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Yount v. Criswell Radovan, LLC, 136 Nev. Adv. Op. 47 (July 30, 2020)

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DISTRICT COURT'S SUA SPONTE DAMAGES AWARD DEEMED ABUSE OF
DISCRETION FOR LACK OF IMPLIED CONSENT

SUMMARY

The District Court did not err by dismissing Yount's claims for contractual damages. The Court held that Yount failed to prove damages because he received a benefit that was not functionally different than the benefit he sought. But because Yount did not provide express or implied consent to introduce post-pleading counterclaims, the district court abused its discretion when it awarded damages for those claims sua sponte.

BACKGROUND

George Yount, an investor in a failed real estate restoration project, sued several defendants involved in setting up his investment in the Cal Neva Lodge project—bringing a variety of claims including breach of contract and negligence against defendants Criswell, Radovan, and Marriner. In 2015, Yount intended to purchase the last remaining \$1 million in equity or one founder's share issued under a Private Placement Memorandum (PPM) but it was simultaneously purchased by another investor. So as to not lose Yount's investment, Criswell and Radovan (CR), who had already purchased founder's shares earlier in the funding round, exercised their option to sell one of their shares to Yount. When Yount discovered that he purchased CR's share rather than one issued directly under the PPM, he asked for his \$1 million back and complained to defendant Marriner, but the money had already been spent. Later that year, the project fell behind and was set to receive another loan from financier, Mosaic. Unfortunately, Mosaic backed out unexpectedly, citing a meeting with a group of investors who revealed the project's troubling circumstances. Subsequently, several other lenders backed out as well, causing the project to fail. The District Court denied Yount's claims and appeal for relief, and awarded each of the defendants damages sua sponte. The judgment was based on evidence that Yount was part of the group of investors that helped to undermine the Mosaic deal, causing the Cal Neva project to fail and thus the losses Yount sought to recover. The parties then moved to file several post-trial motions, but the District Court found it lacked jurisdiction to rule on those motions and further declined to exercise jurisdiction to grant Yount's motion for post-trial discovery.

DISCUSSION

Under NRCP 15(b), an issue not raised in the pleadings may be tried and treated as though it was raised, without amending the pleadings. But this may only be done if the parties provide express or implied consent. When reviewing for abuse of discretion under this rule, the Court generally looks to the nature of the litigation to determine whether the parties recognized that the new issue was being introduced. If recognized, consent is deemed implied and the new issue can be tried thereafter. Introduction of any evidence relevant to that new issue without objection, may be one such indication of consent. But if the evidence is relevant to both the newly introduced issue *and* any other issue raised in the pleadings, it will not weigh in favor of implied consent. If a party is unable to distinguish between the evidence's application to the new issue and a previously pleaded issue, a court cannot confidently conclude that the party recognized the evidence's significance.

¹ By Cristina Phipps

And without sufficient warning that the issue is being tried, a party is deprived of pretrial discovery to explore possible defenses, which constitutes sufficient prejudice to warrant reversal.

Here, CR and Marriner failed to expressly mention any counterclaim for damages in court filings; affirmed at trial that they only advanced affirmative defenses, not counterclaims; never made obvious attempts to introduce counterclaims at trial; nor did the judge indicate his intention to consider any counterclaim prior to his ruling. CR and Marriner argue that after introducing evidence that was relevant to their counterclaim, Yount provided implied consent by not objecting to its introduction. But that evidence was relevant to both the counterclaim for damages and affirmative defenses raised in the pleadings. So Yount's failure to object does not indicate implied consent to the counterclaim. If he could not distinguish between its application to the affirmative defense and the counterclaim, it cannot be concluded that he was put on notice. The purported recognition of the counterclaim is further blurred because it is unclear from the records which counterclaim was introduced and what the amount of damages or what Yount's individual culpability for those damages are. Thus, it would be unjust to uphold the damages award when the prevailing party did not meet its burden of providing an evidentiary basis for the award.

Similarly, NRCP 8(c) does not uphold the damages award. While NRCP 8(c) allows an affirmative defense to be treated as a counterclaim, it only does so when the counterclaim is "mistakenly designated" as an affirmative defense. Counterclaims will generally entitle a defendant to relief, while affirmative defenses often merely preclude or diminish the plaintiff's recovery. Indeed, it is important to note the distinction between the two when asserting mistaken designation, as not all counterclaims are valid defenses either. What's more, for the same reasons the Court rejects use of NRCP 15(b), applying NRCP 8(c) would deprive Yount of the opportunity to conduct or present evidence or argument to counter the claim for damages against him. Accordingly, justice does not weigh in favor of converting the asserted affirmative defenses into counterclaims regardless of CR and Marriner's contentions.

Lastly, NRCP 54(c) did not empower the court to award damages because the parties did not properly try the counterclaim. Only when an issue is raised, tried, and proved to be legally warranted can the court grant relief under NRCP 54(c). Though a damages amount was testified to, no supporting documentation or method of calculation was provided. CR's post-trial motion to add millions of dollars to the award further demonstrates the lack of evidentiary support introduced. Indeed, it is clear that the sum and appropriate allocation of damages were not "adequately explored" at trial. Thus, the damages award was not warranted.

CONCLUSION

Because the purported counterclaims were not properly tried, the Court concluded that the district court abused its discretion. The Court reversed the district court's award of damages to the defendants and remanded for further proceedings consistent with this opinion. The Court refrained from addressing the remaining arguments in the appeal and did not address any uncontested issues.