

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRAD RESNIK,

Appellant,

vs.

QUALITY LOAN SERVICE CORPORATION;
SATICOY BAY LLC, 4928 E. MONROE AVE.;
NATIONSTAR MORTGAGE LLC, D/B/A
MR. COOPER;
U.S. BANK TRUST NATIONAL ASSOCIATION,
AS OWNER TRUSTEE FOR VRMTG ASSET TRUST;
AND SHELLPOINT

Respondents

No. 84751

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Elizabeth A. Brown
Clerk of Supreme Court

PETITIONER'S OPPOSITION TO MOTION TO DISMISS APPEAL

The Motion to Dismiss Appeal recites the procedural history of the case and sets forth NRAP 3A. Then it states that the ORDER GRANTING TEMPORARY WRIT OF RESTITUTION filed April 29, 2022 [Exhibit B, the Order herein], which is the order being appeal, is not an appealable order. The Motion contains no analysis and no citations to supporting case law. This is because all supporting case law supports denial of the Motion.

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I. WRIT OF RESTITUTION IS AN APPEALABLE ORDER

NRAP3A(A)(3) states “An order granting or refusing to grant an injunction or dissolving or refusing to dissolve an injunction” is an appealable order.

Thus, the question is, “is a temporary writ of restitution an injunction?”.

This Court stated “An injunction is ‘[a] court order commanding or preventing an action.’ Black’s Law Dictionary 800 (8th ed. 2004).” Peck v. Crouser, 129 Nev. 120, 124, 295 P.3d 586, 590 (2013)

Did the Order command or prevent an action? Clearly it did. It is “commanding the Sheriff or Constable to remove defendant [Petitioner] and any subtenants from the subject real property . . .” and from removing “any fixtures and other attached household items” which he owns. [Exhibit B, 2:4 -9]

An appeal may be taken from an order denying a motion for an injunction without any express determination that there is no just reason for delay. De Luca Importing Co. v. Buckingham Corp., 90 Nev. 158, 520 P.2d 1365 (1974).

Logically, appeal can be taken from granting an injunciton.

II. UNLAWFUL DETAINER IS IN REM OR QUASI IN REM PROCEEDING

It's noted that "[a] plea to quiet title does not require any particular elements, . . . each party must plead and prove his or her own claim to the property in question." Chapman v. Deutsche Bank Nat'l Tr. Co., 129 Nev. 314, 318, 302 P.3d 1103, 1106 (2013) (internal quotation marks omitted).

Chapman goes on to explain that an unlawful detainer order "is in rem or quasi in rem". Apology for the long cite, but it is relevant.

The primary purpose of an unlawful detainer action is to restore the possession of property to one from whom it has been forcibly taken or to give possession to one from whom it is unlawfully being withheld. G.C. Wallace, Inc. v. Eighth Judicial Dist. Court, 127 Nev. 701, 708, 262 P.3d 1135, 1140 (2011); Seitz, 2012 U.S. Dist. LEXIS 162927, 2012 WL 5523078, at *4 (citing Shorter v. Shelton, 183 Va. 819, 33 S.E.2d 643, 647 (Va. 1945)). Consistent with this purpose, a person who obtains title to property at a trustee's sale may remove holdover tenants by means of an unlawful detainer action under NRS 40.255(1)(c).

To initiate an action under NRS 40.255, the would-be plaintiff must serve the property's occupants with a notice to quit. If the occupants do not vacate the property within the time set by the notice, the owner may file a written complaint for unlawful detainer, seeking

restitution of the premises. NRS 40.300. The plaintiff must serve the complaint with summons on the occupants, id., and provide the court with proof of service of the notice to quit as required by NRS 40.280(3) or (4).

Thereafter, a trial may ensue if the parties' pleadings demonstrate an issue of fact. NRS 40.310. But the proceedings are summary and their scope limited. See G.C. Wallace, 127 Nev. at 708, 262 P.3d at 1140 (explaining that evidence extrinsic to the issue of immediate possession cannot be introduced at trial). Typically, the issues are whether the plaintiff gave the statutorily required notice, Davidsohn v. Doyle, 108 Nev. 145, 150, 825 P.2d 1227, 1230 (1992), and who as between the plaintiff and the defendant has a superior right to possession. NRS 40.320; Lachman v. Barnett, 18 Nev. 269, 274, 3 P. 38, 41-42 (1884) (holding that unlawful detainer does not adjudicate title or an absolute right to possession of property because "[t]he object of the [unlawful detainer] statute was not to try titles, but to preserve the peace and prevent violence"); Seitz, 2012 U.S. Dist. LEXIS 162927, 2012 WL 5523078, at *7 (unlawful detainer action limits court to determining possession between plaintiff and defendant). Notably, a superior right to possession does not require proof of title, although title can be evidence of the right to possession. Yori v. Phenix, 38 Nev. 277, 282, 149 P. 180, 180-81 (1915) ("[I]t has universally been held that title to property cannot be an issue in

such actions . . . even though such pleading and proof may incidentally involve the question of title."). If after a trial, the court determines that the occupant has no legal defense to the alleged unlawful detainer, it will issue a summary order for restitution of the premises. NRS 40.360(1).

Although possession of property differs from ownership of property, possession is nonetheless a type of property interest. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982) ("Property rights in a physical thing have been described as the rights 'to possess, use and dispose of it.'" (quoting United States v. General Motors Corp., 323 U.S. 373, 378, 65 S. Ct. 357, 89 L. Ed. 311 (1945))); Seitz, 2012 U.S. Dist. LEXIS 162927, 2012 WL 5523078, at *5. In his Commentaries on the Laws of England, Blackstone instructed that "there are four 'degrees' of title: (1) 'naked possession,' (2) 'right of possession,' (3) 'mere right of property,' and (4) 'complete title.'" Seitz, 2012 U.S. Dist. LEXIS 162927, 2012 WL 5523078, at *5 (quoting 2 William Blackstone, Commentaries *195-99). Unlawful detainer actions fall into the second "degree" of title in a property, "right of possession," and accordingly, are actions that affect interests in a thing—real property. As such, unlawful detainer is in rem or quasi in rem. See G.C. Wallace, 127 Nev. at 708-09, 262 P.3d at 1140-41 (explaining in the analogous summary eviction setting that the key elements and

defenses of unlawful detainer center on possession and property rights, rather than personal rights or obligations); Seitz, 2012 U.S. Dist. LEXIS 162927, 2012 WL 5523078, at *8; see also Hepburn & Dundas' Heirs v. Dunlop & Co., 14 U.S. 179, 203 n.4, 4 L. Ed. 65 (1816) (describing ejectment as a proceeding in rem); Scherbenske v. Wachovia Mortg., FSB, 626 F. Supp. 2d 1052, 1057 (E.D. Cal. 2009) (holding that the unlawful detainer action plaintiff sought to enjoin was a quasi-in-rem action).

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Id @ 320 - 321

LEGAL AUTHORITY FROM OTHER JURISDICTIONS

Other states have held that a writ is an injunction.

“By definition, an injunction provides relief from future wrongful conduct: the remedy by injunction is to prevent, prohibit or protect from future wrongs and does not afford a remedy for what is past.” Catrett v. Landmark Dodge, 253 Ga. App. 639, 644, 560 SE2d 101 (2002).

People v. Brewer, 235 Cal. App. 4th 122, 135, 185 Cal. Rptr. 3d 104, 113 (2015) holds :

“An injunction is statutorily defined to be ‘a writ or order requiring a person to refrain from a particular act.’ (Code Civ. Proc., § 525.)

While the statute seems to limit that definition to prohibitory injunctions, an injunction may also be mandatory, i.e., may compel the performance of an affirmative act. [Citations.] In short, an injunction may be more completely defined as a writ or order commanding a person either to perform or to refrain from performing a particular act.[Citation]” (McDowell v. Watson (1997) 59 Cal.App.4th 1155, 1160 [69 Cal. Rptr. 2d 692].)

...

An order refusing to dissolve an injunction is an appealable order. (Code Civ. Proc., § 904.1, subd. (a)(6).) Id @ 136

Federal law defines any order that commands or prohibits conduct as an injunction, consistent with Nevada's adoption of the Black's Law Dictionary definition. It looks at the "substantial effect" rather than what it's called.

United States v. Orr Water Ditch Co., 391 F.3d 1077, 1081 (9th Cir. 2004) holds :

Because the stay order was the functional equivalent of a preliminary injunction, we reject this argument. The order restrained the State Engineer from issuing the permits he had authorized in his December 2002 ruling. Regardless of how a district court chooses to title an order, this court has jurisdiction to decide an appeal under 28 U.S.C. § 1292(a)(1) if the "substantial effect" of the appealed order is that of an injunction. Tagupa v. East-West Ctr., Inc., 642 F.2d 1127, 1129 (9th Cir. 1981) ("In determining the appealability of an interlocutory order under 28 U.S.C. § 1292(a)(1), we look to its substantial effect rather than its terminology.") (internal quotation marks and citations omitted). Jurisdiction is therefore proper over this appeal.

Gates v. Shinn, 98 F.3d 463, 468 (9th Cir. 1996) holds :

"A judgment issued by a court in the exercise of its equitable . . . jurisdiction is called a decree, and when a decree commands or prohibits conduct, it is called an injunction.")

United States ex rel. Lutz v. United States, 853 F.3d 131, 139 (4th Cir. 2017) "Under the general definition, an injunction is a 'court order commanding or preventing an action.'" (quoting Black's Law Dictionary (10th ed. 2014))

Moglia v. Pac. Emps. Ins. Co. of N. Am., 547 F.3d 835, 838 (7th Cir. 2008)
"An injunction is an order of specific performance on the merits, a remedy for a legal wrong."

IAP Worldwide Servs. v. United States, 160 Fed. Cl. 57 (2022) states the federal definition of an injunction as follows.

[A]n injunction either mandates or prohibits particular conduct."
PGBA, 389 F.3d at 1228 n.6 (citing Perez v. Ledesma, 401 U.S. 82, 124, 91 S. Ct. 674, 27 L. Ed. 2d 701 (1971)); see also Birmingham Fire Fighters Ass'n 117 v. City of Birmingham, 603 F.3d 1248, 1254 (11th Cir. 2010) ("[T]he classic definition of an injunction" is "a clear and understandable directive from the [trial] court, . . . enforceable through contempt proceedings," giving "some or all of the substantive relief sought in the complaint." (quoting Sierra Club v. Van Antwerp, 526 F.3d 1353, 1358 (11th Cir. 2008))); Sierra Nev. Corp. v. United States, 107 Fed. Cl. 735, 761 (2012) ("An injunction is a coercive order by a court directing a party to do or [*8] refrain from doing something, and applies to future actions." (quoting Ulstein Mar., Ltd. v. United States, 833 F.2d 1052, 1055 (1st Cir. 1987))). Generally, "[a]n injunction, by definition, seeks to stop an ongoing injustice or to prevent future injury." Gomez v. Dade Cty. Fed. Credit Union, 610 F. Appx 859, 863 (11th Cir. 2015) (emphasis added).

CONCLUSION

The Order is an injunction since it deprives Petitioner of his possession and property rights by removing him from his property by use of the “Sheriff or Constable” and by prohibiting Petitioner from removing “any fixtures and other attached household items”, which he owns, from the property. An injunction is appealable under NRAP 3A(a)(3). If Petitioner did NOT timely appeal the Order, Saticoy Bay would be arguing that the Order was not timely appealed as it could have been under NRAP 3A(a)(3).

The Motion should be summarily denied.

/s/ Benjamin B. Childs
Nevada Bar # 3946
Attorney for Petitioner

PROOF OF SERVICE

Respondents' attorneys Michael Bohn, Ariel Stern, and Kristin Schuler-Hintz are served with this PETITIONER'S OPPOSITION TO MOTION TO DISMISS APPEAL through the Nevada Supreme Court electronic filing system on August 2, 2022.

On August 2, 2022 the settlement judge, Ara Shirinian was served by emailing this PETITIONER'S OPPOSITION TO MOTION TO DISMISS APPEAL to him at arashirinian@cox.net

/s/ Benjamin B. Childs
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