IN THE SUPREME COURT OF THE STATE OF NEVADA

SEAYNOAH MAYFIELD AND HELEN MAYFIELD, INDIVIDUALLY AND AS HUSBAND AND WIFE; AND GERALD T. COONEY AND BEVERLY J. COONEY, INDIVIDUALLY AND AS HUSBAND AND WIFE, Appellants, vs. SHELDON F. GOLDBERG AND BARBARA A. GOLDBERG, INDIVIDUALLY AND AS HUSBAND AND WIFE, Respondents.	No. 39887
SEAYNOAH MAYFIELD AND HELEN MAYFIELD, INDIVIDUALLY AND AS HUSBAND AND WIFE; AND GERALD T. COONEY AND BEVERLY J. COONEY, INDIVIDUALLY AND AS HUSBAND AND WIFE, Appellants, vs. BARBARA A. GOLDBERG, Respondent.	No. 40164
SHELDON F. GOLDBERG AND BARBARA A. GOLDBERG, INDIVIDUALLY AND AS HUSBAND AND WIFE, Appellants, vs. SEAYNOAH MAYFIELD AND HELEN MAYFIELD, INDIVIDUALLY AND AS HUSBAND AND WIFE; AND GERALD T. COONEY AND BEVERLY J. COONEY, INDIVIDUALLY AND AS HUSBAND AND WIFE, Respondents.	No. 40408

FILED

JAN 31 2006

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

06-02241

ORDER OF REVERSAL AND REMAND

These are consolidated appeals from a judgment involving a real property dispute and orders denying motions for a new trial and attorney fees. Eighth Judicial District Court, Clark County; Allan R. Earl, Judge.

These appeals concern the ownership of property located in Las Vegas, Nevada. Three different couples have an interest in the property. Each couple has appealed from various orders of the district court, and we have consolidated the three appeals. A fourth related appeal involving Sheldon Goldberg's motion for attorney fees is decided in a separate disposition.

FACTUAL AND PROCEDURAL HISTORY

Sheldon Goldberg, a Colorado attorney, met Gerald Cooney in 1964. They became close personal friends. Goldberg also acted as Cooney's personal and business attorney on several occasions.

In 1980, Sheldon and Barbara Goldberg purchased the disputed property from the owner, Neva Copley, without the benefit of a realtor. Goldberg drafted the documents. The Goldbergs agreed to make Copley's mortgage payments and executed an additional promissory note in her favor. All of the relevant documents, including a grant, bargain, sale deed, which was not immediately recorded, were deposited in escrow with a Las Vegas attorney. Copley completed her portion of the deed, but the grantee line was left blank. Thus, record title remained in Copley's name.

The Goldbergs moved into the house in May 1980. In the late 1980s, the Goldbergs experienced financial difficulties and were unable to make house payments. Sheldon Goldberg asked the Cooneys for financial

help at a time when Goldberg knew Cooney was in ill health. The parties agree that the Cooneys supplied $100,000 to remove the debt due to Copely. They disagree on whether the transaction was a loan secured by a mortgage or a sale of the property to the Cooneys with a leaseback arrangement for the Goldbergs.

Goldberg prepared a draft of a promissory note, leaving blanks for the amount, interest, and due date. Goldberg, Cooney, and Barbara signed the note. Cooney read the note when he signed it. However, he claimed that he told Goldberg that the note did not reflect a sale and leaseback, but was reassured by Goldberg's responses. Goldberg denies this.

Cooney gave $100,000 to Goldberg, part of which was paid directly to satisfy Copley's mortgage and the remainder of which went to the Goldbergs. Goldberg retrieved the Copley grant, bargain, sale deed from escrow and completed the grantee line with Cooney's name. Goldberg recorded the deed with the Clark County Recorder's office. No deed of trust or other document referencing a loan and mortgage arrangement was ever prepared or recorded. A title search would not have revealed Goldberg's alleged interest in the property.

The Goldbergs made erratic payments on the note until March of 1994, after which no payments were made. Goldberg admitted that Cooney demanded payment on the note at least eight different times. Since 1998, the Cooneys have paid all taxes on the property and the Cooneys have insured the property since 1999.

Goldberg met Seaynoah Mayfield in 1995 and they discussed the ownership of the disputed property. Mayfield was interested in purchasing the property. Conflicting evidence was presented as to what

information Goldberg supplied to Mayfield about the Goldbergs' interest in the property and their relationship with the Cooneys. It was undisputed, however, that Mayfield was aware that Goldberg claimed that he was the owner of the property.

Eventually, in 1999, the Cooneys told the Goldbergs that the Cooneys would sell the property if the Goldbergs did not make good on their payments. The Goldbergs then tried to cloud title to the property by recording a document under Barbara's name indicating she had a community property interest in the property. However, the document did not contain a description of the property or a parcel number, therefore, it would not appear on a title search of the property. It would only be discovered if someone searched the records by the Goldbergs' names.

The Cooneys became aware of Mayfield's desire to purchase the property and the Goldbergs continued to ignore their obligations. Thereafter, Cooney called Mayfield in December 1999 and offered to sell the property for $324,000. Cooney and Mayfield also discussed allowing the Goldbergs to remain on the property as tenants. Mayfield checked the County Recorder's office on two different occasions to confirm that Cooney was the titleholder of the property. The searches did not reveal the community property document in Barbara's name. On February 4, 2000, the Cooneys executed a grant, bargain, sale deed in the Mayfields' favor.

On February 18, 2000, Mayfield called Goldberg and informed him of the sale. Mayfield asked Goldberg if he wanted to pay rent or vacate the premises. Goldberg informed Mayfield that he would not do either since he owned the property. Mayfield served Goldberg with an eviction notice on March 1, 2000.

On February 24, 2000, the Goldbergs, in proper person, initiated suit against the Cooneys and the Mayfields. The complaint sought to set aside the fraudulent conveyance and to quiet title. Additionally, the Goldbergs sued for intentional infliction of emotional distress, civil conspiracy, equitable relief, and injunctive relief.

The Cooneys filed their answer and counterclaim on July 21, 2000. The Cooneys counterclaimed for legal malpractice, breach of contract, breach of fiduciary duty, unpaid rent, and unjust enrichment. Barbara, who hired counsel, and Goldberg, still appearing in proper person, answered the Cooneys' counterclaim.

The Mayfields answered on July 25, 2000. On May 8, 2001, the Mayfields filed a motion to amend their answer to include a counterclaim. The Mayfields sought to counterclaim for judicial foreclosure, a writ of restitution, for unpaid rent based on the theory of unjust enrichment, and for elder exploitation.

Barbara opposed the motion, stating that the amendment would disrupt the discovery process, it was untimely, and she would be severely prejudiced if the motion was granted. Goldberg also opposed the motion. The district court denied the Mayfields' motion to amend.

At trial the Goldbergs argued that the unlawful object of the alleged conspiracy between the Cooneys and Mayfields was either to deprive the Goldbergs of their lawful interest in the property or the failure of the Cooneys to initiated a judicial foreclosure proceeding.

At the close of the evidence, the Goldbergs dropped their intentional infliction of emotional distress claim. The jury found in favor of the Goldbergs and against the Cooneys and Mayfields. The jury awarded $100,000 in damages on the conspiracy claim.

On March 28, 2002, the district court entered an order resolving the remaining equitable causes of action. In regards to the note, the district court wrote,

> Admittedly, the document in question is poorly drafted. Nevertheless, it conveys quite clearly to this Court that it is what it purports to be, namely a promissory note in the amount of $100,000 payable by the Plaintiff Goldberg to the Defendant Cooney and that pursuant to the terms of the promissory note, title would be placed in the name of Defendant Cooney as a security device but the home in question would always remain the sole and separate property of Plaintiff Goldberg.

The district court found that when the Cooneys made repeated demands for payment on the note, Goldberg repeatedly assured the Cooneys that the property was increasing in value and the loan was well secured. The district court also stated that Mayfield did not have notice of Barbara's affidavit or the note prior to purchasing the property.

Accordingly, the district court found that the Goldbergs and the Cooneys created an equitable mortgage. The district court stated that it was bound by the jury's determination that the Cooneys and Mayfields civilly conspired and that the sale was null and void. The district court recognized that the Goldbergs defaulted on the note and that generally one who seeks equity must do equity. But the district court stated that these are not normal circumstances and that due to the jury's determination regarding the conspiracy, "Goldberg's (sic) obligation to do equity insofar as the promissory note is concerned is abrogated." The district court concluded,

> As harsh as this ruling is, and as much as this Court would prefer to rule otherwise, the jury verdict and the case law of Nevada mandate that

> this Court has no alternative but to grant Plaintiff's request and to quiet title to the dwelling and the lot upon which it stands located at 3360 Serene Drive, Henderson, Nevada, in the names of Plaintiffs, Sheldon F. Goldberg and Barbara A. Goldberg.

Numerous post-trial motions were filed. All were denied. However, the district court noted it was doing so only because it felt compelled to uphold the jury verdict and that the jury verdict controlled the remaining equity claims. The district court stated, "Am I happy with the way this turned out? No. I'll save that for the Supreme Court. No, I'm not, but so what? So what?"

On April 29, 2002, Barbara filed a memorandum of costs and disbursements for $11,292.53. The Cooneys filed a motion to retax the costs, claiming that many of the costs are excessive or inappropriate. On August 27, 2002, the district court granted Barbara her costs for $9,217.29.

On June 14, 2002, Barbara moved for her attorney fees in the amount of $182,648.50. The district court denied the motion.

All of the parties filed appeals. The Mayfields appeal, in docket number 39887, the denial of their motion to amend their answer, the conspiracy jury instruction, Goldberg's closing argument regarding conspiracy, the denial of the judgment notwithstanding the verdict, and the failure of the district court to apply the presumption that a vendee has an interest in property.

The Cooneys appeal, in docket number 40164, the conspiracy jury instruction, the finding of an equitable mortgage, the application of the statutes of limitation to bar their counterclaims, and the conspiracy

award. The Mayfields join the Cooneys' appeal on the equitable mortgage issue and the conspiracy award.

Barbara appeals, in docket number 40408, the denial of her attorney fees. Goldberg, in a pro per appeal, docket number 40787, appeals the denial of his attorney fees.

This court consolidated docket numbers 39887, 40164, and 40408. Goldberg's pro per appeal was not consolidated, but has been clustered with the related cases.

DISCUSSION

Conspiracy

The Cooneys and the Mayfields raise several issues regarding the conspiracy claim. They allege that: (1) Goldberg committed misconduct by arguing in his closing that the failure to foreclose constituted an unlawful objective; (2) the conspiracy jury instruction omits the intent element; and (3) substantial evidence does not support the jury's findings regarding an unlawful objective, the intent element and damages. We conclude that it is not necessary to consider all of the parties' arguments since substantial evidence does not support the jury's findings regarding conspiracy.

The Goldbergs concede on appeal that failure to foreclose does not constitute an unlawful objective and cannot be the basis for their conspiracy claim. They argue, however, that substantial evidence was presented from which the jury could conclude that the Cooneys and Mayfield agreed to fraudulently deprive the Goldbergs of their interest in the property. We disagree.

Although the evidence certainly supports a finding that the Cooneys knew that they did not have clear title to the house, the record

does not support such a finding against Mayfield. At most the record supports that Mayfield knew that Goldberg claimed an ownership interest. However, no evidence was presented that Mayfield knew that the Cooneys did not have good title or that he agreed to purchase the house so as to defraud the Goldbergs.

Goldberg's own testimony, if believed, established that he told Mayfield that the Cooneys were trustees, but a title search refuted this claim. Thus Mayfield had no reason to believe Goldberg or disbelieve the Cooneys when they stated that the Goldbergs were renters. Accordingly, we conclude that substantial evidence does not support the jury verdict and we vacate the conspiracy award.

Equitable title

On appeal, the Cooneys claim that the district court abused its discretion by finding an equitable mortgage and quieting title in the Goldbergs' name. We disagree.

"A deed absolute on its face may be shown to be a mortgage in equity . . . [T]he form of the transaction will be disregarded and its substance and the intention of the parties at the time will control."[1] No specific words or forms are necessary to create an equitable mortgage.[2] The intention to create a mortgage must be evidenced by a number of objective factors, including:[3]

---

[1]Robinson v. Durston, 83 Nev. 337, 339, 432 P.2d 75, 76 (1967).

[2]Topaz Mutual Co. v. Marsh, 108 Nev. 845, 855, 839 P.2d 606, 612 (1992).

[3]Bidart v. American Title, 103 Nev. 175, 179, 734 P.2d 732, 734 (1987).

> (1) What do the documents say? (2) Who was to pay the taxes on the property? (3) Were documentary stamps affixed to the deed? (4) Was the price disproportionate? (5) Right to repurchase. (6) Absence of common formal procedures employed in real estate sales. (7) Relationship between the parties. (8) Computation of buy back rights. (9) Bonus to be paid in repurchase. (10) Financial embarrassment of the grantor. (11) Continued possession, management, and improvement of the property by the grantor. (12) Non-payment of rent.[4]

The party asserting that it was a loan has the burden to prove it was a loan by cogent, clear and convincing evidence that leaves no doubt upon the mind.[5] We conclude that substantial evidence supports the district court's determination that Goldberg granted an equitable mortgage to Cooney.

However, the Cooneys argue that the Goldbergs are not entitled to an equitable remedy until they have done equity. The Cooneys argue that the Goldbergs failed to do equity since they have not fulfilled their obligation under the note. The Goldbergs claim that the Cooneys are not entitled to equitable relief (payment on the note) due to their wrongful conduct.

As this court has stated, "In seeking equity, a party is required to do equity."[6] Moreover,

---

[4]Robinson, 83 Nev. at 351, 432 P.2d at 83-84.

[5]Id. at 341, 432 P.2d at 77. Also, because the jury found no attorney-client relationship on the property transaction, no other standard applies.

[6]Overhead Door Co. v. Overhead Door Corp., 103 Nev. 126, 127, 734 P.3d 1233, 1235 (1987).

> Any person asking the aid of equity . . . will be compelled to accord, to the other party all equitable rights to which the other is entitled in respect to the subject matter. Relief inconsistent with the equities of the adverse party will be denied, and where the granting of relief raises equitable rights in favor of the defendant, the according of such rights will be imposed as a condition of granting the relief.[7]

In an equitable mortgage action, if the plaintiff owes a balance on the mortgage, the court will not quiet the title until the plaintiff satisfies the mortgage, even if the statute of limitation bars collection.[8]

We conclude that the district court failed to do equity by quieting title in the Goldfield's name. None of these parties come to the table with clean hands. As such, the district court had broad discretion to entertain a spectrum of remedies that would resolve the dispute without rewarding any one party for their disreputable conduct.

The only equitable result that is possible in this case is to require the Goldbergs to repay the $100,000 they borrowed from the Cooneys, plus 10% compounded interest from 1994. Further, title should be quieted in the Mayfields' name.[9] Since the Cooneys only held an

---

[7]Id. at 128, 734 P.3d at 1235 (quoting Jones v. McGonigle, 37 S.W.2d 892, 895 (Mo. 1931)).

[8]Farrell v. West, 114 P.2d 910, 911 (Ariz. 1941); see also Provident Mut. Building-Loan Ass'n, 140 P. 495, 495 (Ariz. 1914); Savage v. Gaut, 57 S.W. 170, (Tenn. Ct. Chancery App. 1900); Paris v. Poss, 56 S.W. 835, 835-36 (Tenn. 1900).

[9]The Mayfields argue on appeal that the district court abused its discretion by summarily dismissing their motion to amend their answer to include a claim for judicial foreclosure. We agree, however in light of our

continued on next page . . .

equitable mortgage when they sold the property to the Mayfields, the Cooneys are obligated to pay the Goldbergs the amount that the Cooneys received from the sale. The amount of the sale, which was $324,000, may be off-set by the amount that the Goldbergs owe the Cooneys under the note. We conclude that, in balancing the interests and fault of the parties, this constitutes the most equitable resolution of the issues that were before the court.

CONCLUSION

We conclude that substantial evidence does not support the finding of a civil conspiracy and vacate that judgment. In light of our decision, the award of costs is also vacated. We further conclude that the district court did not err in finding the existence of an equitable mortgage.

In addition, we conclude that equity demands that title to the property be quieted in the Mayfields' name. The Goldbergs are obligated to repay to the Cooneys the $100,000 note, plus 10% compounded interest since 1994. The Cooneys owe the Goldbergs the difference between the $324,000 sale proceeds and the amount due to satisfy the note.

We remand this case so that the district court may perform the necessary calculations and to enter judgments in accordance with this order. After resolving the calculations, the district court may then determine whether an attorney fee or cost award would be appropriate to any of the parties.[10] Accordingly, we

---

. . . *continued*
decision that equity requires title be quieted in the Mayfield's name we conclude that it is not necessary to remand for trial of this issue.

[10]The parties raised numerous other evidentiary or procedural error issues. We need not address them in light of our resolution.

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

Becker, V.C.J.
Becker

Maupin, J.
Maupin

Douglas, J.
Douglas

cc: Hon. Allan R. Earl, District Judge
Callister & Reynolds
Wm. Patterson Cashill
Law Offices of James J. Ream
Lemons Grundy & Eisenberg
Sheldon F. Goldberg
Jolley Urga Wirth Woodbury & Standish
Clark County Clerk