

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT G. REYNOLDS, an
Individual, and DIAMANTI FINE
JEWELERS, LLC, a Nevada Limited
Liability Company,

Appellants,

vs.

RAFFI TUFENKJIAN, an individual,
and LUXURY HOLDINGS LV, LLC, a
Nevada Limited Liability Company,
DOES 1-10, and ROE
CORPORATIONS 1-10, inclusive,

Respondents.

CASE NO. 78187
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APPEAL

From the Eighth Judicial District Court, Department XIII
The Honorable Mark R. Denton, District Judge
District Court Case No. A-17-753532-C

APPELLANTS' OPENING BRIEF

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NRAP 26.1 DISCLOSURE

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that the following are persons and entities as described in NRA 26.1(a), and must be disclosed:

None other than the named parties.

This representation is made in order that the judges of this court may evaluate possible disqualification or recusal.

APPELLANT'S STATEMENT REGARDING ROUTING

Pursuant to NRAP 28(a)(5), Appellant states that this case raises as principal issues: issues of first impression (NRAP 17(a)(11)) and it originated in the business court. NRAP 19(a)(9).

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JURISDICTIONAL STATEMENT

This Court has jurisdiction under NRAP 3A(b)(1) because the district court entered summary judgment on all claims against all parties in favor of Respondents on November 14, 2018, as amended on January 24, 2019. Notice of final judgment was entered on January 29, 2019. Appellant filed a timely notice of appeal on February 19, 2019. *see* NRAP 4(a)(6).

ISSUES PRESENTED

- (1) Whether the district court erred by granting summary judgment to Respondent in light of material questions regarding whether the contractual exculpation clauses excuse misrepresentations.
- (2) Whether the district court erred by granting summary judgment to Respondent in light of material questions regarding whether Appellant reasonably relied on Respondents misrepresentations.
- (3) Whether the district court erred by granting summary judgment as to Appellant's claims for protection under Nevada's Elder Abuse Statutes.

STATEMENT OF THE CASE

In this case, Appellants (collectively “Reynolds”) claim that certain misrepresentations during the sale of Diamanti Fine Jewelers (Jewelry Store) are excused because the Purchase Agreement included disclaimers against relying on Respondents’ (collectively “Tufenkjian”) representations. Tufenkjian moved for summary judgment on Reynolds’ claims for intentional misrepresentation, negligent misrepresentation, breach of contract, and elder abuse. The district court granted summary judgment to Tufenkjian over Reynolds’ opposition. This appeal follows.

STATEMENT OF FACTS

I. Factual Background

In November 2014, Tufenkjian listed the Jewelry Store for sale. (AA 0472-0477). On January 13, 2015, Reynolds purchased the Jewelry Store from Tufenkjian, and entered into a due diligence period. (AA 162-167). During the due diligence period, it was the responsibility of the Buyer to independently verify all representations made by the Seller, particularly as they relate to the adjustments made to the profit and loss statements. (AA 163). Additionally, it was the responsibility of the Buyer to verify all representations and to make a final purchase decision based on their own independent investigation. (AA 264).

Tufenkjian provided the broker with financial figures that became part of the Business Opportunity Summary (“Business Summary”). (AA 479-523). The Business Summary set forth representations as to the Jewelry Store’s finances, customer base, inventory, and furniture, fixtures and equipment (“FF&E”). *Id.*

During the due diligence period, Tufenkjian assured Reynolds that the financial representations in the Business Summary were accurate. (AA 105, 108, 109). During due diligence, the financial statements contained in the Business Summary could not be independently verified because it had been in the exclusive possession of Tufenkjian. Tufenkjian explained, “I have a holding company and the companies I own put all of their numbers together, and you wouldn’t be able to make sense of it...” and “if you go to the business summary and all of those numbers are factual.” (AA 87). Tufenkjian also delivered to Reynolds at his request, the names and contact information for 1,466 customers. List. (AA 0329). Tufenkjian agreed to sell all inventory to Reynolds at cost. Tufenkjian also presented to Reynolds a list of all inventory in the Jewelry Store. (AA 572-600).

At the end of March 2015, Reynolds completed purchase of the Jewelry Store for \$529,253.44. (AA 602). Reynolds has since learned that the Business Summary contained material misinformation, namely:

1. The annual revenue was not nearly \$800,00 per year as represented (*see* AA 331, 337)(acknowledging that the figure represented revenue from another store);
2. Only 25% of the names on the customer base list were customers (*see* AA 95);
3. Tufenkjian did not hold title to the furniture, fixtures and equipment, which was valued at \$75,000 (*see* AA 114, 461, 602);
4. Tufenkjian exaggerated to the value of the inventory as listed by 10% (*see* AA 332).

II. Procedural Background

Reynolds filed a Complaint against Tufenkjian, which was amended for the third time on November 1, 2017. (AA 15-27). After conducting discovery, Tufenkjian filed for summary judgment on August 10, 2018, arguing that non-reliance provisions bar claims for misrepresentation, that Reynolds' reliance on Tufenkjian was not justified, that a breach of contract claim was not supported, and that Reynolds lacked standing. (AA 33) Reynolds filed an opposition to Tufenkjian's motion for summary judgment on September 4, 2018, arguing that there existed genuine issues of material fact regarding Reynolds' reliance and that Reynolds was

a proper party. (AA 287). Tufenkjian then replied in support of its motion for summary judgment on September 21, 2018. (AA 694). The district court held a hearing on the motion for summary judgment on September 27, 2018. On November 16, 2018, the district court entered an order granting Tufenkjian's motion for summary judgment. (AA 717). Notice of entry of order was made on November 16, 2018. *Id.* On January 28, 2019, the Court Amended the order in part. (AA 833). Notice of the amendment to the order was entered on January 29, 2019. (AA 827). Reynolds filed a timely notice of appeal on February 19, 2019. (AA 835).

SUMMARY OF THE ARGUMENT

The district court's decision should be reversed in light of Nevada's position to not allow contractual clauses to eliminate misrepresentation claims. Here, Tufenkjian's representations regarding the financial status and value of the Jewelry Store that Reynolds later found to be false. Tufenkjian must not be excused from presenting inaccurate and misleading information from which Reynolds relied on to perform due diligence. To find otherwise would lead to an inequitable result.

Whether Reynolds justifiably relied on Tufenkjian's misrepresentations is a factual question that must be presented to a jury. Reynolds argues that Tufenkjian severely misrepresented the revenue of the Jewelry Store, the number of unique

customers, the value of the inventory, and status of the in-store fixtures. Reynolds further argues that Tufenkjian created the information that had been in their exclusive control such that the true nature of the representations could not be known until after the sale. Not only did Tufenkjian know that the information provided was false, he intentionally exploited Reynolds, who at 85 years old, is entitled to the protections provided by NRS 41. As such, the district court's judgment should be reversed and remanded for further proceedings.

ARGUMENT

I. Standard of Review

“This [C]ourt 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). A motion for summary judgment should be granted “when the pleadings and other evidence on file demonstrate that no ‘genuine issue as to any material fact [remains] and that the moving party is entitled to judgment as a matter of law.’” *Id.*; NRCP 56(c). All evidence and inferences must be viewed in light most favorable to the non-moving party on a summary judgment motion. *Safeway*, 121 Nev. at 729, 121 P.3d at 1029. Therefore, summary judgment is improper whenever “a reasonable jury could return

a verdict for the non-moving party.” *Sprague v. Lucky Stores, Inc.*, 109 Nev. 247, 249, 849 P.2d 320, 322 (1993).

When there are unresolved genuine questions of material fact such that “a rational trier of fact could return a verdict for the nonmoving party” then the case must proceed to trial. *Safeway*, 121 Nev. at 731 P.3d at 1031)(citing *Matushita Electric Industrial v. Zenith Radio Corp.*, 475 U.S. 574, 89 L.Ed. 2d 538, 106 S.Ct. 1348 (1986); see also *Pasadas v. City of Reno*, 109 Nev. 448, 851 P.2d 438 (1993)). Here, genuine issues of fact exist concerning whether the contractual disclaimer excused Tufenkjian’s misrepresentations and whether Reynolds qualified for the protections of Nevada’s Elder Abuse statutes.

II. The Contractual Disclaimers Do Not Excuse Tufenkjian’s Negligent Misrepresentation

For at least 27 years, Nevada has not allowed contractual clauses to eliminate misrepresentation claims. *Blanchard v. Blanchard*, 108 Nev. 908, 839 P.2d 1320 (Nev., 1992)(“waiver clauses cannot bar a misrepresentation claim.”). The parties in *Blanchard* entered into an agreement that included clauses stating in relevant parts:

The value attached to each asset as contained in the financial statement, has not been relied upon by the parties, but [Seller’s] representation that all of the assets have been disclosed has been relied upon by [Buyer].

And,

...no representations of fact have been made by either party to the other except as herein expressly set forth...

Despite the contractual clauses which placed the responsibility to inspect the agreement with the buyer, the *Blanchard* court explained,

Generally, a plaintiff making ‘an independent investigation will be charged with knowledge of facts which reasonable diligence would have disclosed’ [citations omitted] ... However, we also recognize that ‘an independent investigation will not preclude reliance where the falsity of the defendant’s statements is not apparent from the inspection, where the plaintiff is not competent to judge the facts without expert assistance, or where the defendant has superior knowledge about the matter in issue.’ [citations omitted].

Id. at 912 (emphasis in original). The clauses related to the purchase of the Jewelry Store are similar to those in *Blanchard*. Tufenkjian represented the following clauses in their Motion for Summary Judgment:

PURCHASER has relied solely upon their personal examination of the business in making this Offer...” (AA 0188) and “...it is further understood and agreed that Buyer has made his own independent investigation of the subject business and has satisfied himself with his ability to conduct the same...” (AA 0189).

Like the present case, the parties in *Blanchard* agreed that the buyer would conduct due diligence and not rely on previous representations. In both cases, the

buyer was presented with information about the subject purchase that he could not have otherwise known. In *Blanchard*, the buyer was presented with community assets and valuations that were later shown to be false (the assets incorrectly listed a property and overvalued a vested portion of a pension plan and stocks). The *Blanchard* Court concluded that despite the contractual waivers, a jury was to determine whether the buyer justifiably relied on the disclosures. The crux of the case presented in the two cases is substantially the same—is summary judgment appropriate when misrepresentations are made in the face of waiver clauses? The *Blanchard* Court held that it is not.

Like *Blanchard*, Reynolds must not be precluded from arguing misrepresentation claims because of non-reliance clauses. This protects persons, like Reynolds, who receive inaccurate and misleading information that clouds due diligence. Tufenkjian's misleading information made verification impossible and certainly not apparent during inspection. Because Tufenkjian was in exclusive control of the financial records and other representations, they held superior knowledge as to the true nature of the Jewelry Store. The misrepresentations were such that it wasn't until after purchase that the truth could be known.

Tufenkjian's Motion principally argues that the contract "eviscerate[s] the necessary element of reliance" (AA 55). Tufenkjian claims that extra-contractual claims for fraud are barred when a contract includes a non-reliance clause. (AA 57). (*citing FMC Technologies, Inc. v. Edwards*, 2007 WL 1725098 at *4 (9th Cir. June 12, 2007) (*quoting Vigortone AG Prods., Inc. v. PM AG Prods., Inc.*, 316 F.3d 641, 644 (7th Cir. 2003))). *FMC Technologies* is not binding upon this Court. It applied Washington state law to that to a contract-based claim. *See Id. quoting Nelson v. City of Irvine*, 143 F.3d 1196, 1206 (9th Cir. 1998). This case was not brought before a Washington state court, it was brought in a Nevada state Court. As such, the reasoning in *Blanchard* applies.

Nevada state courts hold that certain misrepresentations affect proper investigation and reliance. *Epperson v. Roloff*, 102 Nev. 206, 210, 719 P.2d 799, 803 (Nev., 1986). ("[I]ndependent investigation will not preclude reliance where the falsity of the defendant's statements is not apparent from the inspection...") Here, the very nature and scope of the misrepresentations made verification prior to the sale impossible. As explained below, Reynolds may rely on representations made by Tufenkjian when the matters are held to be peculiarly within defendant's knowledge, and because they had no independent means for ascertaining the truth. *See Section*

III. While Tufenkjian claims the contractual clauses should excuse their actions, that would lead to an inequitable result as Reynolds had no ability to discover the truth by pre-contract inspection. To find otherwise would encourage parties to provide and perpetuate unverifiable misrepresentations to a potential seller with an understanding that a contractual clause would excuse an otherwise actionable offense. It is for a jury to decide whether Reynolds justifiably relied on Tufenkjian's misrepresentations. *Id.*

III. Reynolds Justifiably Relied on Tufenkjian's Misrepresentations

Tufenkjian made certain misrepresentations concerning the Jewelry Store that could not have been known until after the close of the sale. "When matters are held to be peculiarly within defendant's knowledge, it is said plaintiff may rely without prosecuting an investigation, as he has no independent means for ascertaining the truth." *Lazard Freres & Co. v. Protective Life Ins. Co.*, 108 F.3d 1531, 1542 (2d Cir.1997)(quoting *Mallis v. Bankers Trust Co.*, 615 F.2d 68, 80 (2d Cir.1980)). In *Lazard*, Plaintiff was a sophisticated investor, had unfettered access to all of the books and records of the businesses and "must have known" of fraudulent misrepresentations. Nevertheless, the Court determined that because Defendant executed a series of "sham covering transactions" and misstatements "peculiarly

within the knowledge of” Defendants, the Plaintiff could not have discovered it by simply conducting a due diligence review of records. The Court’s determination centered on whether the reliance was justifiable and not whether the contract excused the misrepresentations.

This case is similar to *Lazar*. Prior to the sale, Tufenkjian presented to Reynolds documents showing the Jewelry Store generated \$800,000 in revenue in 2014, carried \$134,253.44 in inventory, maintained 1,466 unique customers, and owned the items listed in the FF&E. Time has revealed that Tufenkjian fabricated those disclosures in order to artificially drive up the value of the Jewelry Store. Like *Lazard*, the information was peculiarly within the knowledge of Tufenkjian and Reynolds could not have discovered the true nature of the misrepresentations by simply conducting a due diligence review of the records. Reynolds justifiably relied on Tufenkjian’s representations, documents and records. *See Todd v. Pearl Woods, Inc.*, 20 A.D.2d 911, 248 N.Y.S.2d 975 (2d Dep’t 1964) (Finding that plaintiff justifiably relied on misrepresentations of facts “peculiarly within the knowledge of defendants” even though plaintiff could have ascertained the truth through inspection of public records). A reasonable jury could find that Tufenkjian was in exclusive control of the information, that Tufenkjian knew that the information had

been altered and that Tufenkjian also knew that the information was material to Reynolds' decision to purchase the Jewelry Store.

The element of reliance has two parts: the fact of reliance and the right of reliance.

The right of reliance is tightly bound up with the duty of a representee to be diligent in safeguarding his interests. The legal obligation that a person exercise the common sense and judgment of which he is possessed is a practical limitation on the actionability of various representations. Where persons stand mentally on equal footing, and in no fiduciary relation, the law will not protect one who fails to exercise common sense and judgment...

However, this principle is not applied in cases where a party is by trickery prevented from reading the document or by **trust and confidence lulled into believing another's representation** as to its character and content.

Ruff v. Charter Behavioral Health Sys., 699 N.E.2d 1171, 1174-75 (Ind. Ct. App. 1998)(citing *Plymale v. Upright*, 419 N.E.2d 756, 768 (Ind. Ct. App. 1981))(emphasis added). Here, a reasonable jury could find that Reynolds was justified in relying on Tufenkjian's representations regarding the revenue, costs, customers and assets owned by the business because Reynolds did not and could not know that the business records Tufenkjian presented to them were fabricated.

Indeed, a rational jury could find that Reynolds took reasonable steps under the circumstances to verify the information presented through due diligence.

IV. Reynolds is Entitled to Protection Under NRS 41

Reynolds was a party to the transaction as a 100% owner of Appellant Diamanti Fine Jewelers LLC and as having entered into a personal guarantee on the lease with Tivoli Village. (AA 0611). As set forth above, Tufenkjian intentionally induced Reynolds into purchasing an inflated company by misrepresenting its value. “If an older person ... suffers a loss of money or property caused by exploitation, the person who caused the injury ... or loss is liable to the older person.” NRS 41.1395(1). Exploitation, as used in NRS 41.1395(1) is defined as “[o]btain control, through deception ... over the money, assets or property of the older ... with the intention of permanently depriving the older person ... of the ownership, use, benefit or possession of that person’s money, assets or property.” NRS 41.1395(4)(b). “Older person” is defined as “a person who is 60 years of age or older.” NRS 41.1395(4)(d). Reynolds qualifies for protection under NRS 41. He is over 85 years old and is the sole member and sole manager of Appellant Diamanti Fine Jewelers and the parties understood that Reynolds set up the entity solely to purchase the Jewelry Store and that he used his personal funds to complete the sale.

V. The Jury Must Determine Whether Reynolds Reasonably Relied on Respondent's Misrepresentations and Whether Those Misrepresentations Were Excused

There exists genuine issues of material facts that must be decided by a jury. Because Nevada does not allow contractual clauses to eliminate misrepresentation claims, a jury must determine whether Reynolds' reliance on Tufenkjian's misrepresentations was justified. Inquiries focused on the facts and circumstances of a case are typically not legal. *See, e.g., Mayfield v. Koroghli*, 124 Nev. 343, 352, 184 P.3d 362, 368 (2008); *Basile v. Union Plaza Hotel & Casino*, 110 Nev. 1382 1384, 887 P.2d 273, 275 (1994); *Anderson v. Mandalay Corp.*, 358 P.3d 242, 131 Nev. Adv. Op. 82 (Nev., 2015).

Here, Tufenkjian provided system reports and other business records that Reynolds relied upon to perform due diligence. Reynolds argues that the business records had been altered to inflate the value of the Jewelry Store—Tufenkjian represented that the annual revenue was \$800,000 in 2014, when it was not, represented that the Jewelry Store had a customer base of 1,466 people, when it did not, and represented that the Jewelry Store owned the FF&E, when it did not. Those representations were memorialized in the only business records that Reynolds had

access to. A jury must decide whether the facts support whether Reynolds reasonably relied on those representations when they performed due diligence.

CONCLUSION

For all of the above reasons, the district court's judgment should be reversed and remanded for further proceedings.

DATED this 23rd day of September, 2019.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this opening brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman and 14 point font size.

I FURTHER CERTIFY that this opening brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the answer exempted by NRAP 32(a)(7)(C) it is proportionally spaced, has a typeface of 14 points or more and contains 3,327 words.

FINALLY, I CERTIFY that I have read this Appellant's Opening Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

I understand that I may be subject to sanctions in the event that the accompanying answer is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 23rd day of September, 2019.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Marx Law Firm, and that on the 23rd day of September, 2019, I caused to be served a true and correct copy of the foregoing APPELLANT'S OPENING BRIEF by United States Mail by depositing a copy of the above-referenced document for mailing in the United States Mail, first-class postage prepaid, at Las Vegas, Nevada, to the parties listed below at their last-known mailing addresses, on the date above written:

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