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Summary of Zhang v. Eighth Judicial Dist. Ct., 120 Nev. Adv. Rep. 104

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Zhang v. Eighth Judicial Dist. Ct., 120 Nev. Adv. Rep. 104 (2004)¹

CONTRACTS- SALE OF PROPERTY: THE PREEXISTING DUTY RULE

Summary

On February 1, 2004, Lanlin Zhang contracted to buy former realtor Frank Sorichetti's Las Vegas home for \$532,500. On February 3, 2004 Sorichetti told Zhang that he was terminating the sale "to stay in the home a little longer." Sorichetti then stated that he would sell Zhang the home if she paid more money. Zhang agreed and another contract was drafted that same day reciting a sales price of \$578,000.

On February 16, 2004, Sorichetti notified Zhang that a murder had occurred in the home several years earlier, and that Zhang could cancel the sales contract if she desired. Subsequently, Sorichetti rescinded the second sales contract "to use and/or dispose of my home as I wish," Zhang sued seeking damages, declaratory relief and specific performance of the original contract. Zhang also recorded a lis pendens against the property to prevent Sorichetti from disposing of it before the conclusion of the case.

Sorichetti countered Zhang's complaint with a NRPC 12(b)(5) motion for dismissal for failure to state a claim reasoning that the parties had replaced the original contract with the February 3 contract by novation.² The district court ruled in favor of Sorichetti and dismissed Zhang's complaint despite Zhang's unsuccessful attempt to amend her complaint to seek performance on the February 3 sales contract. The court also expunged her lis pendens on the property but stayed the order temporarily to allow Zhang to seek relief

Zhang subsequently filed a writ of mandamus compelling the district court to reinstate her complaint, vacate the expungement order, and grant leave to amend the complaint. The court then held that Zhang was entitled to her writ of mandamus since the district court manifestly abused its discretion in dismissing her complaint, and reinstated the complaint as to the original sales contract under the contractual doctrine, the preexisting duty rule.

Issue and Disposition

Issue

Is a purchase agreement for real property enforceable when the buyer executes it only because the seller would not perform under an earlier purchase agreement for a lesser price?

¹ By Christopher Carson

² 66 C.J.S. *Novation* § 2 at 484 (1998) (defining "novation" as "a substitution of a new contract or obligation for an old one which is thereby extinguished").

Disposition

No, a modified purchase agreement made specifically because the seller wanted an increased price is a contract not supported by consideration and is invalid. Subsequently, Appellant had a cause of action for breach of the initial contract, the court reversed the dismissal of her complaint and reinstated her *lis pendens* on the property and remanded the case for further proceedings.

Commentary

State of the Law Before *Zhang*

The principle commonly known as the preexisting duty rule, a doctrine that protects buyers from exploitation by sellers, is best explained in *Williston on Contracts*:

Where two parties have entered into a bilateral agreement, it will often occur that one of the parties, having become dissatisfied with the contract, will refuse to perform or to continue performance unless he is promised or paid greater compensation than provided in the original agreement...[T]he question arises whether the new [agreement to pay more money] is enforceable.

...

As a matter of principle, the second agreement must be held invalid, for the performance by the recalcitrant contractor is no legal detriment to him whether actually given or merely promised, since, at the time the second agreement was entered into, he was already bound to do the [performance]; nor is the performance or promise to perform under the second agreement a legal benefit to the promisor, since he was already entitled to have the [performance].³

The preexisting duty rule has long been recognized in Nevada.⁴ However, it has been applied primarily to commercial real estate transactions.⁵ So *Zhang* offers an issue of new impression as to Nevada law.

Effect of *Zhang* on Current Law

By extending the preexisting duty rule to residential real estate transactions, the Court offers a small measure of protection for homebuyers in the volatile Nevada real estate market. By holding a seller to his agreed upon and accepted offer, the Court ensures that a seller cannot squeeze a buyer for every possible dollar on threat of losing the right to purchase a new home. Nevertheless, under the federal Truth in Lending Act, a

³ Richard A. Lord, *WILLISTON ON CONTRACTS* 569-73 (4th ed. 1992).

⁴ *See County of Clark v. Bonanza No. 1*, 96 Nev. 643, 650-51, 615 P.2d 939, 944 (1980).

⁵ *See Walden v. Backus*, 81 Nev. 634, 637, 408 P.2d 712, 714 (1965).

seller still has the option of terminating the sale within three days of the agreement.⁶ However, for this to be a possibility after *Zhang* the seller must open the home back up to all possible purchasers or the seller could find him/herself in the same position as Mr. Sorichetti in this case.

Conclusion

By invalidating the second contract for the sale of the property, the court allows Zhang to have a much stronger case against Sorichetti. Sorichetti's primary reason for invalidating the first contract was to obtain a higher purchase price as opposed to his rescinding of the second contract because he wished to retain the property for his "own use and disposition." While the reasoning is essentially the same for each rescission, the remedy is not. The first rescission qualifies in the court's own words, as an "actionable anticipatory breach of contract"⁷ since the second contract originated from Sorichetti's desire for more money, rather than his desire to end dealings with Zhang. The second contract could be a much closer decision on this issue based on the language that Sorichetti used in his reasoning for the rescission. However, the court avoids this possible entanglement by finding that there was never a valid rescission of the first sales contract. This case shows a great example of the preexisting duty rule and its application in Nevada's volatile home market. This decision protects homebuyers from being squeezed for every possible dollar in a market where the appreciation of a home can be tracked by the hour, day and month.

⁶ 15 U.S.C. § 1635(a) (2000); 12 C.F.R. § 226.23(1) (2004).

⁷ *Zhang v. Eighth Judicial Dist. Ct.*, 120 Nev. Adv. Rep. 104 at 5 (2004) *citing* *Covington Bros. v. Valley Plastering, Inc.*, 93 Nev. 355, 360, 566 P.2d 814, 817 (1977).