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. 69896
District Court Case No. CV1500826

Appellants'
in *pro per*

Opening Brief

Statement of Facts

1. On May 5, 2015 Appellants filed their Complaint CV15-0026, in the Second Judicial District Court of the State of Nevada, setting forth four separate claims for relief, citing seven specific provisions of the Nevada Revised Statutes: NRS116.31183, .3108, .31083, 31084, 31085, 31087 and .31175. (Id.)

2. The Complaint's first claim for relief cited and relied upon **NRS116.31183 Retaliatory action prohibited; separate action by unit's owner,** which specifically authorizes condominium owners to "bring a separate action" when an "agent of an association" has retaliated against them because they (a) "Complained in good faith … ." or (b) "Recommended the selection or replacement of an attorney … ." (id.)

3. In twenty-five (25) paragraphs, prior to citing NRS116.31183, and in seven (7) exhibits attached to the Complaint, Appellants set out their reasons for believing that Respondents retaliated against them because of their complaints to their homeowners' association and their recommendation that Respondents be replaced as attorney for the association. (id.)

4. On September 17, 2015, instead answering the Complaint, Respondents filed a motion stating "Defendant GAYLE A. KERN, dba KERN & ASSOCIATES, LTD., ("Kern") in *pro per,* moves … for an order dismissing the Complaint … ." ("**DEFENDANTS,KERN & ASSOCIATES LTD. AND GAYLE KERN'S MOTION TO DISMISS COMPLAINT**", page 1, punctuation, possessive, bold and italics all original)

5. On October 12, 2015, "Kern" replied to the memorandum Appellants filed in opposition to dismissal, again designating themselves "'Kern' in *pro per*". (**DEFENDANTS,KERN &**

16-21757

ASSOCIATES LTD. AND GAYLE KERN'S REPLY IN SUPPORT OF MOTION TO DISMISS COMPLAINT)

6. On October 22, 2015, again "in *pro per*", Kern urged the Court to deny Appellants' request to postpone or temporarily stay proceedings due to Appellant David Dezzani"s recent cancer diagnosis. (**See: DEFENDANTS,KERN & ASSOCIATES LTD. AND GAYLE KERN'S OPPOSITION TO MOTION TO POSTPONE AND TEMPORARILY STAY PROCEEDINGS,** p. 1)

7. On November 19, 2015, the District Court issued its ORDER, denying Appellant's request for a postponement or temporary stay of proceedings and granting Respondents' motion to dismiss. (The dismissal portion of that ORDER is currently on appeal to this Court in Supreme Court No. 69410.)

8. On November 30, 2015, ***after*** the District Court entered its dismissal ORDER and contrary to every filing they had submitted previously, stating that Kern was "in *pro per*", Respondents filed a **MOTION FOR ATTORNEY'S FEES AND COSTS,** now styling themselves "Defendants, Kern & Associates, Ltd. and Gayle Kern ("Kern") *by and through their consul,* Kern & Associates, Ltd." (Id. at p. 1, italics added).

9. In an affidavit attached to that motion, Gayle A Kern averred that "Kern & Associates, Ltd. and Gayle Kern ("Kern") have been required to retain the services of Kern & Associates, Ltd. for the purpose of defending Plaintiffs' Complaint" and that "$10,932.34" would be "reasonable and should be awarded". (id. at paragraphs 2 and 8).

10. On December 21, 2015, ***after*** Appellants had filed their memorandum opposing an award ir attorney's fees and costs, Kern filed a reply memorandum and attached ***a new exhibit.*** (see: Exhibit 3 to **REPLY TO MEMORANDUM OF ANSWERING POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR ATTORNEY'S & COSTS; COUNTERCAVIT [SIC] AND PLAINTIFF ROCHELLE DEZZANI'S JOINDER THERETO.**)

11. By attaching this **new exhibit**, a copy of a 6-page letter, to their reply memorandum and filing it ***after*** Appellants' memorandum was due and duly filed, Respondents deprived Appellants of any opportunity to address or rebut the statements and assertions in the 6-pages.

12. The **new exhibit** not only contained numerous inaccurate factual statements, incorrect assertions regarding the nature of Appellant' Complaint and misrepresentation regarding applicable law, it also referred to, and enclosed a copy of an order from, another Second Judicial District Court judge, purportedly as support for awarding attorney's fees and costs against Appellants (Id, Exhibit 3. p.2)*

12. On February 8, 2016, without providing Appellants with any opportunity to address or respond to the **new exhibit** 6-page document or the reference to and order from the other District Court judge, the District Court issued the ORDER appealed from herein, awarding "fees and costs in the amount of $13,550.74".

* Appellants are unable to either access or view the individual documents contained in the four volumes of records transmitted from the Second Judicial District Court on 04/01/2016 and filed as "Record on Appeal" documents, numbered 16 10230, 31, 32 and 33, according to the Court's official website.
Because Appellants are unable to view the transmitted documents by volume or page number, they have attempted to direct the Court to each referenced document by providing information regarding its title and filing date and description, in hope this will be sufficient to allow the Court to locate and read the document without too much difficulty.

Statement of District Court Error

The District Court erred and abused its discretion by awarding unauthorized, unjustified and fictitious fees and costs to self-declared "in *pro per*" defendants without any proper evidence and based upon misinterpretation, reliance upon and persuasion by improper factors and considerations.

The fact that Respondents submitted all of their papers "in *pro per*", *prior to entry of* the District Court's dismissal ORDER indicates that Respondents were well aware that Nevada law, under the statutes placed at issue by the Complaint, does not authorize attorney's fees to prevailing defendants.

Of the seven Nevada statutes cited in the Complaint, only "**NRS116.31183, Retaliatory action prohibited; separate action by unit's owner",** specifically authorizes awarding attorney's fees but *to prevailing unit owners*, not to agents who successfully mount a defense and, certainly, not to agents who were the association's attorney while retaliating against complaining homeowners.

Indeed, Respondents' **MOTION FOR ATTORNEY'S FEES & COSTS** suggests that its wording was crafted to avoid not only the factual non-existence of any attorney's fees, but also the prohibition on awarding such fees to self-represented attorneys, as discussed in Settlemeyer v. Smith Harmer 124 Nev 1206.

By crafting the wording of the motion and supporting memorandum to shift the focus away from claiming a right to be reimbursed for legitimate expenses, to instead obtaining an award of fees as a vehicle to punish Appellant under NRS 18.010 (2)(b)s. (e.g. "Kern was successful in dismissing frivolous claims ..." , **MEMORANDUM OF POINTS AND AUTHORITIES**, p. 3)

As discussed in paragraph 10 of the Statement of Facts, after Appellants had filed their memorandum opposing the motion for attorney's fees, within the time constraints specified in the NRCP, Respondents improperly presented a **new exhibit**, *by attaching it to their reply memorandum*, thereby depriving Appellants any opportunity to address or rebut it. (see **REPLY TO MEMORANDUM OF ANSWERING POINTS AND AUHORITIES IN OPPOSITION**

TO MOTION FOR ATTORNEY'S FEES & COSTS; COUNTER-AFFICAVIT [SIC] AND PLAINTIFF ROCHELLE DEZZANI'S JOINDER THERETO, Exhibit 3, copy of a 6-page letter dated September *9, 2015*)

The wording of the District Court's Order establishes beyond doubt that the District Court not only reviewed and relied upon this **new exhibit**, but also grossly misinterpreted it and its enclosure, which was from another District Court judge, in an unrelated case, without providing any opportunity for Appellants to respond.

The undue weight given by the District Court to this improperly presented, 6-page, **new exhibit** is immediately apparent from the first substantive paragraph of the Court's ORDER, wherein the Court labels the exhibit "the September Letter" and refers to it repeatedly thereafter, albeit mostly interpreting it incorrectly.

For example, in the first substantive paragraph of the ORDER, in an effort to justify punishing Appellants by awarding fees and costs, the Court states "The September Letter gave a through and detailed analysis of the deficiencies of the Plaintiffs' claims, namely the inability to institute litigation against the HOA's counsel, Kern" (id. at 2)

In truth and in fact, the 6-page letter contains absolutely no mention of any of the specific provisions of the NRS cited in the complaint and it presents no "analysis" whatsoever of the claims actually presented by Appellants in the Complaint.

Furthermore, not only does "the September Letter" contain no mention of NRS116.31183, there is certainly nothing in it to suggest that the District Court would ignore the clear wording of that provision and create or imply a loophole of immunity for attorneys, as the District Court did in its first ORDER in CV15 0026. (See: Supreme Court No. 69410)

Also, in addition to not mentioning or addressing any of the seven provisions of the NRS alleged in Appellants' Complaint, "the September Letter" focused upon totally different issues, such as traditional contract and tort claims, and discussed irrelevant concepts such as breach of contract, privity of parties, interpretation of CC&Rs, etc. etc, having no applicability to the NRS provisions cited.

The District Court erred, and abused its discretion, by considering, allowing, misinterpreting and relying upon the September Letter, without giving Appellants opportunity to respond, and it further abused its discretion by relying upon and finding "persuasive" a ruling by another District Court, in another case in which the facts, claims, law and findings were different from and inapplicable to the issues in instant matter and were never reviewed on appeal.

In the first full paragraph on page 2 of the ORDER awarding fees and costs herein, the District Court makes the astonishingly erroneous statement: "The September Letter went so far as to direct the Plaintiffs to a local case where a plaintiff raised identical issues and a judge found the issues untenable. Though not binding, this case was certainly persuasive" (ORDER, p,2)

The quoted sentences are both astonishing and erroneous because they demonstrate that the District Court either did not read the ruling he calls "certainly persuasive" or, if he read it, was oblivious to the issues raised in Appellant's Complaint.

The "local case" which the District Court ORDER describes as "certainly persuasive" because of purportedly raising "identical Issues" actually involves ***totally*** *different* issues from what is presented by Appellants' Complaint.

That 'local case", Vainuku v Highland etal., No. CV14-02399 in the Second Judicial District court, was decided by District Judge Janet Berry on May 13, 2015, and as evident from Judge Berry's statement quoted below, its only similarity to the present case is that Gayle Kern was a named defendant in both cases.

Other than Kern also being a defendant in that, which the District Court deemed "persuasive", there were absolutely no similar issues, much less "Identical" ones, as proclaimed by the District Court when awarding attorney's fees herein.

In fact, contrary to the District Court's description of "identical issues" being presented by the two District Court cases, Judge Berry spelled out the issues before her as "claims for breach of contract, commercially unreasonable sale, unjust enrichment, and injunctive and declaratory relief arising from an alleged improper and unlawful foreclosure of Plaintiff's home", none of which are issues in the instant matter.

It was an abuse of discretion for the District Court herein to award fees and costs against pro se Plaintiffs, while failing to address any the seven statutes specifically cited and relied upon by the Plaintiffs in their Complaint and, further, to allow Respondents to present ,and then rely upon, a new exhibit, without providing any opportunity for Appellants to respond and, further, to claim to find an action in another District Court "persuasive" on "identical Issues", especially without actually having read that other District Court's decision or Appellants' complaint or the seven exhibits attached thereto.

Additional abuse of discretion is evident from page 3 of the ORDER awarding fees herein, where in a seeming effort to justify the granting of fees and costs, the District Court made the bald and unsupported statement "The Court finds evidence indicating that this case was maintained in a effort to harass the Defendants" without providing any description of or reference to any of the purported "evidence".

Assuming the Court was alluding only to evidence in the record, as he was legally bound to do, there simply is no evidence to justify or support this bald statement.

Even if Appellants' Complaint is poorly worded, it contains many factual allegations and was accompanied by seven exhibits, at least two of which set forth lengthy descriptions of Appellants' complaints and recommendations that Kern be replaced as the association's attorney, sufficient to engender retaliation as prohibited by NRS116.31183, so it was abuse of discretion to award fees without describing the so-called "evidence" of harassment.

In fact, he only "evidence" other than the Complaint, properly before the District Court would have been Appellant David Dezzani's COUNTER-AFFIDAVIT, attached to the memorandum Appellants filed to oppose the motion for attorney's fees, which describes the "many hours" spent reviewing documents and records before the Complaint was filed and Appellant's "good faith belief" that Kern intentionally retaliated against him and his wife, hardly "evidence" which the District Court legitimately could have relied upon to award attorney fees without being abusive.

Based upon the foregoing, Appellants' assert that the District Court not only committed reversible error by dismissing their Complaint, it also erroneously abused its discretion by awarding fees and costs against them.

In conclusion, Appellants point out that, in addition to the adverse consequences and denial of due process that would result to them personally if the award of fees and costs is affirmed, such a result also would have an adverse impact upon other common interest property owners in Nevada by discouraging them from pursuing the rights and protections ostensibly afforded to them by provisions of the NRS such as 116.31183.

Respectfully submitted, on the 1st day of July, 2016.

David Dezzani, Appellant in *pro per*

Rochelle Dezzani, Appellant in *pro per*