IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID DEZZANI AND ROCHELLE DEZZANI,
Appellants,
vs.
KERN & ASSOCIATES, LTD.; AND GAYLE A. KERN,
Respondents

Supreme Court No. 69410
District Court Case No. CV1500826

Appellants' in *pro per* jReply Brief

Respondent have filed a 45-page Answering Brief, accompanied by a 146-page Appendix, in response to Appellants' 5-page Opening Brief.*

It is difficult for Appellants to know how to reply to such a lengthy Answering Brief, especially in light of the brevity implicitly suggested by the Supreme Court clerk's form for opening briefs by self-represented parties, as discussed in the first footnote below.

Furthermore, because Respondents' 45 pages mostly do not address the issue actually appealed from or respond directly to Appellants' points raised in Opening Brief, composing a brief Reply Brief is especially difficult .

Nevertheless, by way of broad-brush reply,Appellants point out that the length of the Answering Brief and many of the non-responsive statements therein, suggest that Respondents hope to deflect this Court's attention away from the true issue presented on this appeal, i.e. ***whether attorneys advising Nevada common-interest property homeowners' associations are immune from personal liability when they retaliate against members of the association who complain and/or recommend that the attorney be replaced.***

By devoting the first twelve numbered pages of her brief to rehashing facts and issues pertaining to a 2013 disagreement between Appellants and their association and conflating those facts and issues with the issue truly presented in this appeal, as stated in bold italics above, Respondents seek to obscure consideration of the true issue, retaliation, the actual subject matter of this appeal. (see Answering Brief, pp. 1-12 , under "**STATEMENT OF THE CASE**" and

16-19681

"STATEMENT OF FACTS")

Throughout her Answering Brief**, Kern repeatedly asserts that all of her actions were "on behalf of the association" and/or "as the attorney for the Association" and/or "solely as the attorney for the Association" (see e.g. pp. 2, 3 and 4), apparently overlooking and/or the ignoring the fundamental principle that, when considering a motion to dismiss, factual assertions such as those made repeatedly, as quoted above, are required to been have been resolved against in Kern, not in her favor, as the District Court did when granting her motion to dismiss.

Also, by continually alluding to, and phrasing in a favorable light, multiple facts and issues pertaining to the disagreement betweenAppellants' and their homeowners' association in 2013, Kern would have this Court believe there is no factual question regarding whether she was acting "solely" as attorney for the homeowners' association (id. at 3), whereas that disagreement in fact was settled promptly, shortly after a new attorney began representing the association when Appellant's requested intervention by the Ombudsman for Common Interest Communities and Condominium Hotels Program, Nevada Real Estate Division. (See: CICOmbudsman@red.state.nv.us, File #2015-755).

Instead of attempting a line-by-line response to Kern's lengthy Answering Brief, Appellants will focus the rest of this reply brief upon some of the most egregious assertions therein , many of which show, by implication and/or logic, that the District Court erred in granting the subject Motion to Dismiss:

A. The Answering Brief overlooks and/or ignores Appellants' claims based upon NRS116.31183, that Kern, while acting as attorney for Appellants' homeowners association, undertook actions to retaliate for what her Brief describes as "a sequence of unsubstantiated attacks ... upon Kern's provision of legal services to the Association" (id. at 2), "unwarrnnted attacks upon Kern" (id.) and "attack[ing] Kern directly" (id. at 18).

Because Appellants' Complaint cited upon several specific provisions of the NRS which codify and/or create causes of action against agents who may act with dual motives, including 116.31183, it was error for the District Court to simply accept Kern's assertions regarding the sole nature of her actions and dismiss Appellant's claims for relief ,without mentioning or discussing any of Appellants' cited statutory law or allowing Appellants opportunity for discovery.

B. The District Court erroneous ruling deprives Nevada condominium owners of rights and protections specifically granted by Nevada statutes, including NRS116.31183, leaving owners without recourse against attorncys who retaliate against them for complaining about and/or recommending replacement of the association's attorney.

Although Appellants do not know what legislative considerations led to enactment of NRS116.31183 or the other NRS provisions cited in the Complaint, common sense suggests that

the legislative intent was to provide protection to common interest owners of Nevada common interest property owners, like Appellants, who are required to be members of, and pay dues to, a homeowners' association.

As pointed out numerous times by Kern, throughout her Answering Brief, attorneys for Nevada homeowners associations do not have any attorney/client relationship or privity of contract with the individual members of the association, notwithstanding that their dues are used to pay the attorney.

Under the circumstances, it seems obvious that legislative purpose of the subject status was to provide protections to allow members to communicate complaints and recommendations to their associations without fear of retaliation.

Obviously, to grant immunity to association attorneys who retaliate against homeowners, as the District Court's ruling does here, was contrary to and inconsistent with the legislative purpose and intent of the cited provisions of the NRS, including NRS116.31183.

C. Kern's statements, that "by the clear language of NRS116.31183, associations are certainly subject to liability for directing or encouraging others to take retaliatory action against an owner. Further, an attorney could be liable for actions taken independently.", on page 24 of her brief, actually constitute admissions that the District Court's erred by granting her motion and dismissing Appellant's Complaint:

1. Kern's admission, in the quoted-statement above, that "an attorney could be liable for actions taken independently" acknowledges that she "could be liable" if she acted "independently" to take retaliatory action agains Appellants.

Therefore, it was error for the District Court to dismiss Appellants' Complaint, without allowing any discovery, because questions regarding the nature, extent and intent of her actions were questions of fact, improperly resolved in favor of movant Kern by the District Court, without allowing Appellants any opportunity for discovery regarding the nature, extent and intent of her actions.

2. Kern's quoted statements, in bold above, also acknowledge that homeowners' associations "are certainly subject to liability for directing or encouraging others to take retaliatory actions under NRS116.31183", thereby concede also that the District Court erred when it dismissied Appellants' Complaint "in its entirety", as the Court thereby precluded Appellants from proceeding against and/or obtaining any discovery regarding any of the "Doe defendants", who Kern's statement admits to be "certainly subject to liability" for retaliatory actions.

D. Kern's assertions that liability for retaliatory action should rest with the association, rather than with the association's attorney who actually undertakes or directs the retaliatory action, ignores the clear wording of the NRS and makes no sense.

By arguing that she and other attorneys who represent homeowners' associations are immune from liability under the provisions of NRS116.31183, while asserting that "associations are certainly subject to liability", as quoted in paragraph **C.** above, Kern is espousing a position that

her client, not her, should be liable for retaliatory actions undertaken or directed by her, claiming that she herself is personally immune from liability for such actions, a position which defies logic, fairness, justice and the clear wording of the statute and, if true, again showing that the District Court erred in dismissing the Complaint "in its entirety"

E. The Answering Brief's subparagraph 4 stating: "*The Facts Alleged by the Dezzanis Do Not Demonstrate Any Retaliatory Action by Kern*", at page 25, implicitly acknowledges the District Court's error in granting the motion to dismiss.

The above-quoted subparagraph 4., at page 25 of the Answering Brief, and the argument set forth under it, acknowledge the existence of alleged factual issues and the possibility that those facts, if resolved adversely to movant, could demonstrate retaliatory action by Kern.

In other words, only by resolving the "[f]acts urged by the Dezzanis" adversely to them and favorably to movant, did the District Court erroneously grant Kern's motion.

In that regard, it should be noted that there was ample evidence in the record to suggest retaliation, even though no discovery had taken place, and that evidence should have been viewed in light most favorable to Appellants, not movants. e,g. Kern's failure to disclose, present and/or address written documentation which uncontrovertibly contradicted and disproved her legal opinion regarding whether the subject deck was "unallowed"(sic), (see Complaint, Exhibit 3, APP. 26); also, Kern's refusal to allow or permit, and/or her undertaking steps to prevent, Appellants' complaint letter to be placed on the meeting agenda, in violation of the requirements set forth in NRS116.31083. (Id., APP. 25)

F. In the Answering Brief Kern argues without support that the District Court's citation of and reliance upon NRS116.3118, which was not cited, mentioned or relied upon in the Complaint, was simply "an obvious typographical and/or clerical error" (See pages 21-22, footnote 5)

The problem with Kern's brushing-off of the District Court's citing of NRS116.3118 as simply "an obvious typographical and/or clerical error" is that that provision is the only NRS provision cited, mentioned or discussed in the District Coourt's Order *and* not only does it appear *twice* in that order but it also is cited *at least three times* in the next District Court order, signed several months later, when the Court awarded attorney's fee to Kern.

Furthermore, it is notable that none of the several other provisions of the NRS listed in the Complaint were cited, mentioned or addressed by the District Court in the Order appealed from.

If, indeed, the purported "typographical and/or clerical error" is so obvious that any other conclusion is "absurd", as argued by Kern in that footnote, why was did the District Court overlook it multiple times, on at least two occasions, separated by several months?

And, whether citation of NRS116.3118 was intentional or simply an overlooked typo or clerical error, it's existence in the Order, combined with the District Court's failure to address any ot the

NRS provisions actually cited in the Complaint casts doubt upon the thoroughness, carefulness and amount of attention devoted by the District Court to research and analysis of the law governing Appellants' complaint, before summarily dismissing it.

Furthermore, especially in light of the fact that the District Court saw fit to ignore the clear wording provisions of the NRS which explicitly create, codify and grant Nevada condominium owners rights and protections, "In addition to any other remedy ... to bring a separate action", against agents who take or encourage retaliatory action for good faith complaints and/or recommendations regarding "the selection or replacement of an attorney" (NRS116.31183), and, instead, created a loophole of immunity, excluding attorneys from the clear working of the statute, should itself be sufficient to require reversal.

Finally, if the District Court indeed simply signed-off on multiple typos and actually intended to refer to NRS116.31183, then its dismissal Order must be reversed because, it erroneously and contrary to the clear wording of that statute, would grant immunity to a class of perpetrators most likely to engage in the retaliatory actions prohibited by the statute, i.e. attorneys for associations whose replacement is recommended by homeowner/members of the association

G. Kern's Brief, at page 29 and the ensuing a 5-pages, set forth arguments regarding a matter which was not raised by Appellants' appeal nor addressed in the Opening Brief and constitutes an improper attempt to counter-appeal, based upon convoluted assertions that NRS 38.310, which was not addressed by the District Court, required Appellants to mediate before filing their complaint.

IN addition to pointing out that pp. 29 et seq. of Kern's Brief contain arguments related to matters outside the scope of the present appeal, Appellants respond that the arguments are totally specious, because nothing asserted in the Complaint deals with interpretation, application or enforcement of the type to be mediated.

The issue in this matter, plain and simple, is whether Kern, and/or any of the other defendants described in the Complaint, violated any of the cited provisions of the Nevada Revised Statutes because Appellants complained to the association and recommended replacement of the association's attorney.

The District Court erred in dismissing Appellants' Complaint without allowing opportunity for discovery.

Footnotes

* On the page numbered 4, in a footnote, Respondents urge this Court to sanction Appellants for their 5-page Opening Brief because it purportedly "is not compliant with ... NRAP 28(k)" and "did not use the form provided by the Supreme Court clerk to appellants proceeding without assistance of counsel". In reply, Appellants point out that the form provided by the Supreme Court clerk to appellants for "proceeding pro se" specifically authorizes filing of

APPELLANT'S INFORMAL BRIEF "either [on] the lined paper contained in this form ***or an equivalent number of pages of your own paper.*** *" (bold and italics added)*, as done by Appellants in their Opening Brief.

Also, in fairness, it should be noted that Appellants' 5 pages are single-spaced, whereas Respondents' 45 pages are mostly double-spaced, so that Respondents' brief actually is only about 5 times lengthier than Appellants', not 9 times.

** The first numbered paragraph of the Answering Brief states "Respondents Kern and Associates Ltd. and Gayle A Kern are referred to collectively herein as 'Kern'." This designation is somewhat confusing and misleading because of the multiple descriptions of the roles of these two entities, at times claiming to "represent McCloud Condominium Homeowners Association" (see RESPONDENTS' APPENDIX, hereafter "APP" at 102), at other times calling themselves "Defendant GAYLE A KERN, dba KERN & ASSOCIATES, LTD.., ("Kern"), *in pro per*"(see *all* of Respondents' filings regarding the Motion to Dismiss *prior to* the granting of that motion), at other times stating that they were "Defendants, Kern & Associates, Ltd. and Gayle Kern ("Kern"), by and thought their counsel Kern & Associates Ltd." (on all their papers requesting attorneys fees, *after* dismissal was granted, see docketing sheet, NSC No. 69896). For brevity, in this Reply Brief, Appellants also will use the term "Kern" and the pronoun "she", as employed by Kern in the Answering Brief (e.g. at page 10, paragraph10), used to refer collectively to the two Respondents who filed the Answering Brief.

Respectfully submitted, this 17th day of June, 2016.

David Dezzani

Rochelle Dezzani