

IN THE SUPREME COURT OF THE STATE OF NEVADA

GERALD A. NIZNICK AND REESA  
NIZNICK,  
Appellants/Cross-Respondents,

vs.

ANITA R. BROOKS INTERIORS, INC.,  
A NEVADA CORPORATION; AND  
ANITA BROOKS, N/K/A ANITA  
BROOKS CANFIELD, AN  
INDIVIDUAL,  
Respondents/Cross-Appellants.

No. 37965

FILED

AUG 23 2003

JANETTE V. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Richards*  
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND  
REMANDING

The appellants, Dr. Gerald A. Niznick and Reesa Niznick, appeal the district court's judgment in favor of the respondents, Anita R. Brooks Interiors, Inc. and Anita Brooks Canfield.<sup>1</sup> The Niznicks filed a breach of contract action against ABI for alleged fraudulent billing practices committed by ABI in the course of providing interior design services and furnishings for a residence being built by the Niznicks in Las Vegas. After holding a bench trial, the district court issued a judgment in favor of ABI. Subsequently, the district court entered an order denying ABI's post-judgment motion for attorney fees. The Niznicks appeal the judgment of the district court; ABI cross-appeals the district court's denial of its motion for attorney fees.<sup>2</sup> We affirm the judgment of the district court; however, we reverse the district court's post-judgment order denying attorney fees to ABI and remand this matter to the district court.

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<sup>1</sup>The respondents/cross-appellants will be referred to collectively as "ABI" unless otherwise noted.

<sup>2</sup>The motion for attorney fees was filed by ABI alone.

First, we conclude that substantial evidence exists to support the district court's conclusion that the Niznicks' owed unpaid sales tax and freight charges.<sup>3</sup> We will not set aside a district court's findings of fact and conclusions of law, which are supported by substantial evidence, unless clearly erroneous.<sup>4</sup>

With regard to the unpaid sales tax charges, Canfield testified as to the amounts owed by the Niznicks. Canfield was in the position to know what was owed on the Niznick account, and she relied upon her personal knowledge when reviewing the invoice records in order to prepare the final reconciliation. The district court expressly concluded that she was a credible witness.<sup>5</sup> Furthermore, the best evidence rule does not require the production of the actual sales tax records because ABI was not attempting to prove the contents of these records,<sup>6</sup> but was attempting to prove what charges remained unpaid on the Niznicks' account.

With regard to the unpaid freight charges, the fact that the Niznicks had previously accepted freight charges calculated at the rate of eight percent of the costs of furnishings on numerous occasions supports the district court's conclusion that the parties had agreed to calculate freight charges at eight percent. In contrast, apart from Gerald Niznick's

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<sup>3</sup>See Enterprise Citizens v. Clark Co. Comm'rs, 112 Nev. 649, 653, 918 P.2d 305, 308 (1996).

<sup>4</sup>Edwards Indus. v. DTE/BTE, Inc., 112 Nev. 1025, 1031, 923 P.2d 569, 573 (1996).

<sup>5</sup>See Rowland v. Lepire, 99 Nev. 308, 312, 662 P.2d 1332, 1334 (1983) (recognizing that the evaluation of witness's credibility lies squarely within the domain of the trier of fact).

<sup>6</sup>See NRS 52.235.

testimony, no evidence was presented for the proposition that the parties had agreed to use the actual freight charges.

Second, the district court did not err in applying the UCC to the parties' contract because the furnishings purchased by the Niznicks are moveable "goods,"<sup>7</sup> and because a primary purpose of the contract was the sale of goods.<sup>8</sup> While the contract also dealt with the rendition of services, the bulk of the parties' performance was in relation to the sale of furnishings for the Niznicks' residence. Since the UCC applies, the district court correctly concluded that the Niznicks accepted and exercised ownership over most of the goods by ignoring a court order and selling the goods with knowledge of their alleged non-conformity and without notifying ABI.<sup>9</sup> The Niznicks also failed to timely reject the Italian purchases, and accordingly, they are deemed to have accepted those furnishings as well.<sup>10</sup>

Third, the district court did not abuse its discretion when it concluded that ABI is not liable for certain fees solicited by Judy Donoff because she was a dual agent of the Niznicks and ABI for the purpose of certain transactions. We have held that "[t]he same person or entity may act as the agent for two parties interested in the same transaction when

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<sup>7</sup>See NRS 104.2102 (providing that Article 2 of the UCC is limited to "transactions in goods"); NRS 104.2105(1) (providing that the term "[g]oods' means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale").

<sup>8</sup>See RRX Industries, Inc. v. Lab-Con, Inc., 772 F.2d 543, 546 (9th Cir. 1985) (holding that when "determining whether a contract is one of sale or to provide services we look to the essence of the agreement").

<sup>9</sup>See NRS 104.2606(1)(c).

<sup>10</sup>See NRS 104.2606(1); NRS 104.2602(1).

their interests do not conflict and where loyalty to one does not necessarily constitute breach of duty to the other.”<sup>11</sup> Although there was conflicting evidence as to whether Donoff was acting on behalf of Canfield, the district court acted within its discretion in concluding, based upon Canfield’s testimony, that Donoff was a dual agent.<sup>12</sup>

Finally, the district court erred when it denied ABI’s post-judgment motion for attorney fees because the conduct of the parties indicates that they intended to be bound by the “Letter[s] of Estimate and Contract,” which included language stating that, in the event of litigation, the prevailing party would be entitled to attorney fees and costs. In Casino Operations, Inc. v. Graham, we stated that “[w]hen the parties to a contract perform under it and demonstrate by their conduct that they knew what they were talking about the courts should enforce that intent.”<sup>13</sup> While the parties initially entered into a contract that was memorialized on a single page, it is clear that they intended to be bound by the subsequent “Letter[s] of Estimate and Contract.”<sup>14</sup> At trial, Gerald Niznick stated that he considered the “Letter[s] of Estimate and Contract” to be binding contracts, and, while ABI argued that the price terms within

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<sup>11</sup>Young v. Nevada Title Co., 103 Nev. 436, 439, 744 P.2d 902, 903 (1987).


<sup>12</sup>See id.

<sup>13</sup>86 Nev. 764, 768, 476 P.2d 953, 956 (1970) (quoting Crestview Cemetery Association v. Dieden, 356 P.2d 171, 177 (Cal. 1960)).

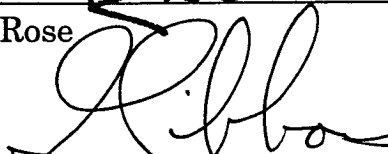
<sup>14</sup>See Haspray v. Pasarelli, 79 Nev. 203, 208, 380 P.2d 919, 921 (1963) (recognizing that separate documents may form a single contract); see also Ray Motor Lodge, Inc. v. Shatz, 80 Nev. 114, 118-19, 390 P.2d 42, 44 (1964) (noting that separate writings may together satisfy the statute of frauds “even though one of them was not signed by the party to be charged, and neither was a sufficient memorandum in itself”).

the "Letter[s] of Estimate and Contract" were merely estimated prices, there is no indication from the record that the "Letter[s] of Estimate and Contract" were not binding agreements. Therefore, since ABI succeeded on its breach of contract counterclaim by recovering unpaid charges owed by the Niznicks, ABI is entitled to attorney fees pursuant to its agreement with the Niznicks.<sup>15</sup> Accordingly, we affirm the district court's judgment, reverse the district court's order denying ABI attorney fees and remand this matter for further proceedings.

It is so ORDERED.

  
\_\_\_\_\_, C.J.  
Agosti

  
\_\_\_\_\_, J.  
Rose

  
\_\_\_\_\_, J.  
Gibbons

cc: Hon. Joseph S. Pavlikowski, Senior Judge  
Kravitz Schnitzer & Sloane, Chtd.  
Steven B. Glade  
Clark County Clerk

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<sup>15</sup>See Hornwood v. Smith's Food King, 105 Nev. 188, 192, 772 P.2d 1284, 1287 (1989).