

23-

DOC # 0790963
10/14/2011 09:24 AM Deputy: SD
OFFICIAL RECORD
Requested By:
BADER & RYAN

Douglas County - NV
Karen Ellison - Recorder
Page: 1 Of 10 Fee: 23.00
BK-1011 PG- 2205 RPTT: 0.00



Case No. 55006 and 55557

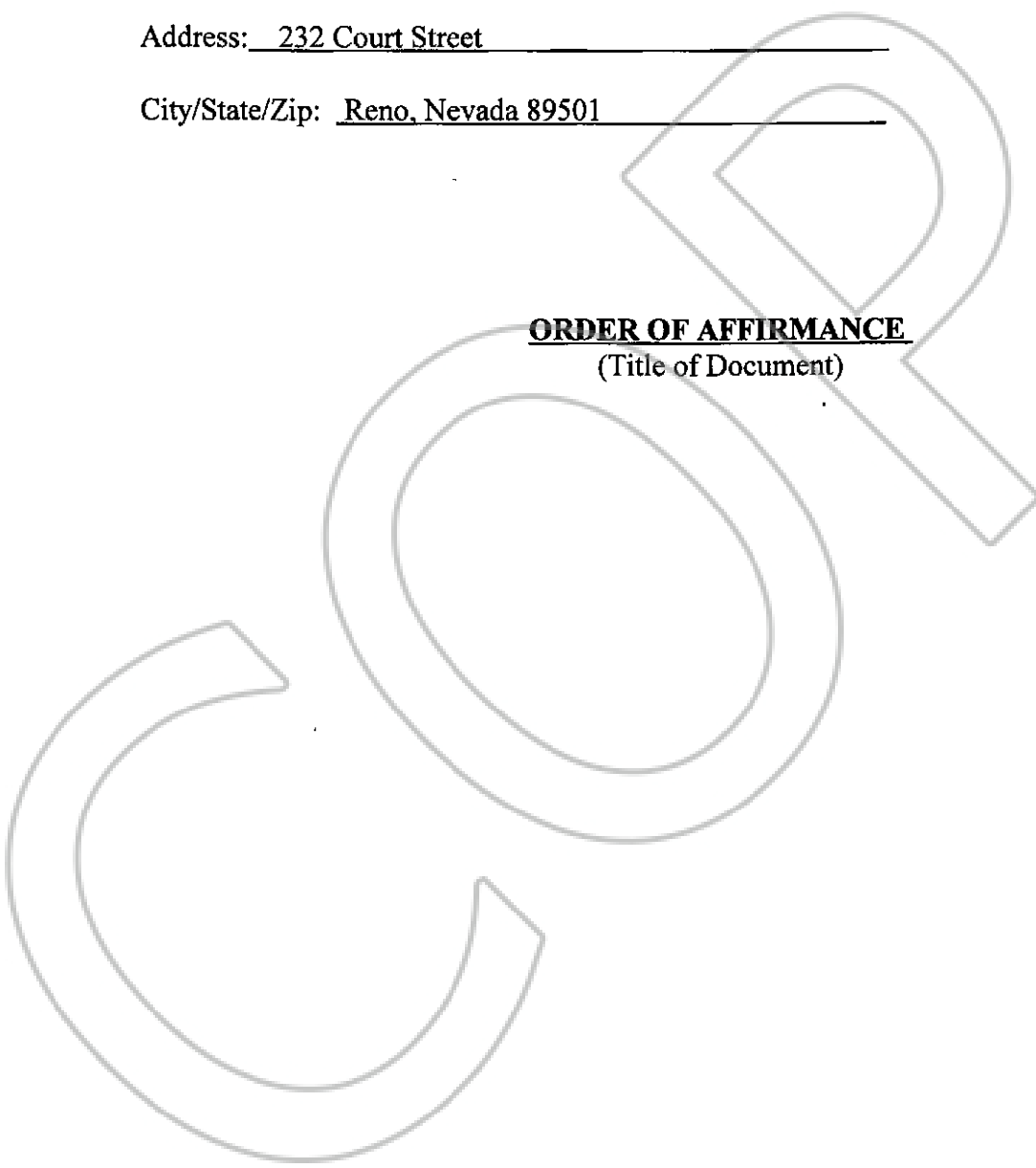
Recording Requested by:

Name: Bader & Ryan, Ltd.
Todd A. Bader, Esq.

Address: 232 Court Street

City/State/Zip: Reno, Nevada 89501

ORDER OF AFFIRMANCE
(Title of Document)



IN THE SUPREME COURT OF THE STATE OF NEVADA

SCHULZ PARTNERS, LLC,
Appellant,
vs.
ZEPHYR COVE PROPERTY OWNERS
ASSOCIATION, INC., A NEVADA
CORPORATION,
Respondent.

No. 55006

SCHULZ PARTNERS, LLC,
Appellant,
vs.
ZEPHYR COVE PROPERTY OWNERS
ASSOCIATION, INC., A NEVADA
CORPORATION,
Respondent.

No. 55557

FILED

JUL 05 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

These are consolidated appeals from a district court order dismissing a real property action and from a post-judgment order denying a motion for NRCP 60(b) relief and resolving the parties' requests for attorney fees. Ninth Judicial District Court, Douglas County; Michael P. Gibbons, Judge.

Appellant Schulz Partners, LLC, raises several issues on appeal, none of which we find meritorious.

FACTS

Schulz initiated the underlying lawsuit in response to respondent Zephyr Cove Property Owners Association, Inc. (ZCPOA) erecting two signs on both sides of a beach area that Schulz claims it

owns.¹ The beach area abuts an area known as Lot 3 that is undisputedly owned by Schulz. Schulz argues that the district court found, in a previous case involving these parties in 1987, that ZCPOA did not have any ownership interest in the beach area abutting Lot 3 and that ZCPOA's posting of the signs is an unlawful cloud upon Schulz's lawful title to the beach area.² Schulz filed a complaint seeking: (1) to extinguish ZCPOA's claim to the beach area, (2) declaratory relief determining the scope of its

¹It appears that the signs incorrectly indicated that only members of the ZCPOA and their guests had the right to use the beach, rather than all property owners in the Zephyr Cove Subdivision.

²In the 1987 case, the district court found that Schulz's predecessors-in-interest were the owners of Lot 3, located in the Zephyr Cove Subdivision, by deed. The district court further found that ZCPOA was the grantee of the beach area abutting Lot 3 from Zephyr Cove Property, Inc. (ZCPI), the developer of the Zephyr Cove Subdivision, and that the beach area was to remain continuously open for use by the owners and/or residents of the Zephyr Cove Subdivision and ZCPOA. Finally, the district court found that Schulz's predecessors-in-interest had no ownership interest in the beach area, but enjoyed the same right of use of the beach area as all other owners in the Zephyr Cove Subdivision. Schulz's predecessors appealed the district court's decision, arguing that the original conveyance of the beach area adjacent to Lot 3 from ZCPI to ZCPOA was ambiguous, and that the original deed conveying Lot 3 must be interpreted to include the beach area at issue. This court dismissed the appeal and concluded that there was no ambiguity in the property description found in the original deed, and that Schulz's predecessors did not hold an ownership interest in the beach area. Schulz v. Zephyr Cove Property Owners Association, Inc., Docket No. 18344 (Order Dismissing Appeal, March 30, 1988). Further, this court concluded that the district court properly found that Schulz had not adversely possessed the beach area, despite the construction of a seawall and exclusive possession of the land, because of Schulz's failure to pay property taxes on the property, which precluded a successful adverse possession claim. Id.

property rights, (3) an injunction excluding ZCPOA from the beach area, and (4) slander of title for ZCPOA's posting of signs on the beach area. In response, ZCPOA filed a motion to dismiss Schulz's complaint. The district court granted ZCPOA's motion and dismissed Schulz's complaint in its entirety, finding that Schulz was barred from bringing the action under claim and issue preclusion because the lawsuit was based on the same claims and issues that were already decided in the 1987 case.

Subsequently, Schulz filed a motion to set aside the district court's order dismissing its complaint based on newly discovered evidence it alleged demonstrated fraud, misrepresentation, and other misconduct on the part of ZCPOA. Both parties moved for attorney fees. The district court denied Schulz's motions to set aside and for attorney fees and awarded attorney fees and costs to ZCPOA. These appeals followed.

DISCUSSION

This court reviews de novo a district court's order granting a motion to dismiss and the order will not be upheld "unless it appears beyond a doubt that the plaintiff could prove no set of facts . . . [that] would entitle him [or her] to relief." Vacation Village v. Hitachi America, 110 Nev. 481, 484, 874 P.2d 744, 746 (1994) (third alteration in original) (quoting Edgar v. Wagner, 101 Nev. 226, 228 699 P.2d 110, 112 (1985)); see Sanchez v. Wal-Mart Stores, 125 Nev. ___, ___, 221 P.3d 1276, 1280 (2009). In reviewing an order granting a motion to dismiss pursuant to NRCP 12(b)(5), this court will draw every reasonable inference in the plaintiff's favor. Sanchez, 125 Nev. at ___, 221 P.3d at 1280.

First, we conclude that the district court properly granted ZCPOA's motion to dismiss Schulz's complaint. Specifically, we conclude that Schulz's claims in the underlying case are barred by the doctrines of

claim and issue preclusion because the issues of ownership and use of the beach area were already determined, in litigation involving these same parties or their predecessors-in-interest, in the 1987 case. See Five Star Capital Corp. v. Ruby, 124 Nev. 1048, 194 P.3d 709 (2008). Thus, Schulz could prove no set of facts entitling it to relief. Similarly, we conclude that the district court did not abuse its discretion in denying Schulz's motion for a preliminary injunction because Schulz failed to show a likelihood of success on the merits of its underlying claims. University Sys. v. Nevadans for Sound Gov't, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004).

Second, Schulz argues that the district court abused its discretion by denying its NRCP 60(b) motion to set aside the dismissal based on purportedly new evidence that ZCPOA's corporate charter had been revoked in the 1987 case and that ZCPOA perpetrated a fraud on the court by preparing the order in that case. This argument is similarly without merit. This court will not interfere with a district court's denial of an NRCP 60(b) motion unless the district court abused its discretion. Kahn v. Orme, 108 Nev. 510, 513, 835 P.2d 790, 792 (1992). The information regarding ZCPOA's corporate charter has been public record for over 20 years and was raised in the 1987 case; therefore, it was not newly discovered and the district court did not abuse its discretion in denying Schulz's motion on this ground.

Third, Schulz argues that it sufficiently pleaded an adverse possession cause of action. This claim and issue was already litigated in the 1987 case. Thus, any claim to adverse possession of the beach area prior to the decision in the 1987 case is similarly barred by the doctrines of claim and issue preclusion. To successfully assert a claim of adverse possession during the period of time following the decision in the 1987

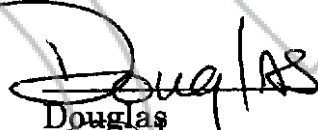
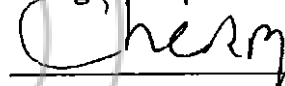
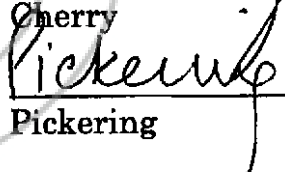
case, Schulz must have pleaded by verified complaint actual, exclusive and adverse possession of the disputed property for 15 years, and that it paid all taxes levied or assessed against the property during the period of 5 years preceding the filing of the underlying complaint. NRS 40.090(1). Schulz's adverse possession claim is precluded because it did not claim it paid taxes during the 5 years preceding the filing of the complaint, and the district court properly found that Schulz could not show a right to the property.

Finally, Schulz argues that the district court abused its discretion when it awarded ZCPOA attorney fees and costs and denied its motion for attorney fees. Schulz's claims are without merit. The decision to award attorney fees is within the sound discretion of the district court. Bergmann v. Boyce, 109 Nev. 670, 674, 856 P.2d 560, 563 (1993). Therefore, this court will not disturb a district court's award of attorney fees on appeal absent a manifest abuse of discretion. Nelson v. Peckham Plaza Partnerships, 110 Nev. 23, 26, 866 P.2d 1138, 1139-40 (1994).

Here, the district court awarded ZCPOA attorney fees pursuant to NRS 18.010(2)(b), which authorizes the award of attorney fees to a prevailing party when the district court finds that "the claim . . . was brought or maintained without reasonable ground or to harass the prevailing party." In this regard, the district court stated, "this court finds that the imposition of fees is appropriate to deter Schulz from continued attempts to undermine the 1987 final order. Simple dismissal has proven to be inadequate in deterring such conduct." Thus, we conclude that the district court did not abuse its discretion in awarding attorney fees and costs to ZCPOA.

In addition, we conclude that Schulz's motion for attorney fees was properly denied. Schulz argues that it was entitled to attorney fees because it achieved a substantial benefit for all lot owners in the Zephyr Cove Subdivision because, by filing the underlying complaint, it caused ZCPOA to change the signs at issue. In Thomas v. City of North Las Vegas, this court stated that the substantial benefit doctrine "allows recovery of attorney fees when a successful party confers a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them." 122 Nev. 82, 91, 127 P.3d 1057, 1063 (2006) (internal quotations omitted). The district court did not abuse its discretion in finding that Schulz had failed to prove its substantial benefit argument because Schulz was not the successful or prevailing party.³ Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 _____ C.J.
Douglas
 _____ J.
Cherry
 _____ J.
Pickering

³Schulz also argues, for the first time on appeal, that it has title to the beach area pursuant to the settled boundaries doctrine. Although we conclude that the fact that the property description does not include the lake line is determinative on this issue, we consider Schulz's argument waived. Nye County v. Washoe Medical Center, 108 Nev. 490, 493, 835 P.2d 780, 782 (1992) ("Generally, an issue which is not raised in the district court is waived on appeal.").

cc: Hon. Michael P. Gibbons, District Judge
Robert G. Berry, Settlement Judge
Harry W. Swainston
Bader & Ryan
Douglas County Clerk

COPY



COPY

CERTIFIED COPY

This document is a full, true and correct copy of the original on file and of record in my office.

DATE: October 11, 2011

Supreme Court Clerk, State of Nevada

J. Castillo Chief Deputy

COUNTY OF DOUGLAS, STATE OF NEVADA

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document, **Order of Affirmance**.

filed in case number: Supreme Court Case No. 55006 and 55557

Document does not contain the social security number of any person

-OR-

Document contains the social security number of a person as required by:

A specific state or federal law, to wit:

(State specific state or federal law)

-or-

For the administration of a public program

-or-

For an application for a federal or state grant

-or-

Confidential Family Court Information Sheet
(NRS 125.130, NRS 125.230 and NRS 125B.055)

Date: October 12, 2011

Todd A. Bader
(Signature)

TODD A. BADER
(Print Name)