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Summary of M.C. Multi-Family Dev. v. Crestdale Assocs., 124 Nev. Adv. Op. No. 77

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M.C. Multi-Family Dev. v. Crestdale Assocs., 124 Nev. Adv. Op. No. 77 (October 2, 2008)[1]

TORT - CONVERSION

Summary

Appeal from a district court order granting Defendant's motion for directed verdict on a claim for conversion and cross-appeal denying Defendant's request for attorney fees and prejudgment interest.

Disposition/Outcome

Reversed district court's directed verdict on the conversion claim and remanded the matter for a jury trial restricting the theory of liability to "wrongful dominion." Affirmed district court's denial of attorney fees and prejudgment interest.

Factual and Procedural History

In 1995, Lance Walter, Allen Stern, Toni Stern, Paul Kenner, and David Allsop formed a limited liability company, Walter Homes, Ltd., to develop residential real estate. Allsop owned 12.5 percent of the corporate stock with the remaining stock divided amongst the other four owners. In November 1999, Allsop and John H. Midby, a managing partner of the real property development company, M.C. Multi-Family Development, LLC., executed an express agreement whereby Multi-Family Development acquired the 87.5 percent interest and management rights in Walter Homes held by Walter, Kenner, and the Sterns. Allsop continued to retain his 12.5 percent ownership interest.

Prior to this agreement, Allsop formed a competing business, Crestdale Associates, Ltd., to engage in developing residential real estate in October 1999.[2] Allsop did not obtain a separate contractor's license for Crestdale Associates, but instead used the Walter Homes license to develop Crestdale Associates properties. In September 2000, Allsop approached Midby and proposed to purchase, for himself, Multi-Family Development's interest in Walter Homes. A proposed written purchase agreement drafted by Allsop's attorney contained a provision releasing Allsop from liability for his prior use of the Walter Homes contractor's license. Midby subsequently discontinued negotiations upon discovery of Allsop's use of the license in connection with other ventures.

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[2] Paragraph 6.3 of the Walter Homes Operating Agreement sets forth the rights of the members. Specifically, it does not "preclude or limit in any respect the right of any Member…to engage in or invest in any business activity… including those which may be the same or similar to the Company's business and in direct competition therewith" and such activity may be entered into "independently or with other Members." M.C. Multi-Family Dev. v. Crestdale Assocs., 124 Nev. Adv. Op. No. 77, at 4 (October 2, 2008). Article 20 of the Operating Agreement states "[t]he Articles of Organization and this Operating Agreement contain the entire understanding between and among the Members and supersede any prior understandings." *Id.* at 4–5.

In early 1998, prior to Multi-Family Development's purchase of 87.5 percent of Walter Homes, Midby and Allsop came to an oral understanding that in exchange for Allsop's consulting services, Midby would pay Allsop $10,000 per month plus a percentage of the profits from the Sienna Villas[3] project for his consulting services. Allsop began consulting Midby in June 1998, but terminated the agreement in July 2000 after receiving payment for the months of January, February, and March 2000 only.

"Appellants/cross-respondents, John H. Midby, Multi-Family Development, LLC, and Walter Homes, Ltd. (collectively 'Multi-Family Development') filed a complaint against respondents/cross-appellants, Crestdale Associates, David Allsop, and Karen Allsop, (collectively 'Crestdale Associates')"[4] seeking damages and various forms of relief. Multi-Family Development alleged causes of action for "(1) fraud in the inducement to purchase Walter Homes stock, (2) breach of the covenant of good faith and faith dealing, (3) breach of the duty of loyalty, (4) breach of fiduciary duty, (5) conversion, and (6) unjust enrichment."[5] Crestdale Associates responded by filing an answer and counterclaiming for breach of the consulting agreement, fraudulent misrepresentation, and unjust enrichment. The district court denied Multi-Family Development's motion for summary judgment on all claims and counterclaims.

Prior to trial, Multi-Family Development rejected an unapportioned offer of judgment from Crestdale Associates where it agreed to pay Multi-Family Development $5,000 and dismiss all of its counterclaims. Multi-Family Development also rejected a second unapportioned offer in the amount of $50,000.

During the jury trial, the district court did not allow Multi-Family Development, in defense of Crestdale Associates' counterclaim for breach of the consulting agreement, to admit an unexecuted, written draft of the consulting agreement that Midby and Allsop had attempted to negotiate. However, the district court did permit Multi-Family Development to question Allsop regarding the preliminary negotiations that resulted in the oral understanding.

The district court granted Crestdale Associates' motion for a directed verdict on the conversion claim stating that Multi-Family Development did not present evidence of the taking of the license. Additionally, the district court granted Crestdale Associates a directed verdict as to the fraud in the inducement claim. The jury found in favor of Crestdale Associates as to all remaining claims and counterclaims and awarded it $678,500 in damages. However, the district court found that Crestdale Associates' offer of judgment was not properly apportioned among plaintiffs. Therefore, the court denied Crestdale Associates' request for attorney's fees under Nevada's "offer of judgment" rule and statute[6] and also denied Crestdale Associates' request for prejudgment interest [7].

Multi-Family Development filed a timely appeal arguing that error occurred in several

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[3] The Sienna Villas project is a Multi-Family Development project located in the Las Vegas area.
[4] M.C. Multi-Family Dev., 124 Nev. Adv. Op. No. 77, at 5.
[5] *Id.* at 5–6.
[6] Nev. R. Civ. P. 68; Nev. Rev. Stat. § 17.115 (2005).
[7] Nev. Rev. Stat. § 99.040(1)(a) (2005).

evidentiary rulings[8] and that a new trial was necessary based upon the district court's directed verdict on the conversion claim. Crestdale Associates cross-appealed the district court's denial of attorney fees and prejudgment interest.

Discussion

Conversion

Multi-Family Development alleged that intangible property can be converted under Nevada law, and therefore, Crestdale Associates is liable for conversion because it engaged in the "wrongful dominion" of the Walter Homes contractor's license. Specifically, Multi Family Development argued that Allsop, an employee and shareholder of Walter Homes, held no ownership or possessory interest in the corporate contractor's license.[9] Furthermore, it contended that neither Midby, as Walter Homes' other shareholder, nor the Walter Homes Operating Agreement gave Allsop permission to use the license for use in his independent projects.

Crestdale Associates argued that the district court's directed verdict was appropriate because Multi-Family Development did not demonstrate that Allsop was not authorized to use the license or that he used it to the exclusion of Walter Homes. Specifically, Crestdale Associates argued that it did not exercise "wrongful dominion" over the contractor's license because the Operating Agreement did not expressly prohibit the use of the license for non-Walter Homes projects, and the owners of Walter Homes had engaged in a practice of using the license for their independent projects

The court clarified the circumstances under Nevada law allowing for a conversion of intangible property. In doing so, it defined conversion as "a distinct act of dominion wrongfully exerted over another's personal property in denial of, or inconsistent with his title or rights therein or in derogation, exclusion, or defiance of such title or rights."[10] Moreover, the court acknowledged a trend in the recognition of intangible property as personal property that can be converted while expressly rejecting the idea that conversion claims only apply to tangible personal property.

The court used the three part test set out in *Kremen v. Cohen*[11] to find a property right in the contractor's license. First, the court found that contractor's license is a property interest capable of precise definition because it provides the right to engage in certain, approved instances of construction and development. Next, the court found the interest is capable of

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[8] Because Multi-Family Development failed to address the alleged errors in its brief, the court did not address them in its opinion.

[9] Multi-Family Development based its assertion on N.R.S. 624.260 which governs contractor license qualifications and N.R.S. 624.305 which discusses unlawful use, assignment, or transfer of a contractor's license. NEV. REV. STAT. § 624.260 (1999); NEV. REV. STAT. § 624.305 (1959).

[10]M.C. Multi-Family Dev. v. Crestdale Assocs., 124 Nev. Adv. Op. No. 77, at 12 (October 2, 2008) (quoting Evans v. Dean Witter Reynolds, Inc., 5 P.3d 1043, 1048 (2000)). "Conversion is an act of general intent which does not require wrongful intent and is not excused by care, good faith, or lack of knowledge." *Id.*

[11] 337 F.3d 1024, 1030 (9th Cir. 2003). The three part test to determine whether a property right exists to support a claim for conversion: (1) there is an interest capable of precise definition, (2) the interest is capable of exclusive possession or control, and (3) the putative owner has established a legitimate claim to exclusivity. *Id*.

Walter Homes' exclusive control because N.R.S. 624.305 allows only use of the license by the entity or individual named on the license.[12] Finally, the court found that Walter Homes as the license holder has a legitimate claim to exclusivity of its use under N.R.S. 624.260(2) which requires the licensee demonstrate that he is qualified to obtain a contractor's license.[13] The court further relied on the Restatement (Second) of Torts Section 242[14] to determine when intangible personal property can be converted and found that the intangible rights held in the contractor's license were merged into the license document. Thus, the court concluded that a contractor's license is intangible personal property and may be converted under Nevada law.

Although Crestdale Associates argued that facts presented at trial failed to demonstrate it exercised "wrongful dominion" over the license, the court found that while the unauthorized use of the contractor's license did not constitute a physical appropriation or a "taking," it may constitute an act inconsistent with the rights of the titleholder under *Evans v. Dean Witter Reynolds*[15].

Therefore, the court found that Multi-Family Development provided sufficient evidence to defeat Crestdale Associate's motion for a directed verdict. In particular, the court noted that Allsop did not have permission from Midby to use the license nor did the Operating Agreement authorize the use of the license for the independent projects of its members. In addition, Multi Family Development's 87.5 percent acquisition of Walter Homes reduced the probative value of a prior course of conduct with respect to the license. Additionally, testimony at trial that showed other members of Walter Homes using the license on individual projects was not sufficiently overwhelming to require a directed verdict in favor of Crestdale Associates. The court, however, found that a question remained as to whether Crestdale Associates' use of the license constituted a wrongful dominion inconsistent with or in derogation of Walter Homes' rights in the license.

<u>Parol Evidence</u>

As to the breach of contract claim, Multi-Family Development argued that language of the Operating Agreement was clear, unambiguous, and unmodified by any course of conduct that followed. Therefore, it contended that the district court abused its discretion in allowing Crestdale Associates to present parol evidence to show the intent and meaning of the Walter Homes Operating Agreement. The court noted that parol evidence may be introduced to "show subsequent oral agreements to rescind or modify a written contract"[16] and that Nevada allows admission of extrinsic oral evidence to reveal a separate oral agreement in instances where a written contract is silent[17]. Therefore, the court found that the Operating Agreement was silent as to the ability of corporate members to use the license on independent projects ,and thus, the district court properly allowed the admission of parol evidence concerning the Operating Agreement's treatment of the contractor's license.

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[12] *Kremen*, 337 F.3d at 1030; Nev. Rev. Stat. § 624.305 (1959).
[13] *Kremen*, 337 F.3d at 1030; Nev. Rev. Stat. § 624.260(2) (1999).
[14] States in pertinent part that "[w]here there is conversion of a document in which intangible rights are merged, the damages include the value of such rights." Restatement (Second) of Torts § 242 (1965).
[15] 5 P.3d 1043 (2000).
[16] Silver Dollar Club v. Cosgriff Neon, 389 P.2d 923, 924 (1964).
[17] Kaldi v. Farmers Ins. Exch., 21 P.3d 16, 22 (2001) (quoting Crow-Spieker #23 v. Robinson, 629 P.2d 1198, 1199 (1981)).

Crestdale Associates' counterclaim for breach of the separate consulting agreement

Multi-Family Development argued that the district court abused its discretion in refusing to allow into evidence an unexecuted written draft of the consulting agreement between Midby and Allsop because the draft reflected the failure of both parties to come to an oral agreement and demonstrated Multi-Family Development had not intended to pay Allsop a percentage of the profits from the Sienna Villas project.

The Court referred to N.R.S. 48.035(1) stating that evidence is inadmissible "if probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury."[18] As a result, the court found that the district court acted within its discretion in refusing to admit the executed draft because of the potential for prejudice outweighing its probative value. Specifically, allowing the jury to review the document may have caused undue confusion concerning the actual existence of the oral consulting agreement.

Attorney Fees and Prejudgment Interest

Pursuant to the Nevada Revised Statutes and the Nevada Rules of Civil Procedure, Crestdale Associates argued that it should be awarded attorney fees[19] as well as prejudgment interest[20].

In its decision to award attorneys fees, the court relied on *Albios v. Horizon Communities* to determine when the offer of judgment penalty provisions applies to multiple plaintiffs. [21] *Albios* requires a defendant to show that the same plaintiff was authorized to accept the settlement offer on behalf of all plaintiffs and either (1) a single common theory of liability or (2) derivative damages is involved. [22]

The court found that the district court did not abuse its discretion in its denial of attorney fees because Crestdale Associates' offer of judgment was not properly apportioned among plaintiffs. In particular, there is a factual dispute as to whether Midby had the ability to accept a settlement offer without approval from Allsop who not only owned 12.5 percent of Walter Homes but was also the sole member of the Administrative Committee. Additionally, Crestdale Associates was not bound by the Walter Homes Operating Agreement, resulting in separate theories of liability against Allsop and Crestdale Associates.

The court further found that the district court did not abuse its discretion in its denial of prejudgment interest under the consulting agreement. In particular, the court stated that the amount of money due under the oral consulting agreement between Midby and Allsop was

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[18] NEV. REV. STAT. § 48.035(1) (1979). The Court also looked to N.R.S. 48.015 and noted that evidence is relevant when it has a "tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." NEV. REV. STAT. § 48.015 (1971).
[19] Nevada allows recovery of attorney fees when the opposing party rejects an offer of judgment and does not recover more than the offer at trial. NEV. REV. STAT. § 17.115 (2005); s*ee also* NEV. R. CIV. P. 68.
[20] NEV. REV. STAT. § 99.040 (2005).
[21] 132 P.3d 1022 (2006).
[22] *Id.* at 1031.

neither definite nor ascertainable.[23] Midby did not owe a definite sum of money because the contract negotiations did not specify a term of duration, but only that Midby was to pay Allsop monthly for his consulting services.

<u>Conclusion</u>

The court concluded that a contractor's license is intangible personal property that can be converted under Nevada law, and the unauthorized use of a contractor's license in contravention of the license holder's rights may give rise to a conversion claim. The court reversed the district court's directed verdict as to Multi-Family Development's conversion claim and remanded the matter for a jury trial restricted to a "wrongful dominion" theory of liability. The court affirmed the district court's order in regards to Multi-Family Development's other claims and Crestdale Associate' counterclaims seeking attorney fees and prejudgment interest.

[23] *See* Paradise Homes v. Cent. Sur., 437 P.2d 78, 83 (1968); Jeaness v. Besnilian, 706 P.2d 143, 147 (1985).