IN THE SUPREME COURT OF THE STATE OF NEVADA

LOYCE SWIFT,
Appellant,
vs.
SHORELINE CONDOMINIUM ASSOCIATION,
Respondent.

No. 37709

FILED

JUN 18 2003

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

ORDER OF AFFIRMANCE

This is an appeal from a district court judgment that permanently enjoined appellant Loyce Swift from keeping her ten-pound poodle "Fluffy" at Shoreline Condominiums.

FACTUAL BACKGROUND

Respondent Shoreline Condominium Association (Shoreline) has a no-dog policy reflected in its rules and regulations and on signs posted at building entrances. Shoreline informed Swift of the no-dog policy several times before she purchased her Shoreline condominium. A neighbor also informed Swift of the no-dog policy before she moved into her condominium. Swift unsuccessfully sought to have the policy changed. Despite the no-dog policy, Swift brought Fluffy to live with her at Shoreline.

Swift saw her general physician, Dr. Delionback, complaining of depression and sleeplessness. At Swift's request, Dr. Delionback wrote Shoreline requesting that Swift be allowed to maintain Fluffy on the premises to help with her ailments. He did not prescribe a dog, but simply agreed with Swift's suggestion that having Fluffy might be helpful.

Shoreline requested and offered to pay for an independent mental health evaluation to determine whether Swift suffered from a disability entitling her to a reasonable accommodation to the no-dog policy. Swift agreed to the examination, but changed her mind when she claimed Dr. Delionback diagnosed her with fibromyalgia approximately two or three weeks later. Dr. Delionback did not confirm the diagnosis of fibromyalgia.

Shoreline initiated a complaint for injunctive relief to prohibit Fluffy from living on the premises. In the affirmative defenses in her answer, Swift indirectly alleged that Shoreline's rule establishing a no-dog policy was unreasonable. Swift also filed a counterclaim alleging discrimination, retaliation, and intentional infliction of emotional distress. Swift filed a motion for summary judgment. However, the record on appeal does not indicate the district court ever ruled upon the summary judgment motion. The district court bifurcated Shoreline's request for an injunction from Swift's counterclaims. A one-day bench trial was held on Shoreline's consolidated injunction request pursuant to NRCP 65(a)(2). At the close of Shoreline's evidence, Swift unsuccessfully moved for dismissal. The district court granted a permanent injunction and Swift appeals. The district court's findings of fact and conclusions of law addressed only the permanent injunction issue and did not address the reasonableness of Shoreline's no-dog policy or other issues set forth in Swift's counterclaim. Swift filed a motion to stay the injunction pending the outcome of the appeal. We granted Swift's motion.

DISCUSSION

NRCP 41(b) allows a case to be dismissed at trial after the plaintiff presents his evidence when he fails to prove a sufficient case

based on the facts and law. "In ruling on a motion to dismiss, the court must accept the plaintiff's evidence as true and draw all permissible inferences in the plaintiff's favor, and may not assess the credibility of witnesses or the weight of the evidence."[1]

The order granting Swift's motion to dismiss is not independently appealable; but since Swift has appealed from the permanent injunction, the order denying her motion to dismiss may be heard on appeal.[2] Swift argues the district court erred by denying her motion to dismiss. The district court denied the motion to dismiss because Shoreline presented evidence that challenged the validity of Swift's handicap. The evidence showed Shoreline requested and offered to pay for an independent mental health evaluation. Swift ultimately refused to undergo the evaluation. In addition, the evidence established that Fluffy spent more time with Swift's sister than with Swift. Also, Shoreline contended that maintaining Fluffy may not have been an appropriate accommodation. Finally, the evidence raised questions regarding Dr. Delionback's diagnosis. Based on the evidence presented by Shoreline, the district court did not abuse its discretion in denying Swift's motion to dismiss.

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[1]Maduike v. Agency Rent-A-Car, 114 Nev. 1, 4, 953 P.2d 24, 25 (1998).

[2]C.f. Consolidated Generator v. Cummins Engine, 114 Nev. 1304, 1312, 971 P.2d 1251, 1256 (1998).

The occurrence of a wrong is a prerequisite to the issuance of a permanent injunction.[3] A permanent injunction is available when no adequate remedy at law exists, a balancing of equities favors the moving party, and success on the merits is demonstrated.[4] The issuance of a permanent injunction is reviewed for an abuse of discretion.[5] A district court's findings of fact will not be set aside unless clearly erroneous.[6]

Swift contends the district court erred by granting Shoreline injunctive relief because she is entitled to an accommodation under 42 USCA § 3604(3). To establish a fair housing discrimination claim pursuant to 42 USCA § 3604(3)(A),[7] the movant must show that (1) she is handicapped as defined by 42 U.S.C. § 3602(h); (2) the opposing party "knew of her . . . handicap or should reasonably be expected to know of it; (3) accommodation of the handicap 'may be necessary' to afford [her] an

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[3]State Farm Mut. Auto. Ins. v. Jafbros Inc., 109 Nev. 926, 928, 860 P.2d 176, 178 (1993).

[4]Id.

[5]See A.L.M.N., Inc. v. Rosoff, 104 Nev. 274, 277, 757 P.2d 1319, 1321 (1988) (noting that imposition of a permanent injunction is normally reviewed for abuse of discretion so long as the court held a hearing on the injunction).

[6]S.O.C., Inc. v. The Mirage Casino-Hotel, 117 Nev. 403, 407, 23 P.3d 243, 246 (2001).

[7]Under 42 U.S.C. § 3604(3)(A), discrimination against a handicapped person includes "a refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises."

equal opportunity to use and enjoy the dwelling; and (4) [the opposing party] refused to make such accommodation."[8] "Without a causal link between defendants' policy and plaintiff's injury, there can be no obligation on the part of defendants to make a reasonable accommodation."[9]

As the district court stated, "One of the fundamental questions in the case is whether [Swift] has demonstrated a handicap" as defined by 42 U.S.C. § 3602(h). Under 42 U.S.C. § 3602(h), a person is handicapped when she has "(1) a physical or mental impairment which substantially limits one or more of such person's major life activities,[10] (2) a record of having such an impairment, or (3) be[en] regarded as having such an impairment." Substantial evidence supports the district court's finding that Swift did not suffer from a handicap pursuant to this statute.

The district court found Swift lacked credibility, Swift did not suffer from a handicap warranting relief under the Fair Housing Act, and the presence of Fluffy did not play a significant factor in alleviating her ailment. In addition, Swift did not prove a sufficient nexus between keeping Fluffy and alleviating her depression. The district court did not abuse its discretion in granting a permanent injunction because a

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[8]U.S. v. California Mobile Home Park Management Co., 107 F.3d 1374, 1380 (9th Cir. 1997) (quoting 42 U.S.C. § 3604(f)(3)(B)).

[9]Id. at 1381.

[10]24 C.F.R. § 100.201(a)(2)(b) states that "[m]ajor life activities means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working" (emphasis omitted).

balancing of equities favors the award of an injunction at this time against Swift's request for an accommodation for her dog pursuant to the Fair Housing Act.[11]

Accordingly, we

ORDER the decision of the district court granting the injunction based upon 42 USCA § 3604(3) AFFIRMED and remand this case for further proceedings consistent with this order.[12]

_____, J.
Rose

_____, J.
Gibbons

cc: Hon. James W. Hardesty, District Judge
Ian E. Silverberg
Glade L. Hall
Washoe District Court Clerk

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[11]From our review of the record on appeal, Swift further argues that Shoreline's rule establishing a no-dog policy is unreasonable since Shoreline's rules allow other animals such as indoor cats, ferrets, guinea pigs, birds, fish, and reptiles, but not small dogs which can be kept primarily indoors. We do not address the issue of the reasonableness of this rule since the district court did not consider this issue in granting Shoreline a permanent injunction.

[12]We vacate our June 12, 2001, order granting a stay.

MAUPIN, J., concurring in part and dissenting in part:

I agree that the permanent injunction issued by the district court should be affirmed. The majority, however, indicates that the reasonableness of respondent's "no-dog" policy was not reached below because the district court only tried the permanent injunction issues, not the bifurcated issues raised in appellant's counterclaims. The majority therefore implies that the reasonableness of the policy may still be litigated in further proceedings in the trial court. I disagree.

First, appellant's counterclaims contain no causes of action alleging that the policy was unreasonable in violation of Nevada law;[1] rather, the counterclaim lodges the federal fair housing violation claim resolved on the merits in this appeal, a claim that respondent's actions were taken in retaliation for appellant's assertion of her federal rights, and claims for infliction of emotional distress, punitive damages and attorney's fees.

Second, appellant's answer contained no explicit affirmative defense concerning the reasonableness of the policy. As discussed below, the only claim concerning the per se reasonableness of the policy under Nevada law can only be gleaned by a vague implication from appellant's affirmative defense that respondent's claims were barred under the doctrines of estoppel and waiver.

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[1]See, e.g., NRS 116.31065(1) (providing under the Uniform Common-Interest Ownership Act, that rules adopted by an association "[m]ust be reasonably related to the purpose for which they are adopted").

Although appellant's counterclaim was partially bifurcated from respondent's claim for injunctive relief in the trial below,[2] appellant's explicitly alleged affirmative defenses to respondent's claims were litigated, at least by implication. This includes appellant's claims of estoppel and waiver. In this connection, appellant has never asserted estoppel or waiver claims based upon some action by respondent either leading appellant to believe that the policy did not apply to her or that respondent would not enforce it. This then leaves but one alternative for the estoppel claim to have had any legal or factual basis; that respondent was estopped from seeking injunctive relief because the policy was unreasonable in violation of Nevada law.[3] Assuming the remote possibility that appellant affirmatively alleged estoppel based upon the reasonableness of the "no-dog" policy, the order granting such relief subsumes resolution of that issue.

Conclusion

The district court correctly concluded that appellant has demonstrated no violation of federal law inherent in respondent's "no-dog" policy. Second, there is no reasonableness issue concerning the policy left to litigate in district court. Third, the bifurcated portions of appellant's counterclaim are rendered moot by our affirmance of the order granting

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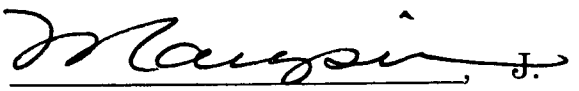
[2]Appellant's answer contained an affirmative defense alleging that the "no-dog" policy violated federal fair housing laws, a claim that duplicated her first claim for relief in her counterclaim. The counterclaims for retaliation, infliction of emotional distress and attorney's fees were not tried as part of the injunction hearing. Because the district court reached the fair housing issue, the bifurcation was only partial.

[3]See NRS 116.31065(1).

permanent injunctive relief. Fourth, any claims attacking the policy in a separate piece of litigation would be barred under notions of res judicata and/or collateral estoppel.



Maupin