

IN THE SUPREME COURT OF THE STATE OF NEVADA

NATIONAL TITLE COMPANY, A
NEVADA CORPORATION,
Appellant/Cross-Respondent,

vs.

THE J. COBLENTZ 1994 TRUST
DATED 12/15/94; THE WINTHROP
TRUST DATED 8/9/92; AND SUZANNE
COBLENTZ FELD,
Respondents/Cross-Appellants.

No. 36342

FILED

AUG 20 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART AND REVERSING IN PART

This is an appeal from a judgment entered on a verdict following a bench trial. Respondents and cross-appellants, The J. Coblentz 1994 Trust, The Winthrop Trust and Suzanne Coblentz Feld (“the Felds”), negotiated with Christopher Villareale and Crown Realty, Inc., for the sale of real property that the Felds owned in Las Vegas. Villareale agreed in writing to a counter-offer drafted by the Felds. This agreement provided that Villareale would deposit \$200,000 in escrow, to serve as liquidated damages should Villareale breach the agreement.

Villareale approached appellant and cross-respondent, National Title Co. (“National”), to handle the escrow. Villareale gave a \$200,000 check to National as required by the agreement, but the check was dishonored for insufficient funds. National nonetheless represented to the Felds that Villareale had deposited the money into an escrow account.

After Villareale’s successors-in-interest failed to perform, the Felds requested the \$200,000 from National. Upon discovering that National was not holding the money, the Felds sued National on theories

National was not holding the money, the Felds sued National on theories of contractual breach, negligence and breach of fiduciary duty. The district court, following a bench trial on the tort claims, awarded \$130,000 to the Felds, finding that National had breached a fiduciary duty, but also finding the Felds guilty of comparative negligence in connection with the transaction. National appeals the judgment and the order denying its motion for a new trial. The Felds cross-appeal the judgment to the extent it found them comparatively negligent, and the post-trial order concerning interest.

Standard of review

When reviewing a judgment on a verdict following a bench trial, this court will not overturn a district court's findings of fact unless they are clearly erroneous and not supported by substantial evidence.¹ This court reviews questions of law de novo.² We review an order denying a motion for a new trial for a palpable abuse of discretion.³

Fiduciary duty

National argues that it owed the Felds no fiduciary duty in the absence of a valid escrow agreement. In Hoffman v. District Court, this court explained that an escrow agreement is a triangular contract.⁴ The buyer and seller must agree to the terms of deposit, must deliver the items

¹Diamond Enterps., Inc. v. Lau, 113 Nev. 1376, 1378, 951 P.2d 73, 74 (1997).

²Evans v. Dean Witter Reynolds, Inc., 116 Nev. 598, 606, 5 P.3d 1043, 1048 (2000).

³Woosley v. State Farm Ins. Co., 117 Nev. 182, 188, 18 P.3d 317, 321 (2001).

⁴90 Nev. 267, 270, 523 P.2d 848, 850 (1974).

on deposit to the escrow agent, and the escrow agent must agree to receive and disperse the property.⁵ “The agreement by the seller and buyer to all the terms of the escrow instructions and the acceptance by the escrow agent of the position of depository create the escrow.”⁶

The district court found that the Felds, Villareale and National entered an escrow agreement in June 1997. The evidence showed that in June of 1997 Villareale brought the signed agreement specifying the sale terms,⁷ along with a \$200,000 check, to National. The agreement provided that the escrow agent would deliver the \$200,000 to the Felds in the event that Villareale defaulted, and otherwise apply the money to the purchase price. The district court did not clearly err in finding that these provisions were sufficient to serve as escrow instructions.

National accepted Villareale’s check⁸ and confirmed that it had opened an escrow account. By objectively manifesting that it was acting as an escrow agent, National bound itself to an escrow agreement with the Felds.⁹ The district court’s finding that these events created an

⁵Id.

⁶Id.

⁷Although this agreement provided for a later, formal contract, it was itself a valid land sale contract. Cf. See Hanneman v. Downer, 110 Nev. 167, 176, 871 P.2d 279, 284 (1994) (note or memorandum memorializing land sale agreement satisfies statute of frauds).

⁸The check itself satisfied the requirement of an item on deposit. The fact that the check was dishonored later does not void the agreement.

⁹See James Hardie Gypsum, Inc. v. Inquipco, 112 Nev. 1397, 1402, 929 P.2d 903, 906 (1996) (contract formation depends upon objective
continued on next page . . .

escrow agreement was not clearly erroneous. Because the parties entered escrow in June 1997, National's argument concerning the non-execution of escrow instructions in November 1997 has no merit.

National also argues that it had no duty to disclose the fact that Villareale's check had been dishonored, as the escrow instructions did not expressly impose such a duty. In Mark Properties v. National Title Co., this court held that an escrow company has a fiduciary duty to disclose facts of which it is aware, which represent substantial evidence of fraud, even if the escrow instructions do not expressly impose such a duty.¹⁰ Here, National was aware that Villareale's check had been dishonored and that Villareale, nevertheless, represented he had complied with his agreement to deposit \$200,000 into escrow. Also, given that the check was immediately dishonored, National was aware that Villareale entered into the agreement knowing that he was tying up the property with a check that would not clear for payment from his account. These facts constitute substantial evidence of fraud, and the district court correctly concluded that National had a duty to disclose them to the Felds.

Causation and damages

National argues that the Felds did not prove any actual loss caused by Villareale's breach.

The contract between the Felds and Villareale provided for \$200,000 in liquidated damages. Liquidated damages clauses are prima facie valid, and a party to an agreement challenging such a clause has the

... continued

manifestations of intent), disapproved of on other grounds by Sandy Valley Assocs. v. Sky Ranch Estates, 117 Nev. ___, 35 P.3d 964 (2001).

¹⁰117 Nev. ___, ___, 34 P.3d 587, 590-91 (2001).

burden of showing that it is an unreasonable penalty.¹¹ Because no evidence was presented that this clause exacted an unreasonable penalty between the actual parties to the sale, there was no proof that the agreement was invalid as between Villareale and the Felds. Any fluctuations in the land's value were irrelevant, as the Felds were entitled to \$200,000 from Villareale regardless of actual damages.

National argues, however, that had it disclosed that the bank had dishonored the check, Villareale might have backed out of the agreement without actually placing funds in escrow, such that it is uncertain that National's breach actually deprived the Felds of the funds. Yet, the district court also noted in its findings that the escrow proceeded for over a year after Villareale's check was dishonored, and valued the Felds' lost use of the land during this period at \$200,000.¹² National's breach proximately caused this loss, and the valuation is not clearly erroneous, considering the land's worth and the liquidated damages clause.

We also reject National's argument that the Felds failed to mitigate damages. "As a general rule, a party cannot recover damages for

¹¹See Mason v. Fakhimi, 109 Nev. 1153, 1156-57, 865 P.2d 333, 335 (1993) (also noting that liquidated damages clauses are generally upheld with respect to real estate sales contracts).

¹²National points out that the Felds left the land undeveloped at all relevant times. Plaintiffs seeking to recover for the lost use of their property, however, need not prove that they would have made actual use of the property during the period of deprivation. Cf. Williams v. Lamb, 77 Nev. 233, 236, 361 P.2d 946, 947 (1961) (district court may award "the use value of property during the period a person who is entitled to its possession has wrongfully been deprived thereof").

losses that a reasonable effort could have avoided.”¹³ The property was tied up for approximately one year as a result of these events. There is no evidence to suggest that failure to sell the property, or list it for sale, after determining that the escrow had not been funded, would have lessened the damages sustained as a result of the property being held in escrow.

Liquidated damages

National argues that the district court enforced the liquidated damages clause in the Felds-Villareale contract against it, even though National was not a party to that agreement. The district court’s judgment noted this concern, and explained that it did not enforce the liquidated damages clause against National. Rather, the district court used the amount of the liquidated damages clause, which National represented that it held in escrow, as evidence of damages.

The district court found that National’s breach of duty caused damage to the Felds by denying them either the \$200,000 deposit or the use of their land for one year, which the district court valued at \$200,000. Had National not breached its fiduciary duty, Villareale could have been forced to make the deposit, or the negotiations could have been promptly terminated. The district court did not hold National contractually bound to the liquidated damages clause; rather, the district court concluded that the tort damages equaled the stipulated liquidated damages.

Indispensable parties

National contends that Crown Realty, Inc. and Windstar Development Corp., corporations connected with Villareale and who were

¹³Hanneman v. Downer, 110 Nev. 167, 173, 871 P.2d 279, 283 (1994).

to be the ultimate purchasers, were necessary and indispensable parties to the litigation. Where feasible, a party must be joined if complete relief cannot be afforded without him or if he claims an interest in the subject matter of the litigation and lack of joinder would: (1) impair his interest; or (2) cause a risk of double liability for another party.¹⁴ Because Villareale's check was dishonored and no actual deposit of money occurred, the purported successors to Villareale's position in the transaction had no interest to claim in the present litigation.

Additionally, the buyers were not "necessary" parties simply because they might be liable to National under an indemnity or contribution theory. "[P]otential contributors and indemnitors are not necessary precisely because impleader . . . protects the defendant[.]"¹⁵ Accordingly, Crown Realty and Windstar were not indispensable parties to the litigation.

Comparative fault

The Felds argue that the district court erred in finding comparative negligence and reducing the judgment from \$200,000 to \$130,000. Although National did not plead comparative fault, the district court found that the Felds gave implied consent to the trial of this issue. The district court stated that the Felds did not object to National's presentation of evidence concerning Suzanne Feld's failure to request proof of the escrow deposit in November 1997. National presented this evidence, however, not to show comparative fault, but to disprove the

¹⁴See NRCP 19(a).

¹⁵Countrywide Home Loans, Inc. v. Superior Court, 82 Cal. Rptr. 2d 63, 69-70 (Ct. App. 1999) (quoting 4 James Wm. Moore et al., Moore's Federal Practice § 19.03[4][e] at pp. 19-61 to 19-62 (3d ed. 1998)).

existence of an escrow agreement. National never argued a theory of comparative fault.

Although NRCF 15(b) grants district courts broad discretion to allow amended pleadings where an issue has been tried by implied consent, it does not allow a district court to sua sponte raise an affirmative defense on behalf of a party.¹⁶ We conclude that the district court abused its discretion in applying NRCF 15(b) here. Because National did not plead comparative fault as required by NRCF 8(c), it waived that defense, and the district court erred in reducing the judgment from \$200,000 to \$130,000. We reverse this part of the district court's judgment.¹⁷

Prejudgment interest

The Felds also argue that the district court erroneously awarded prejudgment interest from the date of summons rather than the date the escrow deposit came due. NRS 17.130(2) provides for prejudgment interest from the date of service of summons, unless otherwise provided by contract or law.¹⁸ The Felds argue that NRS

¹⁶See Idaho Resources v. Freeport-McMoran Gold, 110 Nev. 459, 461-62, 874 P.2d 742, 744 (1994) (error to sua sponte apply equitable estoppel in decision following a bench trial).

¹⁷The Felds also argue that the comparative fault principles pertaining to actions for "injury to property," promulgated in NRS 41.141(1), are inapplicable to commercial tort cases where no tangible property damage is involved. We have never addressed the meaning of "injury to property" in NRS 41.141(1). Assuming without deciding that the statute applies here, we nevertheless reverse this portion of the district court's judgment, as comparative fault was not tried by implied consent.

¹⁸NRS 17.130(2) provides, in part: "When no rate of interest is provided by contract or otherwise by law, or specified in the judgment, the
continued on next page . . .

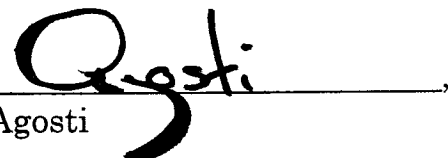
99.040(1)(a), which awards prejudgment interest on contract claims from the date that performance comes due,¹⁹ should apply here instead.

The Felds voluntarily abandoned the contract cause of action in their initial complaint and chose to proceed solely on a tort theory in their amended complaint. The fact that a contract gave rise to the fiduciary duty which National tortiously breached does not make this an action to recover contract damages. Accordingly, the district court correctly calculated interest from the date of service of the summons under NRS 17.130(2).

Having consider all of the parties arguments, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART. We remand to the district court to enter judgment based upon a \$200,000 verdict.


_____, C. J.
Maupin


_____, J.
Agosti

. . . continued

judgment draws interest from the time of service of the summons and complaint until satisfied[.]”

¹⁹NRS 99.040 provides, in part: “1. When there is no express contract in writing fixing a different rate of interest, interest must be allowed . . . upon all money from the time it becomes due, in the following cases: (a) Upon contracts, express or implied, other than book accounts.”

cc: Hon. Mark R. Denton, District Judge
Goold Patterson DeVore Ales & Roadhouse
Lionel Sawyer & Collins/Las Vegas
Clark County Clerk

LEAVITT, J., dissenting:

Originally, this case began as a contract action. The complaint was amended to a tort action for negligence and breach of fiduciary duty against National, and proceeded to trial on these tort theories.

The Felds entered into a contract to sell vacant land to a buyer who was required to deposit \$200,000.00 in an escrow account with National. A check was deposited with National but was later dishonored and returned by the bank unpaid. National notified the Felds that the check had been received and provided them a copy of such check. However, National failed to notify the Felds that the check did not clear and therefore, the escrow account contained no money. The failure to notify was the basis for the negligence and breach of fiduciary duty causes of action.

The escrow instructions between the Felds and the buyer contained a liquidated damage clause which stated "in the event the escrow does not close for any reason other than the failure of the Buyer to obtain the zoning, the \$200,000.00 deposit shall be released to Seller forthwith upon written demand by Seller."

The district court entered judgment against National for the amount required to be deposited in the escrow account, reduced by comparative negligence of the Felds.

Liquidated damages is the sum which parties to a contract agree to pay if a party fails to perform under the terms of the agreement.¹ The sum is agreed upon by the parties after a good faith effort to estimate the actual damages that may ensue if a breach occurs.² A liquidated damages clause is valid unless its application amounts to an unenforceable penalty.³ If the liquidated damages “are disproportionate to the actual damages sustained by the injured party” then such damages constitute a penalty.⁴

In its section entitled “Causation and damages,” the majority opinion appears to conclude that since the liquidated damages clause was not invalid as to the parties, then it supports the amount of actual damages caused by National’s breach. This analysis is inconsistent with the district court’s and the majority’s assertion that the liquidated damages clause was not the basis of the judgment against National. Although the majority may be correct when it points to the lack of evidence that the liquidated damages clause constituted an unreasonable penalty, I note that this absence may be attributable to the fact that the buyer, against whom the clause was enforceable, were not a party to this action. Further, the validity of the liquidated damages clause is irrelevant

¹Joseph F. Sanson Investment v. 268 Limited, 106 Nev. 429, 435, 795 P.2d 493, 496-97 (1990).

²Id. at 435, 795 P.2d at 497.

³Id.

⁴Id. (quoting Haromy v. Sawyer, 98 Nev. 544, 547, 654 P.2d 1022, 1023 (1982)).

to the question of actual damages caused by a third-party who is not bound by such a clause.

We have previously determined that the actual damages for breach of a real estate contract is the difference between the contract price and the value of the land at the time of the breach, and where the market value of the land at the time of the breach is higher than the purchase price, the seller is entitled to only nominal damages plus consequential damages.⁵


Here, the Felds seek to recover for the loss of use of their property but have failed to show the value of such loss. The Felds still have the property which was the subject of the sale. There was no evidence that the Felds lost the opportunity to sell the land while it was in escrow. There was no loss of rent, since the property was vacant. The value of the land in all probability appreciated in value during the time it was in escrow. The \$200,000.00 damage amount awarded is grossly disproportionate to any possible actual damages sustained by the Felds and in effect, is a penalty for non-performance by the buyer.

In a tort action, a plaintiff may recover compensatory and punitive damages. National should not be held to a measure of damages decided between the Felds and the buyer in the event of a breach of an agreement to which it is not a party. The liquidated damage clause can only be enforced against the defaulting party, in this case, the buyer. The Felds' recovery from National is limited to actual damages suffered by reason of National's negligence or breach of fiduciary duty. If the Felds

⁵Harris v. Shell Dev. Corp., 95 Nev. 348, 352, 594 P.2d 731-733-34 (1979).

are successful in seeking recovery for compensatory damages, and if National's conduct constitutes "oppression, fraud or malice," then punitive damages may also be awarded.⁶

I would reverse and remand the matter for a determination of actual damages, if any, sustained by the Felds.


_____, J.
Leavitt

⁶Id.; see also NRS 42.005.