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Albios v. Horizon Communities, Inc., 122 Nev. Adv. Op. 37, 132 P.3d 1022
(Apr. 27, 2006)¹

CONTRACT LAW – AWARDING COSTS AND FEES

Summary

An appeal and cross-appeal from the Eighth Judicial District Court in which the court awarded prejudgment interest, costs, and attorney fees stemming from a construction defect case.

Disposition/Outcome

Affirmed in part, reversed in part and remanded with instructions. When a party is barred from recuperating costs and fees under NRS 17.115 and NRCP 68, that party is also barred from recovering costs and fees under NRS 40.655. When multiple offers of judgment are made, the successive offer extinguishes the previous offer.

Factual and Procedural History

Appellant Dionicio Albios and Kathryn Albios sued respondent Horizon Communities, Inc. (“Horizon”) for constructional defects in their home. Before going to trial, Horizon made three offers of judgment. The first offer was for \$150,000, inclusive of attorney fees and costs. The second offer was for \$200,001, inclusive of attorney fees and costs. The final offer was for \$100,000, exclusive of attorney fees and costs. None of the offers were apportioned between Mr. and Mrs. Albios. The Albioses rejected all three of Horizon’s offers of judgment. Following trial, the jury returned a verdict in favor of the Albioses’ for \$100,000. The verdict amount was reduced by 5% for comparative negligence, resulting in a \$95,000 judgment.

Both the appellant and respondent sought for attorney fees and costs through post-trial motions. Horizon requested the court to award it \$126,501.56 in costs and \$233,287.50 in attorney fees. Horizon argued that NRCP 68 and NRS 17.115 entitled it to attorney fees and costs because the Albioses rejected an offer of judgment that was more than the amount awarded by the jury. The Albioses requested from the court \$192,707.85 in costs and attorney fees amounting to \$232,200.

The district court granted the Albioses motion and awarded them \$179,000 in costs and \$50,000 in attorney fees. The district court also awarded interest on the judgment but denied interest on the attorney fees and costs. The district court also denied the Albioses’ request for post-trial fees and costs. The rate for the prejudgment interest was calculated at 11.5%, which was the effective rate during the period immediately preceding the service of the Albioses’ summons and complaint.

Horizon filed a motion to alter the judgment. Horizon argued that the prejudgment interest was incorrectly calculated and that the interest rate should be determined by applying the

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interest rate that was given by the State of Nevada, Division of Financial Institutions. The Albioses' opposed the motion and argued that the interest rate should be increased in accordance to NRS 99.040. Horizon withdrew its motion and both parties filed their notices to appeal.

Discussion

NRS Chapter 40 versus NRCP 68 and NRS 17.115

In determining whether NRS Chapter 40 precluded application of the NRCP 68 and NRS 17.115 penalty provisions, the Court first examined the language of the statutes. NRS 40.655 states that a party may receive “[a]ny reasonable attorney fees” as damages in a construction defect case only when the award is “approved by the court.”² In contrast to the permissive language of NRS 40.655, the penalties described in NRCP 68 and NRS 17.115 are mandatory against a party who rejects a offer of judgment that is more favorable than a jury award.³

The Court concluded that to allow NRS 40.655 to override NRCP 68 and NRS 17.115 would produce “an absurd result.”⁴ Such a result would render NRCP 68 and NRS 17.115 “essentially toothless” and would thwart their purpose: to save taxpayer resources and the judicial system’s energies for other disputes.⁵ Thus, the Court held that when a party is barred from recuperating costs and fees under NRS 17.115 and NRCP 68, that party is also precluded from recovering costs and fees under NRS 40.655.

Successive Offers of Judgment

After finding that a valid offer of judgment was made by Horizon as to trigger both NRCP 68 and NRS 17.115, the Court addressed an issue of first impression: whether successive offers of judgment extinguish previous offers of judgment or whether all offers of judgment control. Acknowledging the split in authority on this issue throughout the United States, the Court adopted California’s position: that successive offers extinguish previous offers. The rationale for this position is that the settlement process is a contractual one, making the principles of contract applicable.⁶ “The general rule on offers is that ‘any new offer communicated prior to a valid acceptance of a previous offer, extinguishes and replaces a prior one.’”⁷

Applying the successive offer rule, the Albioses were awarded \$95,000, which is less than Horizon’s third offer of \$100,000. However, the Court had recently held that pre-offer judgment interest must be included in the judgment amount when comparing it to the offer of judgment, unless the offer clearly excluded prejudgment interest. The Albioses were awarded \$12,983.46 in pre-offer judgment interest. This amount coupled with the \$95,000 verdict makes the Albioses’ award more favorable than Horizon’s third offer of judgment. Therefore, the Albioses were entitled to attorney fees and costs.

² NEV. REV. STAT. § 40.655 (2005)

³ NEV. REV. STAT. § 17.155 (2005); Nev. R. Civ. P. 68.

⁴ *Albios v. Horizon Communities*, 132 P.3d 1022, 1029 (Nev. 2006).

⁵ *Id.*

⁶ *Distefano v. Hall*, 69 Cal. Rptr. 691, 695 (Cal. Ct. App. 1968).

⁷ *Albios*, 132 P.3d at 1029 (citing *Distefano*, 69 Cal. Rptr. at 695).

Conclusion

When a party is barred from recuperating costs and fees under NRS 17.115 and NRCP 68, that party is also precluded from recovering costs and fees under NRS 40.655. When multiple offers of judgment are made, the successive offer extinguishes the previous offer.