

IN THE SUPREME COURT OF THE STATE OF NEVADA

RANDY VENTURACCI, EXECUTOR OF
THE ESTATE OF JOHN J. CASEY,
Appellant,

vs.

JJM, INC., A NEVADA CORPORATION,
D/B/A REALTY EXECUTIVES OF
NORTHERN NEVADA, A NEVADA
CORPORATION, BY AND THROUGH
CURRY JAMESON, BROKER,
TOGETHER WITH LARRY WOOD, A
REALTY EXECUTIVES AGENT AND
BROKER-SALESMAN,
Respondents.

No. 37736

FILED

MAR 04 2003

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

ORDER OF AFFIRMANCE

This is an appeal from a final judgment in a district court case concerning a commission for a real estate transaction. On appeal, appellant Randy Venturacci argues (1) the jury disregarded the instructions and evidence by finding in favor of Larry Wood; (2) the court erroneously denied a Rule 41(b) involuntary motion to dismiss; and (3) the court erred by refusing his proffered jury instructions. We disagree.

FACTS

In April 1996, Wood entered into an exclusive right to sell contract for the sale of Grass Valley Ranch. The contract listed the undersigned owner(s) as "John J. Casey, dba Casey Ranches, Holland Livestock Ranches, et al., and his heirs and assigns." Casey Ranches owned the majority of the ranch, and John J. Casey personally owned a portion of the ranch.

Casey encouraged Wood to contact Dr. Robert Parlasca as a possible buyer. In March 1997, Parlasca expressed an interest in exchanging his Black Elk Ranch for Casey's Grass Valley Ranch. Wood

told Parlasca he was the listing agent on the Casey Ranch and had a duty to represent Casey's interests. According to Wood, he told Parlasca the parties would need to authorize dual representation if they got to the point of writing an offer. He also informed Parlasca an exchange of Black Elk Ranch would constitute a separate transaction and require compensation. Parlasca responded negatively. Although Wood discussed the proposal with Casey, he did not mention additional compensation from Parlasca.

Casey wanted to sell his ranch for cash. To facilitate a cash transaction, Wood told Parlasca to sell Black Elk Ranch. Wood offered to list Parlasca's ranch, find a developer, and "put together a three-way exchange." Parlasca's friend, Robert Henkel, agreed to purchase Black Elk Ranch. Parlasca refused to deal with Wood when compensation was requested.

In October 1997, Vidler Water Company (Vidler) made a firm offer on Grass Valley Ranch. Wood sent the offer to Casey and included a dual representation consent form signed by Vidler. Casey rejected the offer. Shortly thereafter, Casey asked Wood "what it would take to buy [him] out of [his] listing contract," because he thought he had the ranch sold. Casey had entered into a contract with "Henkel or nominee" to sell his ranch. Wood claims Henkel was the "straw man" for Parlasca.

In December 1997, Wood received a termination letter from Thomas Belaustegui, Casey's attorney. The letter informed Wood he was terminated for reasons including, but "not limited to[, Wood's] failure to equitably and fairly represent Casey in negotiations with potential buyers." In January 1998, Wood was reinstated after his attorney contacted Belaustegui. When Wood asked about the status of the Parlasca deal, Belaustegui told him the deal was on hold.

In March 1998, Casey died. In December 1998, Parlasca closed on the Grass Valley Ranch and became the owner. Wood sued the Casey estate for his commission.

The jury awarded Wood \$150,000. The court amended the judgment to include an award of interest, costs, and attorney fees.

DISCUSSION

Jury Instructions

Jury Instructions 14 through 17

Venturacci claims the jury disregarded the evidence and Jury Instructions 14 through 17 by finding Wood was entitled to a commission. Wood claims Jury Instructions 14, 15, and 17 were erroneous because the jury had to find in favor of Venturacci if they determined he breached a duty to Casey.

Jury Instructions 14 through 17 describe the duties owed by a real estate agent to his or her client and disclosures owed to a seller when the agent acts on behalf of the seller and buyer. Since Wood did not object to these instructions at trial, he is precluded from raising this issue on appeal.¹

A new trial may be allowed for "[m]anifest disregard by the jury of the instructions of the court."² The standard is whether a trial

¹See Patterson v. State, 111 Nev. 1525, 1530, 907 P.2d 984, 987 (1995) (citing Sterling v. State, 108 Nev. 391, 394, 834 P.2d 400, 402 (1992)) (concluding that failure to object to jury instruction precludes appellate review unless plain error exists); see also Johnson v. Egtegar, 112 Nev. 428, 434, 915 P.2d 271, 275 (1996) (citing Carson Ready Mix v. First Nat'l Bk., 97 Nev. 474, 477, 635 P.2d 276, 278 (1981)) ("[O]bjections made during conferences in chambers should be on the record.").

²NRCP 59(a)(5); see Brascia v. Johnson, 105 Nev. 592, 594, 781 P.2d 765, 767 (1989) (explaining that a motion for a new trial under NRCP 59(a) for manifest disregard of jury instructions allowed only if "the jury

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court could "declare that, had the jurors properly applied the instructions of the court, it would have been impossible for them to reach the verdict which they reached."³ A jury verdict will not be disturbed on appeal where there is a "material conflict of evidence on . . . determinative issues" to be decided by the jury.⁴

Jury Instruction 14 states:

As a licensed Nevada real estate agent, Larry Wood's duties to the seller included the following:

1. To disclose as soon as practicable;
 - a. Any material and relevant facts, data or information which he knew, or by which the exercise of reasonable care and diligence he should have known, relating to the property which is the subject of the transaction.
 - b. Each source from which he will receive compensation as a result of the transaction.
 - c. Any changes in the relationship to a party to the transaction.

. . . continued

erred as a matter of law." A new trial may not be granted "if the question only concerns the weight of the evidence."); see also Dillard Department Stores v. Beckwith, 115 Nev. 372, 378, 989 P.2d 882, 886 (1999) (quoting Frances v. Plaza Pacific Equities, 109 Nev. 91, 94, 847 P.2d 722, 724 (1993)) (stating a jury's verdict may be overturned if "clearly erroneous when viewed in light of all the evidence presented").

³M & R Investment v. Anzalotti, 105 Nev. 224, 226, 773 P.2d 729, 730 (1989) (quoting Weaver Brothers, Ltd. v. Misskelley, 98 Nev. 232, 234, 645 P.2d 438, 440 (1982)).

⁴McKenna v. Ingersoll, 76 Nev. 169, 175, 350 P.2d 725, 728 (1960) (citing Tonopah L. Co. v. Riley, 30 Nev. 312, 322, 95 P. 1001, 1004 (1908)).

2. To exercise reasonable skill and care with respect to all parties to the real estate transaction.
3. To provide to each party to the real estate transaction the properly filled-out forms required by the Nevada Real Estate Division.
4. To not deal with any party to a real estate transaction in a manner which is deceitful, fraudulent or dishonest.

If you find that Larry Wood violated any of these duties, you must find in favor of the defendant.

Jury Instruction 15 states:

If a Real Estate Agent is acting for both the seller and the buyer in the same transaction, he is acting as a dual agent. Before he may act as a dual agent, the broker must obtain written consent from both the seller and the buyer to act as a dual agent. Further, this written consent must be obtained as soon as is practicable but not later than the date a written agreement is signed by the buyer or seller or both, and before the broker may continue to act in his capacity as an agent.

If you find that Larry Wood was acting for both the seller and the buyer, but failed to get written consent as required, then you must find in favor of the defendant.

Jury Instruction 16 states:

You must find that Larry Wood acted as an agent for Bob Parlasca if you find that the following is established by a preponderance of the evidence;

1. That Larry Wood acted for Bob Parlasca with the intention or expectation of receiving compensation; and

2. That Larry Wood offered, attempted to or agreed to offer, engaged in or attempted or agreed to engage in; directly or indirectly, any single act as follows: to sell, exchange, negotiate, offer, attempt to or agree to negotiate the sale, exchange, option, purchase, rental or lease of, or list or solicit prospective purchasers, for Bob Parlasca's Ranch.

Jury Instruction 17 states:

A fiduciary relationship exists between a real estate agent and his client. In this case, Larry Wood was the agent of the seller.

The fiduciary relationship imposes a duty on Larry Wood, within the limits of the agency, to deal fairly and honestly with the seller. It also imposes the responsibility upon Larry Wood to disclose any potential conflicts of interest, including all potential sources of commissions, that he might have with respect to the transaction.

A conflict of interest exists when a real estate agent places his business interests ahead of the seller's.

It is for you to decide whether Larry Wood violated his fiduciary duties to the seller in this matter.

If you find that Larry Wood violated his fiduciary duties to the seller, you must find in favor of defendant.

The jury heard the evidence presented and observed the demeanor of witnesses. As the main witness, Wood testified for two days and was subject to rigorous cross-examination. The jury found in favor of Wood despite the wording of the instructions given to the jury. Since the jury was required to decide contested issues of material fact, we hold the jury's verdict was based on the evidence and the jury's verdict was not

clearly erroneous. The district court, therefore, was not compelled to grant a judgment notwithstanding the verdict, new trial, or remittitur.

Proposed Jury Instructions

Venturacci argues the district court erred in declining to submit proposed jury instructions on the personal liability of Casey's Estate because it was not a proper party defendant.

The district court has broad discretion to settle jury instructions and decide evidentiary issues.⁵ As such, this court will review a district court's decision to give a particular instruction only for an abuse of discretion or judicial error.⁶ An abuse of discretion occurs if the district court's decision is arbitrary or capricious, or if it exceeds the bounds of law or reason.⁷

Venturacci proposed the following instructions:

Proposed Jury Instruction A states:

If you find a valid and enforceable listing agreement between Larry Wood and Casey Ranches, a partnership, as opposed to Larry Wood and John Casey, you must find for the Defendant.

Proposed Jury Instruction B states:

If you find that John Casey was not the owner of the Ranch which was sold, then you must find for the Defendant.

⁵See Greene v. State, 113 Nev. 157, 167-68, 931 P.2d 54, 60-61 (1997), receded from on other grounds by Byford v. State, 116 Nev. 215, 235, 994 P.2d 700, 713 (2000).

⁶See Howard v. State, 102 Nev. 572, 578, 729 P.2d 1341, 1345 (1986); see also Quillen v. State, 112 Nev. 1369, 1381, 929 P.2d 893, 901 (1996).

⁷See State, Dep't Mtr. Veh. v. Root, 113 Nev. 942, 947, 944 P.2d 784, 787 (1997).

Casey signed the exclusive listing agreement stating the owner was "John Jay Casey, dba Casey Ranches, Holland Livestock Ranches, et al., and his heirs and assigns." Casey personally owned a portion of Grass Valley Ranch. The remainder of the ranch was owned by Casey Ranches, a partnership consisting of three corporations. Casey was the sole shareholder and president of each corporation. As Wood contends, Casey was the only person authorized to sign the exclusive listing agreement. Furthermore, the record reveals possible bad faith by Casey to avoid paying Wood his commission. Casey entered into a contract with "Henkel or nominee" to sell the ranch without informing Wood; he offered to buy Wood out of their exclusive listing agreement because he thought he had the ranch sold; he terminated Wood and justified his actions based on a complaint letter he requested Parlasca to draft; and Casey's attorney told Wood the Parlasca deal was on hold, when in fact it was still in progress. During the hearing on the motion to dismiss, the district judge stated he was "almost ready to rule as a matter of law that we have the right defendant here."

Based on a review of the record, we conclude the district court did not abuse its discretion in refusing to give the proposed jury instructions.

Proper Party

Venturacci argues the district court erroneously denied his Rule 41(b) motion to dismiss for Wood's failure to bring suit against a proper party defendant. We note at the outset that Venturacci never raised this defense in his pleadings.

An answer to a complaint must affirmatively set forth any matter constituting an avoidance or affirmative defense. "If an affirmative

defense is not pleaded, it is deemed waived, and no evidence can be submitted relevant to that issue."⁸ We have stated, "An affirmative defense raises a matter which is beyond the limits of the plaintiff's prima facie case. Surprise and prejudice may result when evidence is admitted to prove a true affirmative defense that is without the scope of the plaintiff's complaint."⁹ Failure to name a proper party defendant is an affirmative defense despite the fact it is not enumerated in NRCP 8(c).

Further, NRCP 9(a) is an affirmative defense that requires "a party [who] desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued . . . [to] do so by specific negative averment."

We conclude Venturacci waived the defense of lack of a proper party defendant because he failed to affirmatively or specifically plead this defense in his answer. Consequently, the district court's ruling was not in error.

Amicus Curiae Brief

In its amicus curiae brief, the Nevada Association of Realtors argued the merits of allowing a real estate agent to collect his or her


⁸Pierce Lathing Co. v. ISEC, Inc., 114 Nev. 291, 295, 956 P.2d 93, 95 (1998) (citing Chisholm v. Redfield, 75 Nev. 502, 508, 347 P.2d 523, 526 (1959)).


⁹Pierce Lathing Co., 114 Nev. at 295, 956 P.2d at 95 (citing Mason v. Hunter, 534 F.2d 822, 825 (8th Cir.1976)).


commission despite a fiduciary breach. We decline to address this issue.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Rose


_____, J.
Maupin


_____, J.
Gibbons

cc: Hon. Peter I. Breen, District Judge
Robison Belaustegui Sharp & Low
Law Office of Mark Wray
Melody L. Luetkehans
Washoe District Court Clerk