

IN THE SUPREME COURT OF THE STATE OF NEVADA

DARWIN BARTON AND CATHERINE
LAMB-BARTON,
Appellants,
vs.
BANK OF AMERICA AND MIGUEL
ZANARTU,
Respondents.

No. 39656

FILED

SEP 05 2003

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

ORDER AFFIRMING IN PART, REVERSING IN PART
AND REMANDING

This is a proper person appeal from a summary judgment in a case involving the loss of personal property. In 1998, appellants Darwin Barton and Catherine Lamb-Barton defaulted on their mortgage payments and respondent Bank of America's predecessor foreclosed, acquiring the property on a credit bid. When the Bartons refused to vacate the property, the bank sued for unlawful detainer. The Bartons responded by suing the bank for wrongful foreclosure. In September 2001, the district court granted the bank summary judgment.¹

On October 22, 2001, the district court issued a writ of restitution, directing the constable to remove the Bartons from the property. On November 13, while the Bartons were on vacation, the constable executed the writ, evicted the Bartons' fifteen-year-old son from the property, and changed the locks on the home. Remaining inside the home were the Bartons' personal belongings and pets (one spider, one cat,

¹This court dismissed the Bartons' appeal from that judgment for repeated procedural derelictions. Barton v. Nationsbank, Dkt. No. 38678 (Order Dismissing Appeal, Feb. 19, 2003).

and four fish). The Bartons learned of the eviction and “made several phone calls in an effort to get [their personal] property released.” The bank gave the Bartons five hours on November 30 to retrieve personal property items, charging the Bartons \$35 per hour. The Bartons retrieved some of their property, but the spider and fish had died and the cat had disappeared.

In December 2001, the Bartons sued the bank and one of its employees, respondent Miguel Zanartu, for intentional interference with chattel, conversion, abuse of process and prima facie tort. The district court entered summary judgment against the Bartons, and this proper person appeal followed.² Pursuant to this court’s directive, the bank has filed a response.

DISCUSSION

Summary judgment is appropriate when the record, viewed in the light most favorable to the non-moving party, indicates there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.³ This court reviews a summary judgment de novo.⁴ As explained below, we conclude that the summary judgment should be affirmed in part and reversed in part, and the case should be remanded for further proceedings.

²A proper person opening brief is not required. See NRAP 46(b).

³Borgerson v. Scanlon, 117 Nev. 216, 19 P.3d 236 (2001); NRCP 56(c).

⁴Id.

Trespass to Chattel & Conversion

Intentional interference with chattel, more commonly known as trespass to chattel, occurs when a person intentionally dispossesses another person of the chattel, or intermeddles with a chattel in the possession of another.⁵ Conversion is a more serious interference with a person's possessory rights.⁶

When the bank completed its foreclosure of the Bartons' real property, the Bartons became holdover tenants, subject to eviction.⁷ The bank, as the Bartons' landlord, was required to safely store the Bartons' personal property for thirty days after eviction.⁸ The Bartons offered evidence demonstrating that, after they were evicted, the bank delayed access to their personal property and allowed them only limited access during the thirty-day period, causing the loss of personal property items, including family pets.

In opposition to summary judgment, the bank proffered the affidavit of Chad Padgett, a mortgage officer purportedly "familiar with the file pertaining to the subject real property." Although Padgett testified that "no animals were detected on the Property," he provided no foundation to show how he would have known that fact, as he was apparently not present during the eviction. Padgett's affidavit testimony

⁵Restatement (Second) of Torts § 217 (1965).

⁶See Evans v. Dean Witter Reynolds, Inc., 116 Nev. 598, 5 P.3d 1043 (2000).

⁷NRS 40.255(1).

⁸NRS 118A.460(1)(a).

is, therefore, inadmissible.⁹ In any event, there was conflicting evidence regarding the presence of the Bartons' pets.

Thus, a genuine issue of material fact exists as to whether the bank wrongfully stored appellants' personal property so as to be liable for trespass to chattels or conversion.¹⁰

Although there is a privilege to commit acts that would otherwise be a trespass to chattel or a conversion when a person acts pursuant to a valid court order,¹¹ a genuine issue of fact exists as to whether the writ of restitution's execution was valid. The Bartons insisted they were not given notice of their eviction, and the bank responded by pointing only to a district court docket entry that reflects the filing of a "Notice of Entry of Writ of Restitution." Execution on a writ of restitution may not occur unless the sheriff serves notice and a copy of the writ by regular mail no later than the next business day after the writ is served on the sheriff.¹² And, contrary to the bank's assertion, the issue of the execution's validity was before the district court, as the Bartons complained in their complaint and opposition to summary judgment that they had no notice of the eviction.

Abuse of Process

An abuse of process claim requires an ulterior purpose by the defendants other than resolving a legal dispute, and a willful act in the

⁹NRCP 56(e).

¹⁰See NRS 118A.460(1)(a) (providing that "[t]he landlord is liable to the tenant only for his negligent or wrongful acts in storing the property).

¹¹Restatement (Second) of Torts § 266 (1965).

¹²NRS 21.076; NRS 40.425.

use of the legal process not proper in the regular conduct of the proceeding.¹³ The Bartons alleged irregular conduct in the form of being locked out without notice and being prevented from accessing their personal property, and they alleged the bank's ulterior purpose was "to punish" them "for standing up for their rights." Although the sheriff, rather than the bank, was responsible for providing notice of the eviction,¹⁴ a party that does not directly participate in the abuse of process may nevertheless be liable for ratifying the abuse.¹⁵ Implicit within the Bartons' abuse of process claim is that the bank used the purportedly non-noticed eviction to accomplish its alleged ulterior purpose, and therefore, the bank ratified the improper eviction. As the bank advanced no argument or evidence expressly targeting this, or any other, aspect of the Bartons' abuse of process claim, summary judgment of the claim was inappropriate.

Prima Facie Tort

The elements of a prima facie tort are (1) an intentional lawful act by the defendants; (2) an intent to cause injury to the plaintiffs; (3) injury to the plaintiffs; and (4) an absence of, or insufficient justification for, the defendants' act.¹⁶ This court has not yet recognized prima facie

¹³LaMantia v. Redisi, 118 Nev. 27, 30, 38 P.3d 877, 879 (2002).

¹⁴NRS 21.076; NRS 40.425.

¹⁵Food Lion v. United Food & Commercial, 567 S.E.2d 257 (S.C. Ct. App. 2002); see also 72 C.J.S. Process § 112 (1987).

¹⁶Balke v. Ream, 33 S.W.3d 589, 594 (Mo. Ct. App. 2000); Hagebak v. Stone, 61 P.3d 201, 208 (N.M. Ct. App. 2002); see also Restatement (Second) of Torts § 870 (1979).

tort as a viable cause of action in Nevada.¹⁷ Further, it is generally recognized that prima facie tort claims are permitted only when the plaintiffs would have no other cause of action.¹⁸ Because this court has not yet adopted the prima facie tort doctrine, and because the Bartons have other recognized causes of action at their disposal, summary judgment on this cause of action was appropriate.

Respondent Miguel Zanartu

The Bartons allege that bank employee Miguel Zanartu “caused the Bartons to be locked out of their home without their clothing, personal possessions and pets.” The bank proffered undisputed evidence, however, that Zanartu “merely arranged for the scheduling of the lockout on behalf of Bank of America.” Further, the Bartons conceded in their opposition to summary judgment that their “case is not about a lockout, but rather, what happened . . . after the lockout.” Thus, summary judgment was properly granted as to Zanartu.

CONCLUSION

We conclude that the district court erred in granting the bank summary judgment on the Bartons’ claims for trespass to chattel, conversion, and abuse of process. But summary judgment was properly granted on the Bartons’ claims for prima facie tort and all other claims against Miguel Zanartu.

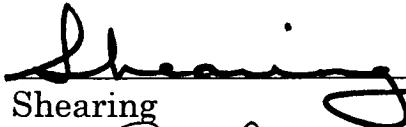
¹⁷Accord Pospisil v. First Nat. Bank of Lewistown, 37 P.3d 704, 708 (Mont. 2001); Costell v. Toledo Hosp., 527 N.E.2d 858, 860 (Ohio 1988).


¹⁸Taylor v. Metzger, 706 A.2d 685, 700 (N.J. 1998) (noting that prima facie tort is a tort of last resort).

Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART, AND WE REMAND this matter to the district court for proceedings consistent with this order.¹⁹


_____, J.
Becker


_____, J.
Shearing


_____, J:
Gibbons

cc: Hon. Jennifer Togliatti, District Judge
Miles & Associates, LLP
Darwin Barton
Catherine Lamb-Barton
Clark County Clerk

¹⁹Although appellants have not been granted permission to file documents in this matter in proper person, see NRAP 46(b), we have received and considered appellants' proper person documents.