IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH M. HERROSCHECK AND PHILLIP POCHINSKY, AS TRUSTEES FOR THE ESTATE OF STEPHEN HARRIS, Appellants, vs. MARTY SCOTT BENNETT, Respondent.	No. 43510
JOSEPH M. HERROSCHECK AND PHILLIP POCHINSKY, AS TRUSTEES FOR THE ESTATE OF STEPHEN HARRIS, Appellants, vs. MARTY SCOTT BENNETT, Respondent.	No. 44005 ✓

FILED

SEP 28 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY [signature]
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

These are consolidated appeals from a district court judgment in a trustee's sale of real property and a post-judgment order awarding attorney fees. Eighth Judicial District Court, Clark County; Jennifer Togliatti, Judge.

Appellant raises the following issues on appeal: (1) whether the respondent was the equitable owner of the property at the time of the trustee's sale; (2) whether the respondent forfeited his equitable interest in the real property when he failed to make payments according to the contract; (3) whether the respondent was estopped from claiming any equitable ownership in the property; and (4) whether the district court abused its discretion by awarding attorney fees to a prevailing party without providing an analysis for the award.

We will not set aside a district court's factual determinations unless they are clearly erroneous and not supported by substantial evidence.[1] A finding is clearly erroneous when, although there is supporting evidence, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.[2] Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion.[3] This court has recognized that the construction of a contractual term is a question of law and that this court is obligated to make its own independent determination on this issue, and should not defer to the district court's determination.[4] Additionally, statutory interpretation is a question of law which this court reviews de novo.[5] Furthermore, this court reviews a district court's award of attorney fees for an abuse of discretion.[6]

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[1]Dewey v. Redevelopment Agency of Reno, 119 Nev. 87, 93, 64 P.3d 1070, 1075 (2003).

[2]Unionamerica Mortgage and Equity v. McDonald, 97 Nev. 210, 211-12, 626 P.2d 1272-73 (1981) (citing United States v. Gypsum Co., 333 U.S. 364, 395, 68 S. Ct. 525, 542 (1948)).

[3]Richardson v. Perales, 402 U.S. 389, 401, 91 S. Ct. 1420, 1427 (1971) (citation omitted).

[4]Sheehan & Sheehan v. Nelson Malley & Co., 121 Nev. 481, 486, 117 P.3d 219, 223 (2005).

[5]City of Henderson v. Kilgore, 122 Nev. 331, 334, 131 P.3d 11, 13 (2006).

[6]Henry Products Inc. v. Tarmu, 114 Nev. 1017, 1020, 967 P.2d 444, 446 (1998).

I. Equitable owner of the real property at the time of the trustee's sale

Appellants Joseph M. Herroscheck and Phillip Pochinsky, as trustees for the Estate of Stephen Harris, collectively the Estate, contend that respondent Marty Scott Bennett (Bennett) forfeited his equitable ownership of the property upon his failure to meet the obligations under the contract's provisions. The Estate also contends that at any time before Bennett's full payment of the contract terms, Heaney's interest in the property was subject to attachment. We disagree.

This court has concluded, "[a]n equitable conversion occurs when a contract for the sale of real property becomes binding upon the parties. The purchaser is deemed to be the equitable owner of the land and the seller is considered to be the owner of the purchase price."[7] This court further concluded in Herndon v. Grilz that under the doctrine of equitable conversion a seller retained only a legal interest in the subject property such that the seller's judgment creditor could not attach a lien.[8] We conclude that the seller's legal interest is only an interest in personal property.[9] As such, the Estate's attachment had no effect on Bennett's equitable interest.

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[7]Herndon v. Grilz, 112 Nev. 873, 877, 920 P.2d 998, 1001 (1996).

[8]Id.

[9]We note the Court of Appeals of Utah's conclusion of the nature of the interest retained by a vendor of real property in an installment contract in Cannefax v. Clement. The holding was affirmed by the Utah Supreme Court. The appeals court stated:

continued on next page . . .

We conclude that substantial evidence supports the district court's findings concerning Heaney's interest as seller of the real property to Bennett, that, 1) following the execution of the contract and the down payment, Bennett became the owner of the real property and Heaney's interest was only the right to receive proceeds which was personal property; 2) when the Estate purportedly levied upon all of the right, title, and interest of Heaney in the real property it acquired nothing because Heaney had no interest in the real property; and 3) the judgment of the Estate against Heaney was not a judgment lien against the property because Heaney had no interest in the real property.

II. Whether Bennett forfeited his equitable interest in the real property when he failed to make payments according to the contract

The Estate contends that because it was the successful bidder at the Sheriff's sale of Heaney's interest in the property, the excess proceeds belong to the Estate as a part of the purchase price that Bennett failed to pay. We disagree. This court concluded in McCall v. Carlson that

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. . . continued

> Under the doctrine of equitable conversion, once parties have entered into a binding and enforceable land sale contract, the buyer's interest in the contract is said to be real property and the seller's retained interest is characterized as personal property . . . . The rights of the parties are evaluated as if the conveyance had been made.

The Utah court went on to hold "that a judgment lien against the seller's interest is not an encumbrance on the buyer's property interest under a land sale contract."

in an agreement to sell real property where the buyer failed to comply "with the terms of the agreement he forfeits his equitable title, if the agreement so provides."[10] (Emphasis added.) We conclude the contractual agreement's provisions control as to when equitable title would be forfeited by Bennett. Under the contract Bennett had a 20-day notice to cure upon receiving notice. The contractual term and the facts are straightforward. Bennett never received notice and took reasonable efforts to contact Heaney to rectify the situation following notice of the Sheriff's sale. We conclude that under the agreement, Bennett never lost his equitable title in the property. Because Bennett never lost his equitable title in the property, Heaney never gained an equitable interest in the property (and thus the Estate never gained an equitable interest in the property via its judgment lien on Heaney's interest).

As such, we conclude that substantial evidence supports the district court's findings that 1) when the subject property was foreclosed upon, Bennett was the owner of the subject real property and the successor-in-interest of the real property to Heaney; and 2) Bennett, as the owner of the subject real property at the time of the foreclosure sale was entitled to the excess proceeds realized from the foreclosure sale.

III. Whether Bennett was estopped from claiming any equitable ownership in the property

The Estate contends that Bennett waived his rights to receive any benefit from the Sheriff's sale of real property when he purposefully

[10] McCall v. Carlson, 63 Nev. 390, 407, 172 P.2d 171, 179 (1946).

stopped making payments, and should be estopped from receiving any funds from the sale. We disagree. In Cheqer, Inc. v. Painters & Decorators, we held that estoppel requires that (1) the party to be estopped must be apprised of the true facts; (2) he must intend that his conduct shall be acted upon or must so act so that the party asserting estoppel has the right to believe it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; and (4) [the party asserting estoppel] must have relied to his detriment on the conduct of the party to be estopped.[11]

We conclude that nothing in the record suggests that Bennett was purposefully acting to bring about a desired action or reliance on behalf of the Estate. Also we conclude that nothing in the record shows that the Estate was not aware of the events concerning the foreclosure on the first deed of trust. Furthermore, we conclude nothing in the record shows the Estate relied on the conduct of respondent to its detriment.

IV. Whether the district court abused its discretion by awarding attorney fees without providing a basis for the award

The Estate contends the district court erred in not providing its reasoning for awarding the attorney fees. We agree. This court has held that in the awarding of attorney fees, the district court shall consider in its analysis the factors enumerated in Brunzell v. Golden Gate National Bank,[12] which include: 1) the advocate's professional qualities; 2) the

[11]Cheqer, Inc. v. Painters & Decorators, 98 Nev. 609, 614, 655 P.2d 996, 998-99 (1982).

[12]Brunzell v. Golden Gate National Bank, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969)

nature of the litigation; 3) the work performed; and 4) the result.[13] The trial transcript is silent as to the district court's basis for awarding attorney fees. The minutes regarding the motion for attorney fees list a calculation of 36.9 hours at a $175/hr rate.[14] But, the minutes do not provide analysis as to the award of attorney fees and the district court's order of September 10, 2004, awarding attorney fees makes no reference as to any of the Brunzell factors. As such, we conclude that the district court abused its discretion in awarding attorney fees.

Having reviewed the record, we conclude that the substantial evidence supports the district court's judgment as to the proper ownership of the remaining funds from the sale. But, we conclude that the district court erred in failing to provide adequate analysis as to its award of

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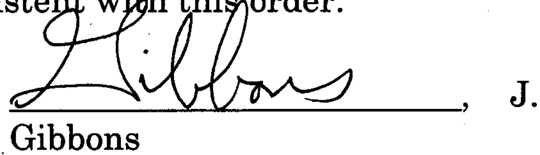
[13]Schuette v. Beazer Homes Holdings Corp., 121 Nev. 837, 865, 124 P.3d 530, 549 (2005).

[14]Evidently the district court recognized the number of hours requested by respondent but changed the hourly rate from the requested $200/hr to $175/hr.

attorney fees. Accordingly, we

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



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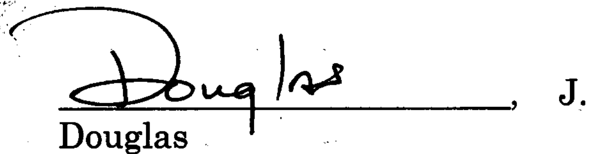
Gibbons



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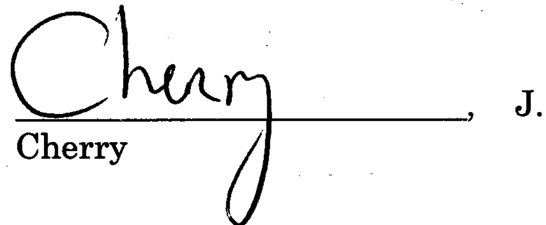

_______________, J.
Cherry

cc: Hon. Jennifer Togliatti, District Judge
Larry J. Cohen, Settlement Judge
Marquis & Aurbach
William L. McGimsey
Eighth District Court Clerk