IN THE SUPREME COURT OF THE STATE OF NEVADA

PETER LAHNER AND BRENDA LAHNER,
Appellants,
vs.
DALE W. DENIO,
Respondent.

No. 46769

FILED

SEP 28 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER AFFIRMING IN PART AND VACATING IN PART

This is an appeal from a district court order, following remand from this court, in a dispute over a real property option agreement and the award of attorney fees and costs. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge.

The parties are familiar with the facts, and we do not recount them except as pertinent to our disposition.

This court's determination of whether the district court complied with its mandate on remand is reviewed de novo.[1] Further, where the record contains substantial evidence to support the district court's conclusions, the judgment must be upheld.[2] Finally, this court reviews a district court's award of attorney fees for an abuse of discretion.[3]

Appellants Peter and Brenda Lahner argue on appeal that the district court erred in not following this court's instructions on remand

[1]Wheeler Springs Plaza, LLC v. Beemon, 119 Nev. 260, 263, 71 P.3d 1258, 1260 (2003).

[2]Idaho Resources v. Freeport-McMoran Gold, 110 Nev. 459, 460, 874 P.2d 742, 743 (1994).

[3]Wynn v. Smith, 117 Nev. 6, 13, 16 P.3d 424, 428 (2001).

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and that it was error for the district court to award attorney fees and costs to respondent Dale W. Denio.

The Lahners contend that even though this court gave the district court specific instructions to allow them thirty days to equalize their contribution to the option, the district court erroneously determined that the option had lapsed without being exercised. While citing to Alldredge v. Archie,[4] the Lahners assert that they were not required to make an attempt in exercising the option because the district court's determination that the Lahners had no interest in the option was still pending on appeal; they argue that any attempt to exercise the option would have been futile.

Further, the Lahners contend that Denio purchased the real property in dispute for the benefit of both the Lahners and Denio as co-optionees. While citing to Bartz v. Heringer,[5] the Lahners argue that Denio attempted to frustrate the option agreement by entering into the written agreement on September 25, 2002, which was five days before the expiration of the option. The Lahners further cite to NRS 87.210(1)[6] to argue that Denio owed a fiduciary duty to them as partners.

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[4]93 Nev. 537, 543, 569 P.2d 940, 944 (1977) (holding that where there is no work available for a non-striker and where he has been given every indication that he is laid off, he is not required to cross a picket line in order to show his lack of participation in a labor dispute; "the law does not require a futile act in order to collect benefits.").

[5]322 N.W.2d 243, 244 (N.D. 1982) (holding that a co-optionee has the fiduciary duty to not frustrate the stated purpose of an option by refusing to cooperate with his fellow co-optionee).

[6]NRS 87.210(1) reads:

continued on next page . . .

The Lahners, additionally, assert that because Denio had actual and constructive notice of the Lahners' interest in the option (as Denio was a party to the option agreement and as the Preliminary Title Report reflected the option as a condition to title), Denio purchased the real property subject to the Lahners' interest in the option. In support of this argument, the Lahners cite to State, Dep't of Transp. v. Las Vegas Bldg.[7] for the proposition that an option to purchase land may be a substantial and valuable right.

Additionally, without citing to any authority, the Lahners argue that Denio constructively exercised the option on their behalf, even though Denio entered into a separate land sale agreement with Lowell and Sybil Thomas (the optioners/sellers of the real property in dispute). The Lahners contend that because the written agreement entered on September 25, 2002, essentially provided the same terms as the option, Denio's actions of entering into a separate agreement was a constructive exercise of the option.

The Lahners further argue that there were no grounds for the district court to award Denio his post-appeal attorney fees and costs. They

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> Every partner must account to the partnership for any benefit and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property.

[7]104 Nev. 479, 486, 761 P.2d 843, 847 (1988).

contend that pursuant to State, Dep't of Human Resources v. Fowler,[8] the district court could not award attorney fees and costs to Denio because there were no specific rules or statutes that allowed the district court to award attorney fees and costs.

Further, the Lahners contend that because Denio merely requested attorney fees and costs in his memorandum of points and authorities to his pre-hearing statement and because Denio never requested attorney fees and costs again, they reasonably believed that Denio had abandoned his request for post-remand attorney fees and costs. Consequently, in response to Denio's argument that this issue has not been preserved on appeal, the Lahners argue that they could not raise this issue below because of their reasonable belief that Denio had abandoned his request.

The Lahners additionally argue that Denio's reliance on Landsberg v. Scrabble Crossword Game Players, Inc.[9] and Carpenters Southern California Administrative Corp. v. Russell[10] is misplaced.

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[8]109 Nev. 782, 784, 858 P.2d 375, 376 (1993) (holding that a court may not award attorney fees unless authorized by a statute, rule, or contract).

[9]736 F.2d 485, 491 (9th Cir. 1984) (holding that an award of attorney fees may well have been justified in an action for breach of implied-in-fact contract by defendant's vexatious, oppressive, obdurate, and bad-faith conduct in the litigation).

[10]726 F.2d 1410, 1417 (9th Cir. 1984) (holding that unless the employer which successfully defended an action under the Employee Retirement Income Security Act would prevail on remand for recovery of attorney fees and costs, the employer would not be entitled to such an award for costs incurred on his appeal).

Unlike the holding in Landsberg, the Lahners contend that they never proceeded in a vexatious, oppressive, obdurate, or bad faith manner on remand; they further contend that this case does not fall under the purview of Employee Retirement Income Security Act (ERISA), as in Russell.

Denio responds that the district court could not carry out this court's mandate on remand because it was presented with facts that were substantially different than the facts in the underlying case from the prior appeal. While citing to Beemon,[11] Emeterio v. Clint Hurt and Assocs.,[12] and State, Dep't Hwys. v. Alper,[13] Denio argues that the law of the case doctrine did not apply on remand because Lahner's ability to equalize his contribution to the option was not possible, as Denio contends that the option had lapsed. Further, Denio asserts that his purchase of the Thomas's real property under a separate written agreement and his subsequent reconfiguration of the real property with his previously

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[11]119 Nev. at 264 n.3, 71 P.3d at 1260 ("[A]n exception to the law of case doctrine occurs when the presentation of new evidence or an intervening change in the controlling law dictates a different result, or the appellate decision is clearly erroneous and, if implemented, would work a manifest injustice.").

[12]114 Nev. 1031, 1034, 967 P.2d 432, 434 (1998) ("This court has declined to apply the law of the case doctrine, however, where issues presented in the second appeal are not the same as those presented in the first appeal.").

[13]101 Nev. 493, 496, 706 P.2d 139, 141 (1985) ("The doctrine of the law of the case provides that when an appellate court states a principle of law, that rule becomes the law of the case and is controlling both in the lower court and on subsequent appeals, as long as the facts remain substantially unchanged.").

adjoining parcels of land precluded the applicability of the law of the case doctrine. Additionally, because the record in the prior appeal did not reflect the events that took place after the appeal was filed and before this court's remand to the district court, Denio stresses that the court was unaware that the option had expired and that the district court could not follow this court's mandate on remand because of the substantially changed circumstances.

As to his award of attorney fees and costs, Denio argues that it was well within the district court's discretion to conclude that he was entitled to his award of post-appeal attorney fees and costs. As detailed above, Denio contends that under Old Aztec Mine,[14] this issue has not been preserved on appeal because the Lahners never objected to his request for attorney fees and costs. Further, while citing to Landsberg[15] and Russell,[16] Denio argues that, as with Federal courts, the district court was permitted to award attorney fees and costs to him for prevailing on remand.

Having reviewed the arguments and record on appeal, we conclude that the law of the case doctrine did not apply in the underlying case on remand, as the facts established at the evidentiary hearing upon remand demonstrate a substantial change in circumstances.[17] Further,

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[14]97 Nev. at 52, 623 P.2d at 983.

[15]736 F.2d at 491.

[16]726 F.2d at 1417.

[17]See Beemon, 119 Nev. at 264 n.3, 71 P.3d at 1260; Emeterio, 114 Nev. at 1034, 967 P.2d at 434; Alper, 101 Nev. at 496, 706 P.2d at 141.

we conclude that there is substantial evidence in the record to support the district court's determination that the option had expired.[18]

Even though the Lahners cite to Archie[19] for the proposition that any attempt to exercise the option would have been futile and not necessary, we conclude that our holding in Archie does not follow that proposition because Archie dealt with the entitlement of unemployment benefits, whereas this appeal inherently deals with whether an option was exercised—which we conclude is completely distinguishable.

In any case, by relying on Bartz,[20] the Lahners make a compelling argument that Denio purchased the property as a trustee for their partnership. However, in Bartz, the deprived co-optionee took steps to exercise the option, as he took steps to provide notice of his intent to exercise the option.[21] Unlike the co-optionee in Bartz, the Lahners took no steps to exercise the option or to preserve their rights. On the contrary, the Lahners were appealing the district court's decision to not enforce the option purchase agreement; the Lahners' efforts to have Denio purchase their interest in the option suggests that the Lahners did not want to exercise the option themselves, as they wanted to force the sale of their interest in the option to Denio. Consequently, unlike the holding in Bartz, where the Supreme Court of North Dakota held that "[c]o-optionees, like

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[18]See Idaho Resources, 110 Nev. at 460, 874 P.2d at 743.

[19]93 Nev. at 543, 569 P.2d at 944.

[20]322 N.W.2d at 244.

[21]Id.

cotenants, must do equity,"[22] we conclude that it would be inequitable to allow Lahner to benefit from Denio's purchase of the real property in dispute.[23]

Accordingly, we conclude that the district court did not err in determining that the option expired and that Denio did not purchase the real property in dispute under the option; there is substantial evidence in the record to support these determinations.

As to the district court's award of attorney fees and costs to Denio, we consider this issue on appeal even though the Lahners did not object to this award in district court.[24] Consequently, we conclude that the district court erred because the award of attorney fees and costs was not authorized by any statute, rule, or contract.[25] Additionally, we agree with

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[22]Id.

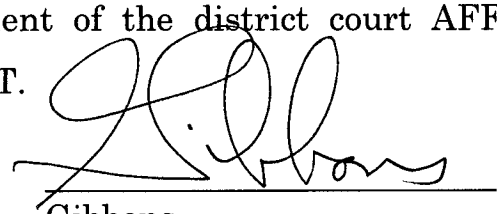
[23]In reaching our conclusion, we note that the district court could not have precluded the Lahners from being able to equalize their contribution to the option upon remand from the prior appeal merely based on Denio's acts of reconfiguring the real property in dispute with his previously adjoining parcels of land, apart from the other circumstances, as Denio knew or should have known that this court could have reversed the district court's determination in the prior appeal.

[24]We consider this issue on appeal because there were no statutes or rules cited in the portion of the district court's order awarding attorney fees and costs to Denio. Further, the record lacks any indication that the parties agreed to pay attorney fees and costs to the prevailing party. See Albios v. Horizon Communities, Inc., 122 Nev. 409, 417, 132 P.3d 1022, 1027-28 (2006) (holding that a district court may not award attorney fees absent authority under a statute, rule, or contract).

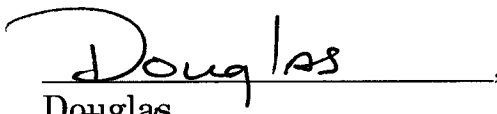
[25]See Fowler, 109 Nev. at 784, 858 P.2d at 376; Albios, 122 Nev. at 417, 132 P.2d at 1027-28.

the Lahners that Denio's reliance on Landsberg[26] is misplaced because the record does not show that the Lahners acted in a vexatious, oppressive, obdurate, or bad faith manner; further, this case does not fall under the purview of ERISA, as in Russell.[27] Therefore, we vacate the district court's award of attorney fees and costs to Denio. Accordingly, we

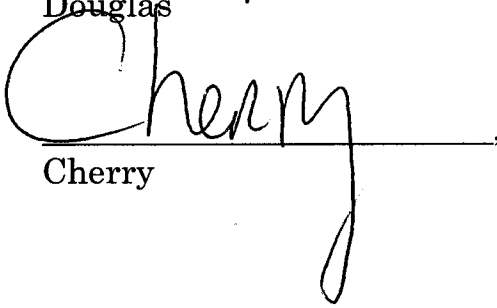
ORDER the judgment of the district court AFFIRMED IN PART AND VACATED IN PART.



_____, J.
Gibbons



_____, J.
Douglas



_____, J.
Cherry

cc: Hon. Steven R. Kosach, District Judge
Patrick O. King, Settlement Judge
Bader & Ryan
Marvin W. Murphy
Lemons Grundy & Eisenberg
Washoe District Court Clerk

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[26]736 F.2d at 491.

[27]726 F.2d at 1417.