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Torrealba v. Kesmetis, 124 Nev. Adv. Op. No. 10 (March 6, 2008)¹

CIVIL PROCEDURE

Summary

Appeal from a district court summary judgment in a tort action.

Disposition/Outcome

Reversed and remanded the district court's summary judgment dismissing claims of negligence per se and fraud, and remanding to the district court the question of whether instruments recorded but improperly acknowledged served as constructive notice under N.R.S. 111.320.

Factual and Procedural History

In 1997, Mrs. And Mrs. Leonard and Shelly Torrealbas began investing with J.M.K. Investments, Inc., such that J.M.K. would make real estate loans, naming the Torrealbas as lenders. In April 2000, J.M.K. informed the Torrealbas that borrowers on three loans were going to default. The defaulting loans included the Taylor ranch, Saxton, and Diamond Key Homes loans. On January 7, 2003, the Torrealbas learned that three declarations of agency and limited powers of attorney had been notarized and recorded for the loans. The powers of attorney authorized J.M.K. to sign for the Torrealbas when reconveying the deeds of trust to the borrowers.

The Torrealbas neither signed powers of attorney nor appeared before notaries for the Taylor ranch or Saxton loans. However, two notary employees of J.M.K., Laurie Kesmetis and Emily Herrera, notarized the Torrealbas' signatures on powers of attorney and recorded the documents on February 20, 1998 for the Taylor ranch loan and May 27, 1999 for the Saxton loan. Although Leonard Torrealba admitted to signing a document on his and Shelly Torrealba's behalf, he asserted that he did not understand that the document was a power of attorney and did not sign the document in front of a notary. The document was recorded on July 20, 2000, but who notarized it remains unknown.

On January 6, 2006, the Torrealbas filed a complaint in the district court against J.M.K, Kesmetis, Herrera, and John Keilly, the president of J.M.K. The Torrealbas alleged negligence per se for violations of N.R.S. 240.075, 240.120, and 240.150. They also alleged fraud. They claimed injury as a result of J.M.K.'s improper reconveyance of deeds of trust in which the Torrealbas had an interest. The defendants argued that the statute of limitations barred the claim for negligence per se. The court agreed and granted the defendants summary judgment, further finding that the Torrealbas had constructive notice of all three powers of attorney upon recordation. The court also found that the Torrealbas had actual notice of the Diamond Key Homes power of attorney because Leonard had signed the document. As a result of both findings, the court determined that

¹ By Barbara McDonald.

the claims were time-barred under the two year statute of limitations pursuant to N.R.S. 11.190(4)(b). The Torrealbas appealed after a denial of their motion for reconsideration.

Discussion

Negligence per se

The Torrealbas brought their actions under N.R.S. 240.150(1) and 240.150(2). They did not bring their claims under N.R.S. 240.150(3) and 240.150(4), which authorized the Secretary of State to discipline a notary public for willful violations of regulatory duties. Neither of the statutes under which the Torrealbas brought their claim referred to penalties. Therefore, the Torrealbas claimed that their negligence per se claim was not “[a]n action upon a statute for a penalty” and therefore should not be subject to the two-year statute of limitations which N.R.S. 11.190(4)(b) required. They argued that instead, N.R.S. 11.190(3)(a), which provides for a three-year statute of limitations for “actions upon a liability created by statute” should apply.

The court agreed, looking to *Sonoma County v. Hall*² for its rationale. In *Sonoma*, the California court applied a three-year statute of limitations to an action on the bond of a county recorder.³ Statute had created the position of county recorder; statute prescribed the recorder’s duty to collect and pay fees; and statute created liability for failure to perform the duty.⁴ Thus when the recorder failed to pay the county the collected amount, the court applied the three-year statute for actions upon a statute-created liability.⁵

Similarly here, a statute authorized the notary public’s position, duties and liabilities. The Secretary of State retained authority to penalize the notary. A notary was required to file a bond for \$10,000 payable to the state to provide indemnification. The court reasoned that a claim on a notary’s official bond under 240.150(1) and 240.150(2) was an action upon a liability created by statute. Therefore, the three-year statute of limitations applied.

The respondents further argued that the claims at bar were “[a]n action upon a statute for penalty” and therefore subject to the two-year statute of limitations. However, the court construed “penalty” as meaning something other than a pecuniary loss. Because the Torrealbas were suing for losses resulting from alleged notary misconduct, as authorized by statute, the court characterized their action as one upon a liability created by statute. The Torrealbas brought their claim within the three-year limit because they discovered the conduct on January 7, 2003 and filed their complaint on January 6, 2006.

Fraud

Upon appeal, the Torrealbas based a claim of fraud on N.R.S. 240.150. Because the statute makes no provision for fraud, the court concluded that such use of the statute was improper. The court said that the Torrealbas claim was based on common law. Therefore, the three-year statute of limitations pursuant to N.R.S. 11.190(3)(d) would

² 62 P. 257, 257 (Cal. 1900).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

apply. The court held that the district court erred in applying the two year-statute of limitations pursuant to NRS 11.90(4)(b).

The district court found that the Torrealbas had actual notice of the Diamond Key Homes power of attorney when Leonard signed the document. The district court also found that Leonard had constructive notice of all three powers of attorney as of their recordation dates. These dates were all more than three years before the Torrealbas filed suit. However, the Torrealbas claimed they discovered the facts regarding the fraud on January 7, 2003. Noting that an action for fraud “accrues when the aggrieved party discovers the facts constituting the fraud,” the court held that their January 6, 2006 complaint was timely.

Actual notice

Although the Torrealbas acknowledged that Leonard signed their names on a document that later attached to the Diamond Key Homes power of attorney, they maintained that it was a separate sheet and did not include any acknowledgement. Furthermore, J.M.K. never informed the Torrealbas of the document’s intended use. The court ruled that a genuine issue of material fact existed as to whether Leonard knew about the document and whether his signature supplied actual notice. The court therefore held that summary judgment against the Torrealbas was inappropriate.

Constructive Notice

On this issue the court responded to an issue of first impression: whether the recordation of an improperly acknowledged instrument provided constructive notice. The Torrealbas maintained that it did not, while the respondents looked to N.R.S. 11.315 and N.R.S. 11.320 to contend that the act of recording certain instruments imparts notice of the documents to third parties, subsequent mortgagers, and subsequent purchasers.

The court held that a recorded but improperly acknowledged instrument could only provide constructive notice if honoring the instrument would not create harm or improperly benefit the notary or any other party to the instrument.

The court explained that N.R.S. 111.450(1) requires that powers of attorney be acknowledged and recorded in the same manner as any other instrument conveying or affecting property. Under N.R.S. 111.320, filing an acknowledged and recorded written instrument that conveys or affects property serves as notice of its contents to all persons. N.R.S. 111.315 requires that the instruments be recorded in the county in which the property exists if recordation is to serve as notice.

N.R.S 111.320 further requires that powers of attorney be acknowledged pursuant to N.R.S. Chapter 111. N.R.S. 111.240 requires that acknowledgement of a power of attorney containing authority to convey real property conform to provisions of the Uniform Law on Notarial Acts.⁶

The court concluded that a “bare allegation” of a defect in a power of attorney’s acknowledgement could not prevent a recorded power of attorney from serving constructive notice. The court also rejected a rule requiring strict compliance with notarial requirements because doing so would prevent courts from considering the individual facts of a case. In doing so it noted that some jurisdictions require strict

⁶ N.R.S. §§ 240.161 - 240.169.

compliance.⁷ However, the court adopted the test from *In re Williams*,⁸ allowing courts to consider the individual facts in a case of defective acknowledgement. Doing so would allow courts to waive some technical notarial violations while protecting any actual harm that might flow from honoring an improperly acknowledged document.

In *Williams* a notary altered an acknowledgement to appear as if the debtors in a bankruptcy case had signed a deed in Maryland.⁹ However, it had actually been notarized in West Virginia.¹⁰ The notary made the change because he was only authorized to acknowledge signatures in Maryland.¹¹ The deed was then recorded in West Virginia.¹² The bankruptcy trustee sought to have the mortgage company declared an unsecured creditor because of the improper acknowledgement.¹³

The *Williams* court framed the test as whether any harm flowed from the transaction or any improper benefit flowed to the notary or any party to the instrument.¹⁴ If the answer to either question was affirmative, then the acknowledgement was invalid and the recorded instrument would fail to serve constructive notice.¹⁵

Here, the court adopted the *Williams* test. The court provided a rationale similar to that of *Williams* and stated that the test “strikes an appropriate balance between respecting the role of substantive notary requirements in protecting parties to a transaction from wrongdoing or fraud and recognizing that certain technical acknowledgement violations may not warrant voiding an instrument.”

The district court concluded that for at least three years before they filed their complaint, the Torrealbas had constructive notice of all three powers of attorney. However because it was not clear whether the Diamond Key Homes loan power of attorney had been signed, acknowledged or recorded, the issue was remanded to the district court.

The Torrealbas had constructive notice of the other two loans only if improper benefit to the notaries or other parties would not flow or harm would result as a result of honoring the improperly acknowledged power of attorney. The Torrealbas alleged that they never appeared before the notaries to sign the powers of attorney for the Saxton or Taylor Ranch loans. No genuine issue of material fact existed with regard to the propriety of the acknowledgements because J.M.K. did not refute that the Torrealbas failed to appear before the notaries. Since they did not appear, the powers of attorney were not acknowledged pursuant to N.R.S. 240.1655(2)(a), and the court therefore reversed summary judgment. It further remanded to the district court for a determination of whether honoring the improperly acknowledged powers of attorney would cause harm or confer a benefit.

⁷ See *Szczepka v. Weaver*, 942 P.2d 247, 249 (Okla. Civ. App. 1997); *Succession of Wilson*, 213 So. 2d 776, 780 (La. Ct. App. 1968); *Gulft Production Co. v. Continental Oil Co.*, 61 S.W.2d 185, 186-187 (Tex. Civ. App. 1993).

⁸ 584 S.E.2d 922 (W. Va. 2003).

⁹ *Id.* at 924.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 928.

¹⁵ *Id.*

Conclusion

The court reversed the district court's summary judgment on the Torrealbas' claim of negligence per se because the claim was brought under N.R.S. 240.150(1)-(2), which is subject to the three-year statute of limitations provided by N.R.S. 11.190(3)(a). The court also reversed summary judgment on the fraud claim because common-law fraud is subject to a three-year statute of limitations under N.R.S. 11.190(3)(d). The court remanded to the district court to determine whether the Torrealbas filed their complaint within the three-year limitation period.

The court reversed summary judgment on the issue of whether the Torrealbas had actual notice of the Diamond Key Homes power of attorney. The court did so because a genuine factual dispute remained as to whether Leonard's signature charged the Torrealbas with actual notice.

The court also adopted the test from *Williams* to determine whether a recorded but improperly acknowledged instrument could impart constructive notice. It held that if the notary or any party to the instrument would obtain improper benefit as a result of the court's honoring improper acknowledgement, the acknowledgement should be void for constructive purposes. The court reversed and remanded to the district court to apply the test.