

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE DOROTHY TOWNE TRUST,
Appellant,

vs.

FLEETWOOD CORPORATION, A
NEVADA CORPORATION,
Respondent.

No. 50330

FLEETWOOD CORPORATION,
Appellant,

vs.

DOROTHY TOWNE, AN INDIVIDUAL;
AND THE DOROTHY TOWNE TRUST,
Respondents.

No. 50983

FILED

APR 30 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

These are consolidated appeals from a district court summary judgment in a contract, tort, and declaratory relief action and a post-judgment order denying attorney fees. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge.

These appeals arise out of a geothermal lease and sublease. The geothermal lease is between the landlord, Dorothy Towne and the Towne Trust (collectively "the Trust") and the tenant, Fleetwood Corporation. Fleetwood subleased its geothermal rights to Far West, Inc. in return for royalties from electricity production. The Trust and Fleetwood litigated several issues involving the lease and sublease, and the district court granted Fleetwood summary judgment on all claims.

The Trust argues that the district court improperly granted Fleetwood summary judgment on the Trust's claims that: (1) Fleetwood slandered the Trust's title by objecting to the Reno Energy Project at the administrative hearings; (2) Fleetwood breached the covenant of good faith

and fair dealing at the administrative hearings; (3) the Trust is entitled to declaratory relief terminating the lease because Fleetwood failed to pay the east side taxes; and (4) the duration of the lease is limited by the life of Fleetwood's President, Jay Woodworth. We conclude that there remain genuine issues of material fact regarding the Trust's claims for slander of title, breach of the covenant of good faith and fair dealing, and the east side taxes, and therefore we reverse and remand. We affirm the district court's decision regarding the duration of the lease.

Fleetwood also appeals from the district court's denial of its post-judgment application for attorney fees. We affirm the district court's order denying Fleetwood attorney fees.

The parties are familiar with the facts and procedural history of this case; therefore, we do not recount them in this order except as is necessary for our disposition.

Standard of Review

"This court reviews a district court's grant of summary judgment de novo." Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper when, viewing the evidence in the light most favorable to the non-moving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Id.

Slander of title

The district court found that the hearings before the Public Utilities Commission of Nevada (PUCN), the Nevada Division of Minerals (NDOM), the Washoe County Planning Commission (WCPC), and the Galena/Steamboat Citizen Advisory Board (GCAB), were all quasi-judicial proceedings. Therefore, the district court held that all of Fleetwood's statements at these hearings were absolutely privileged and could not

subject Fleetwood to civil liability. We conclude that the district court's findings and the record were insufficient for this court to address this issue.

Statements made in quasi-judicial proceedings are absolutely privileged, even if they are false or malicious, if they are relevant to the subject of the proceeding. Sahara Gaming v. Culinary Workers, 115 Nev. 212, 215-16, 984 P.2d 164, 166 (1999). The relevancy standard is very broad and it is satisfied if the statement "has some bearing on the subject matter of the proceeding." Id. at 218-19, 984 P.2d at 168 (internal quotations omitted). The absolute privilege also bars all derivative claims based on the privileged statements. Id. at 219, 984 P.2d at 168. Whether the privilege applies and whether the statements are relevant to the proceeding are questions of law. Circus Circus Hotels v. Witherspoon, 99 Nev. 56, 62, 657 P.2d 101, 105 (1983).

For an administrative proceeding to be considered quasi-judicial, the proceeding must provide "the basic protections of a trial." Stockmeier v. State, Dep't of Corrections, 122 Nev. 385, 391, 135 P.3d 220, 224 (2006), overruled on other grounds by Buzz Stew, LLC v. City of N. Las Vegas, 124 Nev. ___, ___, 181 P.3d 670, 672 n.6 (2008). At a minimum, these protections include, "(1) the ability to present and object to evidence, (2) the ability to cross-examine witnesses, (3) a written decision from the public body, and (4) an opportunity to appeal to a higher authority." Id. at 391-92, 135 P.3d at 224.

The district court concluded that all of the hearings before the PUCN, NDOM, WCPC, and GCAB were quasi-judicial proceedings without sufficient findings to support this conclusion. Similarly, the record was sparse regarding the due process protections provided at the

hearings, especially regarding the WCPC and GCAB. Given the inadequate factual record on this issue, summary judgment was inappropriate. Therefore, we reverse and remand to the district court for further proceedings to make the necessary findings pursuant to Stockmeier in determining whether these hearings were quasi-judicial proceedings.

Contractual and tortious breaches of the covenant of good faith and fair dealing

The district court also granted Fleetwood summary judgment regarding the Trust's claims for contractual and tortious breaches of the covenant of good faith and fair dealing because the claims were derivative claims based on the absolutely privileged statements. Because inadequate findings supported the application of the absolute privilege, a genuine issue of material fact remains regarding whether Fleetwood breached the implied covenant of good faith and fair dealing it owed to the Trust at the various administrative hearings. Therefore, the district court improperly granted Fleetwood summary judgment regarding the Trust's claims for breach of the covenant of good faith and fair dealing.

Declaratory relief based on the east side taxes

The Trust sought a declaration from the district court that the lease was terminated because Fleetwood failed to pay the east side taxes.

Statute of limitations

The district court found that the six-year statute of limitations barred the Trust's claim for declaratory relief because the Trust never gave Fleetwood a notice of termination as required by the lease. We agree, on different grounds, that the statute of limitations bars some of the Trust's claims.

The statute of limitations for claims based on a written contract is six years.¹ NRS 11.190(1)(b). Generally, the statute of limitations begins to run when the claim accrues, which is when the party knows or should know the facts constituting the cause of action. Soper v. Means, 111 Nev. 1290, 1294-95, 903 P.2d 222, 224-25 (1995). If a demand for performance is necessary for the cause of action to accrue, the demand must be made in a reasonable time under the circumstances. Id. at 1294, 903 P.2d at 224.

In this case, the lease states that Fleetwood must pay the property taxes. The Trust knew that Fleetwood was not paying the taxes from the inception of the lease in 1991 because Towne received and paid all the taxes since 1991, except the 1998 payment. Therefore, the Trust's cause of action arose each time it paid the taxes. Thus, each time Fleetwood did not pay the taxes, a six-year statute of limitations began to run, based on the Trust's cause of action under the lease. Towne first asserted the breach in its August 24, 2006, amended counterclaim.

¹Fleetwood did not plead the statute of limitations in its answer to the Trust's amended counterclaim, but raised the issue in its reply brief in support of motion for summary judgment and opposition to cross-motion for summary judgment. The Trust then addressed the issue in its reply to opposition to cross-motion for summary judgment and did not object to the pleadings. Thus, the parties tried the statute of limitations by implied consent. NRCP 8(c); Elliot v. Resnick, 114 Nev. 25, 30, 952 P.2d 961, 964 (1998); Williams v. Cottonwood Cove Dev. Co., 96 Nev. 857, 860-61, 619 P.2d 1219, 1221 (1980) (holding that affirmative defense raised in a summary judgment motion was not waived because other party had an opportunity to respond and no prejudice attached).

Therefore, the six-year statute of limitations bars the Trust's claim for any taxes which accrued before August 24, 2000.²

Laches

The Trust argues that the district court erred in finding that laches barred its claim for declaratory relief regarding the east side taxes. We agree. There are genuine issues of material fact regarding the application of the affirmative defense of laches. Although the statute of limitations bars the Trust's claim for the east side taxes before August 24, 2000, laches may still apply to the taxes accrued after that date.

Laches is an equitable doctrine appropriate when one party's delay disadvantages the other party so that its position cannot be restored. Carson City v. Price, 113 Nev. 409, 412, 934 P.2d 1042, 1043 (1997). As an affirmative defense pursuant to NRCP 8(c), Fleetwood has the burden of proof to establish laches. Whether laches applies depends on the facts of each case. Carson City, 113 Nev at 412, 913 P.2d at 1043. If the statute of limitations has not run, laches is only appropriate in especially strong circumstances. Mackintosh v. California Fed. Sav., 113 Nev. 393, 404, 935 P.2d 1154, 1161 (1997). Some relevant factual considerations to the application of laches include whether evidence is available and whether interested parties or witnesses have died during the delay. Cooney v. Pedroli, 49 Nev. 55, 63, 235 P. 637, 640 (1925). When

²The district court found that the statute of limitations barred the Trust's east side taxes claims because the Trust never gave Fleetwood notice of termination as required by the lease, and therefore failed to preserve its claims by making a proper demand. However, we conclude that the notices of default that the Trust gave Fleetwood were adequate demands and preserved the Trust's claims.

parties present conflicting evidence regarding the elements to prove laches, the existence of laches is a question of fact. SIIS v. Durable Developers, 102 Nev. 397, 399, 724 P.2d 199, 200 (1986).

Even if the Trust delayed in bringing its claim regarding the east side taxes, there is a genuine issue of material fact regarding the extent to which Fleetwood was harmed by any delay. During this delay, Fleetwood continued to collect royalties under the lease and the Trust paid the taxes, except for the 1998 payment. Also at issue is the extent to which the death of Towne, an interested party, and the only other witness to the alleged oral agreement, disadvantaged Fleetwood in establishing its defense. There is also a question as to whether, if the lease was terminated as of 2000, Fleetwood would be obligated to return all the royalties it received since the termination, and if so, what the amount would be. Therefore, there remain genuine issues of material fact regarding whether, during the Trust's delay in bringing suit, Towne's death and Fleetwood's potential liability put Fleetwood at an incurable disadvantage. Thus, the district court improperly granted summary judgment for Fleetwood on this issue.

Oral modification

The district court found that there was an enforceable oral agreement between Towne and Fleetwood providing that Towne would pay the east side taxes and keep the east side rental income. We conclude that this is a genuine issue of material fact which is in dispute.

Fleetwood argues that this oral modification of the lease exists, while the Trust contends it does not. Fleetwood produced two handwritten notes from Towne to Woodworth, signed by Towne, discussing Towne's paying of the property taxes. However, neither note mentions Woodworth's promise to tender the east side rental income to Towne.

Towne paid the east side taxes from the inception of the lease until her death in 2003, except for the 1998 payment, and Fleetwood tendered the east side rental income to Towne since the inception of the lease. Towne received all the tax bills for the east side and west side and forwarded the west side tax bills to Fleetwood for payment, but never forwarded the east side bills, except in 1998. This evidence reveals a genuine issue of material fact as to whether Fleetwood and Towne orally modified the lease regarding the east side taxes. Therefore, the district court erred in granting Fleetwood summary judgment on this issue.

Declaratory relief regarding the duration of the lease

In the event the district court did not declare the lease terminated, the Trust sought a declaration regarding the duration of the lease. The district court did not find the lease terminated, and it declared the duration of the lease to be as long as the geothermal resources are used to generate electricity. The Trust argues that the district court erroneously rendered the “Demise of Tenant” provision in the lease meaningless. The Trust also argues that the lease is ambiguous because it is unclear whether the demise of the tenant provision limits the duration of the sublease by the life of Woodward or by the length of existence of Fleetwood. We disagree because the duration of the lease is unambiguous.

Contract interpretation is a question of law that this court reviews de novo. Musser v. Bank of America, 114 Nev. 945, 947, 964 P.2d 51, 52 (1998). When a contract is clear on its face, this court construes the meaning according to the written language and does not alter the terms. Canfora v. Coast Hotels & Casinos, Inc., 121 Nev. 771, 776, 121 P.3d 599, 603 (2005). This court should interpret a contract so that none of its provisions are rendered meaningless. Phillips v. Mercer, 94 Nev. 279, 282, 579 P.2d 174, 176 (1978). “Also, a specific provision will qualify the

meaning of a general provision.” Shelton v. Shelton, 119 Nev. 492, 497, 78 P.3d 507, 510 (2003). Whether a contract is ambiguous is also a question of law. Margrave v. Dermody Properties, 110 Nev. 824, 827, 878 P.2d 291, 293 (1994). “A contract is ambiguous if it is reasonably susceptible to more than one interpretation.” Id. If a contract is ambiguous, this court must consider the conduct and circumstances of the parties to determine the parties’ intent. Shelton, 119 Nev. at 497, 78 P.3d at 510.

The lease contains a provision titled “Term” that states, “The term of this lease shall be coextensive with the term of the lease attached as Exhibit ‘B,’” which is the sublease. The sublease also contains a provision titled “Term,” and it states,

The term of this Lease shall commence upon the date of its execution and subject to the conditions set forth below shall continue for a term of three (3) years and for so long thereafter as geothermal resources from the Leased Premises or lands unitized therewith are used for the commercial generation of electricity.

The plain language of this provision indicates that both the lease and the sublease run for three years and for so long after as the geothermal resources are used to commercially generate electricity.

However, the Trust argues that the demise of tenant provision in the lease renders the duration of the lease ambiguous. This provision states, “[u]pon the demise of the Tenant, all of his rights and interest under the . . . [sublease] shall revert to Landlord.” Throughout the lease, Fleetwood Corporation is the Tenant. Thus, the plain meaning of the demise of tenant provision indicates that upon the demise of Fleetwood, all its interests under the lease revert to the Trust. The Trust argues that the provision is ambiguous because the use of “demise” and “his” makes it much more likely that the provision was referring to the death of

Woodworth rather than the end of Fleetwood. The Trust argues, therefore, that this court must discern the parties' intent, which is an issue of material fact making the district court's granting Fleetwood summary judgment inappropriate. We conclude that the term provisions in the lease and sublease are unambiguous, and the district court properly found that the duration of the lease is for three years and for as long after as the geothermal resources are used to commercially produce electricity.

The Trust argues that this interpretation renders the demise of tenant provision meaningless. We disagree. The term provisions and the demise of tenant provision address different circumstances. The term provisions state the general duration of the lease and sublease. The demise of tenant provision controls in the specific situation where Fleetwood ceases to exist while the geothermal resources are still being used to commercially produce electricity. If this were to occur, all of Fleetwood's interests under the lease would revert to the Trust. Thus, the specific demise of tenant provision qualifies the meaning of the more general term provisions without rendering meaningless the term provisions. Therefore, we conclude that the lease is unambiguous, and the district court properly granted Fleetwood summary judgment on the Trust's declaratory relief claim based on the duration of the lease.

Fleetwood's application for attorney fees

Fleetwood argues that it is entitled to attorney fees as supplemental relief for the Trust's inequitable conduct pursuant to NRS 30.100, which is part of Nevada's Uniform Declaratory Judgment Act (UDJA). We disagree because attorney fees are not necessary or proper as supplemental relief in this case.

Generally, a court cannot award attorney fees "absent a statute, rule, or contract authorizing such award." Thomas v. City of

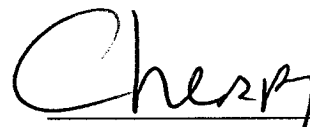


North Las Vegas, 122 Nev. 82, 90, 127 P.3d 1057, 1063 (2006). This court reviews a district court's decision regarding attorney fees for an abuse of discretion, unless the decision implicates matters of law, in which case this court reviews the decision de novo. Id. Under NRS 30.100, "[f]urther relief based on a declaratory judgment or decree may be granted whenever necessary or proper." This court interprets the UDJA broadly and liberally regarding its purposes of affording equitable relief. NRS 30.140; Woods v. Bromley, 69 Nev. 96, 106-07, 241 P.2d 1103, 1108 (1952). In this case, reviewing the district court's order regarding attorney fees requires statutory interpretation, which is a matter of law, and therefore this court reviews the decision de novo. Madera v. SIIS, 114 Nev. 253, 257, 956 P.2d 117, 120 (1998).

Whether NRS 30.100 allows attorney fees as supplemental relief is an issue of first impression in Nevada. The Supreme Court of Montana interpreted Montana's UDJA supplemental relief statute, which is identical to Nevada's statute, and held that it allows the court discretion to award attorney fees. Trustees of Indiana University v. Buxbaum, 69 P.3d 663, 670, 674 (Mont. 2003). The court provided some examples of when such an award would be necessary and proper, including "anomalous result" cases, such as a case where a party would have been better off not having brought the declaratory relief claim; when there is no alternative for obtaining relief; and where a declaration was necessary to change the status quo. Id. at 673-74. Similarly, the United States Court of Appeals for the District of Columbia held that attorney fees are available as supplemental relief under an analogous federal statute when necessary or proper. Horn & Hardart Co. v. National Rail Passenger Corp., 843 F.2d 546, 548 (D.C. Cir. 1988). That court held that an award of attorney fees

was proper when the factual and legal predicates were met for a contractual costs provision. Id. To be necessary or proper requires more than that the party prevail; for example, fees may be necessary when they are needed to effectuate the declaratory relief. Patton v. Denver Post Corp., 379 F. Supp. 2d 1114, 1116-17 (D. Colo. 2005).

In this case, Fleetwood is seeking attorney fees as supplemental relief under the UDJA for defending against the Trust's claims for declaratory relief. Fleetwood did not seek declaratory relief, the declarations of the district court preserved the status quo between the parties, and Fleetwood did not incur attorney fees in effectuating the declaratory relief. Therefore, attorney fees are not necessary or proper as supplemental relief in this case.

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


Cherry, J.

Saitta, J.

Gibbons, J.

cc: Hon. Patrick Flanagan, District Judge
Robert Eisenberg, Settlement Judge
McDonald Carano Wilson LLP/Reno
Parsons Behle & Latimer/Reno
Washoe District Court Clerk