IN THE SUPREME COURT OF THE STATE OF NEVADA

DAWOOD N. SHALOMI AND REGINE Y. SHALOMI,
Appellants,
vs.
GOOD HUMOR CORPORATION, A DELAWARE CORPORATION,
Respondent.

No. 43521

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court order granting a motion to dismiss pursuant to NRCP 12(b)(5). We reverse and remand for further proceedings consistent with this order.

DISCUSSION

The facts and procedural history of this case are not in dispute. Appellants Dawood N. Shalomi and Regine Y. Shalomi filed a nuisance action against respondent Good Humor Corporation. The Shalomis appeal the district court's order granting Good Humor's motion to dismiss for failure to state a claim upon which relief may be granted.

The standard of review for a district court's dismissal of an action under NRCP 12(b)(5) is rigorous.[1] The district court must regard all factual allegations in the complaint as true and draw all inferences in favor of the non-moving party.[2] "A complaint should only be dismissed if it

[1]Hampe v. Foote, 118 Nev. 405, 408, 47 P.3d 438, 439 (2002).

[2]Id.

appears beyond a reasonable doubt that the plaintiff could prove no set of facts, which, if true, would entitle him to relief."[3]

The Shalomis' complaint alleged that the operation of Good Humor's ice cream plant and, specifically, the use and storage of 99,000 pounds of anhydrous ammonia, constituted a nuisance under NRS 40.140. This statute defines a nuisance as

> anything which is injurious to health, or indecent and offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property. . . . [A nuisance] action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by the nuisance, and by the judgment the nuisance may be enjoined or abated, as well as damages recovered.

This court has confined the definition of a nuisance to such "unreasonable, unwarrantable or unlawful use by a person of his own property, . . . producing such material annoyance, inconvenience, discomfort or hurt that the law will presume a consequent damage."[4] To be actionable, "an intentional interference with the use and enjoyment of land . . . [must] 'be both substantial and unreasonable.'"[5] Whether a particular operation constitutes a nuisance is generally a question of fact.[6]

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[3]Id.

[4]Bliss v. Grayson, 24 Nev. 422, 454, 56 P. 231, 240 (1899).

[5]Jezowski v. City of Reno, 71 Nev. 233, 240, 286 P.2d 257, 260 (1955) (quoting 4 Restatement of the Law of Torts § 822 cmt. g & § 826 cmt. a (1939)).

[6]Id. at 240, 286 P.2d at 260.

The allegations in the complaint were sufficient to establish the elements of a claim for relief under a theory of nuisance. The district court erred in dismissing the complaint. This dismissal precluded the parties from conducting discovery to determine if there are genuine issues of material fact.

CONCLUSION

We conclude that the district court erred in granting respondent's motion to dismiss the action for nuisance. We do not need to address the other issues raised by the parties. Therefore, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

_____, J.
Maupin

_____, J.
Gibbons

_____, J.
Hardesty

cc: Hon. Valorie Vega, District Judge
Gordon & Silver, Ltd.
Law Office of Garry L. Hayes
Clark County Clerk