

IN THE SUPREME COURT OF THE STATE OF NEVADA

PRO-BROKERS, INC., A NEVADA
CORPORATION AND ROGER
THOMPSON, AN INDIVIDUAL,
Appellants,
vs.
BRENT MUHLENBERG,
Respondent.

No. 48854

FILED

JUL 24 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court judgment following a bench trial, certified as final under NRCP 54(b), in a tort action. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

Respondent Brent Muhlenberg filed this instant action against appellants Pro-Brokers, Inc., and Roger Thompson (collectively, Sellers). At trial, Muhlenberg alleged a number of claims against Sellers, including that they intentionally misrepresented, in connection with the sale of a parcel of commercial property, the rental history of its tenants. Sellers denied the accusation. The district court determined that Sellers misrepresented the tenants' rental history, and as a result, Muhlenberg suffered \$122,742.26 in damages in the form of lost rents.

Sellers raise two main arguments on appeal. First, Sellers contend that the district court erred when it determined that they were liable for intentional misrepresentation. Second, Sellers argue that the district court abused its discretion when it calculated the damage award. We conclude that both of these arguments lack merit. The parties are familiar with the facts of this case, and we recount them only as necessary to explain our decision.

08-19104

The district court did not err when it concluded that Sellers were liable for intentional misrepresentation

Sellers argue that the district court erred when it determined that they were liable for intentional misrepresentation because (1) its determination is not supported by substantial evidence in the record, and (2) it failed to make factual findings for each element. We disagree.

Substantial evidence

This court reviews a district court's findings on the elements of a misrepresentation claim for substantial evidence.¹ Substantial evidence is "that which 'a reasonable mind might accept as adequate to support a conclusion.'"² This court will not disturb a district court's factual determination when it is based on conflicting evidence because the trial court is in the best position to "evaluate the credibility of the parties offering different versions of the facts."³

To prevail on an intentional misrepresentation claim, a plaintiff must prove by clear and convincing evidence the following four elements: (1) the defendant asserts a false representation with the knowledge or belief that it is false or without sufficient foundation, (2) the defendant intended to induce the plaintiff to act or refrain from acting, (3) the plaintiff justifiably relies on the misrepresentation, and (4) the plaintiff suffers damages as a result.⁴

¹Sanguinetti v. Strecker, 94 Nev. 200, 206, 577 P.2d 404, 408 (1978).

²State, Emp. Security v. Hilton Hotels, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986) (quoting Richardson v. Perales, 402 U.S. 389, 401 (1971)).

³Kleeman v. Zigtama, 95 Nev. 285, 287, 593 P.2d 468, 469 (1979).

⁴Lubbe v. Barba, 91 Nev. 596, 599, 540 P.2d 115, 117 (1975).

We conclude that there is substantial evidence in the record to support the district court's finding that Muhlenberg proved by clear and convincing evidence all four elements of his intentional misrepresentation claim against Sellers. First, the false representation element is supported by the following evidence in the record: (1) Pro-Brokers told Muhlenberg that the tenants' rent payments were current and that they had been late on rent only a few times; however, Sellers had previously attempted to evict the tenants; (2) Pro-Brokers told Muhlenberg that "everything was paid up-to-date;" however, the tenants failed to maintain insurance, as required under the lease; and (3) Pro-Brokers told Muhlenberg that that the tenants were "good tenants;" however, Thompson foreclosed on the tenants in the summer of 2000, and thereafter, instructed Pro-Brokers to lease the property to them. Second, the intent to induce element is inferred by the following evidence in the record: (1) Sellers knew that Muhlenberg was looking for investment property, (2) Sellers knew that Muhlenberg had considered purchasing other properties, and (3) Sellers knew that Muhlenberg was attracted to the property because of its monthly income potential. Third, the justifiable reliance element is supported by the following evidence in the record: (1) Muhlenberg asked Sellers for a copy of the lease; (2) Muhlenberg verified that the tax records had been paid; (3) Muhlenberg met with the tenants, and they discussed the property's condition, the tenants' line of business, and whether they were current on their rent payments; (4) Muhlenberg knew that the tenants had a right of first refusal on the property; and (5) at the time of purchase, Muhlenberg was aware that the tenants had been on the property for about one year. Fourth, the damages element is supported by: (1) exhibit 11, which showed that Muhlenberg suffered \$122,742.26 in

damages, (2) Muhlenberg's testimony at trial, and (3) even assuming, arguendo, that Muhlenberg was obligated to credit Sellers for the profits that he earned after selling the property, he still would have suffered at least \$22,742.26 in damages.

Factual findings

In bench trials, the district court must enter "specific findings of fact and conclusions of law."⁵ "The findings must be sufficient to indicate the factual basis for the court's ultimate conclusions."⁶ "[T]his court will imply findings of fact and conclusions of law so long as the record is clear and will support the judgment."⁷

We conclude that the district court's findings were sufficient to indicate the factual basis for its ultimate conclusion that Sellers committed the tort of intentional misrepresentation. Regarding the false representation element, the district court stated in its findings of fact and conclusions of law that Pro-Brokers "either negligently or intentionally represented that Omni Electric Inc., was a 'good tenant' and that they were current in their rent at the time." Regarding the intent to induce and justifiable reliance elements, the district court did not make express findings; however, we will imply the findings because the record, as discussed above, is clear and supports the judgment. Regarding the

⁵Robison v. Robison, 100 Nev. 668, 673, 691 P.2d 451, 455 (1984); see also NRCP 52(a).

⁶Robison, 100 Nev. at 673, 691 P.2d at 455.

⁷Luciano v. Diercks, 97 Nev. 637, 639, 637 P.2d 1219, 1220 (1981).

damages element, the district court expressly found that Sellers' intentional misrepresentation caused Muhlenberg to suffer damages.

Accordingly, we conclude that there is substantial evidence in the record to support the district court's findings of fact and conclusions of law that Sellers were liable for intentional misrepresentation.

The district court did not abuse its discretion when it calculated the damages award

Sellers contend that the district court abused its discretion when it calculated the \$122,742.26 damage award because (1) it calculated Muhlenberg's damages as lost rents for the entire lease term, (2) it should have at least reduced his damages by his eventual \$100,000 profit on the building's sale, and (3) the calculation was not supported by substantial evidence. Muhlenberg argues that the district court did not abuse its discretion when it calculated his damages because (1) an intentional misrepresentation damage award permits the recovery of lost rents, which are "benefit-of-the-bargain" damages; and (2) his \$100,000 profit on the building's resale was not related to the Sellers' misrepresentations about the tenants' rental history. We agree with Muhlenberg and conclude that Sellers' arguments lack merit.

"A district court is given wide discretion in calculating an award of damages and an award will not be disturbed on appeal absent an abuse of discretion."⁸

⁸Flamingo Realty v. Midwest Development, 110 Nev. 984, 987, 879 P.2d 69, 71 (1994).

If a defendant is liable for intentional misrepresentation, then a plaintiff is entitled to recover benefit-of-the-bargain damages, which are the difference between what the plaintiff would have received if the defendant's misrepresentations were true, less what he or she actually received.⁹ A plaintiff is not entitled to recover for losses that, as determined by the district court, arise solely from general economic conditions.¹⁰

We conclude that the district court did not abuse its discretion when it awarded Muhlenberg benefit-of-the-bargain damages. Muhlenberg was entitled to recover for his lost rents as benefit-of-the-bargain damages because, as discussed above, substantial evidence supports the district court's conclusion that Sellers were liable for intentional misrepresentation. We further conclude that the district court did not abuse its discretion when it refused to award Sellers any of Muhlenberg's profits on the sale of the property because there is no evidence in the record to indicate that the profits arose from anything other than general economic conditions.

Conclusion

We reach two conclusions in this order of affirmance. First, we conclude that the district court did not err when it concluded that Sellers were liable for intentional misrepresentation because (1) its findings are supported by substantial evidence in the record, and (2) its express findings of fact were sufficient to support its ultimate conclusions,

⁹Collins v. Burns, 103 Nev. 394, 398, 741 P.2d 819, 822 (1987).

¹⁰Id. at 399, 741 P.2d at 822.

and (3) we imply the district court's missing findings of fact with respect to the intent to induce and justifiable reliance elements because facts in the record clearly support their existence. Second, we conclude that the district court did not abuse its discretion when it awarded Muhlenberg \$122,742.26 in damages and declined to award Sellers an offset.

Because we affirm the district court's judgment in favor of Muhlenberg on his intentional misrepresentation claim, we need not reach Sellers' remaining arguments regarding the propriety of Muhlenberg's negligent misrepresentation claim.¹¹ We also need not address Sellers' contention that the district court's dual conclusion of law was reversible error because (1) they failed to cogently argue the issue in their opening brief and did not present any relevant authority in support;¹² and (2) they did not object to the district court's dual conclusion of law in their motion to amend the findings and the judgment, and their argument does not involve a constitutional or jurisdictional issue.¹³ Accordingly, we

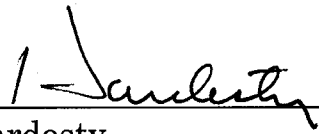
¹¹On appeal, Sellers argued that the district court erred because (1) it improperly found that they were liable for negligent misrepresentation because Muhlenberg's complaint did not assert a negligent misrepresentation claim and the claim was not properly before the court, and (2) the district court improperly concluded that Sellers were liable for negligent misrepresentation because substantial evidence did not support its findings and it also failed to make specific findings of fact.

¹²Edwards v. Emperor's Garden Rest., 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006).

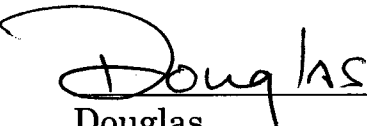
¹³See, e.g., Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (concluding that this court does not need to review an unraised point unless the issue concerns our jurisdiction); McNair v. Rivera, 110 Nev. 463, 468 n.6, 874 P.2d 1240, 1244 n.6 (1994) (concluding

continued on next page . . .

ORDER the judgment of the district court AFFIRMED.


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

cc: Hon. Valerie Adair, District Judge
Peter W. Guyon
Brooksbank & Associates
Hardy Law Group
Eighth District Court Clerk

... continued

that this court will sua sponte review an unraised point for plain or constitutional error).