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Liu v. Christopher Homes, LLC, 130 Nev. Adv. Op. 17 (Mar. 27, 2014)¹

CIVIL PROCEDURE: ATTORNEY FEES AS SPECIAL DAMAGES

Summary

The Court clarified two issues: (1) *Sandy Valley Associates v. Sky Ranch Estates Owners Association*'s² and *Horgan v. Felton*'s³ effect on the law regarding the recovery of attorney fees as special damages; and (2) the extent to which *Horgan* retreated from *Sandy Valley*'s discussion about the grounds for recovering attorney fees as special damages.

Disposition

The decision in *Horgan v. Felton*⁴ should not be read to mean that a party in any matter that relates to real property must prevail on a slander of title claim in order to recover attorney fees as special damages. Rather, *Horgan* only applies in a special type of civil action that is brought by a party: an action to clarify or remove a cloud on title.⁵

Factual and Procedural History

The Plaintiff purchased a home from developer Christopher Homes Ridges, LLC (“CHR”) pursuant to a contract (“the Agreement”) wherein CHR agreed to convey good marketable title to the Plaintiff at the close of escrow.

CHR hired Christopher Homes, LLC (“CH”) as a general contractor who subsequently hired K&D Construction (K&D) as a subcontractor for various services. CHR failed to timely or fully pay K&D and as a result K&D recorded a lien on various properties, one of which was the Plaintiff's.

K&D filed a civil suit against CHR, CH and the Plaintiff to recover on the liens through foreclosure. In answer, the Plaintiff filed a cross-claim against CHR for a breach of contract claim. Under this claim, the Plaintiff tried to recover attorney fees and costs that she allegedly incurred in defending herself against K&D's action.

The district court relied on *Horgan* and found that, as a matter of law, the Plaintiff could not recover attorney fees as special damages because she did not prove slander of title. As a result, the Plaintiff filed an appeal challenging the district court's determinations regarding the recovery of attorney fees as special damages.

¹ By Allison Vitangeli

² 117 Nev. 948, 35 P.3d 964 (2001).

³ 123 Nev. 577, 170 P.3d 982 (2007).

⁴ *Id.* at 123 Nev. 583–86, 170 P.3d 986–88.

⁵ *Id.*

Discussion

The Plaintiff argued that the district court erred in its reading of *Horgan* in favor of CHR arguing that it does not bar a party from recovering attorney fees as special damages when the civil action incidentally pertains to title to real property. Instead, the Plaintiff asserted *Horgan* only prohibits a grant of attorney fees that stem from an action in which a claimant tries to remove a cloud on title but fails to prove slander of title. Next, the plaintiff asserted the attorney's fees as special damages sought did not arise from an action to remove a cloud on title but rather from CHR's breach of contract. Liu then argues that *Sandy Valley* permits the recovery of attorney fees as special damages that arise from a breach of contract and thus her attorney fees claim was not barred as a matter of law. The Court reviewed the legal issues presented by these arguments de novo.⁶

Horgan's partial abrogation of Sandy Valley

The Court first pointed out that attorney fees are generally not recoverable “absent authority under a statute, rule, or contract.”⁷ However, “as an exception to the general rule,” attorney fees may be awarded “as special damages in limited circumstances.”⁸

Next the court summarized the three significant statements that are found in *Sandy Valley* which concern the grounds for recovering attorney fees as special damages.⁹ First, attorney fees may be recovered as special damages if they are pleaded according to NRCP 9(g) and are a “natural and proximate consequence of the injurious conduct.”¹⁰ Second, the court stated that attorney fees are recoverable as special damages when they arise from a third-party legal dispute as a result of a breach of contract.¹¹ Third, the *Sandy Valley* court stated that in actions concerning a cloud on title to real property “[a]ttorney fees may . . . be awarded as damages in those cases in which a party incurred the fees . . . in clarifying or removing a cloud upon the title to property.”¹²

Next, the Court went on to discuss how the *Horgan* court revisited *Sandy Valley* and retreated from the third statement above that concerns an award of attorney fees in cloud-on-title actions.¹³ There, the court stated “in cases concerning title to real property, attorney fees are only allowable as special damages in slander of title actions, not merely when a cloud on the title to real property exists.”¹⁴ The Court did not read this statement to the exclusion of the rest of the opinion.¹⁵ Rather, the Court analyzed the remainder of the *Horgan* opinion, and found that it is clear the case did not hold that a party in any matter that relates to title to real property must prevail on a slander of title claim in order to recover attorney fees as special damages.¹⁶ Rather,

⁶ See *Thomas v. City of N. Las Vegas*, 122 Nev. 82, 90, 127 P.3d 1057, 1063 (2006) (providing that a denial of attorney fees is generally reviewed for abuse of discretion but that de novo review applies when an attorney fees matter concerns questions of law).

⁷ *Albion v. Horizon Communities, Inc.*, 122 Nev. 409, 417, 132 P.3d 1022, 1028 (2006).

⁸ 123 Nev. at 583, 170 P.3d at 986.

⁹ 117 Nev. at 956–57, 35 P.3d at 969–70.

¹⁰ *Id.*

¹¹ *Id.* at 957, 35 P.3d at 970.

¹² *Id.*

¹³ 123 Nev. at 579, 588, 170 P.3d at 983, 988.

¹⁴ 123 Nev. at 579, 583, 170 P.3d at 983, 983.

¹⁵ See *Orr v. Allen*, 248 U.S. 35, 36 (1918).

¹⁶ 123 Nev. at 583–86, 170 P.3d at 986–88.

that the *Horgan* court specifically referred to actions meant only to clarify or remove a cloud-on-title.¹⁷

In such circumstances, the Court concluded that a “plaintiff may recover as damages the expense of legal proceedings necessary to remove a cloud on the plaintiff’s title” when he or she prevails on a slander of title claim.¹⁸ The *Horgan* court came to this conclusion by primarily relying upon authorities that permit the award of attorney fees as special damages to parties who brought claims to clarify or remove a cloud on title, accrued attorney fees in bringing those claims, and prevailed on a slander of title claim.¹⁹ Thus, the *Horgan* court’s holding applies to actions where a plaintiff seeks recovery of attorney fees that were accrued from pursuing an action to clarify or remove a cloud-on-title. Moreover, the *Horgan* court was not concluding that a slander of title claim is a prerequisite to recovering attorney fees as special damages in *all* civil actions that relate to title to real property.²⁰ Rather, it is only a prerequisite to a party’s recovery of attorney fees that were sustained in asserting claims to clarify or remove a cloud-on-title, such as declaratory or equitable relief claims.²¹

In the present case, the Court pointed out that the Plaintiff incurred attorney fees by defending against K&D’s civil action that was a result of CHR’s breach of the Agreement not from a claim seeking declaratory or equitable relief. Therefore, the Court agreed with the Plaintiff’s argument in that the attorney fees claim asserted by the Plaintiff was not in the purview of *Horgan*’s requirement that a party who brought an action to clarify or remove a cloud-on-title must prove slander of title in order to recover the attorney fees that he or she incurred in the action.²²

The portion of Sandy Valley that Horgan did not overturn

Finally, in light of the above discussion, the Court held that it maintained that “a party to a contract may recover from a breaching party the attorney fees that arise from the breach that caused the former party to accrue attorney fees in defending himself or herself against a third party’s legal action.” Specifically, the Court found that the *Horgan* decision did not retreat from *Sandy Valley*’s conclusion on the first and second statements referenced above.

Conclusion

In the present case, the Court held that *Sandy Valley* permits, and *Horgan* does not bar, Liu’s claim to recover attorney fees as special damages that were purportedly sustained in defending herself against K&D’s suit, which was allegedly caused by CHR’s breach of the

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *See id.* at 584–86, 170 P.3d at 987–88 (citing: *Wright v. Rogers*, 342 P.2d 447, 449, 457 (Cal. Ct. App. 1959) (providing that in an action to remove a cloud on title, the plaintiff may recover attorney fees as special damages if he or she prevails on a slander of title claim)).

²⁰ *See* 123 Nev. at 579, 583–86, 170 P.3d at 983, 986–88.

²¹ *Id.*

²² *Id.*

Agreement. Accordingly, the Court reversed the district court's findings of fact, conclusions of law and judgment on Liu's claim and remanded the matter for further proceedings.²³

²³ The Court also instructed the district court to make a determination on whether the evidence before it proved that CHR's breach of the Agreement caused Liu to accumulate the attorney fees in defending her interest against K&D's suit. This was a question of fact that was inappropriate to determine for the first time on appeal.