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Summary of Butwinick v. Hepner, 128 Nev. Adv. Op. 65

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CIVIL PROCEDURE – APPELLATE JURISDICTION

Summary

The Court considered Respondents’ motion to substitute themselves as the real parties in interest after acquiring Appellants’ rights and interests in the underlying district court action at a judgment execution sale, and to dismiss Appellants’ appeal from a district court order.

Disposition/Outcome

Although Nevada’s judgment execution statutes permit a judgment creditor to execute on a debtor’s personal property, including the right to bring an action to recover a debt, money, or thing, those statutes do not include the right to execute on a party’s defenses to an action, and permitting a judgment creditor to execute on a judgment in such a way would cut off a debtor’s defenses in a manner inconsistent with due process principles.

Factual and Procedural History

Within the district court, Respondents brought suit against Appellants, alleging breach of contract and fraud and tort-based claims related to an asset purchase and sale agreement, under which Respondents purchased two furniture stores from Appellants. Although the Appellants answered and filed a counterclaim, arguing that Respondents failed to make payments on the promissory note used for the owner-financed purchase of the stores, the district court entered judgment for Respondents and allowed Respondents to rescind the agreement.

Respondents obtained a writ of execution on the judgment, thereby allowing them to execute against Appellants’ personal property. Following Appellants’ unsuccessful attempts to restrain the sale of Appellants’ personal property and quash the writ of execution, Respondents executed against Appellants’ property by purchasing Appellants’ rights and interests in the district court action.

Respondents argued that NRS 10.045² and NRS 21.080(1)³ allowed Respondents to execute against Appellants’ defenses as personal property. As such, Respondents moved to substitute as real parties in interest under NRAP 43 and to dismiss the appeal under NRAP 42(b), on the basis that Respondents acquired Appellants’ defenses.⁴ Appellants opposed the motion and argued that an appellant’s defenses to an underlying lawsuit is not personal property subject to execution during the pendency of an appeal.

¹ By Robert Stewart.

² NEV. REV. STAT. 10.045 (2007) (defining personal property).

³ NEV. REV. STAT. 21.080(1) (2007) (describing property liable to execution).

⁴ Nev. R. App. P. 43 (laying forth the rule on substitution of parties); Nev. R. App. P. 42(b) (laying forth the rule on voluntary dismissal in the Supreme Court of Nevada).

Discussion

The Court issued a per curiam opinion. The Court first laid forth the parameters of personal property, stating that “[u]nder NRS 10.045, personal property includes things in action.” Then, after noting that Respondents cited no authority to support the proposition that Appellants’ defenses to Respondents’ underlying lawsuit constitute a “thing in action” subject to execution under NRS 21.080 and NRS 10.045, and that Respondents offered no authority, nor did the Court find any, to support the proposition that a litigant’s defenses are assignable, the Court held that Nevada’s judgment execution statutes do not contemplate executing on defensive appellate rights as property.

In noting the adverse results that would exist *if* the Court were to view defensive appellate rights as property and grant Respondents’ motion, the Court stated that such a route would foreclose both Appellants’ defenses to Respondents’ underlying claims and Appellants’ appeal to the resultant district court order.

Conclusion

The Court denied Respondents’ motion because Nevada’s judgment execution statutes do not contemplate executing on defensive appellate rights as property.