IN THE SUPREME COURT OF THE STATE OF NEVADA

DONALD WALKER,
Appellant,
vs.
SAIRA MCKINLEY, F/K/A SAIRA COTTON,
Respondent.

No. 39966

FILED

SEP 26 2006

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

ORDER OF AFFIRMANCE

This is an appeal from an order granting respondent's motion for summary judgment in an action seeking injunctive and declaratory relief. Eighth Judicial District Court, Clark County; Gene T. Porter, Judge.

This case involves a husband's unilateral encumbrance, during the pendency of divorce proceedings, of community real estate held of record in joint tenancy. The wife successfully prosecuted a separate action against the lender for injunctive and declaratory relief to prevent foreclosure and to quiet title to the property. The action between the wife and the lender is the subject of this appeal.

FACTS AND PROCEDURAL HISTORY

Respondent Saira McKinley and her husband, William Cotton,[1] acquired several parcels of residential and commercial real estate during their 12-year marriage, including their marital residence located on Fogg Street in Las Vegas. They also jointly operated a family business known as Cotton Air Conditioning, Inc. (Cotton AC). Unfortunately, the

[1]Cotton is not a party to this appeal.

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marriage deteriorated and McKinley filed for divorce. In that proceeding, the district court issued a joint preliminary injunction (JPI) prohibiting either party from encumbering "common or community property" except in the ordinary course of business.

While the divorce remained pending, and without McKinley's knowledge or consent, Cotton obtained a series of loans from appellant Donald Walker, to pay expenses related to Cotton AC. Cotton eventually consolidated these loans into a promissory note for $120,000, and unilaterally provided security to Walker through a deed of trust to the Fogg Street residence, again without McKinley's consent. Cotton eventually defaulted on the loan and Walker initiated foreclosure proceedings. Soon thereafter, Cotton filed for bankruptcy on behalf of himself and Cotton AC.

Although the district court in the divorce case completed trial proceedings in June of 1996, it did not enter final findings of fact and conclusions of law "nunc pro tunc" until November 5, 2001. In the findings and conclusions, the district court ultimately awarded the Fogg Street residence to McKinley as her separate property, and concluded that Walker's lien against the residence was invalid because the lien was imposed contrary to the JPI. The court further stated in its findings that, if another court were to later determine that Walker's lien was valid, Cotton was responsible for its removal from the Fogg Street residence, and was to repay it, if necessary, from sale proceeds generated from certain commercial properties he received in the property division.

Several years after the trial, but before the entry of final findings of fact and conclusions of law, Walker unsuccessfully sought intervention in the divorce proceedings to protect his alleged interest in

the Fogg Street residence. He had, in any event, attended all of the divorce hearings during which the property was discussed.

Between the trial and the entry of the nunc pro tunc findings and conclusions, McKinley filed the instant matter below. In this separate action, she sought injunctive and declaratory relief to preclude Walker from foreclosing on the Fogg Street residence. McKinley eventually moved for summary judgment, which Walker opposed. Walker also filed countermotions for sanctions against McKinley, and for partial summary judgment in his favor. The district court granted McKinley's motion for summary judgment and denied Walker's motions. In this, the district court quieted title to the Fogg Street property in favor of McKinley. Walker appeals from the portion of the orders granting summary judgment in favor of McKinley.

DISCUSSION

This court reviews orders granting summary judgment de novo.[2] Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.[3] A factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the non-moving party.

Walker challenges the decision below on several grounds: first, that the district court erred in taking judicial notice of the divorce

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[2]Nicholas v. Public Employees' Ret. Board, 116 Nev. 40, 43, 992 P.2d 262, 264 (2000).

[3]Wood v. Safeway, Inc., 121 Nev. ___, ___, 121 P.3d 1026, 1031 (2005).

proceedings; second, that the district court erred in applying the doctrine of collateral estoppel; third, that the district court violated his due process rights; and fourth, that questions of fact remained unresolved.

The following was never disputed below: (1) that the Fogg Street property was acquired as marital property; (2) that, at the time McKinley commenced divorce proceedings, there were no encumbrances on the property; (3) that Cotton was served with a JPI in February 1994, which prohibited his encumbering any joint or marital property; (4) that Walker attended all of the divorce hearings; (5) that all of the loans in question were made to Cotton AC, not to Cotton or explicitly to the marital estate; (6) that the loans were not made until months after commencement of the divorce case; (7) that McKinley had no knowledge of the alleged loans and did not consent to them; (8) that Walker recorded the deed of trust securing the consolidated loans nearly one and one-half years into the divorce action; and (9) that Walker recorded the deed of trust without McKinley's knowledge or consent. The district court had also made an interim ruling denying Walker's motion to dismiss, relying in part on NRS 123.230(3), which provides that "[n]either spouse may sell, convey or encumber the community real property unless both join in the execution of the deed or other instrument . . . and the deed or other instrument must be acknowledged by both."

We conclude that McKinley was entitled to judgment as a matter of law. First, because of the close relationship between the instant matter and the divorce action, the district court committed no error in

taking judicial notice of the proceedings in the divorce case.[4] Second, Walker has never, except in his reply brief before this court, taken issue with the district court's implied determination in the instant matter that the Fogg Street property was community property. Although "a deed to property owned by a husband and wife is taken in joint tenancy 'raises a rebuttable presumption that the property was, in fact, held in joint tenancy,'" that presumption may be rebutted.[5] We conclude that the presumption was rebutted as a matter of law. In addition to the fact that the community status of the property was really never in dispute below, there was no dispute that the property was acquired with marital funds and held as the marital residence. Thus, although neither of the district courts in these matters expressly found that the Fogg Street property was community rather than joint tenancy property, both impliedly did so. To demonstrate, the district court in the divorce proceedings awarded the property as part of an unequal distribution of community property and the district court below refused to dismiss the action based upon NRS 123.230(3). Under that provision, the transfer was void.[6] Third, Walker failed to attempt intervention in the divorce case until several years after

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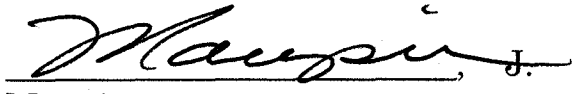
[4]See Occhiuto v. Occhiuto, 97 Nev. 143, 625 P.2d 568 (1981).

[5]Neumann v. McMillan, 97 Nev. 340, 341, 629 P.2d 1214, 1215 (1981) (quoting Peters v. Peters, 92 Nev. 687, 691, 557 P.2d 713, 715 (1976)). We also recognize that a conveyance of one joint tenant's interest in joint tenancy property generally terminates the joint tenancy. See Smolen v. Smolen, 114 Nev. 342, 956 P.2d 128 (1998). That precept does not obtain, however, when the joint tenancy presumption has been overcome; in such a case, NRS 123.230(3) controls.

[6]Neumann, 97 Nev. at 341-42, 629 P.2d at1215.

the trial. We conclude that this constituted a waiver of his rights to contest the district court's rulings in the divorce action.[7] Finally, we cannot discern from this record any genuine issues of fact that remained to be decided below. Accordingly, under our new standard governing NRCP 56 motions for summary judgment, the district court committed no error in its ruling in favor of McKinley.[8]

In light of the above, we hereby ORDER the judgment of the district court AFFIRMED.



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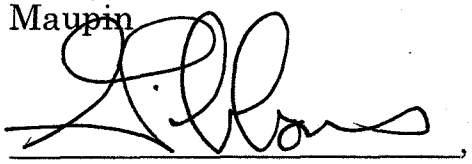
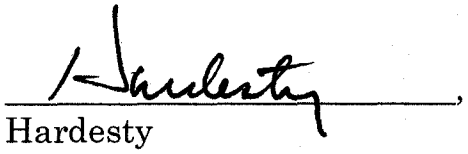
Maupin



_____, J.
Gibbons



_____, J.
Hardesty

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[7]See Allstate Insurance Co. v. Pietrosh, 85 Nev. 310, 454 P.2d 106 (1969).

[8]See Wood, 121 Nev. at ___, 121 P.3d at 1031 (rejecting the prior standard for relief under NRCP 56, that summary judgment is precluded in the trial court when there is the "slightest doubt as to the operative facts," and adopting the standard that a factual dispute is genuine where the evidence is such that a "rational trier of fact" could return a verdict in favor of the non-moving party).

We also conclude that our rulings in this order render harmless any error in the district court's application of res judicata below.

cc: Eighth Judicial District Court Dept. 1, District Judge
Lansford W. Levitt, Settlement Judge
L. Earl Hawley
Ellis & Gordon
Clark County Clerk