

IN THE SUPREME COURT OF THE STATE OF NEVADA

SBA DEVELOPMENT, INC., A
NEVADA CORPORATION, D/B/A
ROYAL CONSTRUCTION COMPANY,
Appellant,

vs.

ABC DEVELOPMENT GROUP, LTD., A
NEVADA LIMITED LIABILITY
COMPANY,
Respondent.

No. 41478

FILED

JUL 25 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court judgment and an order denying a new trial in a contract case. Eighth Judicial District Court, Clark County; Gene T. Porter, Judge.

This case arises out of a construction contract between the owners of the land, respondent ABC Development Group, Ltd., and the general contractor, appellant SBA Development, Inc. The contract concerned the construction of 175 single-family residences to be built in two phases, Units 1 and 2. It further provided that SBA would administer and supervise construction, secure bids and hire subcontractors, obtain permits, keep accounting records for the project, and make all payments and disbursements from the project account. SBA was to be paid \$4,000 for each home constructed, 50 percent of the options purchased by the homebuyers, and 16.33 percent of the profit derived from the development and sale of the homes.

The parties began to experience problems almost from the beginning. At trial, ABC presented evidence that SBA breached the contract in several ways, including, but not limited to, wrongful cessation

of labor, failure to maintain a proper accounting, submission of false bills for payment, failure to properly insure the project, improper supervision, failure to timely and accurately pay the subcontractors, failure to obtain the necessary permits, and failure to timely obtain the bond releases.

After SBA rested its case, ABC moved for a directed verdict. The district court granted the motion as to anticipatory repudiation, unjust enrichment, quantum meruit, and injunctive relief. However, the district court denied the motion as to the fraud claim.

After closing statements, the jury received two special verdict forms. ABC's special verdict form read as follows:

We the jury in the above titled action find for Counter-Claimant, ABC Development and against Counter-Defendant, SBA Development and assess the total amount of damages as follows:

1. For Breach of Contract in the amount of:

2. For Breach of the Covenant of Good Faith and Fair Dealing in the amount of:

3. For Fraud in the amount of:

4. Do you find by clear and convincing evidence that SBA Development was guilty of oppression, malice or fraud in the conduct on which you base your finding of liability.

Answer "Yes" or "No"

The jury returned a verdict for ABC and awarded damages as follows: \$225,000 for breach of contract, and \$0 for breach of the covenant of good faith and fair dealing and fraud. However, the jury answered "Yes" to number four.

After reading the verdict, the district court stated that because the jury found SBA guilty of malice or oppression, it was necessary to reconvene the trial and the jury for a punitive damages hearing.

The district court subsequently asked the jury to clarify its verdict through a special interrogatory. The interrogatory, to which SBA objected, read as follows:

Compensatory damages have been awarded by the jury on ABC's claim for breach of contract. No compensatory damages have been awarded by the jury on ABC's claim for fraud. Did you award no damages for ABC's claim for fraud

- a.) Because you believe ABC has already been compensated for fraud in your award for breach of contract
- b.) Because you believe damages for fraud would be awarded at a subsequent hearing OR
- c.) Because you believe there are no damages for fraud.

The jury indicated "a." The district court then proceeded with the punitive damages hearing, and the jury returned a punitive damages award in the amount of \$84,300. The district court also denied SBA's motion for a new trial.

On July 23, 2003, the district court entered an amended judgment awarding ABC \$225,000 in compensatory damages, \$84,300 in punitive damages, \$23,285.88 in costs, and \$300,000 in attorney fees, for a total award of \$660,912.60.

DISCUSSION

Breach of contract

SBA contends that this court should reverse the judgment of the district court based upon the jury's determination that SBA breached

the contract because ABC did not present any evidence that it gave SBA notice or the opportunity to cure its alleged breach, as required under the contract. SBA also argues that ABC's failure to provide notice and time to cure constitutes a waiver of the breach. Further, SBA alleges that the parties settled their disputes at the May 18, 2000, meeting. We disagree.

When a contract provides that notice and time to cure must be given to a breaching party before terminating the contract, it constitutes a breach not to provide the requisite notice and time to cure.¹ A party asserting waiver has the burden to prove that there has been an intentional relinquishment of a known right.² "A waiver may be implied through conduct evidencing an intent to waive a right, or conduct that is inconsistent with any other intention than waiver."³ "Waiver can be implied from conduct such as making payments for or accepting performance which does not meet contract requirements."⁴ However, "a party's continued performance subsequent to defective performance by the other party does not waive the performing party's contractual rights as long as he complies with notice requirements."⁵ "The question of waiver of a contractual right is . . . a question of fact and subject to the clearly

¹Maykuth v. Adolph Coors Co., 690 F.2d 689, 694 (9th Cir. 1982).

²Gramanz v. T-Shirts and Souvenirs, Inc., 111 Nev. 478, 483, 894 P.2d 342, 346 (1995).

³Id.

⁴Udevco, Inc. v. Wagner, 100 Nev. 185, 189, 678 P.2d 679, 682 (1984).

⁵Kern Oil & Ref. Co. v. Tenneco Oil Co., 840 F.2d 730, 737 (9th Cir. 1988).

erroneous standard.”⁶ Also, an injured party must attempt to mitigate its damages, and it cannot recover for damages that could have been avoided with reasonable care.⁷ “[F]indings of fact and conclusions of law, supported by substantial evidence, will not be set aside unless clearly erroneous.”⁸

There is substantial evidence in the record that ABC gave notice to SBA of its breaches and that ABC provided SBA with more than the requisite time to cure. Alvin Wohl, ABC’s attorney, sent a letter on May 15, 2000, to Steven Aizenberg, president of SBA, giving notice of numerous breaches. At trial, Aizenberg admitted that ABC repeatedly made demands for its damages. Since ABC did not terminate the contract until July 7, 2001, SBA had over a year to cure its breaches.

The evidence also shows that ABC did not waive SBA’s breaches. ABC provided clear testimony that it did not immediately terminate the contract because it was attempting to mitigate the additional damages it would have incurred had it terminated the contract in the middle of the construction of Unit I. As long as notice of breach is provided, the non-breaching party’s continued performance does not waive its contractual rights.⁹ Although ABC continued its performance after

⁶Id. at 736.

⁷Dillard Department Stores v. Beckwith, 115 Nev. 372, 379-80, 989 P.2d 882, 886-87 (1999); Silver State Disposal v. Shelley, 105 Nev. 309, 311-12, 774 P.2d 1044, 1046 (1989).

⁸Edwards Indus. v. DTE/BTE, Inc., 112 Nev. 1025, 1031, 923 P.2d 569, 573 (1996).

⁹Kern Oil, 840 F.2d at 737.

SBA breached the contract, the record shows that ABC provided SBA with continuous notice that it considered SBA in breach of the contract.

Finally, the record does not support SBA's contention that the May 18, 2000, meeting resolved the parties' disputes. The record indicates that the purpose of the meeting was to address the breach ABC allegedly committed, *i.e.*, failing to pay a \$253,000 invoice from SBA to ABC. It is clear that ABC's intention was to resolve the invoice issue so that SBA would resume work on the project and that SBA's intention was to secure payment of the amount due. This interpretation is supported by SBA's own argument that the result of the meeting was that ABC paid SBA only \$31,000 in satisfaction of the \$253,000 invoice. This partial payment did not fully resolve the parties' dispute, and ABC continued to provide SBC with notice that ABC considers it to be in breach of the contract.

We conclude that ABC presented substantial evidence that it complied with its contractual obligation to provide SBA with written notice of SBA's breaches and ample time to cure. Substantial evidence supports the determination that SBA did not meet its burden to show that ABC waived SBA's breach by continuing its performance. Accordingly, the jury's determination that SBA was liable for breach of contract is not clearly erroneous.

Validity of the fraud verdict

SBA argues that it is entitled to a new trial because the jury disregarded its instructions and returned a facially contradictory verdict that is contrary to Nevada law. SBA contends that the verdict was contradictory because the jury found no damages for fraud, yet indicated that SBA acted with malice or oppression. Accordingly, SBA alleges that since it was not found liable in tort and a punitive award can be based

only on the tort action, the punitive award should be reversed. SBA argues that the jury clearly ignored Jury Instructions 20 and 21, since those instructions informed the jury that it should determine only whether SBA acted with malice or oppression if it awarded fraud damages.

We agree that if the jury returns a facially contradictory verdict and the district court failed to have the jury satisfactorily clarify the verdict, a new trial is warranted.¹⁰ If the jury does not follow its instructions, the verdict must be set aside as contrary to law.¹¹ “If the punitive damage award is not based upon a cause of action sounding in tort, the award must be stricken on appeal. Also, compensatory damages must be awarded before the court can award punitive damages.”¹²

We conclude, however, that the verdict, as clarified in the special interrogatory, was not contradictory. In the special interrogatory, the jury clearly indicated that it intended the \$225,000 compensatory damages award to be for both breach of contract and fraud. Further, the jury’s rejection of the other alternatives on the special interrogatory indicates that the jury believed there were damages for fraud. Also, there is no evidence that the jury disregarded Jury Instructions 20 and 21. Jury Instruction 21 states that the jury must find that ABC suffered actual injury or harm as a result of SBA’s fraudulent conduct. It does not say that the jury could not combine the award or that it had to write a number

¹⁰Amoroso Constr. v. Lazovich and Lazovich, 107 Nev. 294, 297-98, 810 P.2d 775, 777 (1991).

¹¹Price v. Sinnott, 85 Nev. 600, 606, 460 P.2d 837, 840 (1969).

¹²Sprouse v. Wentz, 105 Nev. 597, 602, 781 P.2d 1136, 1138-39 (1989) (internal citations omitted).

greater than zero on line number 3 of the verdict form. Accordingly, the jury adequately resolved the contradiction, and the verdict is not contrary to Nevada law.

Procedure used to clarify the jury's verdict

SBA contends that the district court did not have the power to reconvene the jury after dismissing it and several days after it rendered the verdict. However, the district court did not dismiss the jury.

“[T]he time to determine whether a verdict is inconsistent with Nevada law is before the court dismisses the jury.”¹³ However, this court has recognized an exception when “the jury has not yet dispersed and where there is no evidence that the jury has been subjected to outside influences from the time of the initial discharge to the time of the re-empanelment.”¹⁴

In S.J. Amoroso Construction v. Lazovich and Lazovich, a subcontractor, Lazovich, sued the general contractor, Amoroso, for breach of contract and fraud.¹⁵ The jury returned a verdict for Lazovich for \$637,765 in compensatory damages for breach of contract, \$0 for fraud, and \$1,000,000 in punitive damages.¹⁶

To clarify the verdict, the court sent the jury the following interrogatory:

¹³Amoroso, 107 Nev. at 298, 810 P.2d at 778.

¹⁴Sierra Foods v. Williams, 107 Nev. 574, 576, 816 P.2d 466, 467 (1991).

¹⁵107 Nev. at 296, 810 P.2d at 776.

¹⁶Id.

Compensatory damages have been awarded by the Jury on plaintiff's claim for breach of contract.

No compensatory damages have been awarded by the Jury on plaintiff's claim for fraud.

Did you award no damages for plaintiff's claim for fraud

(a) because you believe plaintiff has already been compensated for fraud in your award for breach of contract,

or

(b) because you believe plaintiff has not proved fraud by clear and convincing evidence.¹⁷

The jury responded with (a).¹⁸ On appeal, this court affirmed both the use of the interrogatory and the punitive damages award, stating, "This jury found fraud which resulted in damages to [Lazovich and Lazovich]. However, the verdict contained no fraud damages because the jury determined that the breach of contract damages adequately compensated for the fraud. Under these circumstances, punitive damages are statutorily permissible."¹⁹

In the current case, the interrogatory used to clarify the jury's verdict was in the proper form, as it was almost identical to the interrogatory this court approved in Amoroso. Additionally, the district court provided the jury with the normal admonishment given before a

¹⁷Id. at 296, 810 P.2d at 776-77.

¹⁸Id. at 296, 810 P.2d at 777.

¹⁹Id. at 298, 810 P.2d at 777-78.

recess. Because the district court had not yet dismissed the jury and there was no evidence of outside influence, the district court had the discretion to ask the jury to clarify the verdict.

NRS 42.005(1)

SBA argues that the verdict violates NRS 42.005(1) and the United States Supreme Court decision in State Farm Mutual Automobile Insurance Company v. Campbell.²⁰ SBA acknowledges that in Amoroso, this court approved a punitive damages award that was based on a lump sum award for breach of contract and a tort. In Amoroso, the jury awarded \$637,765 in compensatory damages for breach of contract and nothing for fraud. We determined that the jury's award of \$1 million for punitive damages was excessive and reduced it to \$500,000.²¹ However, SBA argues that Amoroso predates the most recent amendments to NRS 42.005 and the Campbell decision, which require the district court to determine the appropriateness of a punitive damages award by comparing the punitive damages award to the compensatory damages award. SBA contends that the district court cannot make this comparison when the jury awards a lump sum. We disagree.

Contrary to SBA's assertion, the 1995 change to NRS 42.005(1) only added the language, "Except as otherwise provided in NRS 42.007," and that change is not relevant to this case. The amendment does not have any impact on our holding in Amoroso. We further conclude that the jury did not err by entering judgment for \$84,300 in

²⁰538 U.S. 408 (2003).

²¹Amoroso, 107 Nev. 298-99, 810 P.2d at 778.

punitive damages, which is significantly less than the \$225,000 compensatory damages award. The punitive damages award is not out of proportion with the compensatory damages award and does not violate NRS 42.005 or the holding in Campbell.

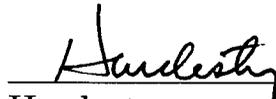
We further conclude that SBA's remaining arguments are without merit. Accordingly, we

ORDER the judgment and order of the district court AFFIRMED.


_____, J.

Rose

_____, J.
Gibbons


_____, J.
Hardesty

cc: Eighth Judicial District Court Dept. 1, District Judge
Ryan, Mercaldo, & Worthington, LLP
Theresa M. Dowling, P.C.
Michael H. Singer, Ltd.
Wohl Sammis & Perkins, LLP
Clark County Clerk