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Rosenburg Living Trust v. MacDonald Highlands Realty, LLC C/W 70478, 134 Nev. Adv. Op. 69 (Sept. 13, 2018) (en banc)

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PROPERTY LAW: IMPLIED RESTRICTIVE COVENANTS, DISCLOSURE DUTIES

Summary

The Court determined that Nevada law does not recognize implied restrictive covenants based on a common development scheme, and the Court did not adopt the doctrine under these facts. Additionally, the Court held that, unlike common law disclosure requirements, claims arising from the duties of a licensee under NRS Chapter 645 could not be waived. Finally, it held that attorney fees and costs should only be awarded where a claim is without reasonable ground, or to harass the prevailing party.

Background

In 2012, Shahin Malek purchased a lot in the MacDonald Highlands master planned community, situated around Dragon Ridge Golf Course. Malek's purchase included an out-of-bounds parcel situated between his lot and the ninth hole of the golf course. In order to purchase this parcel, Malek needed to have the lot rezoned from public/semi-public to residential. Malek followed the proper rezoning process with no objection, including the then owner of the neighboring lot who received notice. Subsequently, the Frederic and Barbara Rosenberg Living Trust (the Trust) purchased the neighboring lot. When the Trust discovered the purchase of the out-of-bounds parcel, it filed a complaint against the MacDonald parties and Malek seeking to establish an implied restrictive covenant to restrict Malek from building on the out-of-bounds parcel, and an easement across the parcel. The Trust further sought monetary damages against the MacDonald parties for negligent and intentional misrepresentation, and real estate broker violations under NRS Chapter 645.

The district court granted the MacDonald parties and Malek's motions for summary judgment on all the Trust's claims. The district found that as a matter of law, Nevada does not recognize the types of covenants and easements the Trust sought, and the Trust voluntarily waived any claims it may have against the MacDonald parties. Subsequently, the district court awarded the MacDonald parties and Malek attorney fees and costs. This appeal followed.

Discussion

The district court did not err in concluding that Nevada law has not recognized an implied restrictive covenant for use

Nevada law has never recognized implied restrictive covenants in the context of common development schemes.² To support their position, the Trust argued that the Court recognized an implied restrictive covenant in *Shearer v. City of Reno*.³ However, the Court distinguished *Shearer* from the present case. In *Shearer*, a landowner sold a group of lots with the express agreement

¹ By Scott Cooper.

² See *Probasco v. City of Reno*, 85 Nev. 563, 459 P.2d 772, 774 (1969).

³ *Shearer v. City of Reno*, 36 Nev. 443, 136 P. 707 (1913).

not to build on them. The landowner further dedicated the lots to the public for all time, and even filed a plat declaring so. In the present case, there was no express agreement and no public use dedication. During oral argument, the Trust conceded that there was never an express agreement that the out-of-bounds parcel would remain a part of the golf course, or that the golf course would even remain a golf course. Additionally, there is no public dedication for the golf course. Instead, those who wish to use the golf course must have a membership or pay to play. For these reasons, the Court found that the Trust is not seeking the kind of implied restrictive covenant found in *Shearer*, and therefore the Trust's argument fails.

Furthermore, the Trust argued that their position is supported by *Boyd v. McDonald*.⁴ In *Boyd*, the Court recognized implied easements for ingress and egress across another's property. However, this is not what the Trust is seeking. The Court explained that an implied easement gives a person the right to use the land of another in some way or another. The Trust is not seeking to use the land of another, rather it is seeking to restrict the land of another. For this reason, the Court held that *Boyd* is inapplicable to the relief the Trust seeks, and makes clear an implied easement and an implied restrictive covenant are two distinct doctrines. Therefore, the relief the Trust seeks is not obtainable under *Boyd*.

Additionally, even if the Court were to adopt the doctrine, the Trust has not proved the elements required. An implied restrictive covenant may arise when the following elements are proven: 1) there is a common grantor, 2) the property subject to restriction is designated, 3) a general plan or scheme of restrictions exists for the property, and 4) the restrictions run with the land.⁵ Furthermore, the Court acknowledged other jurisdictions do apply this doctrine, they do so with extreme caution.⁶ While the Trust established the first element, they failed to prove the other three. Primarily, the Trust failed to prove that the common grantor, MacDonald Highlands, intended to place any restrictions on the out-of-bounds parcel. There is no evidence in the record that MacDonald ever intended for the out-of-bounds parcel to remain a part of the golf course for perpetuity. Further, the record does not prove that Malek and his predecessors had actual or constructive notice of that restriction. Therefore, even if the Court were to adopt the doctrine of implied restrictive covenants for common development schemes, the district court was correct in granting the motion for summary judgement on the implied restrictive covenant.

The Trust waived its common law, but not statutory, claims against the MacDonald parties

Generally, “[n]ondisclosure by the seller of adverse information concerning real property . . . will not provide the basis for an action by the buyer to rescind or for damages when the property is sold ‘as is.’”⁷ Based on the record, the Trust expressly agreed to inspect the property and bore the responsibility of ensuring it was suitable before closing. As a result, by agreeing to purchase the lot “as is”, the Trust waived its common law claims for negligent misrepresentation, fraudulent or intentional misrepresentation, and unjust enrichment against the MacDonald parties.

However, the Trust did not waive their claims under NRS 645.252.⁸ NRS 645.252 provides that any licensee acting as a real estate agent in a transaction shall disclose any material information

⁴ *Boyd v. McDonald*, 81 Nev. 642, 408 P.2d 717 (1965).

⁵ 20 AM. JUR. 2d *Covenants Etc.* § 156 (2015).

⁶ *Id.*

⁷ *Mackintosh v. Jack Matthews & Co.*, 109 Nev. 628, 633, 855 P.2d 549, 552 (1993).

⁸ NEV. REV. STAT. § 645.252 (2017).

that the agent knows or should have known to each party in the real estate transaction.⁹ However, with the exception of the duty to present all offers to clients, NRS 645.255 prevents the duties of a licensee under NRS 645.252 from being waived.¹⁰ Accordingly, the Trust could not have waived their statutory claims and should be able to maintain their statutory claims against the MacDonald parties. Therefore, summary judgment on the statutory claims against the MacDonald parties was inappropriate. Additionally, where the underlying decision of a district court is reversed making the recipient of the costs the prevailing party, the costs should also be reversed.¹¹ Since the Trust's statutory claims survive, it was inappropriate for the district court to award attorney fees and costs to the MacDonald parties.

The district court abused its discretion in awarding attorney fees and costs to Malek

NRS 18.010(2)(b) allows the district court to award attorney fees and costs to the prevailing party if a claim is brought or maintained “without reasonable ground or to harass the prevailing party.”¹² The district court found that after Malek filed his motion for summary judgement the Trust frivolously maintained its lawsuit against Malek. While the current jurisprudence in Nevada does support the Trust's position, their case was not without reasonable ground or to harass Malek. Instead, the Court saw the claim as a novel legal issue and public policy does not support punishing a party presenting a novel legal issue. Therefore, the district court's award of attorney fees and costs to Malek is reversed.

Conclusion

Nevada law has never recognized implied restrictive covenants based on common development schemes, and the Court declined to adopt the doctrine here. Furthermore, the Trust could not waive their claims under NRS Chapter 645, so the district court's granting of summary judgment and attorney fees and costs in favor of the MacDonald parties is reversed. Finally, the Court held that the district court abused its discretion by granting Malek attorney fees and costs because the Trust's claims were not without reasonable grounds or meant to harass Malek.

⁹ *Id.*

¹⁰ NEV. REV. STAT. § 645.255 (2017).

¹¹ *See. Bower v. Harrah's Laughlin Inc.*, 125 Nev. 470, 495-95, 215 P.3d 709, 726 (2009).

¹² NEV. REV. STAT. § 18.010(2)(b) (2017).