

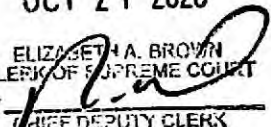
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JERRY R. JACKS, AN INDIVIDUAL,
Appellant,
vs.
702 LLC, A NEVADA LIMITED
LIABILITY COMPANY; AND JOSHUA
COZEN-MCNALLY, AN INDIVIDUAL,
Respondents.

No. 79826-COA

FILED

OCT 21 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

Jerry R. Jacks appeals a post-trial district court order granting 702 LLC attorney fees. Eighth Judicial District Court, Clark County; Susan H. Johnson, Judge.

In December 2015, Jacks entered into an “Agreement to Sell Real Estate” (the Agreement) with Joshua Cozen-McNally and his limited liability company, 702 LLC.¹ The Agreement stipulated a sales price of \$55,000 due within two years of signing, a \$2,500 down payment due at signing, and three-percent interest on the remaining balance due on the first of each month until closing. The Agreement provided that full payment could be made to close the sale at any time before December 2017.

702 LLC signed the agreement through Cozen-McNally and paid the down payment of \$2,500. However, neither 702 LLC nor Cozen-McNally made interest payments between March and July of 2016. According to Jacks, Cozen-McNally telephoned him in July, indicating that he still wanted to close on the sale. In August of that year, Cozen-McNally paid Jacks \$1,312.15, which covered the interest payments for March through December 2016.

¹We recount the facts only as necessary for our disposition.

Neither 702 LLC nor Cozen-McNally made any interest payments between January and July of 2017. Cozen-McNally testified that Jacks told him it was not necessary to make the monthly interest payments because that amount could be satisfied when the remaining principal balance was paid at closing. Jacks denied making such statements.

Sometime in the first six months of 2017, Cozen-McNally observed that condominiums were being constructed on the land abutting the vacant lot subject to the Agreement. As a result, Cozen-McNally made an oral agreement to sell the subject property to a third party. Jacks and Cozen-McNally then agreed to close or finalize the sale in July 2017 pursuant to the Agreement. At the closing, the parties met with an escrow officer, Sandi Bianco. According to Deborah Ballard, Cozen-McNally's business partner and friend, Bianco presented Jacks with some documents, which he signed in part. Jacks then demanded to be paid the full amount that day. Bianco informed Jacks that the matter would have to go through escrow to recordation before he would be paid.

Jacks testified that he was informed at closing that there was no money in escrow and that he would be paid in two to three weeks. He further testified that he informed Cozen-McNally that he would not complete the sale without money being exchanged, after which he announced that he "was done," orally terminated the agreement, and left the meeting with the papers he signed. Cozen-McNally and Ballard testified that Jacks did say he "was done," but that he did not terminate the contract.

The following day, Cozen-McNally recorded the Agreement against the subject property with the Clark County Recorder's Office. Jacks thereafter placed a "For Sale" sign on the lot with the assistance of his neighbor, whom Jacks offered to sell the subject property to for \$80,000. Cozen-McNally testified that he attempted to contact Jacks multiple times

after the failed closing. According to Cozen-McNally, Jacks did not respond to his correspondence or his telephone calls.

In May 2018, Wayne Webber saw the “For Sale” sign on the subject property. Webber entered into a purchase agreement with Jacks for an agreed-upon sales price of \$100,000. Webber testified that he later received a text message from Cozen-McNally that read: “I think you bought property I already purchased.” Title of the property was never transferred to Webber.

In July 2018, Jacks filed this lawsuit against Cozen-McNally and 702 LLC. He (1) asserted a damage claim for slander of title, (2) sought an injunction to compel respondents to withdraw the recording of the Agreement, and (3) sought declaratory relief that respondents had no rights in the property. 702 LLC answered and counterclaimed for (1) breach of contract, (2) negligent interference with economic opportunity, (3) intentional interference with economic opportunity, and (4) declaratory relief that Jacks was obligated to accept the purchase price from 702 LLC on or before the two-year deadline specified in the Agreement.

In September 2018, Cozen-McNally and 702 LLC made two separate offers of judgment to Jacks pursuant to NRS 17.115 and NRCP 68.² Cozen-McNally offered to allow Jacks to take judgment against him in the amount of \$10. 702 LLC offered to allow Jacks to take judgment against it in the amount of \$60,000, but if accepted, Jacks would be required to convey the subject property to 702 LLC. Both offers were inclusive of interest, costs, and attorney fees. Jacks did not accept the offers of judgment.

²The offer of judgments indicated that they were pursuant to NRS 17.115 and NRCP 68. The district court’s order correctly notes that NRS 17.115 was repealed in 2015. Therefore, the district court used only NRCP 68 to decide the motion, which no party challenges on appeal.

The district court held a bench trial and found in favor of 702 LLC and Cozen-McNally with respect to Jacks' complaint and for 702 LLC on its counterclaims for breach of contract and declaratory relief. The court concluded that the respondents' failure to make regular and timely interest payments did not constitute a material breach, and thus, it was Jacks who breached the contract when he improperly repudiated the Agreement and refused to perform before the December 2017 deadline.

Following trial, Cozen-McNally and 702 LLC filed a motion for attorney fees based on the offers of judgment. After a hearing on the motion, the court found that Cozen-McNally was not entitled to fees because his \$10 offer of judgment was not reasonable. However, the court awarded 702 LLC \$18,725 in attorney fees pursuant to NRCP 68 based on its \$60,000 offer of judgment.

On appeal, Jacks contends that the district court erroneously awarded attorney fees to 702 LLC because (1) it misapplied the *Beattie* factors and (2) it failed to consider that the subject property was under contract for sale to a third party when Jacks received the offer of judgment. We disagree.

This court reviews the district court's decision regarding attorney fees for abuse of discretion. *Albios v. Horizon Cmtys., Inc.*, 122 Nev. 409, 417, 132 P.3d 1022, 1027-28 (2006). "However, the district court may not award attorney fees absent authority under a statute, rule, or contract." *Id.* Under NRCP 68, either party may make an offer of judgment and serve it on another party at least ten days before trial.³ The district court may

³The Nevada Rules of Civil Procedure were amended effective March 1, 2019. See *In re Creating a Comm. to Update & Revise the Nev. Rules of Civil Procedure*, ADKT 0522 (Order Amending the Rules of Civil Procedure, the Rules of Appellate Procedure, and the Nevada Electronic Filing and

order a party to pay the reasonable attorney fees if that party rejects the offer of judgment and then fails to obtain a more favorable judgment at trial. NRCP 68(f)(2).

When an award of attorney fees is based on an offer of judgment under NRCP 68, the district court must consider the factors set forth in *Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983). The *Beattie* factors ask whether: 1) the plaintiff filed the claim in good faith; 2) the defendant made a reasonable offer of judgment both in timing and amount; 3) the plaintiff's rejection of the offer was grossly unreasonable or in bad faith; and 4) the defendant is seeking reasonable fees. *Id.*

To determine if the defendant is seeking reasonable fees, the district court must consider the factors set forth in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969). *Miller v. Wilfong*, 121 Nev. 619, 623, 119 P.3d 727, 730 (2005). The *Brunzell* factors are: 1) the qualities of the advocate; 2) the character of the work to be done; 3) the work actually performed; and 4) the results achieved. *Brunzell*, 85 Nev. at 349, 455 P.2d at 33.

A district court's award of fees will be considered reasonable "as long as the court provides sufficient reasoning and findings in support of its ultimate determination." *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 865, 124 P.3d 530, 549 (2005). This requires the district court to demonstrate that it considered the required factors and that the award is

Conversion Rules, December 31, 2018) ("[T]his amendment to the [NRCP] shall be effective prospectively on March 1, 2019, as to all pending cases and cases initiated after that date."). As pertinent here, the claim, counterclaim, and offers of judgment were served prior to March 1, 2019. Therefore, we use the version of the NRCP in effect at that time. However, the result is the same under either version of the rule.

supported by substantial evidence. *Logan v. Abe*, 131 Nev. 260, 266, 350 P.3d 1139, 1143 (2015).

Jacks argues that the district court erroneously awarded attorney fees because it misapplied the *Beattie* factors. Here, the court explicitly weighed all *Beattie* and *Brunzell* factors and found that three of the four factors weighed in favor of awarding 702 LLC \$18,725 in attorney fees.

Concerning the first *Beattie* factor, the district court determined that Jacks brought his claims in good faith. Specifically, 702 LLC's failure to make timely interest payments or have the final payment ready when Jacks expected to close escrow may have created misunderstandings and mistrust between the parties.

Regarding the second *Beattie* factor, whether the defendant's offer of judgment was reasonable, Jacks argues that the offer was premature because it was made before the early case conference. Jacks does not argue that the amount was unreasonable. The district court found that the second factor weighed in favor of awarding attorney fees because it was reasonable in timing and amount. Specifically, the offer was in excess of the sales price in the Agreement and both parties had ample opportunity to evaluate the risks and benefits of litigation in light of the offer. *See Certified Fire Prot., Inc. v. Precision Constr., Inc.*, 128 Nev. 371, 383, 283 P.3d 250, 258 (2012).

At the time the offer was made, both parties had firsthand knowledge of the facts surrounding the parties' attempted closing. In addition, Jacks had already been served the respondents' answer and counterclaim, filed his own motion for summary judgment, and received the respondents' opposition to his motion for summary judgment. Therefore, the district court's finding that both parties had sufficient opportunity and information to evaluate the risks and benefits of litigation when 702 LLC

made the offer was based on substantial evidence and the district court did not abuse its discretion for this factor.

With respect to the third *Beattie* factor, whether the plaintiff's rejection of the offer was grossly unreasonable or in bad faith, the court found that it weighed in favor of awarding attorney fees. It determined that Jacks' decision to reject the offer of judgment was grossly unreasonable or in bad faith because the offer contained a higher purchase price than the Agreement, and Jacks improperly repudiated the Agreement because he learned he could get a greater purchase price for the property.

Jacks argues that he could not have been grossly unreasonable in rejecting such an early offer of judgment since the court found that he brought the claim in good faith. When analyzing an offer of judgment, if a party lacks access to key evidence, then its rejection of a settlement offer is more reasonable. *See Trs. of Carpenters for S. Nev. Health & Welfare Tr. v. Better Bldg. Co.*, 101 Nev. 742, 746, 710 P.2d 1379, 1382 (1985) (holding that a party's decision to reject an offer of judgment was not unreasonable because key information was not disclosed until nine months after the offer was made).

As explained above, at the time the offer was made, both parties had access to the Agreement and had firsthand knowledge of the facts surrounding the parties' attempted closing. In addition, Jacks had already been served the respondents' answer, counterclaim, and opposition to his motion for summary judgment.⁴ Therefore, Jacks did not need the benefit

⁴The fact that Jacks believed he could succeed on his claims under the summary judgment standard before any discovery was conducted is telling in that he believed there were no additional material facts to be determined to resolve the case. *See Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (holding that summary judgment is proper if the pleadings

of discovery to determine the strength of the parties' positions and whether he should accept the offers of judgment. Additionally, filing a case in good faith as analyzed under the first factor is not the same as rejecting the offer of judgment under the third factor because these two factors address actions occurring at different points in the litigation.

Further, the Agreement provided that respondents could pay the remaining principal balance before the end of the two-year period and it did not contain a provision that gave Jacks the right to terminate early. The Agreement, signed December 22, 2015, states that in order to close the sale, full payment can be made any time during the next two years. If the entire balance is not paid within that time, the contract becomes null and void. The parties attempted to close the sale in July 2017. The Agreement contained no clauses which discussed forfeiture or a party's right to terminate. Based on all the evidence before the district court, it reasonably found that Jacks had all the information necessary to understand that he was the breaching party, yet he elected to reject 702 LLC's offer of judgment and pursue his claims and defend respondents' counterclaims. Thus, the district court did not abuse its discretion when it determined that Jacks' decision to reject the offer was grossly unreasonable or in bad faith.⁵


and all other evidence on file demonstrates that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law).


⁵Jacks also argues that his rejection of the offer was not grossly unreasonable because the court failed to consider that the subject property was under contract for sale to a third party when Jacks received the offer of judgment. Jacks contends that his rejection could not be grossly unreasonable because of the impending third-party sale. However, "[i]n Nevada, the method upon which a reasonable fee is determined is subject to the discretion of the court, which is tempered only by reason and fairness." *Schuetz*, 121 Nev. at 864, 124 P.3d at 548-49 (internal quotations omitted).


Looking at the fourth *Beattie* factor, whether the defendant is seeking reasonable fees, the court found that it weighed in favor of awarding attorney fees. The district court determined that the amount of attorney fees incurred after Jacks rejected the offer of judgment was reasonable. The record demonstrates that the court properly considered all the *Brunzell* factors when making this determination. It noted that the attorney was competent and experienced; gave his skill, time, and attention to 702 LLC's important property title claims; and obtained a judgment mostly in his clients' favor. Accordingly, the district court correctly applied both the *Beattie* and *Brunzell* factors and its award of attorney fees was not an abuse of discretion.

Therefore, we conclude that the district court properly awarded 702 LLC attorney fees under NRCP 68. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Tao


_____, C.J.
Gibbons


_____, J.
Bulla

cc: Hon. Susan Johnson, District Judge
Royal & Miles, LLP
Kerry P. Faughnan
Eighth District Court Clerk

The fact that the district court did not directly consider the third-party sale does not result in error because the court had already found that Jacks breached the contract by attempting to improperly sell to a third party. The district court's decision was based on substantial evidence that Jacks' decision was grossly unreasonable in rejecting 702 LLC's offer of judgment.