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Dezzani v. Kern & Assocs. Ltd., 134 Nev. Adv. Op. 9 (Mar. 1, 2018)[1]

STATUTORY INTERPRETATION: ATTORNEYS AS AGENTS UNDER NRS 116.31183

Summary

The Court determined that attorneys do not qualify as agents for the purposes of retaliatory action under NRS 116.31183 where the attorney is providing legal service for a homeowners' association. The Court further held that an attorney litigating pro se or representing his or her law firm may not collect attorney fees but may collect attorney costs.

Background

David and Rochelle Dezzani own a condo in Incline Village, Nevada. The Dezzanis, as well as all other unit owners, are members of the McCloud Condominium Homeowners' Association (HOA). Gayle Kern and her firm (Kern & Associates) represent the HOA. When the Dezzanis bought the condo, it had a deck extension that the previous owner had installed. The previous owner had received permission to install the deck extension from the HOA board in 2002.

The HOA issued the Dezzanis a notice of violation stating that their extended deck protruded into common area and thus violated the HOA's CC&Rs. After the Dezzanis responded to the notice of violation, Kern contacted them. Kern stated that she represented the HOA and restated the HOA's position on the deck extension. The Dezzanis challenged the notice of violation. The HOA board held a hearing and ultimately upheld the notice of violation.

The Dezzanis filed a complaint against Kern and other parties. The complaint stated that Kern retaliated against them based on NRS 116.31183. The Dezzanis alleged that Kern retaliated against them because they requested that the HOA retain new legal representation. The Dezzanis allege that Kern retaliated against them because they asked the HOA to retain new counsel. Kern filed a 12(b)(5) motion to dismiss. The Court granted Kern's motion and awarded her attorney costs and fees. The Dezzanis appealed.

Discussion

The Court noted that NRS 116.31183 allows for a separate action when an HOA's agent takes certain retaliatory action against a unit's owner.[2] The Court therefore determined that the key question was whether an attorney qualified as an agent under this section.

The district court did not err in dismissing Dezzanis' complaint

The Court stated that it reviews issues of statutory interpretation de novo. To this end, the Court will first consider the statute's plain meaning. The Court also noted that it has a duty to first try to read statutes in a way that renders them consistent with other statutes.

The Court noted that the word "agent" was not defined anywhere in NRS chapter 116. However, NRS 116.31164 uses the words agent and attorney distinctly.[3] The Court took this to mean that the Legislature meant to distinguish between the two. Since provisions in NRS Chapter

[1] Ron Evans.
[2] *See* NEV. REV. STAT. § 1163.1183 (2017).
[3] NEV. REV. STAT. § 116.31164 (2017).

16 use attorney and agent distinctly, the Court concluded that it would be inappropriate to include attorneys within the definition of agents under NRS 116.31183.

The Court noted that the dissent would have it ignore the rules of statutory interpretation that instructs the Court to begin by applying the words' plain meaning. The dissent would have it begin by applying rules of grammar and punctuation. However, grammar and punctuation rules are only to be used when the result is clearly consistent with legislative intent. The Court further raised an issue with the dissent's reading of the word "or." The Court noted that it is instructed to read "or" disjunctively unless there is a compelling reason not to do so. While the dissent argued that the word "or" should be read as including "attorney" as a subset of "agents," the Court noted that absent clear intent by Congress to not intend "or" be read disjunctively, it would not assign controlling weight to a comma. The Court then argued that given the dissent's reading of the statute, attorneys should always be considered a subcategory of agent. However, it is noted that Chapter 16 frequently uses the words attorney and agent distinctly when attempting to address responsibilities applicable to agents but not to attorneys.

The Court also rejected the argument that attorneys should be included as a subset of agents under NRS 116.31183 as a matter of public policy. The Court relied on the unique nature of the attorney-client relationship that distinguishes it from a typical agent-principal relationship. The Court noted that the attorney-client relationship is an agent-principal relationship for the purpose of determining whether a client is responsible for the actions of an attorney. However, the Court noted that such liability is different from imposing liability on an attorney for adverse actions taken against a third party in representing a client. The Court noted that attorneys generally owe no duty to adverse third parties when acting solely as legal representation. Further, the attorney-client relationship is subject to strict ethical standards. The Court also noted that there is a long history of courts treating attorney-client relationships differently from typical agent-principal relationships based on factual differences. Given these factors, the Court declined to include attorneys as a subset of agents under NRS § 116.31183. Therefore, there can be no liability for retaliatory actions under NRS § 116.31183 against an attorney where the alleged retaliatory act is providing legal representation for a client.

The district court erred in awarding Kern attorney fees

The Court noted that the district court awarded attorney fees to Kern under NRS 18.010(2)(b) and as sanctions under NRCP 11 because it found that the Dezzanis' lawsuit was filed for the purpose of harassing Kern. The Court noted that it reviews a district court's award of attorney's fees for abuse of discretion. The Court has consistently held that attorneys who proceed pro se or represent their law firm, they cannot be awarded attorney fees. This is because there are no fees to award. The Court cites *Sellers v. Fourth Judicial Dist. Court* for the proposition that attorneys fees generally cannot be awarded to pro se attorney litigants.[4] The Court held that was not the case here. However, the Court did uphold the district court's award of costs on the ground that Kern incurred actual financial costs in representing herself.

Conclusion

In NRS 116.31183, the word "agent" does not include attorneys who are providing legal representation for a client. Therefore, an attorney who is merely legally representing their client

[4] Sellers v. Fourth Judicial Dist. Court of State, in & for City of Elko, 119 Nev. 256, 259 (2003).

cannot be held liable for retaliatory conduct under NRS 116.1183. Further, attorney *pro se* litigants who represent themselves or their law firm may not be awarded attorney fees they did not actually incur, but may be awarded costs. The Court upheld in part and overturned in part the district court's ruling.

Dissent

Justice Pickering argued that attorneys are agents, and therefore can potentially face liability under NRS 116.31183. After noting that NRS 116.31183 is silent as to the meaning of the word "agent," the dissent turned its attention to NRS 116.31164. While the majority opinion read the "or" between the words "attorney" and "agent" as disjunctive, the dissent argued that such a reading assumes more than can be supported. The dissent argued that an attorney is universally understood to be an agent. The dissent further points to legislative history that it believes supports the notion that the Legislature intended to include attorneys within its definition of the word "agent" for the purposes of this statute. The dissent argued that this case therefore should not have been dismissed.