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Coker v. Sassone, 135 Nev. Adv. Op. 2 (Jan. 3, 2019)

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STANDARD OF REVIEW: NEVADA’S ANTI-SLAPP STATUTE

Summary

The Court clarified that the appropriate standard of review for a district court’s denial or grant of an anti-SLAPP motion to dismiss is de novo.

Background

Marco Sassone discovered his artwork was part of a fraudulent scheme where counterfeit copies of his work were being sold as originals. He traced the sales back to the appellant, Darrell Coker, and sued under Nevada’s Deceptive Trade Practice and RICO statutes. Coker filed a special motion to dismiss under NRS 41.660,² arguing that dissemination of artwork to the public is expressive conduct and that his activity was protected by Nevada’s anti-SLAPP statute in part because the dissemination of artwork is in the public’s interest. Sassone argued that he filed the present action to enjoin Coker from injuring his reputation and reducing the value of his artwork, not to silence his speech. The district court denied Coker’s motion and Coker timely appealed.

Discussion

Standard of Review

Nevada’s anti-SLAPP statute has undergone a series of legislative changes to ensure full protection and meaningful appellate review. In 2015, the Legislature decreased the plaintiff’s burden of proof from clear and convincing evidence to prima facie evidence.³ As amended, the special motion to dismiss provided for in NRS 41.660 procedurally functions like a summary judgment motion; thus, the Court concluded de novo review was appropriate.

The Court has recognized the similarities between California’s and Nevada’s anti-SLAPP statutes and found further support for de novo review.⁴ Here, the Court specifically relied on *Park v. Board of Trustees of California State University* for guidance.⁵ The Court, therefore, found it appropriate to adopt California’s recitation of the standard of review for a district court’s denial or grant of an anti-SLAPP motion to dismiss as de novo.

¹ By Whitney Jones.

² Nev. Rev. Stat. § 41.660 (2017).

³ *Id.*

⁴ California’s and Nevada’s statutes share a near identical structure for anti-SLAPP review. Both statutes posit a two-step process for determining how to rule on an anti-SLAPP motion and allow courts to consult affidavits when deciding, *Compare* Cal. Civ. Proc. Code §§ 425.16(b)(1)-(2), 425.16(e) (West 2016) *with* Nev. Rev. Stat. § 41.660(3)(a)-(d).

⁵ 393 P.3d 905, 911 (Cal. 2017) (The California Supreme Court held that it “reviews de novo the grant or denial of anti-SLAPP motions.”) (citations omitted).

Coker's conduct is not protected communication under Nevada's anti-SLAPP statute

Under Nevada's anti-SLAPP statute, a district court must conduct a two-prong analysis of a special motion to dismiss. First, it must determine whether the moving party, by a preponderance of the evidence, established a good faith communication in furtherance of the right to free speech in connection with an issue of public concern.⁶ If the moving party satisfies the first-prong, "the burden shifts to the plaintiff to show with prima face evidence, a probability of prevailing."⁷ Otherwise, the inquiry ends at the first prong, and the case advances to discovery.

The district court dismissed Coker's anti-SLAPP without reaching the second-prong because he failed to demonstrate his conduct was "truthful or made without knowledge of its falsehood" under NRS 41.637(4).⁸ Moreover, the Court concluded Coker failed to sufficiently prove his communication was made in direct connection with an issue of public interest.

Coker failed to demonstrate that his conduct was truthful or made without knowledge of its falsehood

In *Shapiro v. Welt*, the Court clarified that "no communication falls within the purview of NRS 41.660 unless it is 'truthful or is made without knowledge of its falsehood.'"⁹ Here, the issue is the representation of the artwork as originals. Coker's declaration swearing he did not personally create the art is not sufficient; rather, Coker needed to demonstrate that he believed the artwork were originals when he sold them. The Court concluded that Coker failed to demonstrate that his conduct was truthful or made without knowledge of its falsehood.

Coker failed to demonstrate that his conduct was made in direct connection with an issue of public interest

To determine whether an issue is in the public interest, the Court adopted California's guiding principles.¹⁰ Here, the Court first found that Coker failed to demonstrate that false advertising and the sale of counterfeit artwork is sufficiently related to the dissemination of creative works or why they should be included in the definition of "an issue of public interest." Second, the Court rejected Coker's general contention that the sole question under the first prong is whether the conduct is "expressive activity" and reiterated that courts must look to statutory definitions, as opposed to general principles of First Amendment law.¹¹ The Court disagreed, finding that to hold NRS 41.660 to apply broadly to all expressive conduct would render the specific limitations articulated in NRS 41.637 meaningless.

In sum, the Court identified two grounds for dismissal under the first prong of analysis and therefore found no reason to address the second prong.

⁶ Nev. Rev. Stat. § 41.660(3)(a).

⁷ *Shapiro v. Welt*, 133 Nev. 35, 38, 389 P.3d 262, 297 (2017) (quoting Nev. Rev. Stat. § 41.660(3)(b)).

⁸ Nev. Rev. Stat. § 41.637(4) (2017) (Category of speech defined as a "[c]ommunication made in direct connection with an issue of public interest. . . is truthful or is made without knowledge of its falsehood.").

⁹ *Shapiro*, 133 Nev. at 40, 389 P.3d at 268 (quoting Nev. Rev. Stat. § 41.637).

¹⁰ *See Shapiro*, 133 Nev. at 39, 389 P.3d at 268 (quoting *Piping Rock Partners, Inc. v. David Lerner Assocs.*, 946 F. Supp. 2d 957, 968 (N.D. Cal. 2013)).

¹¹ *See Delucchi v. Songer*, 133 Nev. 290, 299, 396 P.3d 826, 833 (2017).

Conclusion

The Court determined that the applicable standard of review under NRS 41.660 is de novo. Moreover, the Court held that Coker failed to demonstrate the challenged claims arose from activity protected by NRS 41.660 and that advertising and selling counterfeit artwork as original is not in direct connection with an issue of public interest. Accordingly, the Court affirmed the district court's decision.