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Reynolds v. Tufenkjian, 136 Nev. Adv. Op. 19 (Apr. 9, 2020)

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EXECUTION TO SATISFY A JUDGMENT AND ASSIGNABILITY OF JUDGMENT
DEBTOR’S RIGHTS OF ACTION

Summary

The Court considered whether a party who purchased a judgment debtor’s rights of action could motion the Court to substitute themselves in as the real party in interest and dismiss the appeal. The Court held that only “things in action” that are otherwise assignable may be subject to execution to satisfy a judgment. The Court concluded that tort claims for personal injury—including fraud/intentional misrepresentation and elder exploitation—are generally not assignable. The Court further concluded that tort claims for injury to property and contract-based claims, unless the claims are personal in nature, are generally assignable. Therefore, the Court granted the respondents’ motion in part and the appeal was dismissed in part.

Background

This opinion was issued in response to a motion from the respondents, Raffi Tufenkjian and Luxury Holdings LV, LLC, to substitute themselves in the place of the appellants, Robert G. Reynolds and Diamanti Fine Jewelers. Through the motion, the respondents additionally sought to voluntarily dismiss this appeal because they purchased the appellants’ rights and interests in the underlying district court action through a judgment execution sale.

In the underlying action, the appellants alleged breach of contract, fraud, and tort claims against the respondents. After the appellants purchased a jewelry store from the respondents, the appellants brought forward these claims in district court, alleging they relied to their detriment on false representations from the respondents regarding the store’s value. The district court granted summary judgment for the respondents and awarded the respondents \$57,941.92 in attorney fees and costs, pursuant to terms in the parties’ contract.

The appellants then appealed the judgment but did not obtain a stay of execution for the award of attorney fees and costs; the appellants claimed they could not afford to post a supersedeas bond. The respondents then obtained a writ of execution, allowing them to execute against Reynolds’ personal property. Through the writ, the sheriff was directed to “levy and seize upon any and all causes of action, claims, allegations, assertions or defenses of” the appellants, including any from the underlying district court action.

The respondents then purchased “all the rights, title and interest of” the appellants in the underlying district court action for \$100 at the sheriff’s sale. Following this purchase, the respondents sought to substitute themselves in place of the appellants (pursuant to NRAP 43) and to voluntarily dismiss the appeal (pursuant to NRAP 42(b)). While the respondents asserted this was proper because they now owned the claims, the appellants argued that granting the respondents’ motion would prevent parties who are not financially able to satisfy a contested judgment from asserting their rights to an appeal.

The Nevada Supreme Court then ordered supplemental briefing from the parties on the issue of whether, through the execution sale, each of the appellants’ claims were properly assigned to the respondents. The respondents argued, based on statutory law, that all claims were assigned

¹ By Brittini Tanenbaum.

properly. Appellants argued that the claims were not assignable because they were personal to Reynolds, and that the Court should void the execution sale as a matter of public policy.

Discussion

Only assignable things in action are subject to execution under Nevada law

Under NRS 21.320, a district court can order a judgment debtor's nonexempt property to "be applied toward the satisfaction of the judgment" against the party. Under NRS 21.080(1), the property that can be subject to this includes all of the judgment debtor's personal property, except property excluded under NRS 21.090. As defined by NRS 10.045, "personal property" includes "things in action." "Things in action" is defined as "a right to bring an action to recover a debt, money, or thing."² This Court previously determined that "a 'thing in action' subject to execution . . . does not include a party's defenses to an action."³

Jurisdictions vary regarding the interpretation of "things in action," with some holding that the term only includes claims that the debtor would otherwise be able to assign to another party.⁴ In other jurisdictions, "things in action" is viewed more broadly to include any claims for damages, regardless of whether the claims could be otherwise assigned.⁵

This Court agrees with the former interpretation and holds that "things in action" only includes the claims that a judgment debtor would otherwise have the power to assign. Nevada prohibits certain causes of action from being able to be assigned, regardless of how the assignment occurs.⁶

In Nevada, "a judgment creditor can acquire no greater right in the property levied upon than that which the judgment debtor possesses," therefore, "unless the debtor has the power to pass the title to such property or interest in property by his . . . own act," a judgment debtor's property cannot be subject to execution.⁷ Therefore, while the appellants' claims are "things in action" possessed by the appellants, if the claims cannot be assigned, the sheriff may not sell the unassignable claims to satisfy the judgment against the appellants.⁸

Accordingly, the Court determined they must look at each of the appellants' claims to establish which claims were assignable and could therefore be executed on.

² Gallegos v. Malco Enters. of Nev., Inc., 127 Nev. 579, 582, 255 P.3d 1287, 1289 (2011) (quoting *Chose in Action, Black's Law Dictionary* (9th ed. 2009)).

³ Butwinick v. Hepner, 128 Nev. 718, 723, 291 P.3d 119, 121–22 (2012).

⁴ See, e.g., Holt v. Stollenwerck, 56 So. 912, 913 (Ala. 1911); Wittenauer v. Kaelin, 15 S.W.2d 461, 462–63 (Ky. Ct. App. 1989).

⁵ See, e.g., O'Grady v. Potts, 396 P.2d 285, 289 (Kan. 1964); Chi., Burlington & Quincy R.R. Co. v. Dunn, 52 Ill. 260, 264 (1869).

⁶ See, e.g., Chaffee v. Smith, 98 Nev. 222, 223–24, 645 P.2d 966, 966 (1982); Gruber v. Baker, 20 Nev. 453, 469, 23 P. 858, 862 (1890); *accord* Miller v. Jackson Hosp. & Clinic, 776 So. 2d 122, 125 (Ala. 2000); Webb v. Gittlen, 174 P.3d 275, 278 (Ariz. 2008).

⁷ 30 Am. Jur. 2d *Executions and Enforcement of Judgments* § 118 (2017).

⁸ See, e.g., State Farm Mut. Auto. Ins. Co. v. Estep, 873 N.E.2d 1021, 1025–26 (Ind. 2007); see also Scarlett v. Barnes, 121 B.R. 578, 580 (W.D. Mo. 1990); Carbo Indus., Inc. v. Alcus Fuel Oil, Inc., 998 N.Y.S.2d 571, 572 (Sup. Ct. 2014); cf. Craft v. Craft, 757 So. 2d 571, 572 (Fla. Dist. Ct. App. 2000).

Tort claims for personal injury are generally not assignable

In general, Nevada prohibits the assignment of tort claims as a matter of public policy, because many tort claims are personal in nature and intended to recompensate an injured party.⁹ Two of the appellants' claims fall into the category of tort claims—fraud/intentional misrepresentation and elder exploitation. Fraud/intentional misrepresentation is personal in nature and unassignable.¹⁰ Whether elder exploitation claims are assignable was a matter of first impression for the Court.

The Court concluded the appellants' claims for fraud and elder exploitation were not assignable and therefore not subject to execution, because the claims are personal to Reynolds. To reach this conclusion, the Court looked at the plain language of the elder exploitation statute, which clearly provides that the claim can only be brought by the elder person.¹¹ Under NRCP 17(a), a party can “sue in their own names without joining the person for whose benefit the action is brought” under certain circumstances, but the Court determined those circumstances are not present in this case.

Accordingly, the respondents did not acquire the claims for fraud/intentional misrepresentation and elder abuse at the sheriff's sale, therefore the Court denied the respondents' motion to substitute in as the appellants and to dismiss these claims.

Tort claims for injury to property are generally assignable

Whether a claim for negligent misrepresentation is assignable was also a matter of first impression for the Court.

Nevada limits claims for negligent misrepresentation to only claims that resulted in a pecuniary loss.¹² Negligent misrepresentation claims are only allowed in Nevada in the business transaction context.¹³ Therefore, negligent misrepresentation claims are more akin to claims seeking to recover for loss of property, than claims to recover for personal injury. Claims for damages to property are generally assignable.¹⁴

Accordingly, because the appellants' negligent misrepresentation claim was purely for a pecuniary loss, the claim may be assigned and was therefore subject to execution. The Court granted the respondents' motion, in regards to the negligent misrepresentation claim, to substitute in place of the appellants and to dismiss the appeal regarding that claim.

⁹ See, e.g., *Maxwell v. Allstate Ins. Co.*, 102 Nev. 502, 506, 728 P.2d 812, 815 (1986).

¹⁰ See *Prosky v. Clark*, 32 Nev. 441, 445, 109 P. 793, 794 (1910).

¹¹ See *Beazer Homes Nev., Inc. v. Eighth Judicial Dist. Court*, 120 Nev. 575, 579–80, 97 P.3d 1132, 1135 (2004).

¹² *Bill Stremmel Motors, Inc. v. First National Bank of Nevada*, 94 Nev. 131, 134, 575 P.2d 938, 940 (1978); see Restatement (Second) of Torts § 552 (Am. Law Inst. 1977); see also *Goodrich & Pennington Mortg. Fund, Inc. v. J.R. Woolard, Inc.*, 120 Nev. 777, 782, 101 P.3d 792, 795–96 (2004).

¹³ *Barmettler v. Reno Air, Inc.*, 114 Nev. 441, 449, 956 P.2d 1382, 1387 (1988).

¹⁴ See, e.g., *TMJ Haw., Inc. v. Nippon Tr. Bank*, 153 P.3d 444, 452 (Haw. 2007); *Gremminger v. Mo. Labor & Indus. Relations Comm'n*, 129 S.W.3d 399, 403 (Mo. Ct. App. 2004); 6A C.J.S. *Assignments* § 50 (2016).

Contract-based claims are generally assignable

Contract-based claims, in Nevada, are generally assignable and therefore subject to execution, unless the claims are personal in nature.¹⁵ In this case, the contract at issue was not a personal service contract and the appellants presented no argument to depart from the general rule regarding assignability of contract-based claims.

Accordingly, the Court granted the respondents' motion to substitute themselves for the appellants and to dismiss the appeal for this claim, in regards to the breach-of-contract claim.

Conclusion

The Court concluded that the appellants' claims for fraud and elder exploitation were personal in nature, and were therefore not assignable or subject to execution at the sheriff's sale. Therefore, the respondents' motion to substitute themselves for appellants for these claims and to dismiss the appeal for these claims was denied, because the respondents did not obtain the claims for fraud and elder exploitation during the execution sale.

Regarding the appellants' claims for negligent misrepresentation and breach of contract, the Court determined these claims were assignable and subject to execution. Therefore, the Court granted the respondents' motion to substitute themselves for appellants for these claims and to voluntarily dismiss the appeal for these claims.

Accordingly, the Court reinstated briefing for the parties solely for the summary judgment on the appellants' claims for fraud and elder exploitation.

¹⁵ Gallegos, 127 Nev. at 582, 255 P.3d at 1289; *see also* 6 Am. Jur. 2d *Assignments* § 15 (2018). *But see* HD Supply Facilities Maint., Ltd. v. Bymoen, 125 Nev. 200, 204–05, 210 P.3d 183, 185–86 (2009); Traffic Control Servs., Inc. v. United Rentals Nw., Inv., 120 Nev. 168, 176, 87 P.3d 1054, 1060 (2004).