IN THE SUPREME COURT OF THE STATE OF NEVADA

M. HADI SOLTANI AND RAHELIH TABRIZI,
Appellants,
vs.
GP INDUSTRIES D/B/A RENO IRON WORKS AND MARES FRAMING,
Respondents.

No. 56114

FILED

DEC 27 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY H. Ingersoll
DEPUTY CLERK

ORDER AFFIRMING IN PART AND VACATING AND REMANDING IN PART

This is an appeal from district court orders, certified as final under NRCP 54(b), dismissing appellant's counterclaims and third-party complaints and granting attorney fees for the respondents. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge.

Appellants M. Hadi Soltani and Rahelih Tabrizi (the Soltanis) hired a general contractor to build a home and then terminated the contractor's services. When the general contractor sued, the Soltanis countersued, putting forth a variety of claims. Later, the Soltanis amended their counterclaim to include a third-party complaint against several subcontractors, including respondents GP Industries d.b.a. Reno Iron Works (RIW) and Mares Framing. When RIW and Mares Framing demonstrated there was no contractual privity between them and the Soltanis, the district court granted summary judgment to RIW, dismissed the claims against Mares Framing, and awarded both subcontractors attorney fees and costs.

On appeal, the Soltanis raise two issues: (1) for public policy reasons, a homeowner should have a valid cause of action for breach of implied warranty against subcontractors when a general contractor does

not have sufficient assets to cover the damages—even when there is no contractual privity between the homeowner and the subcontractor, (2) the district court abused its discretion in awarding attorney fees to respondents.[1] We affirm the district court's rejection of the Soltanis' breach-of-implied-warranty claim, but reverse the district court's award of attorney fees to Mares Framing.

Order granting summary judgment and dismissal

This court reviews a grant or denial of summary judgment de novo. Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment shall be granted when there is no genuine issue of material fact. Id. In reviewing a motion for summary judgment, this court views the evidence "in a light most favorable to the nonmoving party." Id.

A district court order granting a NRCP 12(b)(5) motion to dismiss "'is subject to a rigorous standard of review on appeal.'" Buzz Stew, LLC v. City of N. Las Vegas, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008) (quoting Seput v. Lacayo, 122 Nev. 499, 501, 134 P.3d 733, 734 (2006)). In conducting its de novo review, this court assumes all factual allegations in the complaint are true and will only uphold the dismissal "if it appears beyond a doubt that [the nonmoving party] could prove no set of facts, which, if true, would entitle it to relief." Id. at 228, 181 P.3d at 672.

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[1]The Soltanis also argue that the district court erred in determining that they were not third-party beneficiaries of the contracts between the general contractor and the subcontractors. This argument has no merit. Lipshie v. Tracy Investment Co., 93 Nev. 370, 379, 566 P.2d 819, 824-25 (1977) (third-party beneficiary status requires "promissory intent to benefit the third party" and foreseeable reliance).

The Soltanis complain that they have no recourse if they are unable to sue the subcontractors because the economic loss doctrine prevents homeowners from pursuing a construction defect tort claim for purely economic losses. They also claim that they will not be able to recover for breach of contract because the general contractor is allegedly insolvent. The Soltanis then cite to Justice Becker's dissenting opinion in Olson v. Richard, 120 Nev. 240, 247-48, 89 P.3d 31, 36 (2004) (Becker, J., dissenting), for the proposition that privity requirements should be dissolved in these circumstances so that a homeowner is not left stranded without a recovery. Finally, the Soltanis reason that NRS Chapter 40 allows homeowners to bring construction defect claims against subcontractors, even when the parties are in not in privity, and thus, privity should not be required under an implied warranty claim either.

We do not find merit in these arguments. In the first place, the public policy issue appears to have been rendered moot. Thus, on November 18, 2011, Mares Framing filed a motion to dismiss this appeal, which the Soltanis have not opposed.[2] Appended to this motion are copies of the verdict and judgment against the Soltanis and in favor of the supposedly defunct general contractor, finding no construction defects. If the Soltanis cannot establish their direct claims for construction defect against the general contractor, they are precluded from proceeding derivatively against the subcontractors on implied warranty theories for

[2]RIW did not join the Mares Framing motion to dismiss which, although not opposed by the Soltanis, does not address the issue the Soltanis raise as to the attorney fees awarded Mares Framing. We therefore grant the Mares Framing motion in part as to the dismissal of the implied warranty claims but deny the motion as to attorney fees.

those same claims. See Elyousef v. O'Reilly & Ferrario, LLC, 126 Nev. ___, ___, 245 P.3d 547, 548 (2010).

Second, Nevada law requires privity to pursue an implied warranty claim. Long v. Flanigan Warehouse Co., 79 Nev. 241, 247, 382 P.2d 399, 402-03 (1963). As the district court correctly found, there was no privity because the contracts between the general contractor and the subcontractors did not even mention the Soltanis. It is true, as the Soltanis note, that members of this court have occasionally opined that homeowners should be allowed to recover from a subcontractor when the general contractor is insolvent. However, in this case, nothing in the record supports the Soltanis' speculation that the general contractor is insolvent and would be unable to pay a judgment. Adding to the speculation, a jury has found in favor of the general contractor and against the Soltanis. These facts make this case an inappropriate vehicle for revisiting the privity requirement imposed by our Nevada cases. We therefore affirm the district court's summary judgment in favor of RIW and order of dismissal as to Mares Framing

Attorney fees and costs

This court reviews a district court's award of attorney fees for abuse of discretion. Albios v. Horizon Communities, Inc., 122 Nev. 409, 417, 132 P.3d 1022, 1027-28 (2006). Abuse of discretion requires that the district court ignore legal principles and act without justification. Collins v. Murphy, 113 Nev. 1380, 1383, 951 P.2d 598, 600 (1997).

The Soltanis argue that RIW and Mares Framing did not provide adequate documentation of their attorney fees to the district court. They also argue that the district court did not use the correct legal standard for awarding attorney fees.

This court has held that affidavits are adequate documentation of attorney fees if they are "sufficient to enable the court to consider all factors necessary to determine a reasonable attorney's fee." Herbst v. Humana Health Ins. of Nevada, 105 Nev. 586, 591, 781 P.2d 762, 765 (1989) (citing Dennis v. Chang, 611 F.2d 1302, 1308 (9th Cir. 1980)). In this case, both subcontractors submitted affidavits with their motions for fees and costs and the district court explicitly wrote that it was intimately familiar with the parties and the litigation. Although an affidavit may not always satisfy the documentation requirement, in this particular case the district court had substantial evidence to support its determination and did not abuse its discretion by accepting affidavits.[3]

The district court awarded RIW attorney fees pursuant to NRS 17.115 because it found that the Soltanis rejected a reasonable and timely offer of judgment that RIW made in May 2009. Where a party rejects an offer of judgment, NRS 17.115(4)(d) allows the district to award reasonable attorney fees. So, here the district court's award was statutorily supportable and not an abuse of discretion.

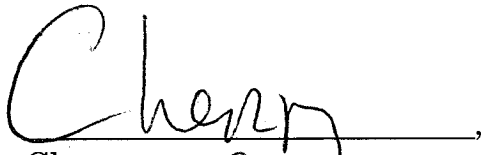
However, the district court erred by granting Mares Farming attorney fees pursuant to NRS 18.010(2)(a). NRS 18.010(2)(a) allows for recovery of attorney fees "[w]hen the prevailing party has not recovered more than $20,000 . . . ." This court has determined that recovery of a money award is a requirement to an award of attorney fees under NRS 18.010(2)(a). Smith v. Crown Financial Services, 111 Nev. 277, 285, 890 P.2d 769, 774 (1995). Here, Mares Framing did not receive a money

[3]Moreover, the attorney fees awarded to RIW satisfy the requirements of NRCP 68(f)(2) and this court's precedent in Beattie v. Thomas, 99 Nev. 579, 668 P.2d 268 (1983).

award and the district court only found that the Soltanis filed a meritless claim. So, we hold that the district court abused its discretion in granting attorney fees to Mares Framing under NRS 18.010(2)(a). However, because Mares Framing request fees under both subparagraphs (a) and (b) of NRS 18.010(2) and the district court did not address the claim under NRS 18.010(2)(b), in reversing the award of fees as to Mares Framing, we remand for the district court to assess the fee claim under NRS 18.010(2)(b).

In light of the foregoing, we

ORDER the judgment of the district court AFFIRMED in part and VACATED AND REMANDED in part to the district court for proceedings consistent with this order.



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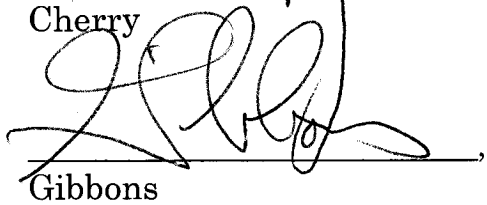
Cherry



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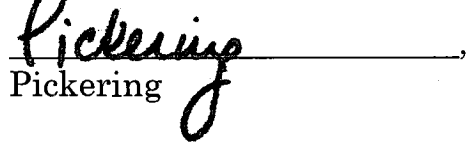
Gibbons



_____, J.
Pickering

cc: Hon. Patrick Flanagan, District Judge
Laurie A. Yott, Settlement Judge
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