IN THE SUPREME COURT OF THE STATE OF NEVADA

CATELLO TILE & MARBLE CONTRACTORS, INC.,
Appellant,
vs.
GEORGE P. KELESIS, AS EXECUTOR FOR THE ESTATE OF LAWRENCE WARD, DECEASED,
Respondent.

No. 37648

FILED

JUL 11 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal of a district court order granting judgment in favor of respondent for the net difference between the amount owed appellant and the attorney fees awarded to respondent.

Appellant contends that the district court erred in determining that respondent was the prevailing party and correspondingly, in awarding respondent attorney fees and costs. We agree.

In Parodi v. Budetti,[1] this court, en banc, considered the question of how to determine who is the prevailing party for purposes of attorney fees and costs in instances where multiple lawsuits have been consolidated into one action.[2] We saw no reason to treat these cases differently than single action cases involving multiple counts or counterclaims, where the aggregate or net judgment is considered for purposes of determining whether the award is within the statutory limits

[1]115 Nev. 236, 984 P.2d 172 (1999).

[2]Id. at 241, 984 P.2d at 175.

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which entitle a party to receive attorney fees.[3] We further held that once the net damages are computed, "[t]he trial court would then award costs to the prevailing party pursuant to NRS 18.020 and proceed with the discretionary analysis [concerning attorney fees] under NRS 18.010(2)(a)" (emphasis added).[4]

Here, the district court considered the value of the agreement between appellant and respondent and then offset the value of the vehicle lease and other litigated amounts. After having done so, the district court concluded that appellant was owed $8,000.00. Since the net damages favored appellant, it was error for the district court to conclude that respondent was the prevailing party for purposes of awarding attorney fees and costs.

Appellant also contends that it was error for the district court to award respondent attorney fees and costs pursuant to the provision in the vehicle lease. We agree. Neither appellant nor respondent were parties to the lease. In addition, the lease provision allowed attorney fees to the holder of the lease only in the event of default on the lease. Here, the lease was paid in full at its inception and was thus no longer operative at the time this dispute arose.

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[3]Id. (citing Robert J. Gordon Constr. v. Meredith Steel, 91 Nev. 434, 537 P.2d 1199 (1975); Peterson v. Freeman, 86 Nev. 850, 477 P.2d 876 (1970)).

[4]Id. at 241-42. See also NRS 18.020, which requires that costs be allowed to prevailing parties in actions to recover money damages or property worth in excess of $2,500.00 and NRS 18.010(2)(a), which allows the court to award attorney fees to the prevailing party when the recovery is under $20,000.00.

Next, appellant contends that the district court erred in refusing to foreclose on the mechanic's lien and in denying its request for reasonable attorney fees. Respondent counters that the district court's finding that appellant failed to establish by any credible evidence, the requirements to prevail under the mechanic's lien statute and its finding that the lien was frivolous and excessive were questions of fact which should not be disturbed on appeal.[5] However, the district court amended its judgment to include the conclusion that appellant failed to satisfy the lien requirements after a hearing during which no evidence was presented. Other than the dispute as to the amount of the lien, neither the amended judgment or the hearing transcripts specify which requirements appellant failed to meet. A review of the record and the statutory provisions in NRS 108.222 et. seq. indicate that the filing, recording, and foreclosure proceedings were timely.

We have previously held that mechanic's lien laws are to be liberally construed to protect the right of mechanic's lien claimants.[6] NRS 108.222 provides that a contractor who provides labor or material over $500.00 has a lien on the structure for the unpaid balance of the contract price, or if no contract exists, for an amount equal to the fair market value

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[5]See Trident Construction v. West Electric, 105 Nev. 423, 427, 776 P.2d, 1239, 1242 (1989) (holding that where a trial court sitting without a jury makes factual determinations based on conflicting evidence, its findings should not be disturbed on appeal where supported by substantial evidence).

[6]Peccole v. Luce & Goodfellow, 66 Nev. 360, 373, 212 P.2d 718, 725 (1949).

of the labor or material. NRS 108.229 provides that a lien is not invalidated by mistakes in claims unless such mistakes are deemed material. The statute also specifies that mistakes shall not "be deemed material unless [they] result[ ] from fraud or [are] made intentionally, or [have] misled the adverse party to his prejudice, but in all cases of immaterial variance the claim of lien may be amended . . . to conform to the proof."[7]

Here, appellant testified that the amount of the lien was based upon its understanding of the agreement being cost plus a percentage for overhead. The district court considered conflicting testimony regarding the agreement and the project's worth and was unable to determine from the evidence the exact nature of the agreement. The proper lien amount was thus at least debatable. The district court found that appellant filed the lien without properly investigating and deducting the amount due for the vehicle. We conclude that such an error would not rise to the level of fraud or intentional mistake contemplated by the statute in order to consider the mistake material, especially since respondent was not prejudiced by the error. We therefore agree that it was error for the district court to deny foreclosure on the lien. NRS 108.237(3) provides that "[t]he court shall also allow to the prevailing party reasonable attorney's fees for the preparation of the lien and for representation of the lien claimant in the action." In Close v. Isbell Construction Co.,[8] we held that a successful lien claimant is entitled to attorney fees even if he

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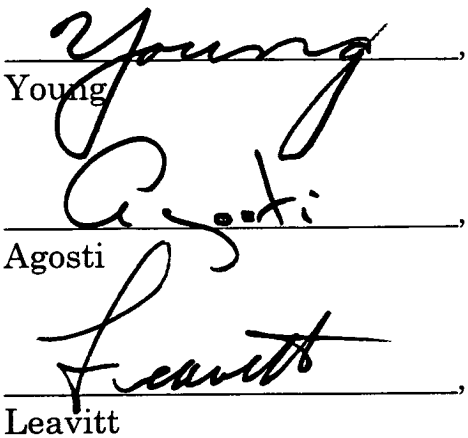
[7]NRS 108.229(1).

[8]86 Nev. 524, 471 P.2d 257 (1970).

recovers less than the amount claimed in its action to foreclose.[9] Appellant's request for reasonable attorney fees was thus also improperly denied.

We have considered appellant's other claims of error and conclude that to the extent in which they differ from the aforementioned arguments, they lack merit. Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.



_____, J.
Young

_____, J.
Agosti

_____, J.
Leavitt

cc: Hon. Nancy M. Saitta, District Judge
Haney, Woloson & Mullins
Marc P. Cook & Associates, Ltd.
Clark County Clerk

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[9]Id. at 531, 571 P.2d at 262.