IN THE SUPREME COURT OF THE STATE OF NEVADA

AFCO CREDIT CORPORATION,
Appellant,
vs.
OLD WEST ENTERPRISES, D/B/A ALIAS SMITH AND JONES RESTAURANT,
Respondent.

No. 42554

FILED

MAR 23 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

Appeal from a district court judgment, entered on a jury verdict, and an order denying a new trial motion in a breach of contract action. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge. Appellant AFCO Credit Corporation entered into a written loan agreement to finance the insurance premiums for respondent Old West Enterprises, d/b/a Alias Smith and Jones Restaurant (Old West). After Old West failed to make a timely payment, AFCO represented to Old West that it would refrain from canceling the policy if it received payment by a certain date. Although AFCO received Old West's payment by the due date, it did not withdraw its cancellation of the insurance policy. A jury found AFCO liable for the breach of oral contract and awarded damages.

We conclude that (1) AFCO was not entitled to a new trial because substantial evidence supports the jury finding that AFCO entered into and breached an oral contract with Old West, (2) no special relationship existed between AFCO and Old West to give rise to a claim for the tortious breach of the covenant of good faith and fair dealing, and (3) the district court erred in entering an excessive award of damages.

06-06156

The district court did not abuse its discretion by denying AFCO's motion for a new trial

We conclude that AFCO was not entitled to a new trial.[1] The jury found that AFCO entered into, and subsequently breached, an oral contract with Old West. We have held that a jury's verdict will be upheld on appeal if it is based upon substantial evidence in the record.[2] "Substantial evidence has been defined as that which 'a reasonable mind might accept as adequate to support a conclusion.'"[3] Old West presented substantial evidence at trial of an express oral contract in which AFCO promised to refrain from canceling the Northland policy if it received Old West's payment by October 29. To summarize, Old West presented evidence that (1) AFCO did not initially inform Old West that it intended to prorate the premium credit over the life of the finance agreement; (2) on October 25, AFCO promised to refrain from cancelling the Northland policy if it received Old West's payment by October 29; and (3) Old West relied on this promise and provided AFCO with payment by the latter date. Therefore, AFCO was not entitled to a new trial, and we affirm the

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[1]"'The decision to grant or deny a motion for a new trial rests within the sound discretion of the trial court and will not be disturbed on appeal absent palpable abuse.'" Allum v. Valley Bank of Nevada, 114 Nev. 1313, 1316, 970 P.2d 1062, 1064 (1998) (quoting Pappas v. State, Dep't Transp., 104 Nev. 572, 574, 763 P.2d 348, 349 (1988)). A new trial may be granted when "'the jury, as a matter of law, could not have reached the conclusion that it reached.'" Carlson v. Locatelli, 109 Nev. 257, 260-61, 849 P.2d 313, 315 (1993) (quoting Brascia v. Johnson, 105 Nev. 592, 594, 781 P.2d 765, 767 (1989)).

[2]Taylor v. Thunder, 116 Nev. 968, 974, 13 P.3d 43, 46 (2000).

[3]State, Emp. Security v. Hilton Hotels, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986) (quoting Richardson v. Perales, 402 U.S. 389, 401 (1971)).

district court's judgment as to AFCO's liability based upon breach of an oral contract.[4]

The district court erred in instructing the jury on the tortious breach of the covenant of good faith and fair dealing

We conclude that there is no special relationship between a premium finance company and its debtor to give rise to a claim for tort damages. Although every contract contains an implied covenant of good faith and fair dealing, an action in tort for breach of the covenant arises only "in rare and exceptional cases" where there is a special relationship between the victim and tortfeasor.[5] A special relationship is "characterized by elements of public interest, adhesion, and fiduciary responsibility."[6] Examples of special relationships include those between insurers and insureds, partners of partnerships, and franchisees and franchisers.[7] Each of these relationships shares "a special element of

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[4]For the same reasons, the district court properly denied AFCO's pretrial motion for summary judgment. Summary judgment is proper only if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. NRCP 56(c); see Wood v. Safeway, Inc., 121 Nev. ____, ____, 121 P.3d 1026, 1029 (2005).

[5]K Mart Corp. v. Ponsock, 103 Nev. 39, 49, 732 P.2d 1364, 1370 (1987).

[6]Great American Ins. v. General Builders, 113 Nev. 346, 355, 934 P.2d 257, 263 (1997).

[7]See Alue vich v. Harrah's, 99 Nev. 215, 217, 660 P.2d 986, 987 (1983) (observing that there is "a cause of action in tort for the breach of an implied covenant of good faith and fair dealing where an insurer fails to deal fairly and in good faith with its insured by refusing, without proper cause, to compensate its insured for a loss covered by the policy").

reliance" common to partnership, insurance, and franchise agreements.[8] We have recognized that in these situations involving an element of reliance, there is a need to "protect the weak from the insults of the stronger" that is not adequately met by ordinary contract damages.[9] Thus, we extend the tort remedy to situations in which one party holds "vastly superior bargaining power."[10]

Generally, relationships between creditors and debtors are not special relationships.[11] Where two experienced commercial entities are represented in a transaction by professional and experienced agents and are not in inherently unequal bargaining positions, there is no special relationship to support tort liability.[12]

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[8]Id.

[9]Ponsock, 103 Nev. at 49, 732 P.2d at 1371.

[10]Aluevich, 99 Nev. at 217, 660 P.2d at 987.

[11]Wolf v. Superior Court, 130 Cal. Rptr. 2d 860, 864-65 (Ct. App. 2003) (reasoning that the implied covenant of good faith and fair dealing that arises out of every contract does not, by itself, create a fiduciary relationship); Bird v. Lewis & Clark College, 303 F.3d 1015, 1023 (9th Cir. 2002) (stating that "[u]nder Oregon law, no fiduciary duties are implied unless the parties are in a 'special relationship'"); Downey v. Humphreys, 227 P.2d 484, 490 (Cal. Dist. Ct. App. 1951) (reasoning that "[a] debt is not a trust and there is not a fiduciary relation between debtor and creditor as such").

[12]See Aluevich, 99 Nev. at 218, 660 P.2d at 987 (declining to extend the tort remedy for the breach of the implied covenant of good faith and fair dealing to a lessor-lessee relationship, where the lessee was an experienced businessperson and attorney); see also Great American Ins., 113 Nev. at 355, 934 P.2d at 263 (concluding that the district court erred in finding tortious conduct and allowing an award of punitive damages

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The facts of this case do not raise the same public policy concerns involved when an insurance company fails to compensate an insured for losses covered in the policy. AFCO does not hold a vastly superior bargaining position over Old West, and Old West does not specially rely on AFCO for insurance policy coverage. AFCO's role was straightforward: it was not responsible for providing insurance, but rather for financing a premium upon request. Further, AFCO strictly complied with the statute outlining the requirements premium finance companies must follow when retaining a limited power of attorney to cancel a policy.[13] AFCO cannot be held liable for the tortious breach of the covenant of good faith and fair dealing given its limited business purpose of financing insurance premiums. Accordingly, the district court erred in instructing the jury that a special relationship existed between AFCO and Old West.

The district court erred in awarding Old West excessive damages

Despite the absence of a special relationship, we affirm AFCO's liability for its breach of the oral contract and remand for determination of damages based solely on a breach of contract theory. "In case of breach of contract, the injured party can only recover damages, and he cannot be damaged in a greater sum than he would have received had there been no breach."[14] The goal of consequential damages is to "'place

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where a surety company failed to provide bonds as promised to the plaintiff building contractor).

[13]NRS 686A.460.

[14]Hennen v. Streeter Et Al., 55 Nev. 285, 292, 31 P.2d 160, 163 (1934).

the nonbreaching party in as good a position as if the contract were performed.'"[15]

Here, the damages award exceeded the amount Old West would have received had AFCO performed the contract by properly reinstating the insurance coverage.[16] The insurance policy in place before the cancellation provided for coverage of $500,000 for property loss, $264,000 for business income loss, $25,000 for food spoilage, and $25,000 for off premises utility losses. This coverage was not in place at the time of the fire because AFCO cancelled Old West's policy despite receiving payment as requested. Old West was entitled to receive the benefit of its bargain, i.e., the coverage it would have received had AFCO properly refrained from canceling the insurance policy as promised under the oral contract. Pursuant to the breach of contract instructions given, the jury's award of damages should have been based on the missing insurance coverage rather than business value and lost profits. Because the jury award exceeded the limits of the insurance policy coverage, we reverse the damages award and remand to the district court for entry of judgment in favor of Old West in the amount of the missing insurance coverage plus prejudgment interest added pursuant to NRS 17.130.[17] Thereafter, this

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[15]Eaton v. J. H. Inc., 94 Nev. 446, 450, 581 P.2d 14, 16-17 (1978) (quoting Lagrange Constr., Inc. v. Kent Corp., 88 Nev. 271, 275, 496 P.2d 766, 768 (1972)).

[16]Counsel for Old West stipulated to the jury instructions on contract damages and did not offer corresponding instructions on tort damages for the breach of the covenant of good faith and fair dealing.

[17]NRS 17.130(1) provides for interest to be granted on "all judgments and decrees, rendered by any court of justice, for any debt, damages or costs." A district court judgment includes both damages and

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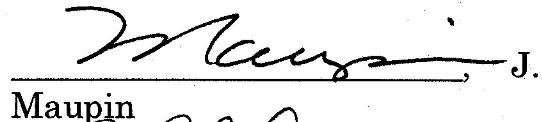
amount shall be reduced by offsets for the settlements with AFCO's codefendants. Accordingly, we

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



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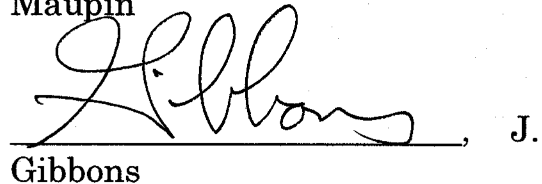

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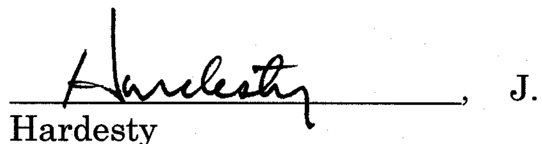

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Hardesty

cc: Hon. Michelle Leavitt, District Judge
Jones Vargas/Las Vegas
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Clark County Clerk

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costs and pre-judgment interest is available for costs incurred by the prevailing party. Bobby Berosini, Ltd. v. PETA, 114 Nev. 1348, 1355, 971 P.2d 383, 387-88 (1998); Gibellini v. Klindt, 110 Nev. 1201, 1209, 885 P.2d 540, 545 (1994). Post-judgment interest is available to compensate the prevailing party "for loss of the use of the money awarded in the judgment" without regard to the various elements that make up the judgment. Powers v. United Servs. Auto Ass'n, 114 Nev. 690, 705, 962 P.2d 596, 605 (1998).