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Summary of Davis v. Beling, 128 Nev. Adv. Op. No. 28

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EVIDENCE - OFFERS OF COMPROMISE IN REAL ESTATE TRANSACTIONS

Summary

The Court considered, on appeal, whether a court can admit evidence of compromise offers within real estate transactions for the purpose of demonstrating a failure to mitigate damages. Further, it considered whether real estate licensees are shielded from all forms of common law liability. Lastly, the Court considered whether compensatory damages should include diminution-in-value for a claim alleging fraud, whether carrying costs as consequential damages should be limited by the economic loss doctrine, and whether the district court erred in denying attorney's fees provided for in listing and purchase agreements to the prevailing party.

Disposition/Outcome

The Court concluded that evidence of offers of compromise is not admissible to demonstrate a failure to mitigate damages. It also found that NRS 645.251 only protects a real estate licensee from liability due to conduct relating to NRS 645.252-645.254. The Court also held that compensatory damages for fraud claims include carrying costs and diminution-in-value, and are not barred by the economic loss doctrine. Lastly, the Court found that the prevailing party was entitled to attorney's fees per their listing and purchase agreements.

Factual and Procedural History

The issue before the Court arose from complications with a couple's desire to use the proceeds from the sale of their home ("Augusta Property") to finance the acquisition of a new custom-built home ("MacDonald Highlands Property"). Kristen Beling and William Dougherty, Jr. ("The Doughertys") entered into contracts with Cheryl Davis ("Davis") as their listing agent and Platinum Properties GMAC Real Estate ("Platinum") as their broker for the sale of their current home.

The Doughertys agreed to sell the Augusta Property to Chris and Tracy Byrd ("The Byrds") who provided an earnest deposit and prepared to close in a few months. After Davis assured the Doughertys that the Byrds were going to close on the Augusta Property, the Doughertys closed on the MacDonald Highlands Property. Davis recommended that the Dougherty buy, rather than rent, an interim home since they needed a place to live for the estimated two-year construction period of the MacDonald Highlands Property, so the Doughertys entered an agreement to purchase a home ("Ping Property") with the intent to sell it after moving into the MacDonald Highlands Property.

¹ By Colin Seale.

Closing on the Ping Property, however, was meant to be contingent on the closing of the Augusta Property because the Doughertys needed the funds from the sale to pay for the closing. However, Davis did not honor the Doughertys' request and failed to make this offer contingent. Furthermore, despite Davis' repeated assertions to the contrary, the Byrds were unable to successfully close on the Augusta Property.

Davis soon informed the Doughertys that they needed to close escrow on the Ping Property or lose their earnest money deposit. The Doughertys did not want to close on the Ping Property because the Augusta Property had not closed. Davis then, pretending to act on behalf of the Byrds, gave the Doughertys \$150,000 to close on the Ping Property and told them the Augusta Property would close in a few days. The Byrds were never able to successfully close on the Augusta Property. Davis then offered to purchase the Ping Property from the Doughertys, but the Doughertys refused.

Davis sued under multiple theories to recover the \$150,000 advanced to the Doughertys, and the Doughertys countersued for multiple causes of action including negligent misrepresentation, fraud by misrepresentation and concealment, breach of fiduciary duty, a claim under NRS 645.257 for a real estate licensee's breach of duties imposed by NRS 645/252-645.254, and sued Platinum based on a respondeat superior theory.

After the court scheduled a jury trial, the district court granted the Dougherty's motion in limine to exclude evidence of Davis' oral offer to buy the Ping Property. The district court also granted Davis' motion in limine to exclude evidence relating to the Doughertys' carrying costs for the Ping Property arguing that they should only recover their out-of-pocket damages and that carrying costs are barred by the economic loss doctrine. The jury's verdict awarded Davis for unjust enrichment, and the Doughertys for compensatory and punitive damages for their fraud-by-concealment claim and statutory damages for their NRS 645.257 claim. The jury also awarded the Doughertys compensatory and punitive damages for their 645.257 claims against Platinum. The court later granted the Doughertys' post-judgment motion for attorney's fees under the offer of judgment rule, but denied their request for attorney fees under the listing and purchase agreements. Both parties appealed challenging various aspects of the district court's decisions.

Discussion

Justice Saitta wrote for the unanimous three-judge panel. The Court first noted that under the plain meaning of NRS 48.105(1),² parties cannot introduce evidence of offers of compromise when such evidence is used to prove the amount of damages or liability, but under NRS 48.105(2),³ the evidence is allowable if used for a different purpose. Even though a failure to mitigate damages is technically a different purpose, the Court found that introducing evidence of

² NEV. REV. STAT. 48.105 (1) (2007).

³ NEV. REV. STAT. 48.105 (2) (2007).

Davis' offer to pay the Doughertys \$150,000 to close on the Ping Property inescapably goes to the amount of damages. Because this is clearly prohibited by statute, the Court affirmed the district court's decision to exclude this evidence.

The Court also found that NRS 645.251⁴ alters traditional forms of common law liability for real estate licensees because it expressly limits their duties of care and disclosure to the provisions in NRS 645.252-NRS 645.254.⁵ Therefore, the district court erred in entering judgment against Davis on Doughertys' fraud-by-concealment claim because this claim directly overlapped with the conduct mentioned in the statute. Analogously, since the Dougherty's claim of respondeat superior liability against Platinum was not covered in these special provisions, the Court affirmed the district court's judgment against Platinum.

On the issue of damages, the Court found that the actual damages under 645.257⁶ corresponded with the common understanding of compensatory damages, which included diminution damages and consequential damages. The Court found that the district court appropriately computed Doughertys' compensatory damages by comparing Davis' conduct to the agent in *Strebel*, who fraudulently induced a homeowner to sell his home.⁷ The current case was similar to *Strebel* because the Court found a substantial relationship between the Doughertys' and the *Strebel* homeowner's lost appreciation damages as well as Davis' and the agent's fraudulent conduct. Therefore, the Court affirmed the district court's decision on the appropriate measure of compensatory damages.

The Court also found that the district court should have allowed the Doughertys' to recover carrying costs of the Ping property as consequential damages because the Doughertys' reasonably incurred the costs to minimize the effects of Davis' fraudulent conduct. Had they not paid the taxes, mortgage, and maintenance costs on the property, a court would have accurately deemed them as failing to mitigate their damages. Furthermore, the Court found that the economic loss doctrine does not apply to intentional breaches of obligations required by law where the breach of that duty caused a purely economic loss to the plaintiff. Therefore, the Court reversed the district court's decision to preclude the Doughertys' recovery of their carrying costs.

Lastly, the Court found that the clear and unambiguous language of the contracts between the parties for the listing agreement of the Augusta Property and the purchase agreements for the Augusta and Ping Properties provided that the prevailing party is entitled to attorneys fees for actions arising out of enforcement of the agreement. Therefore, the Court ruled that the district court erred in denying the Dougherty's' motion for attorney's fees per the agreements.

⁴ NEV. REV. STAT. 645.251 (2007).

⁵ NEV. REV. STAT. 645.252- NEV. REV. STAT. 645.254 (2007).

⁶ NEV. REV. STAT. 645.257 (2007).

⁷ See *Strebel v. Brenlar Investments, Inc.*, 37 Cal. Rptr. 3d 699, 705 (Ct. App. 2006).

Conclusion

Evidence of offers of compromise is not admissible to demonstrate a failure to mitigate damages. Even though NRS 645.251 only protects a real estate licensee from liability of conduct covered in NRS 645.252-645.254, it does not shield a real estate licensee from other forms of common law liability not included in those statutory provisions. Additionally, compensatory damages, including carrying costs and diminution-in-value, are not barred by the economic loss doctrine in an intentional breach of fiduciary duties. Lastly, when the clear and unambiguous language of a contract calls for attorney's fees for the prevailing party in enforcement actions, courts should honor such provisions.