

SUPREME COURT OF NEVADA

Zhang v. Eighth Judicial District Court

103 P.3d 20 (Nev. 2004) · No. No. 43601 · Decided December 29, 2004

SUMMARY

The Supreme Court of Nevada held that a modified real-property purchase agreement, executed after the seller repudiated an earlier agreement and demanded a higher price, was unsupported by consideration and unenforceable under the preexisting duty rule. The court rejected the district court’s conclusion that the later agreement effected a novation and held that the original complaint stated viable claims. It directed reinstatement of the complaint and vacatur of the order expunging the notice of lis pendens.

CASE DETAILS

COURT	Supreme Court of Nevada
WRITING FOR THE COURT	Per Curiam; Rose; Maupin; Douglas
JURISDICTION	Nevada
DECIDED	December 29, 2004
DOCKET	No. 43601
DISPOSITION	writ_granted
PROCEDURAL POSTURE	Petition for writs of mandamus and prohibition challenging dismissal of a complaint, expungement of a notice of lis pendens, and denial of leave to amend.
STANDARD OF REVIEW	On an NRCP 12(b)(5) motion, factual allegations are accepted as true and all inferences are drawn in favor of the nonmoving party; dismissal is proper only if the plaintiff could prove no set of facts entitling her to relief. A dismissal order is reviewed on mandamus for manifest abuse of discretion.
PRECEDENTIAL VALUE	published Nevada Supreme Court opinion
PARTIES	Lanlin Zhang v. The Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, Honorable Valerie Adair, District Judge, Frank V. Sorichetti

TOPICS

breach of contract

anticipatory repudiation

consideration

lis pendens

appellate procedure

PRACTICE AREAS

contracts

real estate

civil procedure

appellate procedure

remedies

QUESTIONS PRESENTED

1. Whether extraordinary writ review was appropriate despite the availability of an appeal after final judgment.
2. Whether Zhang's complaint stated a viable claim based on Sorichetti's alleged anticipatory repudiation of the original purchase agreement.
3. Whether the later agreement increasing the purchase price was enforceable or replaced the original agreement by novation when it was unsupported by new consideration.
4. Whether the district court abused its discretion by expunging Zhang's notice of lis pendens.
5. Whether Zhang was entitled to a writ of prohibition preventing factual determinations concerning novation before discovery and a writ of mandamus compelling leave to amend.

HOLDINGS

1. Writ review was warranted because an appeal after final judgment would be inadequate where the property could be transferred before appellate review.
2. Zhang adequately alleged an actionable anticipatory breach because Sorichetti's statement that he would not sell under the original agreement unless paid more constituted a clear, positive, and unequivocal repudiation.
3. The February 3 agreement increasing the purchase price was unsupported by consideration and did not relieve Sorichetti of his obligations under the February 1 agreement.
4. The February 1 agreement was not replaced by the February 3 agreement through novation, and any purported novation remained subject to the preexisting-duty rule.
5. The district court manifestly abused its discretion by expunging Zhang's notice of lis pendens because her complaint alleged viable claims concerning title to real property.

KEY QUOTATIONS

"We conclude that such a modified agreement is not supported by consideration and is therefore unenforceable." (at 21)

"This principle is commonly known as the preexisting duty rule and is recognized in Nevada." (at 23)

"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." (at 24)

FACTUAL BACKGROUND

Zhang agreed on February 1, 2004, to purchase Sorichetti's Las Vegas home for \$532,500. Two days later, Sorichetti stated that he would not perform under that agreement unless Zhang paid more, and Zhang signed a second agreement increasing the price to \$578,000 and changing other terms. Sorichetti later rescinded the transaction, prompting Zhang to sue for relief based on the original agreement and record a notice of lis pendens.

PROCEDURAL HISTORY

Zhang sued Sorichetti for damages, declaratory relief, and specific performance based primarily on an earlier real-property purchase agreement. The district court granted Sorichetti's NRCP 12(b)(5) motion, concluding that a later agreement replaced the earlier agreement by novation, and ordered Zhang's notice of lis pendens expunged. Zhang petitioned the Nevada Supreme Court for extraordinary relief, which stayed the district court proceedings pending review.

DISPOSITION

writ_granted

REMAND INSTRUCTIONS

The clerk was instructed 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 request for a writ of prohibition and the request to compel 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)
- Lee v. GNLV Corp., 116 Nev. 424, 996 P.2d 416 (2000)
- Kourafas v. Basic Food Flavors, Inc., 120 Nev. ___, 88 P.3d 822 (2004)
- Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 637 P.2d 534 (1981)
- Covington Bros. v. Valley Plastering, Inc., 93 Nev. 355, 566 P.2d 814 (1977)
- Bernard v. Rockhill Dev. Co., 103 Nev. 132, 734 P.2d 1238 (1987)
- County of Clark v. Bonanza No. 1, 96 Nev. 643, 615 P.2d 939 (1980)
- Walden v. Backus, 81 Nev. 634, 408 P.2d 712 (1965)
- Jacobson v. Stern, 96 Nev. 56, 605 P.2d 198 (1980)
- United Fire Ins. Co. v. McClelland, 105 Nev. 504, 780 P.2d 193 (1989)
- U.S. Home Acceptance v. Kelly Park Hills, 542 So. 2d 463 (Fla. Dist. Ct. App. 1989)
- Recker v. Gustafson, 279 N.W.2d 744 (Iowa 1979)
- Higgins v. Monroe Evening News, 404 Mich. 1, 272 N.W.2d 537 (1978)
- King v. Riveland, 125 Wash. 2d 500, 886 P.2d 160 (1994)
- In re Dependency of Q.L.M., 105 Wash. App. 532, 20 P.3d 465 (2001)

