

IN THE SUPREME COURT OF THE STATE OF NEVADA

LAWYERS TITLE OF NEVADA, INC., A
NEVADA CORPORATION,
Appellant,
vs.
KARL BONAR, AN INDIVIDUAL,
Respondent.

No. 56309

FILED

MAY 23 2012

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

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

This is an appeal from a district court judgment following a bench trial in a real property action. Eighth Judicial District Court, Clark County; Miriam Shearing, Judge.

Respondent Karl Bonar agreed to purchase certain real estate from a group of sellers. To facilitate the purchase, Bonar deposited money into an escrow account maintained by appellant Lawyers Title of Nevada, Inc. When the sellers absconded with Bonar's escrow money prior to the agreement's completion, Bonar filed suit against them. He also named Lawyers Title as a defendant, alleging that Lawyers Title breached its fiduciary duty in the course of releasing his escrow money to the sellers.¹

Following a bench trial, the district court found that the sellers defrauded Bonar. The district court further found that Lawyers Title breached its fiduciary duty and that this breach facilitated the sellers' fraud. Consequently, the district court held Lawyers Title liable for Bonar's ensuing damages.

¹The parties are familiar with the facts, and we do not recount them further except as necessary to our disposition.

Lawyers Title now appeals and makes the following arguments: (1) its liability was not established by sufficient evidence; (2) if its liability were otherwise established, then an exculpatory clause in an escrow instruction immunizes it from liability; and (3) even if properly held liable, the district court miscalculated the damages award. As explained below, we affirm the imposition of liability, but we partially reverse the total damages award.

Lawyers Title's liability was established by sufficient evidence

The district court held Lawyers Title liable for breaching its fiduciary duty under three alternative bases. The primary basis was that Lawyers Title breached its fiduciary duty when its escrow agent, Alice Garland, knowingly misrepresented the substance of a "rogue" escrow instruction to Bonar. On appeal, Lawyers Title contends that this basis for liability was not supported by sufficient evidence. We disagree.²

"Where the trial court, sitting without a jury, makes a determination predicated upon conflicting evidence, that determination will not be disturbed on appeal where supported by substantial evidence." Hall v. SSF, Inc., 112 Nev. 1384, 1389, 930 P.2d 94, 97 (1996) (quotations omitted). "Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion."³ Id. (quotations omitted).

²Because sufficient evidence supports this basis for liability, we do not recount the evidence supporting the two alternative bases for liability.

³We reject Lawyers Title's argument that its liability needed to be established by "clear and convincing" evidence. Although the district court's judgment couched some of its language in terms of "fraud," this language does not mean that Bonar was held to a heightened evidentiary standard. Bonar's complaint clearly set forth a breach-of-fiduciary-duty claim, and Lawyers Title's liability was not enhanced in any way by the

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During trial, Bonar testified unequivocally that on March 2, 2005, he spoke with Garland and that Garland informed him that the rogue escrow instruction authorized the first monthly mortgage payment to the Goddards. Bonar further testified that, based upon this representation, he signed the instruction.

Bonar's uncontroverted testimony was adequate to support the district court's conclusion that Garland knowingly misrepresented the substance of the rogue escrow instruction.⁴ See Quintero v. McDonald, 116 Nev. 1181, 1184, 14 P.3d 522, 524 (2000) ("The credibility of witnesses and the weight to be given their testimony is within the sole province of the trier of fact."). Nonetheless, his testimony was corroborated by additional circumstantial evidence.

To begin, the rogue instruction's language was clear in what it purported to authorize. Thus, it would have been reasonable for the district court to infer that Bonar relied upon someone else's representation as to the instruction's contents. Because all three sellers testified that they had no contact with Bonar concerning the rogue instruction, it would also have been reasonable to infer that Garland was the one who made this representation.

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district court's passing references to "fraud." When the district court's judgment is read holistically, it is evident that these passing references were meant as a synonym for "knowing misrepresentation."

⁴The district court properly determined that Bonar's recorded affidavit was irrelevant. This document accurately reflected Bonar's amended agreement with the sellers, and his inadvertent choice of verb tense had no bearing on how he intended his \$137,000 deposit to be used.

Garland's knowledge of her misrepresentation can also be reasonably inferred. State Bar of Nevada v. Claiborne, 104 Nev. 115, 190, 756 P.2d 464, 513 (1988) (recognizing that it may sometimes be necessary to infer a party's intent from circumstantial evidence). Here, every witness—including Lawyers Title's own witness—testified that Garland was the person who drafted and executed the instruction. Because Garland was clearly aware of the instruction's contents, any misrepresentation that she made to Bonar would have been made knowingly.

In sum, the evidence introduced at trial was adequate to support the district court's conclusion that Garland knowingly misrepresented the rogue escrow instruction's substance to Bonar. Hall, 112 Nev. at 1389, 930 P.2d at 97. Thus, Lawyers Title's liability for breach of fiduciary duty was established by sufficient evidence. See Mark Properties v. National Title Co., 117 Nev. 941, 946, 34 P.3d 587, 591 (2001) (“An escrow agent may not close its eyes in the face of known facts and console itself with the thought that no one has yet confessed fraud.” (alteration omitted) (quoting Burkons v. Ticor Title Ins. Co. of Cal., 813 P.2d 710, 718 (Ariz. 1991))).

The exculpatory clause does not immunize Lawyers Title

Lawyers Title contends that an exculpatory clause contained in the rogue escrow instruction immunizes it from liability. We disagree.

Although this court has not directly addressed the issue, “[a]n attempted exemption from liability for a future intentional tort . . . or for a future willful . . . act is generally held void” 8 Richard A. Lord Williston on Contracts § 19:24 (4th ed. 2010). See also Restatement (Second) of Contracts § 195(1) (1981) (“A term exempting a party from tort

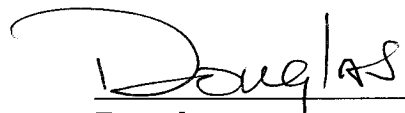
liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy.”); cf. Manderville v. PCG & S Group, Inc., 55 Cal. Rptr. 3d 59, 69 (Ct. App. 2007) (“It is well-established in California that a party to a contract is precluded [by statute] from contracting away his or her liability . . . based on intentional misrepresentation.”).


Thus, the exculpatory clause was ineffective to immunize Lawyers Title from liability for its agent’s knowing misrepresentation.

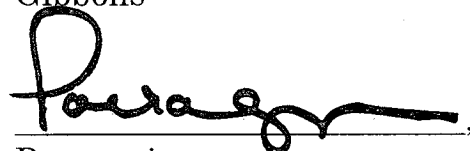
The damages award should be modified to reflect consented-to disbursements

Lawyers Title contends that the district court’s damages calculation improperly included two property-tax payments that it made with Bonar’s consent—payments which total \$479.62. Bonar acknowledges that these two payments were improperly included. We therefore reverse this portion of the district court’s damages award. On remand, the district court shall enter an amended judgment reflecting this reduction in the damages award.

Based on the foregoing, 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.


_____, J.
Douglas


_____, J.
Gibbons


_____, J.
Parraguirre

cc: Chief Judge, The Eighth Judicial District Court
Hon. Miriam Shearing, Senior Justice
Howard Roitman, Settlement Judge
Law Offices of Michael F. Bohn, Ltd.
Pico Rosenberger
Eighth District Court Clerk