

IN THE SUPREME COURT OF THE STATE OF NEVADA

T.I.P. HOLDINGS CORPORATION, A
NEVADA CORPORATION,

Appellant,

vs.

LOUIS F. ORABONA, INDIVIDUALLY;
LOUIS F. ORABONA AND JOLIETTE
ORABONA, TRUSTEES OF THE
ORABONA 2000 FAMILY TRUST; AND
SHERRY B. BOWERS,

Respondents.

No. 49263

FILED

DEC 06 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Alvarado
DEPUTY CLERK

ORDER DISMISSING APPEAL

This is an appeal from a district court judgment in an action for specific performance, quiet title, declaratory relief, and other causes. Eighth Judicial District Court, Clark County; Jessie Elizabeth Walsh, Judge.

Our preliminary review of the docketing statement and the documents submitted to this court pursuant to NRAP 3(e) revealed a potential jurisdictional defect. Specifically, it appeared that the district court's judgment might not be substantively appealable because it did not resolve all of the claims or the rights and liabilities of all the parties.¹ In particular, while the district court had granted summary judgment against appellant on its complaint, the district court apparently had not resolved the abuse-of-process counterclaim asserted by respondents Louis

¹See Lee v. GNLV Corp., 116 Nev. 424, 996 P.2d 416 (2000); Rae v. All American Life & Cas. Co., 95 Nev. 920, 605 P.2d 196 (1979).

F. Orabona, individually, and Louis F. Orabona and Joliette Orabona, as trustees of the Orabona 2000 family trust.² Accordingly, this court ordered appellant to show cause why this appeal should not be dismissed for lack of jurisdiction.

In response, appellant argues that the district court implicitly resolved the abuse-of-process counterclaim. Appellant reasons that the judgment and the findings of fact and conclusions of law “reveal the existence of a bona fide dispute between” appellant and the Orabona respondents and that it is “unmistakable” that appellant had a proper motive for filing its complaint. Therefore, according to appellant, “it is implicit” in the judgment and the findings of fact and conclusions of law that “there is an insufficient basis” for the abuse-of-process counterclaim.³ And appellant further suggests that “[w]here, as here, the Court dismissed the action and treated the matter as concluded,” this court should “deem” the counterclaim dismissed. The respondents have not filed a reply to appellant’s response to the show cause order.

²See NRAP 3A(b). Although not specifically mentioned in the district court’s judgment entered on March 9, 2007, it appears that the judgment necessarily resolved the second counterclaim asserted by the Orabona respondents for declaratory relief as to the parties’ rights, title, and interest in the subject properties—the judgment cancelled the lis pendens against the properties.

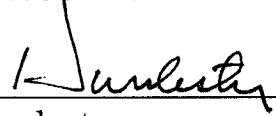
³See LaMantia v. Redisi, 118 Nev. 27, 30, 38 P.3d 877, 879 (2002) (stating that the elements of an abuse-of-process claim are “(1) an ulterior purpose by the defendants other than resolving a legal dispute, and (2) a willful act in the use of the legal process not proper in the regular conduct of the proceeding” (quoting Posadas v. City of Reno, 109 Nev. 448, 457, 851 P.2d 438, 444-45 (1993))).


Despite appellant's arguments, we are not convinced that the district court resolved the abuse-of-process counterclaim. It appears that the Orabonas' motion for summary judgment was directed only at the claims in appellant's complaint. And appellant did not seek summary judgment on the counterclaim. Moreover, the causes of action addressed in the summary judgment proceedings are different from the abuse-of-process counterclaim. In particular, appellant's claims are based on the theory that there was a valid contract for the sale of the real property at issue and that the Orabonas breached that contract, whereas the abuse-of-process counterclaim is based on a theory that there was no valid contract and that even though appellant knew there was no valid contract, it nonetheless filed the underlying action and a lis pendens to cause the Orabonas to expend funds for an attorney and to sell the properties. In granting summary judgment to the Orabonas on appellant's complaint, the district court found that there was no valid contract for the sale of the properties. That finding does not appear to render the abuse-of-process counterclaim moot.⁴ Additionally, the district court's judgment and findings of fact and conclusions of law specifically refer only to appellant's complaint and only enter judgment in favor of the Orabonas on appellant's complaint. We acknowledge that the Orabonas have not challenged appellant's representations regarding the abuse-of-process counterclaim

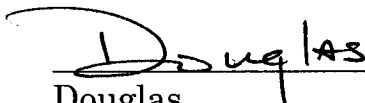
⁴Cf. KDI Sylvan Pools v. Workman, 107 Nev. 340, 342, 810 P.2d 1217, 1219 (1991) (concluding that summary judgment in favor of defendant on plaintiff's claims for breach of contract, interference with a business relationship, and interference with a prospective economic advantage did not resolve or render moot defendant's counterclaim for abuse of process).

and, therefore, they may not intend to pursue that counterclaim. But this court has held that a defendant's inclination not to pursue a counterclaim "does not render the counterclaim moot or operate as a formal dismissal of the claim."⁵ Moreover, appellant bears the burden of establishing that this court has jurisdiction.⁶ Appellant has not met that burden. Accordingly, we

ORDER this appeal DISMISSED.


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

cc: Hon. Jessie Elizabeth Walsh, District Judge
Jerry J. Kaufman, Settlement Judge
Scarpello & Huss, Ltd.
Bowers, Thomas & Associates
Graziadei & Cantor, Ltd.
Law Offices of Roderic A. Carucci
Eighth District Court Clerk

⁵Id.

⁶Moran v. Bonneville Square Assocs., 117 Nev. 525, 527, 25 P.3d 898, 899 (2001) (“[T]he burden rests squarely upon the shoulders of a party seeking to invoke our jurisdiction to establish, to our satisfaction, that this court does in fact have jurisdiction.”).