IN THE SUPREME COURT OF THE STATE OF NEVADA

ONECAP, A NEVADA CORPORATION; COPYRIGHT MEDIA CORPORATION OF NEVADA, A NEVADA CORPORATION; 5440 W. SAHARA, LLC, A NEVADA LIMITED LIABILITY COMPANY; AND AHLERS FAMILY TRUST,
Appellants,
vs.
AL-PAR, LTD., A NEVADA LIMITED LIABILITY COMPANY,
Respondent.

No. 41413

FILED

FEB 14 2005

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

ORDER OF AFFIRMANCE

This is an appeal from a district court order granting of a preliminary injunction enjoining OneCap from "[u]sing, handling, accessing, advertising on, physically touching or meddling with a certain reader board sign, its electrical/mechanical components, its power sources, peripheral equipment and secured housings . . . located at the top of the pylon sign of Sahara Vista Professional Center." Eighth Judicial District Court, Clark County; Jessie Elizabeth Walsh, Judge.

The underlying controversy results from a dispute over ownership of an electronic reader board (ERB) located on a pylon sign erected on parcel one of the Sahara Vista complex in Las Vegas, Nevada. Respondent Al-Par owns parcel five of the Sahara Vista complex. After purchasing the parcel of real property in Sahara Vista, Al-Par purchased the ERB from Saxton, Inc. in 2001. Appellant OneCap owns the parcel one property, upon which the pylon sign is erected and the ERB is attached. A dispute arose between OneCap and Al-Par as to the

ownership of the ERB. Al-Par instituted an action in the district court and filed a motion for temporary restraining order or preliminary injunction. The district court issued a nunc pro tunc order of preliminary injunction, restraining OneCap from meddling with the ERB or any of its components.

On appeal, OneCap contends that the district court abused its discretion in granting a preliminary injunction because: (1) Al-Par cannot show a probability of success on the merits that the ERB is personal property, (2) if the ERB is determined to be personal property, no valid easement exists for Al-Par to enter onto OneCap's property where the ERB is located, and (3) OneCap is a bona fide purchaser for value of the property and did not have notice of Al-Par's interest in the ERB. We disagree and affirm the order granting a preliminary injunction.

FACTS

Jim Saxton, Inc. developed and constructed the Sahara Vista complex in 1991, consisting of separate parcels of land within the complex with freestanding office buildings constructed thereon. Either while construction was in progress, or immediately thereafter, certain covenants, conditions, restrictions, and cross easements (CC&Rs) were recorded against the property by Saxton. These CC&Rs contained language creating a sign easement providing ingress and egress upon the surface of parcel one to Sahara Vista property owners or their tenants for the purpose of repair, maintenance, and replacement of the ERB and pylon sign. The sign easement also specifically provided the owners of parcel four, at that time Americana Realtors, the right to install and maintain an ERB located on the sign easement. This easement was to be perpetual and was to run with the land. Jim Saxton, Inc. was then

merged into the successor entity, Saxton, Inc. Following the Jim Saxton, Inc./Saxton, Inc. merger, the CC&Rs were amended.

The amended CC&Rs reaffirmed the easement granted in favor of the Sahara Vista parcel owners or their tenants against parcel one. In particular, the easement provides access to the pylon sign and ERB located on parcel one. A dispute exists with regard to the location of the pylon sign as described in the CC&Rs; however, there is no dispute that the pylon sign in question actually exists on parcel one

After Al-Par purchased parcel five, Al-Par noticed the ERB and inquired about its functionality. Americana installed the sign, but left the sign when it vacated Sahara Vista in 1997. When Americana left the complex, the control of the sign vested with Saxton. Upon learning that Saxton, Inc. owned the ERB, Al-Par made an offer to purchase the ERB from Saxton, Inc. along with all of the rights to the ERB. Saxton, Inc. indicated that it was willing to sell the ERB "as is" as opposed to leasing it to Al-Par.

Saxton, Inc. sold the ERB to Al-Par in 2001. Saxton, Inc. maintained that it had all rights to the sign, and that there were no third-party interests. The sign was sold from Saxton, Inc. to Al-Par in November of 2001 for the sum of $5,000.

Herman Ahlers purchased parcel one from Saxton, Inc. in 2002. This purchase was consummated after the United States Bankruptcy Judge granted approval for the purchase, for the parcel was part of Saxton, Inc.'s bankruptcy estate. The deed on the property was recorded under the name of OneCap Properties' nominee, Herman Ahlers.

The ERB went "dark" in 1999, when it was last serviced before the sale to Al-Par. The sign remained dark from December 1999 to

January 2002 when, through the efforts of Al-Par, it once again became operational. Al-Par spent more than $7,600 in maintenance, upkeep, and repair to make the sign operational.

OneCap inquired as to whether or not Al-Par would be willing to sell its interest in the sign. Al-Par was unwilling to sell its interest in the ERB, but was potentially open to an agreement whereby it would lease advertising space on the ERB. In November 2002, the power to the ERB was cut off, and the ERB control panel was padlocked shut.[1] Al-Par then cut the lock placed on the control panel, and placed its own lock on the panel. Al-Par then had the power to the sign billed directly to Al-Par's building. In late December 2002, OneCap cut the padlock Al-Par installed and removed the sign's hardware/software, which caused the sign to go dark once again. OneCap then re-keyed the locks that permitted access to the sign equipment. OneCap would not furnish keys to Al-Par. In early January 2003, Al-Par pried the lock off the door to the control panel, and removed the hardware/software components OneCap had inserted. Al-Par then learned that power had been reinstated in the name of 5440 W. Sahara LLC.[2] OneCap again forced entry into the sign compartment and reinstalled its own hardware/software. When this case was originally filed, the ERB displayed advertisements only for OneCap and its affiliates.

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[1]It is unclear from the record who initially padlocked the panel shut.

[2]5440 W. Sahara LLC. is an affiliated organization with OneCap, created in order to purchase parcel one.

DISCUSSION

Standard of Review

For a preliminary injunction to issue, a party must show that there is a likelihood of success on the merits, the non-moving party's conduct, if continued, would cause irreparable harm, and compensatory damages would not provide a sufficient remedy.[3] Injunctive relief is extraordinary relief and must be set forth in specific terms by the order or be sufficiently apparent elsewhere in the record.[4] This court will review a decision to grant a preliminary injunction for an abuse of discretion.[5]

Al-Par can show a substantial likelihood of success on the merits

OneCap contends that the ERB is real property. Conversely, Al-Par can show a substantial likelihood of success on the merits that the ERB is personal property. The ERB is a chattel that only becomes a part of the real property if it is a fixture.

In Fondren v. K/L Complex, Ltd.,[6] we adopted a three-part test to determine if an item is to be classified as real property or personal property. The three-part test requires a showing of annexation, adaptation and intent to classify an item as a fixture opposed to a trade

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[3] Dangberg Holdings v. Douglas Co., 115 Nev. 129, 142, 978 P.2d 311, 319 (1999); Pickett v. Comanche Construction, Inc., 108 Nev. 422, 426, 836 P.2d 42, 44 (1992).

[4] Dangberg, 115 Nev. at 144, 978 P.2d at 320.

[5] S.O.C., Inc. v. The Mirage Casino-Hotel, 117 Nev. 403, 407, 23 P.3d 243, 246 (2001).

[6] Fondren v. K/L Complex, Ltd., 106 Nev. 705, 710, 800 P.2d 719, 722 (1990).

fixture.[7] Fixtures become subject to taxation or the attachment of liens as realty, while trade fixtures maintain their personal property characteristics.[8]

The annexation requirement is met where the item is "actually or constructively joined to the real property."[9] A fixture will be considered a trade fixture when it is placed upon the real property of the landlord with the landlord's consent.[10] Here, the sign was installed by Americana, yet that installation was approved by Saxton, Inc. Americana had a right written into the CC&Rs allowing it access to and use of the pylon sign where the ERB is located. The pylon sign is located on the parcel of property now owned by OneCap. However, the trier of fact must determine additional facts in order to establish whether the ERB was "annexed" to the real property, as required by the Fondren test.

The adaptation test requires that the property "is adapted to the use to which the real property is devoted."[11] When an object that is capable of being removed from the realty consists of a functioning part of, or is an accessory to, that piece of realty, it may be considered a fixture.[12] The district court in this instance did not address this factor of the

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[7]Id.

[8]Id.; Goldie v. Bauchet Properties, 540 P.2d 1, 8 (Cal. 1975).

[9]Fondren, 106 Nev. at 710, 800 P.2d at 722.

[10]Young Elec. Sign Co. v. Erwin Elec. Co., 86 Nev. 822, 826, 477 P.2d 864, 867 (1970).

[11]Fondren, 106 Nev. at 710, 800 P.2d at 722.

[12]35A Am. Jur. 2d Fixtures § 63 (West 2001).

Fondren test. A dispute exists as to whether the ERB is capable of being removed from the pylon sign without causing significant damage. Such a dispute requires a finding by the trier of fact.

The most significant factor in determining whether the item is classified as realty or personal property lies in the intent of the parties at the time the item was installed.[13] Where, as here, it is unclear what the parties intended after the termination of the relationship, the three-part test has not been met to make the chattel a part of the real property.[14]

The record indicates only that Saxton, Inc. allowed Americana to install the ERB and Saxton, Inc. sold the ERB separately to Al-Par. Therefore, the intent of the parties to treat the ERB as a fixture is unclear in the record.

An express sign easement was granted against parcel one existing in perpetuity

OneCap contends that if the property is considered personal property, no easement exists permitting Al-Par access to the pylon sign, and therefore the ERB. The easement to the pylon sign was expressly created by the CC&Rs, and OneCap knew, or should have known of its existence. Therefore, an easement exists in favor of Al-Par to access the pylon sign.

The extent of an easement is determined by the document that creates the easement, and is limited by that document.[15] When a person

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[13]Fondren, 106 Nev. at 710, 800 P.2d at 722.

[14]Id. at 711, 800 P.2d at 723.

[15]S.O.C., 117 Nev. at 408, 23 P.3d at 246-47.

takes property with notice of the restrictions placed on the land, acts that are in violation of those restrictions are not permitted.[16]

The original and amended CC&Rs created an easement with regard to the pylon sign. This easement was declared to touch and concern the land, as well as run with the land in perpetuity. OneCap claims that the easement no longer exists because the current sign is different from the one originally created, and the CC&Rs were never changed. However, typically some non-compliance with the CC&Rs will not invalidate the CC&Rs.[17] Thus, as long as the original purpose of the covenants can still be accomplished, the covenants will stand for their original purpose.[18]

The CC&Rs grant an easement in favor of all owners and tenants of Sahara Vista to advertise and use the pylon sign in front of the complex. The original CC&Rs, the ones in effect with regard to Al-Par, contain a perpetuity clause referring to all easements granted in the CC&Rs, including the sign easement. Therefore, a sign easement is in existence in favor of Al-Par and burdening OneCap.

OneCap is not a bona fide purchaser for value entitled to protection under the recording statute

OneCap contends that it is a bona fide purchaser for value without notice of a prior interest in the ERB. Therefore, OneCap argues that having properly recorded its deed to the property, it should be

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[16]Gladstone v. Gregory, 95 Nev. 474, 480, 596 P.2d 491, 498 (1978).

[17]Gladstone, 95 Nev. at 479, 596 P.2d at 494.

[18]Zupancic v. Sierra Vista Recreation, 97 Nev. 187, 194, 625 P.2d 1177, 1181 (1981).

protected by Nevada's recording statute and should be entitled to the ERB.

Nevada is a race notice state, which requires that an interest in property be recorded and noticed.[19] The doctrine of bona fide purchaser for value "protects a subsequent purchaser's title against competing legal or equitable claims of which the purchaser had no notice at the time of the conveyance."[20] When a party takes property with actual or constructive notice of a prior claim, it is not a purchaser in good faith entitled to the protection of the recording act.[21] Typically, a purchaser has a duty of inquiry "'when the circumstance are such that a purchaser is in possession of facts which would lead a reasonable man in his position to make an investigation that would advise him of the existence of prior unrecorded rights.'"[22]

At a minimum, there exist further questions of fact with regard to whether the ERB was apparent to OneCap when it acquired parcel one and the specific agency relationship between Herman Ahlers and OneCap.

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[19]Buhecker v. R.B. Petersen & Sons, 112 Nev. 1498, 1500, 929 P.2d 937, 939 (1996); see also NRS 111.320; NRS 111.325.

[20]25 Corporation, Inc. v. Eisenman Chemical, 101 Nev. 664, 675, 709 P.2d 164, 172 (1985).

[21]Huntington v. MILA, Inc., 119 Nev. 355, 357, 75 P.3d 354, 356 (2003).

[22]Allison Steel Mfg. Co. v. Bentonite, Inc., 86 Nev. 494, 498, 471 P.2d 666, 668 (1970) (quoting 4 R. G. Patton, American Law of Property, § 17.11 at 565-66 (Little, Brown & Co. 1952)).

The contract for sale of parcel one to OneCap referenced the pylon sign within the boundaries of parcel one. The CC&Rs executed prior to the sale of parcel one gave a right-of-sign access to other tenants of Sahara Vista, and granted exclusive rights to Americana for the ERB. At a minimum, OneCap was on notice that the pylon sign existed, and that other parties within Sahara Vista had rights in that sign.

We conclude that the district court did not abuse its discretion in issuing a preliminary injunction. Therefore, we affirm the order of the district court. Based on the unresolved questions of fact, the district court is directed to conduct an expedited trial of this matter, according the case preferential status.

It is so ORDERED.

_____, J.
Rose

_____, J.
Gibbons

_____, J.
Hardesty

cc: Hon. Jessie Elizabeth Walsh, District Judge
Harold P. Gewerter
Richard L. Tobler
Clark County Clerk