

IN THE SUPREME COURT OF THE STATE OF NEVADA

AUTO MALL NISSAN, A NEVADA
LIMITED LIABILITY COMPANY,
Appellant/Cross-Respondent,

vs.

ACCURACY GLASS & MIRROR CO.,
INC.,
Respondent/Cross-Appellant.

No. 39117

FILED

MAY 17 2006

BY *[Signature]*
SARAH M. BLOOM
CLERK OF SUPREME COURT
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

This is an appeal from a district court order granting judgment for the respondent and an appeal and cross-appeal from a district court order awarding attorney fees. Eighth Judicial District Court, Clark County; Gene T. Porter, Judge.

Appellant/cross-respondent Auto Mall Nissan, LLC contracted for the construction of an auto mall in Henderson, Nevada. Pursuant to a valid subcontract with the general contractor, respondent/cross-appellant Accuracy Glass & Mirror Co., Inc. was to provide the project's glass, door, and mirror work. Nissan's owner, Dan Towbin, recommended Accuracy for the project and visited the site throughout its progression.

During construction, numerous change orders were entered into between the general contractor and Accuracy. As a result, Accuracy's billing for the project was higher than the original contract price. Accuracy was never paid for its additional work.

Several of the project's subcontractors, including Accuracy, recorded mechanic's liens on the property. Atlas Roofing Corporation was the first to file a complaint against Nissan, on June 27, 1996. After notice of the complaint was mailed to Accuracy on August 21, 1996, Accuracy

filed its statement of facts constituting lien in the Atlas case on September 4, 1996, alleging a lien in the amount of \$66,228.43 plus interest. Likewise, Consolidated Electric filed a complaint on July 30, 1996. Accuracy filed a statement of facts constituting lien in that case on August 22, 1996. Additionally, Las Vegas Paving filed a complaint on August 2, 1996, and Accuracy filed its statement of facts constituting lien in that case on September 5, 1996.

On September 16, 1996, the above-noted district court cases were consolidated and a special master was appointed. A stipulation, prepared and signed by Nissan's attorney, was simultaneously filed which stated that the lien claimants did not have to file additional statements of facts constituting liens if they had previously filed a complaint or statement of facts in any of the consolidated cases.

Initially, upon the special master's recommendation, Accuracy was awarded its claim for unpaid work under a theory of unjust enrichment in a judgment in the consolidated case. The district court then ordered the special master to determine whether the judgment was secured by a valid lien and, if so, whether attorney fees were warranted. Upon the special master's recommendation, the district court concluded that the judgment was secured by a valid lien. Thereafter, the district court awarded Accuracy approximately one-half of its requested attorney fees, which amount was an increase in the attorney fees recommended by the special master. Nissan appeals from both orders.

On appeal, Nissan first argues that the change orders entered into between the general contractor and Accuracy did not bind Nissan and that Accuracy failed to establish the actual costs of its work to support its unjust enrichment claim. Secondly, Nissan argues that Accuracy failed to

perfect its mechanic's lien because it did not give a proper pre-lien notice, failed to timely record its lien, and failed to timely file its statement of facts constituting lien. Lastly, Nissan argues that the district court failed to state its basis for awarding Accuracy attorney fees.

Following a review of the record, we conclude that substantial evidence supports the district court's finding that Accuracy was entitled to \$67,432.53 under a theory of unjust enrichment. Likewise, we conclude that substantial evidence supports the district court's finding that the \$67,432.53 amount was secured by a valid lien.¹ However, we further conclude that the district court's failure to state its basis for awarding attorney fees constitutes an abuse of discretion.

Unjust enrichment claim

Pursuant to NRS 108.222(4),² a contractor is the agent of the owner for purposes of a lien claim. Thus, when reviewing a claim of lien for additional work, approved change orders become part of the original contract with the general contractor.³

The original subcontract between Accuracy and the general contractor provided for a contract price of \$185,000 upon successful completion. During the project's construction, numerous change orders were made to the work, and Accuracy's billing for the project totaled

¹Edwards Indus. v. DTE/BTE, Inc., 112 Nev. 1025, 1031, 923 P.2d 569, 573 (1996) ("As this court has stated on numerous occasions, findings of fact and conclusions of law, supported by substantial evidence, will not be set aside unless clearly erroneous.").

²Amended 2003 Nev. Stat., ch. 427, § 28, at 2596.

³California Commercial v. Amedeo Vegas I, 119 Nev. 143, 145, 67 P.3d 328, 330 (2003).

\$233,728.43. The change orders were requested and approved by the general contractor, Nissan's agent under NRS 108.222(1)(b). Accuracy presented expert testimony and other evidentiary support reflecting an unpaid balance of \$66,228.43. Thus, substantial evidence supports the district court's finding that the general contractor was an agent of Nissan necessary to establish a valid lien and, therefore, bound Nissan to pay Accuracy's unpaid balance of \$67,432.53⁴ under a theory of unjust enrichment.

Mechanic's lien

Pursuant to a motion to clarify, the district court entered an amended order requiring the special master to conduct an evidentiary hearing to determine the validity of Accuracy's lien claim and the reasonableness of the attorney fees it requested. Thereafter, the district court held that Nissan had actual notice of Accuracy's work, and that Accuracy had timely recorded its lien and its statement of facts constituting lien. Consequently, the district court ordered judgment for \$67,432.53 in favor of Accuracy as secured by a valid lien.

"This court has repeatedly held that the mechanic's lien statutes are remedial in character and should be liberally construed [and]; that substantial compliance with the statutory requirements is sufficient to perfect the lien if the property owner is not prejudiced."⁵ "The failure to

⁴This figure reflected the interest sought by, and granted to, Accuracy.

⁵Las Vegas Plywood v. D & D Enterprises, 98 Nev. 378, 380, 649 P.2d 1367, 1368 (1982).

serve the pre-lien notice [pursuant to NRS 108.245] does not invalidate a mechanics' or materialmen's lien where the owner received actual notice."⁶

Towbin was familiar with Accuracy's work and recommended Accuracy as a subcontractor. While Accuracy was performing its work on the auto mall, Towbin visited the site an estimated three times a week. Thus, the district court's determination that Nissan had actual notice, because Towbin recommended and witnessed Accuracy's work, is supported by substantial evidence.

Pursuant to NRS 108.226,⁷ notice of a lien must be recorded within ninety days after last provided labor, materials, or services. Accuracy recorded its lien on June 11, 1996, for \$66,228.43 plus interest. Accuracy recorded an amended notice and claim of lien on October 16, 1996, for claims concerning materials and services delivered on June 4, 1996, which were not included in the June 11 recordation. NRS 108.229⁸ permits liens to be amended for immaterial variance and states that such amendments relate back to the time of recording the notice of lien. Thus, substantial evidence supports the district court's determination that Accuracy recorded its lien within the ninety-day statutory period.

"After the filing of a complaint to enforce a lien, all lien claimants are required to 'serve on the plaintiff and also on the defendant . . . written statements of the facts constituting their liens, together with

⁶Fondren v. K/L Complex, Ltd., 106 Nev. 705, 710, 800 P.2d 719, 722 (1990).

⁷Amended 2003 Nev. Stat., ch. 427, § 30, at 2597.

⁸Amended 2003 Nev. Stat., ch. 427, § 34, at 2603.

the dates and amounts thereof.”⁹ Accuracy filed two timely statements of facts constituting liens in cases which were subsequently consolidated. The district court’s stipulation and order of consolidation expressly stated that “without prejudice to any party to this Stipulation and Order, no lien claimant having once filed a complaint or Statement of Facts in any of the cases consolidated hereunder shall be required to file any additional complaint or Statement of Facts Constituting Lien herein.” This stipulation and order of consolidation was prepared and signed by Nissan’s attorney. Accordingly, substantial evidence supports the district court’s determination that Accuracy had timely filed its statement of facts constituting lien in this case.¹⁰

Attorney fees

“Unless there is a manifest abuse of discretion, a district court’s award of attorney’s fees will not be overturned on appeal.”¹¹ “Attorney fees are only available when authorized by rule, statute or contract.”¹² “The failure of a district court to state a basis for the award of

⁹Crestline Inv. Group v. Lewis, 119 Nev. 365, 370, 75 P.3d 363, 366-67 (2003) (alteration in original) (quoting NRS 108.239(2)(b)).

¹⁰See S & S Carpets v. Valley Bank of Nevada, 94 Nev. 165, 166 n.2, 576 P.2d 750, 751 n.2 (1978) (“[N]o contention has been made that the trial court, as a matter of discretion, should have relieved appellant of its default.”); see also Crestline Investment Group, 119 Nev. at 370, 75 P.3d at 367 (2003) (impliedly acknowledging a district court’s ability to relieve a lien claimant of a default under NRS 108.239).

¹¹Nelson v. Peckham Plaza Partnerships, 110 Nev. 23, 26, 866 P.2d 1138, 1139-40 (1994).

¹²Henry Prods., Inc. v. Tarmu, 114 Nev. 1017, 1020, 967 P.2d 444, 446 (1998).

attorney fees is an arbitrary and capricious action and, thus, is an abuse of discretion.”¹³ In Brunzell v. Golden Gate National Bank, this court enumerated factors that a district court must assess in determining the reasonableness of attorney fees.¹⁴

Accuracy sought \$46,830 in attorney fees, plus costs, and a prejudgment interest award. The district court awarded Accuracy \$23,415 in attorney fees, a figure that reflected one-half of Accuracy’s requested attorney fees amount.¹⁵ The district court later supplemented this award with an additional award of \$940.26 in costs.

The district court failed to conduct a Brunzell analysis and failed to state its legal basis for awarding attorney fees. Thus, it appears that the district court arbitrarily decided to award Accuracy one-half of its requested attorney fees. Consequently, we reverse the district court’s award of attorney fees and remand this matter to the district court to conduct a Brunzell analysis and to state its legal basis prior to awarding any attorney fees in this matter on remand.¹⁶ Accordingly, we

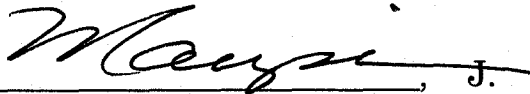
¹³Id.


¹⁴85 Nev. 345, 349-50, 455 P.2d 31, 33 (1969).

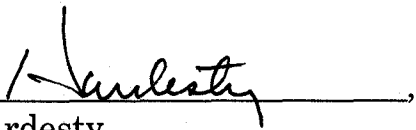
¹⁵This figure represented approximately one-third of the lien claim. The special master recommended a similar amount, ostensibly based upon a standard contingency fee agreement. The mechanic’s lien statutes, however, contemplate awards of actual fees generated.

¹⁶Because we reverse the district court’s award of attorney fees we need not address Accuracy’s cross-appeal for an increase in the district court’s award of attorney fees.

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.

Maupin

_____, J.
Gibbons


_____, J.
Hardesty

cc: Eighth Judicial District Court Dept. 1, District Judge
Leavitt Sully & Rivers
H. Bruce Cox
Clark County Clerk