IN THE SUPREME COURT OF THE STATE OF NEVADA

JOAN C. RIVET, AN INDIVIDUAL; AND JAMES F. COLFER AND OLINE COLFER, HUSBAND AND WIFE,
Appellants,
vs.
MONTREUX, A NEVADA JOINT VENTURE; AND SAM JAKSICK, AN INDIVIDUAL,
Respondents.

No. 40526

FILED

DEC 21 2004

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

ORDER OF AFFIRMANCE

Appeal from a final judgment of the district court entered pursuant to a jury trial. Second Judicial District Court, Washoe County; Jerome Polaha, Judge.

Appellants Joan Rivet, James Colfer and Oline Colfer own property adjacent to the Montreux Golf Course in Washoe County, Nevada. Silt was deposited on their properties during construction of the golf course. A flood also deposited significant debris from the golf course onto their properties. The appellants sued Montreux Golf Club Limited (MGCL), Montreux Joint Venture (MJV) and Sam Jaksick, the manager of Montreux.

The original trial date was continued, and appellants hired new counsel, who sought to reopen limited discovery.

The district court denied the request. Prior to trial, the district court also granted summary judgment in favor of the respondents and against the appellants on several of their causes of action, including a claim for an easement by prescription over Montreux's property. While appellants had alleged an easement by grant, necessity or reservation in

their complaint, the motion for summary judgment only addressed appellants' claims of easement by prescription. However, in its order granting summary judgment, the district court determined that appellants could not present evidence of any type of easement.

A jury trial was held on appellants' remaining claims. At the close of appellants' case-in-chief, respondents moved for dismissal of the claims against MJV and Jaksick under NRCP 41(b), arguing that MGCL was the only entity responsible for developing and constructing the golf course. The district court granted the motion. The jury returned a verdict in favor of appellants on their trespass ($17,500) and nuisance ($1) claims. The district court entered final judgment and offset appellants' award by sums they had received in settlement. After offsets, appellants recovered nothing.[1]

Appellants now argue on appeal that the district court erred by excluding all evidence of an easement, dismissing the claims against MJV and Jaksick, excluding appellants' negligent design claim, denying injunctive relief to appellants and refusing to reopen limited discovery prior to trial. We disagree, and therefore, affirm the district court's judgment.

Easement claims

Appellants argue that the district court erred by granting the respondents' motion for summary judgment as to appellants' entire easement claim. According to appellants, the order in limine excluding all evidence regarding a claim of easement was improper since it was premised upon the court's order granting summary judgment to

[1]Appellants settled with the entity that designed the golf course.

respondents, and this order was based on a motion that only sought summary judgment on appellants' claim of easement by prescription.

This court conducts a de novo review of a summary judgment order.[2] A district court should grant a motion for summary judgment only when, after viewing the record "in [the] light most favorable to the nonmoving party," and making all reasonable inferences in the nonmovant's favor, no genuine issues of material fact remain and the moving party is entitled to judgment as a matter of law.[3]

In their first amended complaint, appellants asserted claims for easement by necessity, reservation, prescription and grant. During pretrial proceedings, respondents moved for summary judgment, addressing only the claim of easement by prescription. Neither party raised any other easement claims in the summary judgment context. The district court, however, granted the summary judgment motion as to all of appellants' easement claims, whether by prescription, grant, reservation or necessity.

While the district court's order may have granted broader relief than was sought in the summary judgment motion, appellants nevertheless waived their remaining easement claims. At the motion in limine hearing the day before trial, appellants did not raise the remaining easement claims in response to the district court's query as to remaining causes of action. Hence, the record reveals that appellants' counsel

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[2]Yeager v. Harrah's Club, Inc., 111 Nev. 830, 833, 897 P.2d 1093, 1094 (1995).

[3]Barmettler v. Reno Air, Inc., 114 Nev. 441, 444-45, 956 P.2d 1382, 1385 (1998).

conceded that appellants were no longer pursuing an easement claim and, therefore, waived any argument that they had an easement by grant, necessity or by implication. Because they failed to bring this issue to the district court's attention, we need not consider it.[4]

Negligent design and construction claims

Appellants settled with Golden Bear International, Inc., with whom MGCL contracted to design the golf course, agreeing to release Golden Bear and its affiliates from any claims for design or design-related work on the golf course. Just before trial, MGCL brought a motion in limine, based upon the release, to exclude the admission of evidence showing negligent planning and design. MJV and Jaksick joined in the motion. Because appellants' counsel requested time to review the motion, the district court delayed the hearing on this issue for three days until the first day of trial. The district court ruled that, based upon the release, evidence of negligent design was not admissible.

Appellants argue that the district court erred as a matter of law in ruling that the release applied to MJV because, if the parties had intended to release MJV as a joint tortfeasor, they were required under NRS 17.245(1)[5] to explicitly name MJV in the release. We reject this argument.

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[4]See State of Washington v. Bagley, 114 Nev. 788, 792, 963 P.2d 498, 501 (1998) (providing that parties cannot raise issues for the first time on appeal); see also Gibbons v. Martin, 91 Nev. 269, 270, 534 P.2d 915, 915 (1975) ("Points not urged in the trial court will not be entertained for the first time on appeal.").

[5]NRS 17.245(1) provides, in pertinent part:

continued on next page . . .

First, the language of the release is so broad that it reasonably could encompass MGCL, MJV and Jaksick. Both MGCL and MJV could be Golden Bear "affiliates," or "firms" or "corporations" connected with Golden Bear. Jaksick is a "person" connected with Golden Bear, and all of these parties expressly are released from liability under the signed agreement. Hence, the district court properly excluded evidence regarding negligent design. Second, appellants conceded that the language was broad enough to encompass MGCL, MJV and Jaksick and that appellants could not pursue a negligent design action against them. When appellants asserted that the release did not preclude a negligent construction claim, the district court agreed.

Appellants now claim that the district court's ruling effectively precluded them from introducing evidence as to negligent construction. However, appellants offer no explanation or argument, and therefore, their allegation of error must now fail.

. . . *continued*

> 1. When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:
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> (a) It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and
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> (b) It discharges the tortfeasor to whom it is given from all liability for contribution and for equitable indemnity to any other tortfeasor.

Dismissal of the claims against MJV and Jaksick

Appellants argue that the district court erred when it granted respondents' motion for dismissal pursuant to NRCP 41(b) as to MJV and Jaksick. Specifically, appellants argue that MJV had participated in the negligent construction of the golf course and that Jaksick should be liable for the construction because he was the alter ego of MGCL or MJV.

When considering a motion to dismiss under NRCP 41(b), the trial court "must accept the plaintiff's evidence as true and draw all permissible inferences in the plaintiff's favor, and may not assess the credibility of witnesses or the weight of the evidence."[6] A plaintiff's evidence must be sufficient to establish a prima facie case against the defendant.[7] On appeal, we apply a heightened standard of review: a claim should not be dismissed unless it appears to a certainty that the plaintiff is not entitled to relief under any set of facts.[8]

In furtherance of the golf course construction, Jaksick procured a permit, in MJV's name, from the U.S. Army Corps of Engineers for a diversion of Galena Creek. The permit was transferred to MGCL. MGCL conceded that it had an ownership interest in the golf course and, therefore, was the proper party against which the actions should proceed. Appellants failed to set forth sufficient allegations to show a prima facie case that MJV had participated in the negligent construction of the golf

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[6]Maduike v. Agency Rent-A-Car, 114 Nev. 1, 4, 953 P.2d 24, 25 (1998).

[7]Barelli v. Barelli, 113 Nev. 873, 880, 944 P.2d 246, 250 (1997).

[8]J.A. Jones Constr. v. Lehrer McGovern Bovis, 120 Nev. ___, ___, 89 P.3d 1009, 1018 (2004).

course, trespassed or caused a nuisance. Therefore, the district court properly dismissed the claims with respect to MJV.

Appellants next contend that the district court improperly dismissed the claims against Jaksick because Jaksick's testimony indicated that all the entities were really one entity under Jaksick's control. We "will uphold a district court's determination with regard to the alter ego doctrine if substantial evidence exists to support the decision," unless it is clear that the district court reached the wrong conclusion.[9] To pierce the corporate veil, the district court must find, by a preponderance of the evidence, that the person asserted to be the alter ego influences and governs the corporation, that there is unity of interest and ownership, and that "'adherence to the corporate fiction of a separate entity would, under the circumstances, sanction [a] fraud or promote injustice.'"[10] Factors to consider in determining whether an alter ego relationship exists include: "(1) commingling of funds; (2) undercapitalization; (3) unauthorized diversion of funds; (4) treatment of corporate assets as the individual's own; and (5) failure to observe corporate formalities."[11]

Jaksick admitted that he was the manager of MGCL, and that Landmark Golf Course owned seventy-five percent of MGCL. Yet, the record reflects no testimony that the entities commingled funds or were

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[9]LFC Mktg. Group, Inc. v. Loomis, 116 Nev. 896, 904, 8 P.3d 841, 846 (2000).

[10]Id. at 904, 8 P.3d at 846-47 (alteration in the original) (quoting Polaris Industrial Corp. v. Kaplan, 103 Nev. 598, 601, 747 P.2d 884, 886 (1987)).

[11]Id. at 904, 8 P.3d at 847.

undercapitalized, that they engaged in unauthorized diversions of funds, that Jaksick treated corporate assets as his own, or that he failed to follow corporate formalities. Hence, appellants failed to prove a prima facie case that Jaksick was the alter ego of either MGCL or MJV and, therefore, the district court properly dismissed the claims against him as an individual.

Injunctive relief

Appellants argue that the district court abused its discretion when it denied injunctive relief. According to appellants, while respondents knew that part of their golf course lay upon a flood plain and that they needed to provide adequate drainage, they installed an inadequate culvert. This inadequate culvert, appellants allege, caused a significant amount of silt and debris to be deposited on appellants' land even before the 1997 flood and that, during the flood, the culvert backed up and overran the channel, spreading debris across appellants' land. Appellants contend that the U.S. Army Corps of Engineers required respondents to clean appellants' land as a condition of their permit and that the district court abused its discretion by refusing to grant injunctive relief to appellants and order respondents to comply with the terms of the permit.

We review the grant or denial of an injunction for an abuse of discretion.[12] While appellants' complaint sought injunctive relief to enforce certain permits, to enjoin some construction and to prevent particular deals between the developers and the county, it did not seek injunctive relief requiring respondents to remove the flood debris from

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[12]Ferris v. City of Las Vegas, 96 Nev. 912, 915, 620 P.2d 864, 866 (1980).

appellants' property. Furthermore, both Rivet and James Colfer testified that they would not give Montreux permission to enter Rivet's land or their parents' land to remove the debris unless Montreux first provided them with a clean-up plan. Given that appellants would not grant permission for respondents to enter their lands and remove the debris, we conclude that the district court did not abuse its discretion by denying the injunction.

Refusal to reopen discovery

Appellants argue that the district court abused its discretion by closing discovery in November 2000, in spite of the fact that trial did not commence until February 2002, because NRCP 26(i) does not require discovery to be completed until forty-five days prior to trial. Appellants characterize the ruling as a discovery sanction for the request to continue the trial by appellants' then-counsel due to his illness. Appellants contend that the discovery ruling was a prejudicial abuse of discretion because further discovery would have enabled their new counsel to better prepare a complex case involving nearly two weeks of trial.

We review the district court's denial of the motion to reopen discovery for an abuse of discretion.[13] The record reveals that trial was scheduled for November 2000, but was continued based upon appellants' counsel's illness. The court granted the continuance motion; however, it ordered that discovery remain closed as it had been prior to the November trial date. Appellants alleged that their previous attorney had conducted no discovery, and that their new counsel needed to reopen discovery in

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[13]Jones v. Bank of Nevada, 91 Nev. 368, 370, 535 P.2d 1279, 1280 (1975); see also NRCP 26(i).

order to prepare adequately for trial. Respondents opposed the motion, arguing that appellants' choice to switch attorneys did not give them the right to reopen discovery. As noted in its order, the district court denied the motion to reopen discovery because "[p]laintiffs' counsel agreed that, given the impending trial date, reopening discovery was no longer practical." No transcript of the status conference at which appellants' counsel allegedly conceded that reopening discovery was impractical exists. However, given that the district court's order specifically states that appellants' counsel conceded this point, we conclude that the district court's discovery order does not evince an abuse of discretion. Furthermore, appellants failed to establish that their inability to depose the eleven witnesses prejudiced their substantial rights.[14]

Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Becker, J.
Becker

Agosti, J.
Agosti

Gibbons, J.
Gibbons

cc: Hon. Jerome Polaha, District Judge
Edward S. Coleman
Thorndal Armstrong Delk Balkenbush & Eisinger/Reno
Washoe County District Court Clerk

[14]NRCP 61.