8-6-2015

Barbara Ann Hollier Trust v. Shack, 131 Nev. Adv. Op. 59 (August 6, 2015)

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Nevada Law Journal

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CIVIL PROCEDURE: TOLLING

Summary

On an issue of first impression, the Nevada Supreme Court held that the filing of a post-judgement motion which tolls the time to appeal also tolls NRCP 54(d)(2)(B)'s 20-day deadline to move for attorney fees. The Court further concluded that (a) the $100,000 offset in Hollier's favor was not extinguished by the Court's previous order and (b) only Acadian Realty is liable for attorney fees.

Facts and Procedural History

Nicole Shack-Parker and her father, William E. Shack, signed a three-year lease with Acadian Realty, Inc. for a commercial property in Las Vegas. Upon execution, the Shacks owed a $100,000 security deposit and a non-refundable $100,000 option fee for Acadian Realty not selling the property during the lease. The property needed extensive work prior to the Shacks opening a child daycare facility. Numerous problems arose during reconstruction, and tensions reached a breaking point when Barbara Lawson allegedly refused to sign documents required by the City of Las Vegas for construction to be completed.

The first trial

The Shacks filed suit against Acadian Realty, the Barbara Ann Hollier Trust,[2] and Barbara Lawson both individually and as trustee of the trust for breach of contract and breach of the implied covenant of good faith and fair dealing. Lawson counter-sued for breach of contract, intentional misrepresentation, and abuse of process.

The district court dismissed Lawson's abuse of process claim following trial but prior to the jury reaching a verdict. The jury awarded the Shacks damages for breach of contract and breach of implied covenant, rejected Lawson's breach of contract and intentional misrepresentation claims, and found the Shacks liable for $105,000 for abuse of process ($100,000 for the option money and $5,000 for attorney fees). The judge affirmed the damages awarded to the Shacks and clarified that the $100,000[3] would be treated as an offset since it was owed to Lawson as option money. Both parties appealed.

[1] By Patrick Phippen.
[2] The Barbara Ann Hollier Trust actually owns the property.
[3] The district court judge noted the $100,000 was being held in escrow and that Lawson was entitled to these funds.

The first appeal

The Court concluded the jury damages awarded was not supported by the evidence and the district court cannot accept a verdict with interlineations on the verdict form.[4] The Court denied a petition for rehearing and remanded for trial solely on the issue of the Shacks' damages.[5]

The second trial

The jury returned a verdict of $371,400 for the Shacks on their breach of contract and breach of implied covenant of good faith and fair dealing claims. Lawson moved for judgment notwithstanding the verdict, or alternatively a new trial, and was denied. Lawson then moved for pre-judgment and post-judgment interest on the $100,000 offset received in the first trial, and was denied after the district court found the reverse and remand order on appeal eliminated the offset. Lawson then moved for a new trial on its breach of contract and abuse of process counterclaims, and was denied.

The Shacks moved for costs, most of which was awarded, and also moved for attorney fees. Lawson opposed the motion for attorney fees, arguing that such a motion was time-barred under NRCP 54(d)(2)(B) because it was filed more than 20 days after the notice of entry of judgment was served. The district court found the motion for attorney fees timely, reasoning Lawson's motion for judgment notwithstanding the verdict tolled the deadline, and awarded the Shacks $400,222 in attorney fees. Lawson appealed, challenging the district court's (1) denial of its motion for judgment notwithstanding the verdict, (2) denial of its motion for a new trial, (3) denial of its motion for relief from judgment, (4) denial of its motion for pre-judgment and post-judgment interest on the offset, (5) award of costs to the Shacks, and (6) award of attorney fees to the Shacks.[6]

Discussion

The Court began by concluding that the filing of a post-judgment motion that tolls the time to appeal also tolls NCRP 54(d)(2)(B)'s 20-day deadline to move for attorney fees.

A plain reading of NRCP 54(d)(2)(B), the Court reasoned, does not reveal whether such tolling is allowed or prohibited. When statutes or procedural rules are ambiguous, they are to be construed "consistently with what reason and public policy would indicate the Legislature intended."[7] Federal law interpreting the FRCP is persuasive authority because the Nevada rules are based largely on the federal rules.

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[4] Shack v. Barbara Ann Hollier Trust, No. 53039, Order of Reversal and Remand (Nev. Mar. 9, 2011).

[5] Shack v. Barbara Ann Hollier Trust, No. 53039, Order Denying Rehearing but Clarifying Order of Reversal and Remand (Nev. May 11, 2011).

[6] Lawson also appealed the district court's overruling an evidentiary objection. The Court concluded in a footnote that the district court abused its discretion but the abuse was harmless.

[7] Nev. Dep't of Corrs. v. York Claims Servs., Inc., 131 Nev. Adv. Op. 25, 348 P.3d 1010, 1013 (2015); *see also* Vanguard Piping v. Eighth Judicial Dist. Court, 129 Nev. Adv. Op. 63, 309 P.3d 1017, 1020 (2013) (NRCP "subject to the same rules of interpretation as statutes").

Many federal courts have implemented tolling under similar circumstances. The Ninth Circuit determined that an FRCP 54(d)(2)(B) motion for attorney fees is timely if filed within 14 days after resolution of FRCP 50(b), 52(b), or 59 post-trial motions.[8] Such motions suspend the finality of a district court judgment because it is "not appealable during the pendency of the post-trial motions."[9] This reasoning has also been adopted by the Second, Sixth, and Eleventh Circuits.[10]

For appellate purposes, a Nevada final judgment "disposes of all the issues presented in the case, and leaves nothing for the future consideration of the court, except for post-judgment issues such as attorney's fees and costs."[11] Nevada's definition of a final judgment aligns with the federal definition, thus the federal reasoning for implementing tolling is equally applicable in Nevada as well. The Court therefore concluded that "a post-judgment motion that tolls NRAP 4(a)'s deadline to appeal also tolls NRCP 54(d)(2)(B)'s filing deadline for a motion for attorney fees until the pending post-judgment motion is decided."[12] Furthermore, judicial economy is promoted by avoiding piecemeal appellate litigation, and adopting tolling "furthers [Nevada's] policy against piecemeal litigation more so than the alternative."

Tolling thus "moves the deadline for filing a motion for attorney fees to 20 days after the resolution of the last post-judgment tolling motion."[13] Tolling is not impractical because an order awarding attorney fees is a "special order entered after final judgment" and as such is substantively appealable on its own.[14]

The district court partially erred in denying Lawson's motion for pre-judgment and post-judgment interest

At the second trial, the district court found the $100,000 offset from the first trial was "wholly reversed and remanded by the Supreme Court of Nevada." However, since the $100,000 was not explicitly addressed by the Court in its March 9, 2011 and May 11, 2011 orders,[15] it remained intact. The $100,000 offset did not accrue interest because it merely reduced the Shacks' original verdict. The Court thus reversed the district court and instructed it to enter a new judgment where the Shacks' second verdict was reduced by the $100,000 without interest.

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[8] Bailey v. Cnty. of Riverside, 414 F.3d 1023, 1025 (9th Cir. 2005).

[9] *Id.*

[10] Weyant v. Okst, 198 F.3d 311, 314–15 (2d Cir. 1999); Miltmore Sales, Inc. v. Int'l Rectifier, Inc., 412 F.3d 685, 688 (6th Cir. 2005); Members First Fed. Credit Union v. Members First Credit Union of Fla., 244 F.3d 806, 807 (11th Cir. 2001).

[11] Lee v. GNLV Corp., 116 Nev. 424, 426, 996 P.2d 416, 417 (2000).

[12] NRAP 4(a)(4) states that a post-trial motion filed pursuant to NRCP 50(b), 52(b), or 59 prevents the time to file a notice of appeal from running until entry of an order disposing of the last such remaining motion.

[13] The scope of the Court's holding specifically includes post-judgment motions under NRCP 50(b), 52(b), and 59.

[14] NRAP 3A(b)(8); Winston Prods. Co. v. DeBoer, 122 Nev. 517, 525, 134 P.3d 726, 731 (2006).

[15] *See supra* notes 4 and 5 and accompanying text.

The district court partially abused its discretion in its award of attorney fees to the Shacks

An award of attorney fees is reviewed for abuse of discretion.[16] The Shacks were awarded attorney fees under the terms of the lease. The district court found Barbara Lawson individually, the Barbara Ann Hollier Trust, and Acadian Realty all liable for the attorney fees. The Court concluded that only Acadian Realty is liable for attorney fees under the lease. The lease clearly stated that only a party to the lease could be held liable for attorney fees, and it was undisputed that only Acadian Realty was a party to the lease.

Conclusion

Post-judgment motions tolling NRAP 4(a)'s deadline to appeal also toll NRCP 54(d)(2)(B)'s filing deadline for a motion for attorney fees until the pending post-judgment motion is decided.

The district court was affirmed in all respects with two exceptions: the $100,000 offset remains intact, and only Acadian Realty is liable for attorney fees.

[16] Bobby Berosini, Ltd. v. PETA, 114 Nev. 1348, 1354, 971 P.2d 383, 386 (1998).