

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT TRETIAK,
Appellant,
vs.
OPTION ONE MORTGAGE
CORPORATION; AND H&R BLOCK
MORTGAGE CORPORATION,
Respondents.

No. 55876

FILED

MAY 11 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *H. Johnson*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from a district court summary judgment in a tort and contract action. Eighth Judicial District Court, Clark County; Susan Johnson, Judge.

Summary judgment is appropriate when there is no genuine issue of material fact, and thus, the moving party is entitled to judgment as a matter of law. Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). To avoid summary judgment once the movant has properly supported the summary judgment motion, the nonmoving party may not rest upon general allegations and conclusions, but must instead set forth by affidavit or otherwise specific facts demonstrating the existence of a genuine issue of material fact for trial. NRCP 56(e). Wood, 121 Nev. at 731, 121 P.3d at 1030-31. This court reviews an order granting summary judgment de novo. Id. at 729, 121 P.3d at 1029.

Appellant sought compensatory damages, punitive damages, attorney fees and costs, and civil penalties for deceptive trade practices pursuant to NRS 598.0973 for numerous alleged improper disclosures and assessments of late fees, which appellant claimed wrongfully inflated the balance he owed on his home loan. Respondents moved for summary judgment contending that appellant was not entitled to civil penalties,

that appellant had no damages due to a loan modification agreement entered into by appellant in the United States Bankruptcy Court, which respondents argued mooted the matter and judicially estopped appellant from seeking damages in the district court. The district court ruled that appellant's claims were moot because appellant had no actual damages after modifying his loan.¹

On appeal, appellant contends that his claims for deceptive trade practices were independently actionable and not moot, notwithstanding the loan modification agreement entered into between appellant and American Home Mortgages Servicing, Inc. (AHMSI) in appellant's bankruptcy case. Appellant asserts that despite his modification agreement, he still has damages, and even if he does not have damages, he is entitled to civil penalties under NRS 598.0973. We disagree.

NRS 598.0973 provides that, with certain exceptions, "in any action brought pursuant to NRS 598.0979 to 598.099, inclusive," the court may impose a civil penalty if it finds that "a person has engaged in a deceptive trade practice directed toward an elderly person." NRS 598.0979 through 598.099 contain various provisions for actions brought by certain qualified public officials, including the district attorney. Appellant is not a qualified public official. As such, appellant was not entitled to civil penalties, even assuming that respondents' actions

¹The district court later denied appellant's motion for reconsideration of the summary judgment and, although the order denying reconsideration is not substantively appealable, we considered the arguments appellant raised in the context of that motion in resolving this matter. Arnold v. Kip, 123 Nev. 410, 168 P.3d 1050 (2007).

constituted deceptive trade practices. Rather, appellant was entitled to seek to recover damages, if he could prove his allegations of deceptive trade practices, if any such damages existed.² NRS 598.0977.


Although appellant argues that the purportedly wrongfully inflated debt obligation served as his damages, in modifying his loan, appellant agreed that he owed a certain amount on his home loan. Appellant acknowledges that his loan modification with AHMSI was ratified by the United States Bankruptcy Court. By agreeing to a principal balance, interest rate, and term, appellant acquiesced to pay a certain amount, and acknowledged the validity of the debt in that amount. Appellant cannot claim before the United States Bankruptcy Court that he owes a certain balance to avoid adverse consequences in bankruptcy court, and then inconsistently assert that the same balance gives rise to tort damages in the district court. Marcuse v. Dell Web Communities, 123 Nev. 278, 287-88, 163 P.3d 462, 468-69 (2007) (holding that judicial estoppel bars a party from asserting inconsistent positions before two courts to gain unfair advantage); Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778, 782-84 (9th Cir. 2001) (judicial estoppel applies when a court has accepted a party's previous inconsistent statement and is

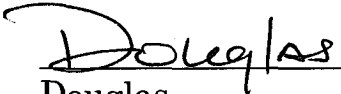
²Appellant also requested attorney fees, and respondents correctly argue that appellant, as a proper person litigant, is not entitled to attorney fees. To the extent that appellant was not seeking an award of attorney fees for himself, but rather sought to recover damages based on what he alleged were wrongfully assessed attorney fees added to his loan balance, these purported damages were settled when appellant entered into his bankruptcy agreement, which was subsequently ratified by the bankruptcy court.

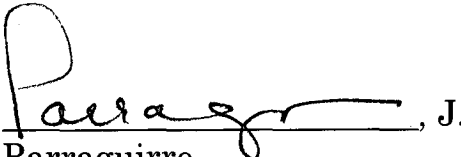
appropriate to bar litigants from making incompatible statements in two different cases).

Since appellant has resolved the dispute over what amount he owes on his home loan, he has no damages. Hence, there are no material issues of fact sufficient to withstand summary judgment concerning damages, an essential element of appellant's claims. Wood, 121 Nev. at 731, 121 P.3d at 1030-31. Thus, we conclude that respondents were entitled to summary judgment on all of appellant's claims. Accordingly, we

ORDER the judgment of the district court AFFIRMED.³


Gibbons, J.


Douglas, J.


Parraguirre, J.

cc: Hon. Susan Johnson, District Judge
Robert Tretiak
Brooks Bauer LLP
Eighth District Court Clerk

³See Rosenstein v. Steele, 103 Nev. 571, 575, 747 P.2d 230, 233 (1987) (noting that this court will affirm a district court's order if the district court reached the correct result, albeit for different reasons).