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Boesiger v. Desert Appraisals, LLC, 135 Nev. Adv. Op. 25 (July 3, 2019)

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SUMMARY JUDGEMENT AND BREACH OF CONTRACT

Summary

The Court held that Appellants provided insufficient evidence to show that Respondents had a duty to Appellant or breached their duty to Appellant. The Appellants failed to provide the required expert testimony necessary for a case concerning the professional conduct of a profession whose standards and procedures are not known to the public. Additionally, because the contract between the Appellants and the Respondents did not expressly name the Appellants as third-party beneficiaries, the Appellants do not have standing to request the contract be enforced.

Background

In 2013, Appellants James and Maria Boesiger (“Appellants”) purchased a house, relying on the appraisal made by Respondents, consisting of Desert Appraisals, LLC, and an individual named Travis T. Gliko. Gilko (“Respondants”), appraised the home at \$340,000. In his appraisal, Gliko noted there was a discrepancy between his determination of the home’s square footage, 3,002 square feet, and the county assessor’s office’s determination of the home’s square footage, 3,553 square feet. Appellants believe that Respondents’ appraisal was faulty because Respondents used incorrect assessor’s data, leading to the Appellant’s overpaying for the home. Appellant alleges that Respondents did not use the standard level of professional care established by the real estate appraisal industry. Additionally, Appellant’s claim that Respondents breached their contract with Appellant as a third-party beneficiary.

Discussion

Professional negligence-based claims

The Court affirmed the trial court’s conclusion that Appellants had failed to provide sufficient evidence that a genuine issue of fact exists that could lead a jury to rule Respondents committed professional negligence.² Appellants unsuccessfully argue an appraiser does not require expert knowledge unavailable to the general public and therefore, they would not have to provide an expert witness for testimony. The Court states that even though members of the public may be aware of home appraisals, the public does not know the specific standards and procedures of professional appraisers. Because the professional standards of real estate appraisers are not within the common knowledge of the average person, Appellants needed to provide an expert witness to give testimony that Respondents’ duty of care fell short of professional industry standards.³ At one

¹ By Jeff Garrett.

² *Wood v. Safeway, Inc.*, 121 Nev. 724, 732, 121 P.3d 1026, 1031 (2005).

³ *Daniel, Mann, Johnson & Mendenhall v. Hilton Hotels Corp.*, 98 Nev. 113, 115, 642 P.2d 1086, 1087 (1982); *See Crawford v. Signet Bank*, 179 F.3d 926, 929 (D.C. Cir. 1999); *Brown v. Interbay Funding, LLC*, 417 F. Supp. 2d 573, 579 (D. Del. 2006); *see also State Bd. of Equalization v. Bakst*, 122 Nev. 1403, 1411–12, 148 P.3d 717, 722–23 (2006).

point, Appellants had arranged a professional appraiser as an expert witness but later withdrew the expert for failing to comply with NRCP 16.1(a)(2). Thus, the only facts Appellants provided to support their claim were depositions by both Appellants and Respondents. The Court held depositions were insufficient and there was “practically no evidentiary basis” to support the Appellants claims of professional misconduct without expert testimony.

Additionally, the Court concludes that even if Respondents had a duty, the Appellants did not provide enough evidence to show Respondents breached their duty. To breach their duty, Respondents would have had to mislead the Appellants on the value of the home, leading to Appellants overpaying for their home. However, the Court understands that “valuation of property is an illusory matter upon which experts hold differences of opinion.” The Appellants failed to establish they were misled or that the price they paid was inflated. In fact, the Appellants had been given notice in the appraisal forms that there was a discrepancy between the appraiser’s determination of the home’s square footage and the determination made by the assessor’s office before they purchased the home. The Court believes there is also reason to be skeptical of Appellants claims because Maria Boesiger had recently been licensed as a real estate professional in Nevada. She had assisted in selling the home in this case for the real estate company she was working for. For these reasons, the Court concluded that Appellants had failed to show that Respondents had a duty or that Respondents had breached their duty.

Breach of contract claim

The Court also agreed with the trial court’s ruling that Appellants lacked the standing to enforce the contract as third-party beneficiaries. Appellants argue that they are third-party beneficiaries of the appraisal so the contract should be enforced. However, according to the express wording in the appraisal report, the only third-party beneficiary to the contract was the lender. In order for a party to have standing as a third-party beneficiary, there must be “a clear intent to benefit the third party.”⁴ Based on the wording of the contract, it could not be assumed that the Respondent’s appraisal report would grant third-party beneficiary rights to other parties relying on their appraisal, such as the “mortgage insurers, government sponsored enterprises, and other secondary market participants.”⁵ The Court also held that even if Appellants were third-party beneficiaries, Appellants did not show sufficient evidence that Respondents breached a duty to them.

Conclusion

Granting summary judgment in favor of the Respondents is appropriate to stop litigation on Appellants’ meritless argument. Appellants have no evidentiary basis for their professional negligence-based claims because of their inability to provide an expert witness to give testimony on the professional standard of care in the appraisal industry. The Appellants also do not have the protections given to third-party beneficiaries, because the express language of the contract does not name Appellants as third-party beneficiaries. The Court affirmed the trial court’s decision to grant Respondents’ motion for summary judgment and dismissed the claim.

⁴ Lipshie v. Tracy Inv. Co., 93 Nev. 370, 379, 566 P.2d 819, 824–25 (1977).

⁵ See Canfora v. Coast Hotels & Casinos, Inc., 121 Nev. 771, 779, 121 P.3d 599, 604–05 (2005).