IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BURP LLC, A NEVADA LIMITED-LIABILITY COMPANY,
Appellant,
vs.
THE OGDEN UNIT OWNER'S ASSOCIATION, A NEVADA NONPROFIT CORPORATION,
Respondent.

No. 85272-COA

FILED

JAN 19 2024

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

Burp LLC ("Burp") appeals from a district court order granting a motion for summary judgment in favor of the Ogden Unit Owner's Association (the Association) in a property matter. Eighth Judicial District Court, Clark County; Crystal Eller, Judge.

In December 2018, Burp purchased a commercial property, known as Commercial Space 1 (the space) from DK Ogden LLC.[1] The space is located on the first floor of the Ogden, a mixed-use property in downtown Las Vegas, and subject to a Declaration of Covenants, Conditions, and Restrictions (CC&Rs). The sale deed included the space and "an undivided fractional interest as tenant in common in the common elements . . . described in the final map."

At the time of the purchase, the space was divided into two distinct units: a night club (Burp's tenant) and a sales office. After the sales office vacated the unit, Burp's tenant intended to expand the night club into the entirety of the space. On or about May 14, 2020, the Association discovered Burp began construction on the expansion without submitting

[1]We do not recount the facts except as necessary to our disposition.

documentation or receiving approval from the Association's Board of Directors (the Board), as required by the CC&Rs. The Association immediately sent Burp a cease-and-desist letter and notice of a hearing before the Board. At the hearing, five days later, the Board found that Burp violated several provisions of the CC&Rs, concluded that the construction posed "an immediate threat of causing substantial adverse effect on the health, safety or welfare of the Owners and residents in the Community," and fined Burp $5,000. The Board's decision required Burp to "[r]emove [the] glass entry doors previously used by the [sales office] and construct [a] soundproof wall to match the wall on the opposite side of the lobby." Two days later, on May 22, the General Manager of the Ogden emailed Burp that it could resume construction.

Over the next month, Burp continued construction, including erecting the required wall, without issue. However, on June 22, an electrical issue turned off the power to the first floor's air conditioner.[2] The Association investigated the issue and realized it had inadvertently permitted Burp to block off a six-foot by nine-foot area behind the wall that was a common element where the air conditioner's access point was located. The Association requested that Burp allow it to repossess the area at its cost, but Burp declined and asserted it had purchased the disputed area.

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[2]As described in the affidavit of the construction company Burp hired: during the demolition an electrical panel that controlled both the common element and the space had to be moved. Burp sought to split re-wire the power panel so that the Association could continue to control the power to the common elements and Burp could turn off power to the space during construction. When Burp turned off the power to the space, the air conditioner also turned off. The construction company's affiant asserted that "[n]either myself or the HOA's electrical contractor kn[e]w that the air conditioning unit even existed." The contractor returned and reconnected the air conditioner to the Association's power.

After unsuccessful negotiations, the Association filed a complaint alleging a breach of restrictive covenants, trespass, conversion, and nuisance, and requesting injunctive and declaratory relief. Burp filed three counterclaims.[3] The Association moved for summary judgment on all claims, and the district court entered judgment in its favor.[4] First, the court determined that Burp breached the CC&Rs by making unauthorized alterations to the space without obtaining prior consent of the Association, causing damages to the Association in the amount of $5,000. Second, the district court determined that the Association was responsible for the common element, that Burp did not adversely possess the common element, and that Burp unlawfully barred the Association from accessing both the common element and HVAC system. Third, the district court determined that Burp's conduct constituted an impermissible trespass; conversion of property rights; private nuisance; breach of the CC&Rs; and breach of NRS Chapter 116. Ultimately, the district court determined that the Association

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[3]Burp asserts on appeal that it is not challenging the grant of summary judgment in the Association's favor on its counterclaims, such that we need not address them further. Insofar as there are any disagreements regarding the apparent dismissal of the counterclaims after Burp filed its notice of appeal, such issues are not properly part of the record on appeal and, thus, need not be considered. *See Carson Ready Mix v. First Nat'l Bank*, 97 Nev. 474, 476, 635 P.2d 276, 277 (1981) (our review on appeal is limited to the record considered by the district court); *cf. Arnold v. Kip*, 123 Nev. 410, 416-17, 168 P.3d 1050, 1054 (2007) (considering issues raised post-judgment because they were properly included as part of the appellate record).

[4]The district court dismissed the Association's claim for injunctive relief as moot, and it is not before this court on appeal. *See Senjab v. Alhulaibi*, 137 Nev. 632, 633-34, 497 P.3d 618, 619 (2021) (noting this court "review[s] only the issues the parties present").

was exclusively responsible for the common element and ordered Burp to vacate the space.[5]

Burp timely appealed and now argues that the district court erred by granting summary judgment on the Association's claims for (1) declaratory relief, (2) conversion, (3) trespass, (4) nuisance, and (5) breach of restrictive covenants. Specifically, Burp argues that the district court committed reversible error by making the factual finding that Burp's use of the disputed area was permissive, rather than adverse, and therefore erred in granting summary judgment of the Association's request for declaratory relief regarding the ownership of the disputed area. The Association responds that the district court properly found, as a matter of law, that Burp did not adversely possess the disputed area. We address the challenge to summary judgment on each of the Associations claims in turn.

"An order granting summary judgment is reviewed by this court using a de novo standard of review." *Pressler v. City of Reno*, 118 Nev. 506, 509, 50 P.3d 1096, 1098 (2002). Similarly, we review questions of law de novo. *Id.* "Summary judgment is warranted 'when . . . the moving party is entitled to judgment as a matter of law.'" *Nev. State Educ. Ass'n v. Clark Cty. Educ. Ass'n*, 137 Nev. 76, 80, 482 P.3d 665, 670-71 (2021) (quoting *Wood v. Safeway, Inc.*, 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005)). "'[T]he pleadings and other proof must be construed in the light most favorable to the nonmoving party,' and summary judgment must be reversed if such construction shows that there is a genuine dispute as to a material fact." *Id.* (alteration in original) (quoting *Wood*, 121 Nev. at 732, 121 P.3d at 1031).

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[5]We note that the district court directed the Association to file and serve a motion for attorney fees and a memorandum of costs, which are not before this court on appeal. *See 9352 Cranesbill Tr. v. Wells Fargo Bank, N.A.*, 136 Nev. 76, 82, 459 P.3d 227, 232 (2020) (declining to address an issue that the district court did not resolve).

"A[dispute] of material fact is genuine when the evidence is such that a rational jury could return a verdict in favor of the nonmoving party." *George L. Browns Ins. v. Star Ins. Co.*, 126 Nev. 316, 323, 237 P.3d 92, 96 (2010).

We first address whether the district court properly granted declaratory relief to the Association, therefore requiring Burp to vacate the disputed area. Burp challenges this determination by arguing that it owned the disputed area through adverse possession. However, Burp's adverse possession argument clearly fails because Burp and any prior owners of the space already had a tenancy-in-common ownership interest in the disputed area, and Burp admitted below that the area is a common element. Burp failed to show, as is required for an adverse possession claim involving tenants-in-common, that it or the prior owners ousted all cotenants for a period of five years, continuously. NRS 11.150; 86 *C.J.S. Tenancy in Common* § 38 (2023) (providing that, for a tenant in common to succeed on an adverse possession claim, they must first show an ouster of cotenants); *see also Abernathie v. Consolidated Va. Mining Co.*, 16 Nev. 260, 269 (1881) (determining that, where a tenancy in common exists, the exclusive possession of the property by one tenant does not necessarily rise to adverse possession; instead, the adverse possession of the shared property must be "unequivocally manifested . . . by outward acts"); *Ouster*, Black's Law Dictionary (11th ed. 2019) ("The wrongful dispossession or exclusion of someone (esp. a cotenant) from property (esp. real property)."). The district court therefore properly rejected Burp's claim of adverse possession, and it follows that the district court's grant of the Association's request for declaratory relief, requiring Burp to vacate the disputed area, was also

proper as the disputed area is a common element owned by all tenants in common and governed by the Association.[6]

Second, we conclude that the district court erred in granting summary judgment on the Association's conversion claim, because real property cannot be converted. *See Holland v. Anthony L. Barney, Ltd.*, 139 Nev., Adv. Op. 49, ___ P.3d ___ (Ct. App. Nov. 22, 2023) (noting that "conversion applies only to personal property"). Real property includes personal property that has been affixed to the real property. *Flyge v. Flynn*, 63 Nev. 201, 235-36, 166 P.2d 539, 554 (1946); *see also Fixture*, Black's Law Dictionary (11th ed. 2019) ("Historically, personal property becomes a fixture when it is physically fastened to or connected with the land or building and the fastening or connection was done to enhance the utility of the land or building."). Here, the property alleged to have been converted includes the Ogden's HVAC system, water-source heat pump, outside air supply fan, and smoke control exhaust fans. It is undisputed that these systems are constructively joined to the Ogden, adapted for commercial and residential unit owners' health and safety, and intended to stay affixed to the building. *See Leasepartner Corp. v. Robert L. Brooks Tr. Dated Nov. 12, 1975*, 113 Nev. 747, 753, 942 P.2d 182, 185 (1997) (stating there are three factors which determine whether an item is a fixture: annexation, adaptation, and intent).

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[6]Insofar as Burp further argues on appeal that the district court erred in granting declaratory relief because the Association "submitted a brief arguing that Burp's counterclaims for quiet title and prescriptive easement created material issues of fact for which summary judgment was improper," we find this argument unpersuasive because Burp's counterclaims and correlating motions are not challenged on appeal, *Senjab*, 137 Nev. at 633-34, 497 P.3d at 619, and because the district court did not err in finding the Burp failed to establish adverse possession, and thus Burp cannot establish a claim for quiet title, *25 Corp., Inc. v. Eisenman Chem. Co.*, 101 Nev. 664, 674, 709 P.2d 164, 171 (1985) ("property must be hostile in its inception; actual, peaceable, open, and uninterrupted for the statutory period.").

Thus, the district court erred as a matter of law in granting the motion for summary judgment on the conversion claim.

Third, we conclude that the district court erred in finding Burp liable for trespass as a matter of law because a genuine dispute of material fact remains as to whether Burp wrongfully dispossessed or excluded the Association from the disputed area. *Nat'l Gold Mining Corp. v. Hygrade Gold Co., Ltd.*, No. 78685, No. 78984, 2021 WL 2769037, at *3 (Nev. July 1, 2021) (Order of Affirmance) ("An ouster, in the law of tenancy in common, is the wrongful dispossession or exclusion by one tenant of his cotenant or cotenants from the common property of which they are entitled to possession." (quoting *Hacienda Ranch Homes, Inc. v. Superior Court*, 131 Cal. Rptr. 3d 498, 503 (Ct. App. 2011))); *George L. Browns Ins.*, 126 Nev. at 323, 237 P.3d at 96. In an affidavit, a representative of the Association asserted that Burp "denied and/or unlawfully impeded on the Association's access to the [disputed area] and the HVAC system." However, in a competing affidavit, Burp's manager asserted that "Burp offered access to A/C and gave a key so management would have access anytime they desired, or, Burp would change the filters." Given the conflicting sworn statements, a rational jury could return a verdict finding that Burp did not wrongfully dispossess or exclude the Association from the disputed area and deny the Association relief on its trespass claim.

Fourth, we conclude that the district court erred in determining Burp was liable for nuisance as a matter of law because there is a genuine dispute of material fact as to whether Burp substantially and unreasonably interfered with the Association's property. *George L. Browns Ins.*, 126 Nev. at 323, 237 P.3d at 96. As discussed above, the parties submitted conflicting affidavits regarding whether Burp offered the Association a key to access the space, and thus the HVAC system. Assuming that Burp did offer such access,

a rational jury could return a verdict finding Burp's activities, once defined, were not so substantial and unreasonable as to implicate nuisance, and thus deny the Association relief. *See* NRS 40.140(1) (defining nuisance as "an obstruction to the free use of property so as to interfere with the comfortable enjoyment of . . . property"); *Sowers v. Forest Hills Subdivision*, 129 Nev. 99, 106, 294 P.3d 427, 432 (2013) (providing that the interference to support a nuisance claim must be substantial, which occurs when a reasonable person would regard the activity as offensive, seriously annoying, or intolerable; and unreasonable, which occurs when the gravity of the harm outweighs the social value). Moreover, the district court failed to make any factual findings as to what activity by Burp constituted interference of the Association's enjoyment of the disputed area, and whether such interference was so substantial and unreasonable as to implicate nuisance. *Sowers*, 129 Nev. at 105, 294 P.3d at 432 (noting that "[t]he determination of whether an activity constitutes a nuisance is generally a question of fact").[7]

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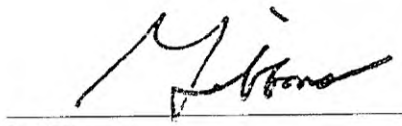
[7]We note that the district court in its order found Burp's "claim for prescriptive easement is *per se* evidence of an impermissible interference with the Association's rights related to the 6 by 9-foot space" as a basis for granting summary judgment on the Association's nuisance claim. An easement by prescription allows the public to use an owner's land for a specific purpose, such as a walking path. *See* NRS 11.165. Here, Burp did not need to request a prescriptive easement because he already had one. Per the Grant, Bargain and Sale Deed, Burp has an undivided fractional interest as a tenant in common in all common elements, including the disputed area, and therefore Burp did not need to obtain an easement by prescription to cross over the disputed area. *Jackson v. Nash*, 109 Nev. 1202, 1214, 866 P.2d 262, 270 (1993) (noting "an owner cannot have an easement in his own land"). Therefore, Burp's unnecessary claim for prescriptive easement cannot be *per se* evidence of impermissible interference. Because there is a genuine dispute as to whether Burp misused the easement to which it was entitled, thereby somehow constituting a nuisance, we reverse the grant of summary judgment on the nuisance claim.

Fifth, insofar as Burp challenges the summary judgment on the Association's breach of restrictive covenant claim, we affirm the district court's determination as it relates to the $5,000 fine. It is undisputed, based on Burp's contractor's affidavit and the notice of result of hearing, that Burp violated the Association's CC&Rs before May 22, and thus was properly fined based on the violation. *See* NRS 116.3102(3) (stating that the executive board of a common-interest community "may determine whether to take enforcement action by exercising the association's power to impose sanctions . . . for a violation"); NRS 116.31031(1)(b) (explaining that the executive board may impose a fine against a unit owner for each violation if the governing documents so provide). However, to the extent that the district court's order encompassed alleged violations of the CC&Rs *after* May 22, we conclude that the district court erred in broadly granting summary judgment as there are no factual findings to support additional violations. *See Nev. State Educ. Ass'n*, 137 Nev. at 80, 482 P.3d at 670-71.[8] Accordingly, we

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



_____, C.J.
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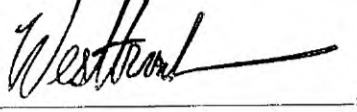

_____, J.
Westbrook

[8]Insofar as the parties have raised any other arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.

cc: Hon. Crystal Eller, District Judge
William C. Turner, Settlement Judge
Clark Hill PLLC
Leach Kern Gruchow Anderson Song/Las Vegas
Eighth District Court Clerk