

IN THE SUPREME COURT OF THE STATE OF NEVADA

DENELL COLMENERO; CHARLES COLMENERO; AND THUNDERBIRD DEVELOPMENT, LLC, A NEVADA LIMITED LIABILITY COMPANY,  
Appellants,

vs.

CHARLES DARLING,  
Respondent.

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CHARLES DARLING,  
Appellant,

vs.

DENELL COLMENERO; CHARLES COLMENERO; THUNDERBIRD DEVELOPMENT, LLC, A NEVADA LIMITED LIABILITY COMPANY; ROBERT T. KNOTT, JR., AND LAW OFFICES OF ROBERT T. KNOTT, JR.,  
Respondents.

No. 40111

FILED

DEC 01 2004

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

ORDER OF AFFIRMANCE

These are appeals from a district court judgment quieting title to real property and awarding damages entered in favor of respondent, Darling, following a bench trial. Eighth Judicial District Court, Clark County; Ronald D. Parraguirre, Judge. This court has stated that findings of fact will not be disturbed on appeal unless they are unsupported by substantial evidence or unless clearly erroneous.<sup>1</sup> When a

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<sup>1</sup>Leonard v. Stoebling, 102 Nev. 543, 548, 728 P.2d 1358, 1361-62 (1986) (quoting Burroughs Corp. v. Century Steel, Inc., 99 Nev. 464, 470, 664 P.2d 354, 357 (1983)); see also NRCP 52(a).

judgment is challenged on the ground that the record is devoid of substantial evidence to support it, the appellate court must determine whether there is any substantial evidence, contradicted or uncontradicted, that supports the judgment of the district court. If the evidence conflicts, this court will not disturb the factual findings of the trial court,<sup>2</sup> “and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.”<sup>3</sup>

At the outset, we reject appellants’ contentions that the district court erred in finding that Darling took the Leon property for valuable consideration, without notice of any claims, in good faith. Nevada is a race notice state and the applicable statute, NRS 111.325, provides that:

Every conveyance of real property within this state hereafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser, in good faith and for a valuable consideration, of the same real property, or any portion thereof, where his own conveyance shall be first duly recorded.

This court has determined that “a party claiming title to the land by a subsequent conveyance must show that the purchase was made in good faith, for valuable consideration; and that the conveyance of the legal title was received before notice of any equities of the prior grantee.”<sup>4</sup> The record contains substantial evidence, which, although contradicted, supports such a finding.

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<sup>2</sup>Sutherland v. Gross, 105 Nev. 192, 196, 772 P.2d 1287, 1290 (1989).

<sup>3</sup>NRCP 52(a).

<sup>4</sup>Berge v. Fredericks, 95 Nev. 183, 186, 591 P.2d 246, 247 (1979).

First, there was substantial evidence that Darling gave valuable consideration for the property. Darling testified that he believed that Flo wanted him to have the property because he took care of her. Darling further testified that he cared for Flo by shopping, cooking, cleaning, providing maintenance and upkeep on the property, and providing transportation for Flo. In addition, Lynn Greaver, Edward Ostrowski, and Lori Jerome corroborated Darling's testimony. Thus, the district court did not err in finding that Darling gave valuable consideration for the Leon property.

Second, there was substantial evidence that Darling purchased the property without notice and in good faith. Darling did not have express notice of Denell's interest in the property because Denell did not record her deed until after Darling recorded his deed. Darling testified that Flo never told him that she wanted Denell to have the house, and furthermore, he had never heard of nor seen another deed. Thus, there is substantial evidence in the record to support a finding that Darling was a good faith purchaser without notice of a prior conveyance.

Moreover, because there is substantial evidence in the record to demonstrate that Darling took the Leon property under the subsequent deed for value and in good faith, pursuant to NRS 111.325, Denell's unrecorded deed as to Darling's subsequent deed is void. As such, it cannot operate to limit Flo's interest in the property to a life estate, rendering Flo incapable of conveying more than a life estate to Darling. We therefore conclude that Colmenero's claims that Flo only conveyed a life estate to Darling are without merit.

In addition, we uphold both the district court's decision establishing \$44,580.37 as the amount due and owing under the deed of

trust encumbering the subject property, and awarding Darling \$33,000 plus interest as damages for unjust enrichment for the lost rental value of the house.

Darling argues that the district court erred in finding that the evidence presented failed to support a claim against Colmenero for forcible detainer.<sup>5</sup> The district court found that Colmenero, with full knowledge of Darling's claim to ownership of the property, changed the locks and intentionally excluded Darling from the premises, thereby depriving him of the use of the property. Nevertheless, the district court determined that Colmenero's acts did not rise to the level of force required under the statute. We agree. Denell merely changed the locks on the premises; she did not use force to prevent Darling from entering the property.<sup>6</sup>

Additionally, we reject Darling's claim that Knott breached his fiduciary duty to Darling, as successor trustor, by acting as counsel for Colmenero when he was trustee of the Leon Trust Deed and a member of Thunderbird Development, LLC, the beneficiary under the Leon Trust

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<sup>5</sup>NRS 40.240, which defines forcible detainer, provides:

Every person is guilty of a forcible detainer who either:

1. By force, or by menaces or threats of violence, unlawfully holds and keeps the possession of any real property, whether the same was acquired peaceably or otherwise.

<sup>6</sup>Yori v. Phenix, 38 Nev. 277, 149 P. 180 (1915) ("Those actions were designed to maintain the peace and afforded a remedy even against an owner who acquired possession of property by force. Force is the gist of the action in forcible entry or forcible detainer."); see also Lachman v. Barnett, 18 Nev. 269, 274, 3 P. 38, 42 (1884). ("The object of the statute was not to try titles, but to preserve the peace and prevent violence.").

Deed. We find it unnecessary to reach the issue of whether Knott breached fiduciary duties owed to Darling because Darling failed to demonstrate that he suffered any damage as a result of the claimed breach because the district court set aside the notice of default and the foreclosure.

Finally, with respect to Darling's contention that he is entitled to attorney fees as damages, we note that in Sandy Valley Associates v. Sky Ranch Estates, we clarified our jurisprudence regarding the difference between attorney fees as a cost of litigation and attorney fees as damages.<sup>7</sup> We explained that a party seeking attorney fees as a cost of litigation does so in a post-trial motion, presenting evidence of the fees, while a party claiming attorney fees as foreseeable damages must plead those damages as special damages in the complaint pursuant to NRCP 9(g).<sup>8</sup> Darling's complaint did not allege attorney fees as special damages caused by Knott's conduct. The complaint merely mentions attorney fees as part of the general prayer for relief for each claim. Additionally, Darling failed to present evidence of attorney fees as damages during trial, and the issue was not litigated. Moreover, because Sandy Valley was decided while this case was being litigated<sup>9</sup>, and because Darling made no attempt to amend his counterclaim to comply with the Sandy Valley decision, the district court did not err in refusing to award attorney fees as damages.

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<sup>7</sup>Sandy Valley Assocs. v. Sky Ranch Estates, 117 Nev. 948, 951, 35 P.2d 964, 966 (2001).

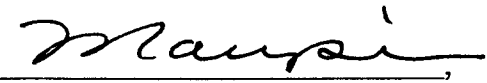
<sup>8</sup>Id. at 956.

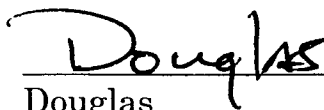
<sup>9</sup>117 Nev. at 948, 35 P.2d at 964 (Sandy Valley was decided on December 10, 2001. The trial in the instant case took place on June 19 and 20, 2002, and judgment was entered on July 12, 2002.)

Accordingly we,

ORDER the judgment of the district court be AFFIRMED.

  
\_\_\_\_\_, J.  
Rose

  
\_\_\_\_\_, J.  
Maupin

  
\_\_\_\_\_, J.  
Douglas

cc: Hon. Ronald D. Parraguirre, District Judge  
William L. McGimsey  
Nitz Walton & Heaton, Ltd.  
Clark County Clerk