees is untimely if it is filed after the time to appeal has expired.³ See NRAP 4(a); Collins v. Murphy, 113 Nev. 1380, 1383, 951 P.2d 598, 600 (1997).

In this case, the Buonos’ motion for attorney fees was filed nearly two years after the district court’s order was entered. Because this award is controlled by the precedents set forth in Davidsohn and Collins, we conclude that the district court abused its discretion in awarding

³The current version of NRCP 54(d), which became effective after the district court issued its order for return of property, is inapplicable here. In the Matter of Amendments to the Nevada Rules of Civil Procedure, ADKT No. 426 (Order Amending Nevada Rule of Civil Procedure 54, February 9, 2009) (providing that amendments to NRCP 54 regarding time limit for attorney-fee motions were effective May 1, 2009). Under the current version of NRCP 54(d), a motion for attorney fees must be filed no later than 20 days after notice of entry of judgment is served. Id.

attorney fees and costs⁴ to the Buonos for the initial proceeding seeking return of their property.⁵

Attorney fees and costs for writ proceeding before this court

When an award of attorney fees implicates a question of law, we review the district court's award de novo. Thomas v. City of North Las Vegas, 122 Nev. 82, 90, 127 P.3d 1057, 1063 (2006).

It is well-settled that attorney fees are not recoverable absent a statute, rule, or contractual provision authorizing such an award. Settelmeyer & Sons v. Smith & Harmer, 124 Nev. 1206, 1220, 197 P.3d 1051, 1060 (2008); Bd. of Gallery of History v. Datecs Corp., 116 Nev. 286, 288, 994 P.2d 1149, 1150 (2000); County of Clark v. Alper, 100 Nev. 382, 395, 685 P.2d 943, 951-52 (1984). Furthermore, the power to award attorney fees and costs for proceedings before us resides solely with this court. See Bd. of Gallery of History, 116 Nev. 286, 994 P.2d 1149. The district court's reliance on NRS 18.010(2)(b) as the basis for the award is erroneous. NRS 18.010 only authorizes a court to award attorney fees or costs for proceedings before that court. NRS 18.010. The district court lacks jurisdiction to award attorney fees or costs for proceedings before us.

⁴We note that the district court also abused its discretion in awarding costs to the Buonos because a memorandum of costs was not filed and served within 5 days of the entry of the final order per NRS 18.110. Henry Prods. Inc., 114 Nev. 1017, 967 P.2d 444.

⁵The Buonos argue that the potential for further enforcement actions tolls the filing deadline for requesting attorney fees. However, the prospect for future action does not affect the finality or appealable nature of the district court's order. See Perkins v. Sierra Nevada Silver Mining Co., 10 Nev. 405, 414 (1876).

Because the mandamus proceeding is an original and separate proceeding within our jurisdiction, we conclude that the district court exceeded its jurisdiction and thus abused its discretion when it awarded attorney fees and costs for the writ proceeding in this case.

Attorney fees and costs for contempt proceeding

We review a district court's decision to award attorney fees for an abuse of discretion. Davidsohn, 112 Nev. at 139, 911 P.2d at 857. While the failure to make explicit findings of factors supporting an award for attorney fees is not per se an abuse of discretion, specific findings of factors supporting an award of fees are favored. See Wynn v. Smith, 117 Nev. 6, 13, 16 P.3d 424, 428 (2001). At a minimum, the record must reflect that the district court properly considered the factors in awarding attorney fees. Schwartz v. Estate of Greenspun, 110 Nev. 1042, 1049, 881 P.2d 638, 642 (1994).

The record in this case is devoid of any factors supporting the district court's award of attorney fees in the contempt proceeding. LVMPD's position during the contempt proceeding was not without reasonable ground or for the purpose of harassment. See NRS 18.010(2)(b).⁶ There was no evidence that LVMPD engaged in any delaying or obstructing tactics. LVMPD did not transfer the property to

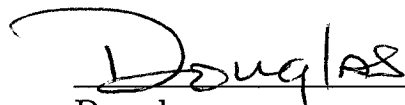
⁶NRS 22.100 provides another basis for an award of attorney fees. Under NRS 22.100, a party found guilty of contempt may be required to pay attorney's fees. Because the parties agree that the district court did not base the award of attorney fees on NRS 22.100, we do not consider whether the district court could have awarded attorney fees under NRS 22.100. We note also that the district court vacated the contempt hearing prior to any actual finding of contempt on the part of LVMPD.

MCS D for the purpose of circumventing the district court's ruling. On the contrary, LVMPD made numerous attempts to recover the Buonos' property from MCS D. See McCormick v. District Court, 67 Nev. 318, 326, 218 P.2d 939, 942 (1950) (recognizing that inability to obey an order is a complete defense to contempt, but refusing to provide this defense if "the contemners voluntarily or contumaciously brought on themselves the disability to obey the order"). LVMPD therefore had a complete defense to the charge of contempt because it had no ability to comply with the district court's order. Because LVMPD's position was not without reasonable ground or for the purpose of harassing the Buonos, there was no basis to support an award of attorney fees under NRS 18.010(2)(b). Therefore, we conclude that the district court abused its discretion in awarding attorney fees for the contempt proceeding.

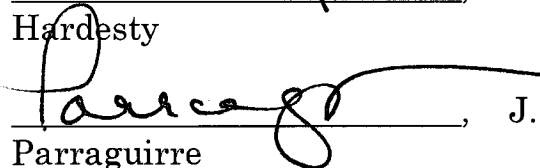
Finally, the district court abused its discretion in awarding cost to the contempt proceeding because the Buonos were not a prevailing party. NRS 18.020 only authorizes the award of cost to a prevailing party and because the order to show cause was vacated, there was no prevailing party for which the district court may award costs.

Accordingly, we reverse the district court's order awarding attorney fees and costs.

It is so ORDERED.


_____, J.
Douglas


_____, J.
Hardesty


_____, J.
Parraguirre

cc: Hon. Michelle Leavitt, District Judge
Marquis & Aurbach
E. Brent Bryson, Ltd.
Eighth District Court Clerk