

LEXSEE



Analysis
As of: Jul 12, 2010

**TURNBERRY PAVILLON PARTNERS, L.P., Plaintiff - Appellant, v. M.J. DEAN
CONSTRUCTION, INC., Defendant - Appellee.**

No. 09-15942

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

2010 U.S. App. LEXIS 9832

**April 16, 2010, Argued and Submitted, San Francisco, California
May 13, 2010, Filed**

NOTICE: PLEASE REFER TO [FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1](#) GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

PRIOR HISTORY: [*1]

Appeal from the United States District Court for the District of Nevada. D.C. No. 2:07-cv-01042-KJD-PAL. Kent J. Dawson, District Judge, Presiding. [Turnberry Pavilion Ptnrs., L.P. v. M.J. Dean Constr., 2009 U.S. Dist. LEXIS 29361 \(D. Nev., Mar. 31, 2009\)](#)

DISPOSITION: REVERSED and REMANDED.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant developer sought review of a judgment from the United States District Court for the District of Nevada, which granted summary judgment to appellee construction manager in the developer's suit seeking contribution and indemnity for settlement sums that the developer paid to a subcontractor in connection with the parties' work in building a condominium complex.

OVERVIEW: The subcontractor was successful on its claims alleging that the manager caused the subcontractor "lost production" and "uncompensated overtime." The developer settled those claims by paying \$ 2.1 million. In

a second case, the condominium association sued for construction defects, and the developer and the manager settled by making payments to the association. The court held that the district court erred in holding that the plain meaning of the settlement agreement in the association's suit clearly released the developer's claims in the instant case. That agreement released claims then known with respect to the claims asserted in the association's litigation. In the association's suit, there no claims based on "lost production" and "uncompensated overtime" due to the manager's negligent concrete work or management. Further, nothing suggested that the negligent concrete work that caused the subcontractor the "lost production" and "uncompensated overtime" damages also caused the finished-product construction defects at issue in the association's suit. To the contrary, the subcontractor incurred monetary damages because it had to correct the manager's negligent concrete work.

OUTCOME: The court reversed the district court's judgment and remanded the case to the district court.

COUNSEL: For TURNBERRY PAVILLON PARTNERS, L.P., Plaintiff - Appellant: Akke Levin, Attorney, Steve Morris, MORRIS PETERSON, Las Vegas, NV.

For M.J. DEAN CONSTRUCTION, INC., Defendant -

Appellee: Robert C. Carlson, Esquire, Megan K. Dorsey, Esquire, Koeller Nebeker Carlson & Haluck LLP, Las Vegas, NV.

JUDGES: Before: ARCHER, Senior Circuit Judge, ** and CALLAHAN and BEA, Circuit Judges. CALLAHAN, CIRCUIT JUDGE, dissenting.

** The Honorable Glenn L. Archer, Jr., United States Circuit Judge for the Federal Circuit, sitting by designation

OPINION

MEMORANDUM *

* This disposition is not appropriate for publication and is not precedent except as provided by [9th Cir. R. 36-3](#).

Turnberry Pavilion Partners, L.P. ("Turnberry") appeals the district court's order granting summary judgment to M.J. Dean Construction, Inc. ("Dean"). The district court held that a settlement agreement in a prior case released Turnberry's claims in this case. We have jurisdiction under [28 U.S.C. § 1291](#), and we reverse and remand.¹

1 Because the parties are familiar with the facts of the [*2] case, we will repeat them here only to the extent necessary to explain our decision.

I.

This court reviews de novo a district court's grant of summary judgment. [Nevada VTN v. Gen. Ins. Co. of Am., 834 F.2d 770, 773 \(9th Cir. 1987\)](#). This court must determine whether, viewing the evidence in the light most favorable to the nonmoving party, there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Id.*

II.

This case is the third in a series of cases that arose from the construction of a luxury condominium tower in Las Vegas, Nevada. Turnberry, the developer, hired Dean as the concrete subcontractor and construction manager, and Malco, Inc. ("Malco") as the subcontractor for the interior drywall and site walls.

In the first case, *Malco*, the Nevada state trial court

found that Dean had caused Malco "lost production" and "uncompensated overtime" due both to Malco's negligent concrete work and negligent construction management. While cross-appeals were pending before the state supreme court, Turnberry paid Malco \$ 2.1 million to settle Malco's claims. In the second case, *One Turnberry*, the condominium association sued Turnberry [*3] in Nevada state court for construction defects in the finished tower. Turnberry filed a third-party complaint against Dean and other subcontractors on the ground that their negligence caused those finished-product construction defects. All the parties reached a settlement in which Turnberry and Dean agreed to pay the condominium association \$ 2 million and \$ 600,000, respectively. In this case, Turnberry seeks indemnity and contribution from Dean for Turnberry's *Malco* settlement payment, which was partly based on the "lost production" and "uncompensated overtime" caused Malco by Dean's negligent concrete work and negligent construction management.

The district court erred in holding that the plain meaning of the *One Turnberry* settlement agreement clearly and unambiguously released Turnberry's indemnity and contribution claims in this case. Nevada law governs the interpretation of the *One Turnberry* settlement agreement because this case is based on diversity of citizenship jurisdiction. [Nevada VTN, 834 F.2d at 773](#). Under Nevada law, the interpretation of a contract is a legal issue for the judge to determine. [Sheehan & Sheehan v. Nelson Malley and Co., 121 Nev. 481, 117 P. 3d 219, 223 \(Nev. 2005\)](#). [*4] Principles of contract law govern the interpretation of a settlement agreement. [May v. Anderson, 121 Nev. 668, 119 P.3d 1254, 1257 \(Nev. 2005\)](#). Nevada courts interpret an unambiguous contract, which is not reasonably susceptible to more than one interpretation, according to its plain meaning. [Canfora v. Coast Hotels and Casinos, Inc., 121 Nev. 771, 121 P.3d 599, 603 \(Nev. 2005\)](#) (per curiam).

The *One Turnberry* settlement agreement releases "claims . . . now known with respect to the Claims asserted in the Litigation[.]" "Litigation" is defined to include only "claims asserted in the [*One Turnberry*] Subject Action, . . . as set forth in Plaintiff's Complaint, Chapter 40 Notice to Builder, Defendant's Third-Party Complaint, all Fourth Party Complaints, and . . . the final and supplemental reports of the following Plaintiff's experts: Christopher Allen, [etc.]" There is no claim in

any of the *One Turnberry* pleadings for indemnity and contribution based on "lost production" and "uncompensated overtime" due to either Dean's negligent concrete work or negligent construction management. Nor does such a claim appear in Mr. Allen's "preliminary" report, which in any event is not a "final" or "supplemental" expert report [*5] included in the "Litigation." No other plaintiff expert reports appear in the record. Nor does the "Chapter 40 Notice."

Nothing suggests that the negligent concrete work that caused Malco the "lost production" and "uncompensated overtime" damages at issue in *Malco* also caused the finished-product construction defects at issue in *One Turnberry*. To the contrary, Malco incurred "lost production" and "uncompensated overtime" damages because it had to "redo" and "correct" Dean's negligent concrete work. For example, the *Malco* court found that "a substantial portion of [Malco's] work was required to be *redone*," and that, "to *correct* Dean's bad concrete work, Malco was required to devote substantial additional time and expense to 'sculpt' the foam portions of the exterior of the building." Thus, if anything, the record suggests that the negligent concrete work that caused Malco "lost production" and "uncompensated overtime" did not remain as finished-product construction defects.

There is also nothing to suggest that Dean's negligent construction management caused the finished-product construction defects at issue in *One Turnberry*. As the *One Turnberry* court noted, "whether you do [the work] [*6] slowly or whether you don't; that doesn't turn to the issue of construction defect." Negligent construction management may have slowed the construction process, causing Malco "lost production" and "uncompensated overtime," but it does not necessarily cause construction defects.

III.

Because there is no claim in any of the *One Turnberry* pleadings, written notices, and plaintiff expert reports for indemnity and contribution based on "lost production" and "uncompensated overtime" due to Dean's negligent concrete work or negligent construction management, we hold that the *One Turnberry* settlement agreement did not release Turnberry's claims in this case. We therefore need not consider whether the doctrine of judicial estoppel applies here.

REVERSED and REMANDED.

DISSENT BY: CALLAHAN

DISSENT

CALLAHAN, CIRCUIT JUDGE, dissenting:

I dissent from the majority's decision to reverse the district court and remand. I would affirm the decision of the district court and hold that the settlement agreement in the prior case, *One Turnberry*, clearly and unambiguously released Turnberry Pavilion Partners, L.P.'s ("Turnberry") indemnity and contribution claims against M.J. Dean ("Dean") arising from the earlier *Malco* action.¹

1 Because [*7] the parties are familiar with the facts of the case, I will repeat them here only to the extent necessary to explain my dissent.

In the *One Turnberry* litigation, the condominium association's complaint asserted that the alleged defects, including the defective concrete work, arose from deficiencies in the "design, specification, planning, supervision, observation of construction, [and] development . . ." of the property caused by Turnberry and the contractors and subcontractors, which would include both Dean and Malco, Inc. ("Malco"). Similarly, Turnberry's Third-Party Complaint against, among others, Dean and Malco, generally alleged that each of the third-party defendants were negligent because "[i]f the Property is defectively designed, developed and/or constructed, the acts and/or omissions of the Third Party Defendants were the direct and proximate cause of any and all damages incurred by Turnberry." In particular, the Third-Party Complaint sought indemnity and contribution against Dean for Dean's "fail[ure] to act reasonably in the design, development and/or construction" of the *One Turnberry* property."

The *One Turnberry* settlement agreement releases "all past, present, and future [*8] claims known relative to defects and deficiencies alleged in this Litigation." This includes "any and all . . . damages . . . of whatsoever kind and nature . . . now known with respect to the Claims asserted in the Litigation." "Claims" includes "any of the actionable omissions, conduct or damage of every kind and nature whatsoever, known, alleged, or asserted in the Litigation." "Litigation" encompasses both the Plaintiff condominium association's complaint in the

One Turnberry action, as well as Turnberry's Third-Party Complaint.

First, I would find that the settlement agreement applied to Turnberry's claims against Dean related to Dean's negligent concrete work. The settlement agreement is broadly written to release all claims related to "defects and deficiencies in the building." Dean's defective concrete work is also a known "Claim" as it was at issue in the *Malco* action and it is encompassed by the pleadings in the "Litigation," as both the condominium association's and Turnberry's Third-Party Complaint bring claims related to the defective concrete work.² I would therefore find that any claim Turnberry had against Dean for Dean's negligent concrete work was released.

2 In the *Malco* [*9] action, the court found that Malco suffered "unanticipated delay and expense" due to the "quality of Dean's concrete work." The court also found that Dean's improper coordination of the subcontractor's work schedules caused "problems, delays and additional costs" to Malco.

I would also hold that the settlement agreement released Turnberry's claims against Dean related to Malco's "lost production" and "uncompensated overtime" due to Dean's negligent construction management during the construction phase. Although I agree that the *One Turnberry* action focused on design defects, I would find

that language in the relevant pleadings and the broad language of the settlement agreement also released Turnberry's claims. Specifically, Turnberry's claims against Dean related to Malco's losses due to Dean's negligent construction management were known "Claims" within the meaning of the settlement agreement, because Malco's complaints regarding Dean's negligent construction management were first raised in the *Malco* action. Further, these "Claims" are encompassed by the pleadings in the "Litigation," as the condominium association's complaint alleged deficiencies in the "*planning, supervision, . . .* [*10] . [and] development . . ." (emphasis added) of the property caused by Turnberry and the contractors and subcontractors. Similarly, the Third-Party Complaint against the contractors alleged claims related to defective design, development and/or construction. In my view, the words "planning," "supervision," and "development" are sufficient to encompass Turnberry's claims against Dean for Malco's "lost production" and "uncompensated overtime" due to Dean's negligent construction management during the construction phase.

Because the settlement agreement is broadly written to release all of the past, present and future "Claims" raised in the "Litigation," and because Turnberry's claims against Dean for Dean's negligent concrete work and negligent construction management satisfy the requirements for being "Claims" in the "Litigation," I would affirm the district court.