IN THE SUPREME COURT OF THE STATE OF NEVADA

PETER LAHNER AND BRENDA LAHNER, Appellants, vs. DALE W. DENIO, Respondent.	No. 39769
PETER LAHNER AND BRENDA LAHNER, Appellants, vs. DALE W. DENIO, Respondent.	No. 40438

FILED

MAY 17 2005

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

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING WITH INSTRUCTIONS

These are consolidated appeals from a district court judgment, entered following a bench trial, in a real estate contract dispute, and a subsequent order awarding attorney fees. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge.

FACTS AND PROCEDURAL HISTORY

This action involves the second of two successive options to purchase land located in Incline Village, Nevada. In 1998, the Robert Gary Tarr Trust acquired the first option to purchase the property from its owners, Lowell and Sybil Thomas. The trust paid a total consideration of $125,000 for these rights. The option agreement provided the trust with renewal rights upon a fixed expiration date, July 15, 1999, in exchange for a further payment of $100,000. Unfortunately, Mr. Tarr died while the option was still pending. Following his death, Mr. Tarr's spouse, Suzanne Tarr, in exchange for services rendered, gave the option rights to

appellant, Peter Lahner. Neither Mrs. Tarr nor Lahner memorialized the transfer via written instrument. Although Mrs. Tarr gave the option to Lahner at no cost, he gratuitously assured Mrs. Tarr that he would pay her the $125,000 her husband had invested in the property in the event Lahner was able to exercise the option and sell the property.

On July 8, 1999, respondent Dale Denio and Lahner verbally agreed to form an equal partnership to acquire and possibly market some or all of the option property. Denio owned property adjacent to the optioned parcel. During the initial discussions leading to the verbal agreement, Denio discovered that the trust had not formally transferred the first option rights to Lahner. Lahner assured Denio that title to the property would not be a problem. However, because the original option was set to expire on July 15, 1999, it was essential that either Lahner or Denio, or both, make the renewal payment of $100,000.

Lahner insisted that Denio pay the $100,000. According to Denio, Lahner justified this arrangement on the basis that he had paid $125,000 to Mrs. Tarr for her interest in the option. Lahner denied this at trial, claiming that he owed the $125,000 to Mrs. Tarr, and that Denio's payment would work towards an equalization of their respective obligations arising from the partnership. In any event, Denio attempted to tender the lesser amount of $50,000 to hold the first option open by placing that amount into escrow.

As noted, Lahner and Mrs. Tarr never formalized the assignment of the option to Lahner. Mr. Thomas refused to agree to the assignment and refused Denio's tender of the lesser renewal amount.[1] As a result, the original option expired on July 15, 1999. In subsequent meetings, Lahner threatened Thomas with protracted litigation if he did not honor the original option agreement by accepting the assignment.

Thomas eventually executed a second option agreement, effective Sepember 30, 1999, giving Lahner and Denio the right to purchase the property for $1,650,000. The second option and a subsequent agreement concerning it are the true subjects of the action below. Lahner and Denio agreed to pay $75,000 for the option, subject to rights to renew for up to three years for additional annual payments of $75,000. Denio made the first payment per the new agreement by tendering an additional $25,000, making up the balance left by the first deposit into escrow.

Evidence at trial confirmed that Lahner never paid the $125,000 to Mrs. Tarr for her rights under the first option. Further, Mrs. Tarr testified that Lahner was under no obligation to do so. In short, regardless of whether Lahner falsely represented that he had actually paid $125,000 for the option, it is evident that Lahner misrepresented that such an obligation existed. Certainly, Denio's first $75,000 payment did not reduce the disparity between his contribution and that of Lahner; rather, it widened the gap between contributions.

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[1]Section 23 of the Tarr-Thomas option agreement required Mr. and Mrs. Thomas's approval of any transfer of the Tarr Trust's rights under the agreement so that the Thomases could assess the financial capability and development expertise of the proposed transferee.

Lahner and Denio attempted to formalize the partnership arrangement through attorney Mark Gunderson. During this process Denio first learned from Lahner that he had actually paid nothing to the Tarr Trust, but that it was a future obligation only. Evidence at trial confirmed that this revelation did not affect Denio's desire to proceed with the partnership. In particular, the record indicates that the profits from an eventual sale would, in any event, satisfy any obligation to Mrs. Tarr, that the Tarr option had lapsed and had been superseded by the second option, that any payments to Mrs. Tarr would come from Lahner's share, and that Denio eventually learned that Lahner was actually under no obligation to Mrs. Tarr.

Lahner and Denio were unable to formalize the arrangement for over eleven months. Because the second option payment was due on September 30, 2000, the two again met at Gunderson's office on August 28, 2000. Gunderson was absent for most of the meeting. Lahner proposed that Denio purchase Lahner's interest in the second option, representing that the United States Forest Service was willing to pay $6 million for the optioned parcel, and that escrow could close within six weeks. Denio decided to proceed on the chance that a potential Forest Service sale provided an adequate back-up plan in the event that he was unable to find another purchaser. Accordingly, Denio made the next option payment of $75,000 on September 28, 2000. Although Gunderson testified that he recommended against reliance on the prospect of a Forest Service sale, Denio claimed at trial that he had no recollection of having received this advice.

Thereafter, a series of newspaper articles discussed recent congressional allocations of several million dollars for acquisition and conservation of lands surrounding Lake Tahoe. In late October 2000, Lahner called the local Forest Service office to discuss possible Forest Service acquisition of the optioned parcel. A Forest Service phone record dated November 1, 2000, reflects that Leslie Morefield, a Forest Service staff member, advised Lahner that the Forest Service had declared a moratorium on such acquisitions.

On November 29, 2000, Denio agreed to purchase Lahner's interest in the option for $1 million (the option purchase agreement). The written agreement provided for a down payment of $50,000 to be paid by November 30, 2000, and the remaining $950,000 by February 6, 2001. The agreement gave Lahner the sole power to reinstate the partnership if the conditions in the contract failed to occur. Denio paid the down payment to Lahner.

On January 22, 2001, Denio spoke with Morefield, at which time he learned that the Forest Service was unable to acquire the property. He also learned that, several years before, the Forest Service secured an appraisal valuing the property at $705,000, that the Forest Service lacked the money to acquire land that year, and that the service could not effect a re-appraisal for at least another six months.

Denio confronted Lahner with this information. In response, Lahner stated that Denio should have conducted an independent investigation regarding the viability of a quick sale to the Forest Service. Denio then refused to close escrow, requested that they recreate the partnership, and demanded return of the $50,000 down payment. Lahner

rejected these requests and demanded payment of the remaining $950,000 due under the purchase agreement.

Lahner and his spouse[2] sued Denio for breach of the option purchase agreement, seeking specific performance. In this, they sought an award of $950,000, the unpaid balance of the purchase price. Denio defended the claim on equitable principles, primarily claiming fraud in the inducement. Denio counterclaimed, seeking a declaration that the partnership and option purchase agreements were void, i.e., rescission of the option purchase agreement, return of the deposit moneys, and an additional award of general and punitive damages. In its decision, the district court found that Lahner intentionally misrepresented that he purchased the first option for $125,000, as well as his understanding regarding the viability of a Forest Service sale. It also concluded that Denio justifiably relied upon Lahner's misrepresentations. Accordingly, the district court denied the Lahners' claims for specific performance and breach of the option purchase agreement. Further, the district court awarded Denio $50,000, representing the down payment on the option purchase agreement, on a theory of unjust enrichment, declared the orally-created partnership void and awarded the entire interest in the second option to Denio. The district court also granted Denio's motion for attorney fees based on the Lahners' inability to obtain a judgment more favorable than Denio's pre-trial offer of judgment under NRCP 68 and NRS 17.115.

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[2]Brenda Lahner evidently had a community property interest in the property.

On appeal, Mr. and Mrs. Lahner assert that the district court improperly denied their claim for the remainder of the option purchase price. More particularly, they argue that the district court erred in sustaining Denio's affirmative defense to the agreement based upon fraud, erred in voiding the partnership, erred in transferring to Denio all of the rights in the second option, and erred in awarding Denio attorney's fees under NRCP 68 and NRS 17.115.

DISCUSSION

This court will not set aside a district court's findings of fact unless they are clearly erroneous or unsupported by substantial evidence.[3] As the finder of fact, the district court is entitled to weigh the evidence, determine witness credibility, and act upon such conclusions.[4] We review conclusions of law de novo.[5]

Specific performance

The Lahners argue on appeal that the district court erred in denying them specific performance on the option purchase agreement with Denio. Granting or denying specific performance lies within the sound discretion of the district court.[6] A party is entitled to specific performance when (1) the terms of the contract are certain, (2) the remedy at law is inadequate, (3) the appellant has tendered performance, and (4) the court

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[3]Sandy Valley Assocs. v. Sky Ranch Estates, 117 Nev. 948, 954, 35 P.3d 964, 968 (2001).

[4]Olivero v. Lowe, 116 Nev. 395, 403, 995 P.2d 1023, 1028 (2000).

[5]Keife v. Logan, 119 Nev. 372, 374, 75 P.3d 357, 359 (2003).

[6]Serpa v. Darling, 107 Nev. 299, 304, 810 P.2d 778, 782 (1991).

is willing to order it.[7] Claims of specific performance are claims in equity, subject to certain equitable defenses, including but not limited to laches, inadequacy of consideration, mistake and fraud.[8] Here, the district court made a series of findings to support its decision to deny this form of equitable relief. Most importantly, the district court found that Lahner successfully induced Denio's entry into the option purchase contract by fraud. This finding implicates the doctrine that a person pursuing an equitable remedy will be denied relief if he or she comes to court with "unclean hands."[9] Accordingly, if substantial evidence supports the district court's factual finding of fraud, we must affirm its denial of specific performance.

As noted, the district court found that Lahner made two false representations to Denio: (1) that he paid Mrs. Tarr $125,000 for his interest in the option, and (2) that the Forest Service was willing to pay $6 million in six weeks for the optioned parcel. We conclude that substantial evidence supports the finding that Lahner made these misrepresentations. Regarding the misrepresentation that Lahner had already paid Mrs. Tarr $125,000, Thomas testified that he heard Lahner make this statement during negotiations over the new option agreement. The district court

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[7]Id. at 305, 810 P.2d at 782.

[8]See Lake Caryonah Imp. Ass'n v. Pulte Home Corp., 903 F.2d 505, 509 (7th Cir. 1990) (laches); Matter of the Estate of Kern, 107 Nev. 988, 991, 823 P.2d 275, 277 (1991) (inadequacy of consideration); Bailey v. Musumeci, 591 A.2d 1316, 1319 (N.H. 1991) (mistake); Wilkinson v. Appleton, 190 N.E.2d 727, 730 (Ill. 1963) (fraud).

[9]See, e.g., Income Investors v. Shelton, 101 P.2d 973, 974 (Wash. 1940).

could have attributed significant weight to this testimony, given Thomas' relative disinterest in the outcome of this case. This first finding, however, is irrelevant to the claim for specific performance because it had no bearing on Denio's agreement to purchase Lahner's rights under the second option. In short, Denio ratified the partnership and Lahner's rights under the second option after learning that Lahner had never paid for the option.

Substantial evidence also supports the district court's finding that Lahner represented to Denio that the Forest Service wanted to acquire the optioned parcel, even after Lahner learned otherwise. First, Forest Service phone records and Forest Service representatives confirmed that Lahner learned of the improbability of a quick sale to the Forest Service before he finalized the option purchase agreement with Denio. Second, Mrs. Denio testified that, in late November of 2000, after Lahner's interaction with the Forest Service, Lahner told her that the Forest Service would pay $6 million in six weeks for the optioned parcel. Third, Lahner himself testified to telling Mrs. Denio that she could rely on such a sale. Although Lahner denies ever telling Mr. and Mrs. Denio about a $6 million sale in six weeks to the Forest Service, it was not unreasonable for the district court to find otherwise.

The doctrine of unclean hands prevents a party from obtaining equitable relief regarding a particular transaction in which that party has acted unjustly or in bad faith.[10] Because substantial evidence supports the claim that Lahner induced the arrangement through an intentional misrepresentation, based upon the "unclean hands" doctrine, we conclude

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[10]See id.

that the district court properly rejected the Lahners' claim for specific performance.

The Lahners argue that the partnership and purchase agreements are enforceable because Denio did not prove by clear and convincing evidence that he justifiably relied upon Lahner's representations concerning the Forest Service's interest in the option property.[11]

To establish justifiable reliance, the claimant must demonstrate by clear and convincing evidence that the false representation played a material and substantial part in leading the claimant to adopt a particular course of conduct.[12] If the claimant was unaware of the representation when he acted, or if it is clear he was not in any way influenced by it, his loss is not attributable to the defendant.[13] The principle of justifiable reliance does not impose a duty to investigate

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[11]To establish a claim for intentional misrepresentation, the claimant must prove by clear and convincing evidence each of the following elements: (1) a false representation made by the defendant; (2) defendant's knowledge or belief that the representation is false or without sufficient basis for making the representation; (3) defendant's intention to induce the plaintiff to act or to refrain from acting in reliance upon the misrepresentation; (4) plaintiff's justifiable reliance upon the misrepresentation; and (5) damage to the plaintiff resulting from such reliance. The issue of whether a party has met the elements of intentional misrepresentation is generally a question of fact. Blanchard v. Blanchard, 108 Nev. 908, 910-11, 839 P.2d 1320, 1322 (1992).

[12]Lubbe v. Barba, 91 Nev. 596, 600, 540 P.2d 115, 118 (1975).

[13]Id.

on the defrauded party absent facts that should alert him that his reliance is unreasonable.[14]

We agree that Denio failed to prove that he justifiably relied on Lahner's representations concerning the Forest Service when he signed the option purchase agreement. First, Lahner's initial representation that he had paid $125,000 to Mrs. Tarr turned out to be false. This should have alerted Denio to Lahner's lack of verity in their respective dealings. Second, even without the history between these two men, it was absurd to assume that a government agency would pay over three times the purchase price set by a private party under the option.

Having said this, the equitable principle that a party with unclean hands because of fraud may not obtain equitable relief applies even if all of the elements of the tort of fraud are not present. Here, although the district court erred in finding justifiable reliance, the finding of basic fraud properly brings the unclean hands doctrine into play.[15]

In light of the above, we conclude that the district court properly denied the Lahners' claim for specific performance.[16]

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[14]Collins v. Burns, 103 Nev. 394, 397, 741 P.2d 819, 821 (1987).

[15]See Pacific Maxon, Inc. v. Wilson, 96 Nev. 867, 870, 619 P.2d 816, 818 (1980); see also Income Investors, 101 P.2d at 974.

[16]We recognize that the district court made no findings concerning whether Denio proved his case of fraud by clear and convincing evidence. It is evident from the record that the district court was aware of the burden and was satisfied that it was met.

Breach of contract and the claim for rescission

We note that the Lahners' claim of breach of the option purchase agreement is essentially an attempt to obtain specific performance. Thus, as stated above, Mr. Lahner's misconduct, as found by the district court, bars such relief. Additionally, we conclude that, based upon the misrepresentations, Denio was entitled to rescission of the option purchase agreement and thus, a refund of the down payment of $50,000.

Although justifiable reliance is necessary to obtain damages stemming from an intentional misrepresentation claim, a court need not find justifiable reliance to rescind a contract.[17] It is sufficient that the defrauded party relied in part on the misrepresentation in adopting a particular course of conduct.[18] Even negligence on the part of the party seeking rescission does not bar equitable relief when the misrepresentation was intentional.[19]

Substantial evidence supports the district court's finding that Denio at least relied in part on Lahner's Forest Service misrepresentation in executing the purchase agreement, and such partial reliance justifies its rescission. Denio had yet to secure the permits necessary to develop the optioned parcel, without which the development of the optioned parcel would be substantially more costly and hence, less profitable. Denio relied at least in part on a Forest Service sale in the event that the Tahoe Regional Planning Agency rejected his permit applications. Therefore, the district court did not err in granting Denio relief on his counterclaim and

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[17]Pacific Maxon, 96 Nev. at 869-70, 619 P.2d at 817.

[18]Id. at 869, 619 P.2d at 817.

[19]Id. at 870, 619 P.2d at 817.

ordering Lahner to return the $50,000 down payment made under the option purchase agreement.[20]

Lahners' rights under the second option

The Lahners argue that the district court erred in voiding the partnership and their rights under the second option. We agree, but conclude that the partnership's existence is superfluous to this matter. The issue concerns the parties' respective rights in the option. The district court voided the Lahners' option rights based upon its finding that Lahner misrepresented that he had actually paid $125,000 for the first option. While the fact of this misrepresentation was supported by substantial evidence, the evidence at trial suggests that Denio ratified the partnership and second option arrangement after learning of the misrepresentation. Denio testified as to his dismay that Lahner had not actually paid Mrs. Tarr $125,000, but he remained in the partnership nonetheless, figuring that he would recoup this amount from profits generated from sale of the optioned parcel. These circumstances lead us to conclude that the Lahners should retain their one-half interest in the option, regardless of the status of the partnership.

Attorney fees

Denio offered the Lahners a $150,000 settlement on the day of the initial settlement conference, which they refused. They argue that the district court erroneously awarded Denio attorney fees under NRS 17.115 and NRCP 68. We disagree.

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[20]The Lahners argue that the district court erroneously found that they sought an investor to pay for the option because they lacked sufficient capital to pay for it themselves. We decline to reach this issue because it is immaterial to our analysis of the district court's decision.

This court will not disturb attorney fee awards absent an abuse of discretion.[21] In exercising its discretion under NRCP 68(f), the district court must carefully evaluate the following factors under Beattie v. Thomas:[22] (1) whether the plaintiff's claim was brought in good faith; (2) whether the defendant's offer of judgment was reasonable and in good faith in both its timing and amount; (3) whether the plaintiff's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith; and (4) whether the fees sought by the offeror are reasonable and justified in amount. We conclude that the district court properly evaluated the relevant factors under NRS 17.115(4) and NRCP 68(f) in its award of attorney fees and costs.

CONCLUSION

We conclude that the district court did not abuse its discretion in denying the Lahners' claim for specific performance due to Mr. Lahner's misrepresentations. For similar reasons, we determine that the district court did not err in rescinding the option purchase agreement. However, we conclude that it was error to void the Lahners' interest in the second option. Accordingly, we reverse that portion of the district court's judgment awarding the entire interest in the second option to Denio, affirm the remainder and remand this matter to the district court. On remand, the district court shall give Mr. and Mrs. Lahner thirty days to equalize their contribution to the option, with such contribution to include interest, as determined by the current statutory rate, calculated from the dates that Denio made his various payments towards the option. The

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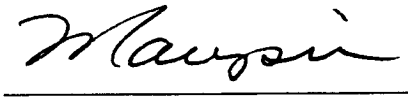
[21]Wynn v. Smith, 117 Nev. 6, 13, 16 P.3d 424, 428 (2001).

[22]99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983).

court shall, after this thirty-day period has passed, reassess the parties' respective interest in the second option.

It is so ORDERED.



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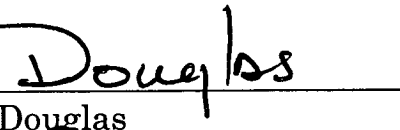

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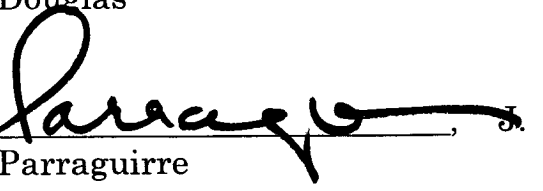

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cc: Hon. Steven R. Kosach, District Judge
Steve E. Wenzel
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