

SUPREME COURT OF NEVADA

Zhang v. Eighth Judicial District Court of State of Nevada

120 Nev. 1037 (2004) · Decided December 29, 2004

SUMMARY

The Nevada Supreme Court considered whether a real property purchase agreement made after the seller repudiated an earlier agreement for a lower price was enforceable. The court held that the later agreement was unsupported by consideration under the preexisting duty rule and did not effect a novation. It issued a writ of mandamus directing the district court to reinstate the complaint and vacate the order expunging the notice of lis pendens.

CASE DETAILS

COURT	Supreme Court of Nevada
WRITING FOR THE COURT	Per Curiam; Douglas; Maupin; Rose
JURISDICTION	Nevada
DECIDED	December 29, 2004
DISPOSITION	writ_granted
PROCEDURAL POSTURE	Zhang petitioned for writs of mandamus and prohibition after the district court dismissed her complaint under NRCP 12(b)(5), expunged her notice of lis pendens, and denied leave to amend. The Supreme Court reviewed the dismissal and expungement orders through extraordinary writ jurisdiction.
STANDARD OF REVIEW	On an NRCP 12(b)(5) motion, the court accepts all factual allegations as true and draws all inferences in favor of the nonmoving party; dismissal is proper only if it appears beyond a reasonable doubt that the plaintiff could prove no set of facts entitling her to relief. On mandamus review of a dismissal order, the Supreme Court determines whether the district court manifestly abused its discretion.
PRECEDENTIAL VALUE	Published Nevada Supreme Court opinion; precedential
PARTIES	Lanlin Zhang v. Eighth Judicial District Court of the State of Nevada, Frank Sorichetti

TOPICS

- appellate procedure
- breach of contract
- consideration
- lis pendens
- remedies

PRACTICE AREAS

Civil procedure

Contracts

Real estate

Appellate procedure

Remedies

QUESTIONS PRESENTED

1. Whether extraordinary writ review was appropriate despite the availability of a later appeal.
2. Whether the February 3 agreement, under which the seller demanded a higher price for performing his obligations under the February 1 agreement, was supported by consideration and replaced the original agreement through novation.
3. Whether the district court erred in dismissing Zhang's complaint under NRCP 12(b)(5).
4. Whether the district court erred in expunging Zhang's notice of lis pendens.
5. Whether Zhang's requests for a writ of prohibition concerning factual issues and mandamus compelling leave to amend remained justiciable after reinstatement of the complaint.

HOLDINGS

1. Extraordinary writ review was appropriate because an appeal after final judgment would be inadequate where the real property could be transferred before appellate review.
2. A seller's promise to perform an existing contractual duty is not consideration for a buyer's promise to pay more, so the February 3 agreement was unsupported by consideration and did not displace the February 1 agreement.
3. The February 3 agreement did not constitute a novation that replaced the February 1 agreement because the parties remained the same and the new agreement was itself subject to the preexisting-duty rule.
4. The district court manifestly abused its discretion by dismissing Zhang's complaint because the complaint alleged a viable claim based on the February 1 agreement.
5. The district court manifestly abused its discretion by expunging Zhang's notice of lis pendens because her complaint alleged viable claims concerning real property.

KEY QUOTATIONS

"We conclude that such a modified agreement is not supported by consideration and is therefore unenforceable." (120 Nev. at 1037)

"This allegation demonstrates an actionable anticipatory breach of contract, which is a "clear, positive, and unequivocal" repudiation of the duties arising under or imposed by agreement." (120 Nev. at 1040)

"Consequently, in the context of NRCP 12(b)(5), we conclude that the February 3 agreement had no effect on the February 1 agreement, and therefore, the district court manifestly abused its discretion in dismissing Zhang's complaint." (120 Nev. at 1043)

FACTUAL BACKGROUND

Zhang agreed to purchase Sorichetti's Las Vegas home for \$532,500 under a February 1, 2004 agreement. Two days later, Sorichetti stated that he would not perform unless Zhang paid more, and the parties executed a second

agreement for \$578,000 with some changed terms. Sorichetti later rescinded the transaction, prompting Zhang to sue for enforcement of the original agreement and record a notice of lis pendens.

PROCEDURAL HISTORY

Zhang sued Sorichetti for damages, declaratory relief, and specific performance of an original real-property purchase agreement. The district court concluded that a later agreement at a higher price novated the original agreement, dismissed the complaint, expunged the lis pendens, and denied leave to amend. The Supreme Court stayed the proceedings, granted mandamus relief directing reinstatement of the complaint and vacation of the expungement order, and held the remaining writ requests moot.

DISPOSITION

writ_granted

REMAND INSTRUCTIONS

The clerk was directed to issue a writ of mandamus directing the district court to reinstate Zhang's complaint and vacate its order expunging the notice of lis pendens. The requests for a writ of prohibition and for an order compelling leave to amend were rendered moot. The Supreme Court's stay was vacated.

CASES CITED

- Dayside Inc. v. Dist. Ct., 119 Nev. 404, 75 P.3d 384 (2003)
- Kourafas v. Basic Food Flavors, Inc., 120 Nev. 195, 197, 88 P.3d 822, 823 (2004)
- Lee v. GNLV Corp., 116 Nev. 424, 426, 996 P.2d 416, 417 (2000)
- Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 637 P.2d 534 (1981)
- Covington Bros. v. Valley Plastering, Inc., 93 Nev. 355, 360, 566 P.2d 814, 817 (1977)
- County of Clark v. Bonanza No. 1, 96 Nev. 643, 650-51, 615 P.2d 939, 944 (1980)
- Walden v. Backus, 81 Nev. 634, 637, 408 P.2d 712, 714 (1965)
- Jacobson v. Stern, 96 Nev. 56, 605 P.2d 198 (1980)
- United Fire Ins. Co. v. McClelland, 105 Nev. 504, 508, 780 P.2d 193, 195 (1989)
- Recker v. Gustafson, 279 N.W.2d 744 (Iowa 1979)
- U.S. Home Acceptance v. Kelly Park Hills, 542 So. 2d 463, 464 (Fla. Dist. Ct. App. 1989)
- Higgins v. Monroe Evening News, 272 N.W.2d 537, 543 (Mich. 1978)
- King v. Riveland, 886 P.2d 160, 164 (Wash. 1994)
- In re Dependency of Q.L.M., 20 P.3d 465, 469 (Wash. Ct. App. 2003)