

IN THE SUPREME COURT OF THE STATE OF NEVADA

TERRY BJERKE AND GL
CONSTRUCTION, INC.,
Appellants,

vs.

DIANE SUE MONTGOMERY, AS
TRUSTEE FOR THE MONTGOMERY
FAMILY TRUST,
Respondent.

TERRY BJERKE,
Appellant,

vs.

HOME DEPOT, INC.,
Respondent.

No. 42710

FILED

DEC 20 2005

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

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

This is an appeal and cross-appeal from a post-judgment district court order awarding attorney fees and costs. Second Judicial District Court, Washoe County; Brent T. Adams, Judge.

The Montgomery Family Trust (the Trust) sued Ledcor Industries, Inc. (Ledcor), and Terry Bjerke and GL Construction sued the Trust on contracts relating to earthwork on the Trust's land. Ledcor made two offers of judgment to the Trust, which in turn made almost simultaneous offers of judgment to Bjerke and GL Construction. No offers were accepted by any party. At trial, a jury awarded damages to the Trust in its suit against Ledcor and found that the Trust was not liable to GL Construction. The damages the Trust received were less than either offer of judgment made by Ledcor. Consequently, Ledcor moved for attorney

fees and costs against the Trust, and the Trust moved for attorney fees and costs against GL Construction, both under NRCP 68.

The district court granted both motions, allowing the Trust to include the attorney fees and costs it paid to Ledcor in the grant of attorney fees from GL Construction to the Trust. GL Construction appeals, arguing that the offer of judgment from the Trust to GL Construction was invalid, the Trust cannot pass on Ledcor's attorney fees, and the attorney fees awarded cannot include attorney fees before the service of the offer of judgment.

The validity of the Trust's offers of judgment to GL Construction

GL Construction argues that the attorney fees awarded to the Trust were in error because the Trust's offer of judgment to GL Construction was illusory.¹ The district court awarded attorney fees to the Trust under NRCP 68, which provides the district court with discretion to award costs and attorney fees when a party does not accept a valid offer of judgment and subsequently recovers less than the offer provided. This

¹GL Construction also argues that the offers of judgment were not open for the requisite ten days. It is true that GL Construction could not have effectively accepted the Trust's offers on the last day of the offers, May 16, 2003, or June 30, 2003, because the Trust in turn could not have accepted Ledcor's offers since Ledcor's offers expired the day before. However, because GL Construction did not raise this matter before the district court, we conclude that this argument has not been preserved for appeal. Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).

The Trust argues that it did not violate the ten-day rule because third-party lawsuit situations require flexibility in NRCP 68. This contention is without merit, as no flexibility is present in the ten-day rule. However, nothing prevented Ledcor from issuing a new offer of judgment to correspond with the Trust's offers to GL.

court reviews awards of costs and attorney fees under NRCP 68 for an abuse of discretion,² but will not disturb a district court's findings of fact.³ However, a district court abuses its discretion when its holdings are "in clear disregard of the guiding legal principles."⁴

In the present case, both of the Trust's offers to GL Construction were "conditioned upon satisfactory acceptance of the Offer of Judgment from Third Party Defendant LEDCOR INDUSTRIES, INC." An offer of judgment is construed using contract principles.⁵ To form a contract, each side must supply some form of consideration, which is lacking when one party is not obligated to perform.⁶ According to the condition, the Trust could have unilaterally refused to accept Ledcor's offer, thus rendering the offer illusory.

However, courts favor contract formation and have found that a covenant of good faith and fair dealing is implied in contracts.⁷ "[A] court will not find a contract to be illusory if the implied covenant of good

²Uniroyal Goodrich Tire v. Mercer, 111 Nev. 318, 324, 890 P.2d 785, 789 (1995); Bergmann v. Boyce, 109 Nev. 670, 674, 856 P.2d 560, 563 (1993).

³Gibellini v. Klindt, 110 Nev. 1201, 1204, 885 P.2d 540, 542 (1994); see Wynn v. Smith, 117 Nev. 6, 14, 16 P.3d 424, 428 (2001).

⁴Bergmann, 109 Nev. at 674, 856 P.2d at 563.

⁵Fleischer v. August, 103 Nev. 242, 246, 737 P.2d 518, 521 (1987).

⁶See Sala & Ruthe Realty, Inc. v. Campbell, 89 Nev. 483, 486, 515 P.2d 394, 396 (1973).

⁷E.g., Hilton Hotels v. Butch Lewis Productions, 107 Nev. 226, 232-33, 808 P.2d 919, 922-23 (1991).

faith and fair dealing can be read to impose an obligation on each party.”⁸ In the present case, had GL Construction accepted the Trust’s offer, the Trust would have been required to act in good faith and accept Ledcor’s offer. GL Construction was not required to meet any conditions or perform in any way other than accepting the offer. Therefore, we conclude that the Trust’s offers to GL Construction were valid, can support an award of attorney fees under NRCP 68, and the district court did not abuse its discretion in awarding costs and attorney fees.

The amount of attorney fees awarded

GL Construction further argues that if the district court did not abuse its discretion in awarding costs and attorney fees, then the district court erred in awarding the Trust its attorney fees incurred prior to the offer of judgment and erred in awarding to the Trust the costs and attorney fees it paid to Ledcor.

First, NRCP 68(f)(2) provides that “the offeree shall pay the offeror’s . . . reasonable attorney’s fees, if any be allowed, actually incurred by the offeror from the time of the offer.” While the district court found the attorney fees request by the Trust to be reasonable, it awarded the Trust \$100,695, or all attorney fees for the period between June 19, 2000, to September 9, 2003. As the Trust gave the first offer of judgment to GL Construction on May 6, 2003, we conclude that the district court abused its discretion by awarding the full amount of attorney fees. The Trust is entitled to reasonable attorney fees only from the date of the first offer, May 6, 2003. We therefore reverse that portion of the district court’s order awarding attorney fees to the Trust and direct the district court, on

⁸Chodos v. West Publishing Co., 292 F.3d 992, 997 (9th Cir. 2002).

remand, to reduce the Trust's award of attorney fees from \$100,695 to \$77,430, which is the amount of the Trust's attorney fees incurred from May 6, 2003, to September 9, 2003.

Second, the district court ordered GL Construction to pay to the Trust the costs and attorney fees it incurred in its lawsuit with Ledcor.

Pass through of costs

This court has allowed costs of suit to pass through from one party to another. Under NRS 18.020, costs taxed to one party become costs of the suit incurred by that party, which can then be passed on to another party.⁹ However, the district court passed the costs in this case through to GL Construction pursuant to NRCP 68. As an alternative, the district court could have awarded costs based on NRS 18.020 because the Trust prevailed over GL Construction. Therefore, while we express no opinion on the validity of passing through costs under NRCP 68, we affirm the district court's award of the costs incurred by Ledcor and taxed to the Trust, \$7,849.96, to the Trust and taxed against GL Construction based on NRS 18.020.¹⁰

⁹Semenza v. Caughlin Crafted Homes, 111 Nev. 1089, 1097, 901 P.2d 684, 689 (1995); Schouweiler v. Yancy Co., 101 Nev. 827, 832, 712 P.2d 786, 789 (1985).

¹⁰GL Construction argues that costs should not pass through because the cases were initially two cases. Regardless of whether the cases were two cases in the beginning, the consolidation of the cases rendered this matter one case, and costs can be passed through even though there are distinct causes of action. See Parodi v. Budetti, 115 Nev. 236, 241, 984 P.2d 172, 175 (1999); Mallin v. Farmers Insurance Exchange, 106 Nev. 606, 608-09, 797 P.2d 978, 980 (1990); Schouweiler, 101 Nev. at 829, 832, 712 P.2d at 787, 789.

Pass through of attorney fees

This court, however, has declined to characterize attorney fees as costs. Attorney fees are not awarded as “of course to the prevailing party” as costs are but, instead, are awarded at the discretion of the court.¹¹ We decline at this time to characterize the award of attorney fees to Ledcor and against the Trust as a cost to the Trust that can be passed on to GL Construction. We conclude that the district court abused its discretion in allowing the Trust to tax the attorney fees of Ledcor, \$91,630, to GL Construction as costs. Therefore, we reverse that portion of the district court’s order awarding costs to the Trust and direct the district court, on remand, to reduce the award of costs granted to the Trust from \$106,461.64 to \$14,831.64.

Accordingly, we

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.

Douglas, J.
Douglas

Rose, J.
Rose

Parraguirre, J.
Parraguirre

¹¹See NRS 18.010; NRS 18.020.

cc: Hon. Brent T. Adams, District Judge
Beasley & Ludwig
Terry Bjerke
C. Nicholas Pereos, Ltd.
Prezant & Mollath
Washoe District Court Clerk