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# Land Baron Invs. v. Bonnie Springs Family LP, 131 Nev. Adv. Op. 69 (Sept. 17, 2015)

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**CONTRACTS: REAL PROPERTY AND MUTUAL MISTAKE**

**Summary**

This case is an appeal arising from a failed land sale contract. The Court considered three issues of first impression, holding that (1) when a party bears the risk, mutual mistake is not a basis for rescission; (2) an abuse of process claim may not be supported by a complaint to an administrative agency; (3) a nuisance claim seeking only emotional distress damages must be supported by proof of physical harm. Ultimately, The Court affirmed in part and reversed in part.

**Background**

In 2004, Land Baron contracted to purchase land for \$17,190,000 from Bonnie Springs Family LP. Land Baron drafted the contract that did not mention access or water rights. Land Baron immediately began listing and relisting the property for sale, but obtaining access and water rights proved difficult. The parties amended the purchase agreement five times to extend the escrow period. Land Baron paid a nonrefundable fee of \$50,000 for each extension. Land Baron began searching for water rights in September of 2005. Land Baron inquired as to whether Bonnie Springs would be willing to share its commercial water rights from the Bonnie Springs Ranch, but Bonnie Springs could not allow its commercial water to be used in a residential development. Despite these issues, Land Baron never attempted to amend the language of the agreement.

Eventually, Land Baron failed to make a payment to extend the escrow, so Bonnie Springs notified Land Baron that it was in breach, terminating escrow, and keeping the deposits as liquidated damages. After subsequent negotiations proved unsuccessful, Land Baron filed a citizen's complaint with the Clark County Commissioner's office alleging multiple code violations. The county commissioner and multiple state and local regulatory agencies performed a large scale inspection of the property, but no violations were found.

Land Baron filed a complaint against Bonnie Springs in district court, asserting claims for breach of contract, breach of the implied covenant of good faith and fair dealing, intentional misrepresentation and nondisclosure, negligent misrepresentation, rescission based on mutual mistake, rescission based on unilateral mistake, rescission based on failure of consideration, and rescission based on fraud in the inducement. These claims were centered on Land Baron's difficulty obtaining access and water rights. Bonnie Springs counterclaimed for breach of contract, abuse of process, nuisance, fraudulent misrepresentation, intentional interference with contractual relations, and slander of title.

Several summary judgment motions were filed. The district court granted Bonnie Springs' motion for summary judgment finding that it had no legal or contractual duty to provide or secure water rights for the property. The district court denied Land Baron's motion for summary judgment regarding mutual mistake, finding no mutual mistake. Finally, the district court granted Land Baron's summary judgment motion dismissing Bonnie Springs' intentional interference with contractual relations and fraudulent misrepresentation claims.

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<sup>1</sup> By Rob Schmidt

The parties proceeded to trial on Bonnie Springs' remaining counterclaims for abuse of process and nuisance. The jury returned a unanimous verdict for Bonnie Springs on both counterclaims. Land Baron moved for a mistrial, but the district court denied the motion, finding the party did not need to prove physical harm in order to recover emotional distress damages for nuisance and abuse of process claims in Nevada.

## **Discussion**

On appeal, the parties disputed whether the district court erred in denying Land Baron's motion for summary judgment on its rescission claim and granting Bonnie Springs' motion for summary judgment on Land Baron's misrepresentation and nondisclosure claims. Land Baron argued the district court improperly denied its motions for a directed verdict on Bonnie Springs' abuse of process and nuisance claims.

*The district court did not err in denying Land Baron's motion for summary judgment on its mutual mistake rescission claim.*

Land Baron argued that it was entitled to summary judgment because both parties mistakenly believed there would be sufficient access and water rights, giving rise to a mutual mistake rendering the contract voidable. The Court rejected mutual mistake as a basis for rescission when a party, at the time they enter into the contract, bears the risk of mistake.<sup>2</sup> A party bears the risk when "he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient."<sup>3</sup> The court also found that "if the risk is foreseeable and yet the contract fails to account for that risk, a court may infer that the party assumed that risk."<sup>4</sup>

In the instant case, Land Baron, a sophisticated and experienced land buyer, bore the risk of mistake, foreclosing any possibility of rescinding the contract based on mutual mistake. Land Baron failed to include language to address the water rights and access issues when it drafted the contract. By failing to provide for those contingencies, Land Baron assumed the risk of mistake as to those issues. Therefore, the district court's grant of summary judgment on Land Baron's rescission claims was appropriate.

Land Baron argued that Bonnie Springs misrepresented, intentionally or negligently, Land Baron's ability to obtain water rights. To establish a claim for intentional or negligent misrepresentation, Land Baron must show that Bonnie Springs supplied Land Baron with false information.<sup>5</sup> Land Baron provided no evidence for this claim. The Court found that Land Baron had not provided any such evidence of this essential element.<sup>6</sup> Therefore, the district court's grant of Bonnie Springs' motion for summary judgment on the misrepresentation claims was appropriate.

*The district court did not err in granting Bonnie Springs' motion for summary judgment on Land Baron's nondisclosure claim*

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<sup>2</sup> RESTATEMENT (SECOND) OF CONTRACTS §§ 152(1), 154(b), (c) (1981).

<sup>3</sup> RESTATEMENT (SECOND) OF CONTRACTS § 154(b) (1981).

<sup>4</sup> United States v. Winstar Corp. 518 U.S. 839, 905-06 (1996).

<sup>5</sup> Barmettler v. Reno Air, Inc., 114 Nev. 441, 446-47, 449, 956 P.2d 1382, 1386-87 (1998).

<sup>6</sup> *Id.* at 447.

Land Baron argued that Bonnie Springs knew, and failed to disclose, that the property could not be supplied with adequate water, giving rise to a claim for nondisclosure. Nondisclosure arises where a seller is aware of materially adverse facts that could not be discovered by the buyer after diligent inquiry.<sup>7</sup> A seller cannot be liable for nondisclosure “[w]hen the defect is patent and obvious, and when the buyer and seller have equal opportunities of knowledge.”<sup>8</sup> Further, liability for nondisclosure is generally not imposed where the buyer knew of or could have discovered the defects prior to the purchase.<sup>9</sup> The defects Land Baron discovered arose from government regulations, were public knowledge, and were available to anyone upon inquiry. The court found there to be no viable nondisclosure claim because the facts were discoverable and Land Baron had an “equal opportunit[y]” to discover those facts before closing.<sup>10</sup> Also, Land Baron produced no evidence that Bonnie Springs was aware, prior to signing the contract, that Land Baron would be unable to obtain access or water rights. Ultimately, the court concluded that Bonnie Springs could not be liable for nondisclosure regarding water rights or access and therefore, as a matter of law, summary judgment was appropriate.

*The district court's denial of Land Baron's motion for a directed verdict on Bonnie Springs' abuse of process and nuisance counterclaims*

#### *Abuse of process*

To support an abuse of process claim, the claimant must show “(1) an ulterior purpose by the [party abusing the process] other than resolving a legal dispute, and (2) a willful act in the use of the legal process not proper in the regular conduct of the proceeding.”<sup>11</sup> The tort requires a “willful act,” and the majority of courts have held that merely filing a complaint and proceeding to properly litigate the case does not meet this requirement.<sup>12</sup> The Court agreed with the majority rule that filing a complaint does not constitute abuse of process. Bonnie Springs failed to show a “willful act” that would not be “proper in the regular conduct of the proceeding.”<sup>13</sup> Because Bonnie Springs failed to establish the elements of abuse of process, the district court erred in denying Land Baron's motion for a directed verdict on the abuse of process counterclaim.

#### *Nuisance*

Nuisance arises where one party interferes with another party's use and enjoyment of land, and that interference is both substantial and unreasonable.<sup>14</sup> In its answer to the complaint, Bonnie Springs based its nuisance counterclaim on the complaint filed with the county commissioner, alleging that the inspection cause “needless expense and loss of income.” However, during trial, representatives of Bonnie Springs admitted that it suffered no known

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<sup>7</sup> Mackintosh v. Jack Matthews & Co., 109 Nev. 628, 633, 855 P.2d 549, 552 (1993).

<sup>8</sup> Collins v. Burns, 103 Nev. 394, 397, 741 P.2d 819, 821 (1987).

<sup>9</sup> Mitchell v. Skubiak, 618 N.E.2d 1013, 1017 (Ill. App. Ct. 1993).

<sup>10</sup> Collins, 103 Nev. at 397.

<sup>11</sup> LaMantia v. Redisi, 118 Nev. 27, 31, 38 P.3d 877, 880 (2002).

<sup>12</sup> See e.g., Pomeroy v. Rizzo, 182 P.3d 1125, 1128 (Alaska 2008).

<sup>13</sup> Kovacs v. Acosta, 106 Nev. 57, 59, 787 P.2d 368, 369 (1990).

<sup>14</sup> Sowers v. Forest Hills Subdivision, 129 Nev. Adv. Op. 9, 294 P.3d 427, 432 (2013).

economic harm as a result of the inspection. Alternatively, Bonnie Springs encouraged the jury to award damages for the emotional pain and suffering inflicted by the nuisance.

The prevailing view, and that of Restatement (Second) of Torts § 929(1)(c) (1979), is that damages for nuisance include "discomfort and annoyance" to the occupants.<sup>15</sup> The Court had not previously addressed emotional distress damages arising under a nuisance claim. The court reasoned that because damages for nuisance include personal inconvenience, discomfort, annoyance, anguish, or sickness, an occupant need not show physical harm to recover. The facts support the damages arising under such a claim, so the Court concluded that the district court did not err by denying Land Baron's motion for a directed verdict on the nuisance counterclaim.

### **Conclusion**

The Court affirmed the district court's decision to deny Land Baron's motion for summary judgment on its mutual mistake rescission claim. In doing so, the Court rejected mutual mistake as a basis for rescission and adopted the Restatement (Second) of Contracts § 154(b) (1981). The Court affirmed that the district court did not err in granting Bonnie Springs' motion for summary judgment on Land Baron's nondisclosure claim. The Court reversed and remanded as to the abuse of process counterclaim because insufficient facts existed to support it. Finally, the Court rejected the assertion that a nuisance claim seeking to recover only emotional distress damages requires proof of physical harm.

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<sup>15</sup> RESTATEMENT (SECOND) OF TORTS § 929 (1)(C) (1979).