

2005

MacDonald Redhawk Investors, Redhawk
Development Company, LLC, MacDonald Utah
Holdings, LLC v. The Ridges at Redhawk, LLC,
Nielsen Red Hawk, LLC, Redhawk Management,
LLC, C. Michael Nielsen : Brief of Appellee

Utah Court of Appeals

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David W. Scofield; Peters Scofield Price; Counsel for Defendants/Appellants .

James S. Lowrie; R. L. Knuth; Ryan M. Harris; Jones, Waldo, Holbrook & McDonough; Counsel for Plaintiffs/Appellees.

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IN THE UTAH COURT OF APPEALS

MACDONALD REDHAWK
INVESTORS, a general partnership;
REDHAWK DEVELOPMENT
COMPANY, LLC, a Utah limited liability
company; and MACDONALD UTAH
HOLDINGS, LLC, a Utah limited liability
company,

Plaintiffs/Appellees,

vs.

THE RIDGES AT REDHAWK, LLC, a
Utah limited liability company; NIELSEN
RED HAWK, LLC, an expired Utah limited
liability company; REDHAWK
MANAGEMENT, LLC, an expired Utah
limited liability company; and C.
MICHAEL NIELSEN, an individual,

Defendants/Appellants.

Case No. 20051063-CA

District Court Case No. 050500229

BRIEF OF APPELLEES

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SUMMIT COUNTY, STATE OF UTAH,
HONORABLE BRUCE C. LUBECK

David W. Scofield (USB #4140)
PETERS SCOFIELD PRICE
340 Broadway Centre
111 East Broadway
Salt Lake City, Utah 84111
Telephone: (801) 322-2002

Counsel for Defendants/Appellees-

741518v1

Appellants

James S. Lowrie (USB #2007)
B.L. Knuth (USB #3625)
Ryan M. Harris (USB #8192)
JONES, WALDO, HOLBROOK & McDONOUGH
170 South Main Street, Suite 1500
Salt Lake City, Utah 84101-1644
Telephone: (801) 521-3200

Counsel for Plaintiffs/Appellants-

Appellees

FILED
UTAH APPELLATE COURT

MAY 17 2006

IN THE UTAH COURT OF APPEALS

MACDONALD REDHAWK	:	
INVESTORS, a general partnership;	:	
REDHAWK DEVELOPMENT	:	
COMPANY, LLC, a Utah limited liability	:	Case No. 20051063-CA
company; and MACDONALD UTAH	:	
HOLDINGS, LLC, a Utah limited liability	:	District Court Case No. 050500229
company,	:	
	:	
Plaintiffs/Appellees,	:	
vs.	:	
	:	
THE RIDGES AT REDHAWK, LLC, a	:	
Utah limited liability company; NIELSEN	:	
RED HAWK, LLC, an expired Utah limited:	:	
liability company; REDHAWK	:	
MANAGEMENT, LLC, an expired Utah	:	
limited liability company; and C.	:	
MICHAEL NIELSEN, an individual,	:	
	:	
Defendants/Appellants.	:	

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David W. Scofield (USB #4140)
PETERS SCOFIELD PRICE
340 Broadway Centre
111 East Broadway
Salt Lake City, Utah 84111
Telephone: (801) 322-2002

Counsel for Defendants/Appellees

James S. Lowrie (USB #2007)
R. L. Knuth (USB #3625)
Ryan M. Harris (USB #8192)
JONES, WALDO, HOLBROOK & McDONOUGH
170 South Main Street, Suite 1500
Salt Lake City, Utah 84101-1644
Telephone: (801) 521-3200

Counsel for Plaintiffs/Appellants

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(j), because this appeal has been transferred to this Court from the Utah Supreme Court, pursuant to Utah Code Ann. § 78-2-2(4). See R. at 177.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The issue presented on appeal is as follows:

1. Whether the district court was correct to deny Appellants' motion to compel arbitration.

"As a general rule, whether a trial court correctly decided a motion to compel arbitration is a question of law which [appellate courts] review for correctness, according no deference to the trial judge." See Central Fla. Investments, Inc. v. Parkwest Assocs., 2002 UT 3, ¶10, 40 P.3d 599.

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND RULES

Appellees do not believe that interpretation of any constitutional provisions, statutes, ordinances, rules, or regulations will be determinative of this appeal.

STATEMENT OF FACTS

In 1999, MacDonald Redhawk Investors ("MRI"), a Utah limited partnership, filed a lawsuit in Third District Court seeking dissolution and winding up of a Utah limited liability known as Redhawk Development, LLC ("the Company" or "Redhawk Development"), the entity developing land in Summit County, Utah, known as the "Redhawk Project." At that time, Redhawk Development had two members: MRI and Nielsen Redhawk LLC ("Nielsen Redhawk"). Certain disputes had arisen between the respective

principals of MRI and Nielsen Redhawk, and MRI brought the lawsuit seeking dissolution of Redhawk Development and an equitable division of the Company's assets. That case was captioned MacDonald Redhawk Investors v. Nielsen Redhawk, LLC et al., Civil No. 990908761 (Utah Third Dist. Ct.), and is herein referred to as "the Dissolution Lawsuit." One of the main issues in the Dissolution Lawsuit was how the Company's real property should be divided between MRI and Nielsen Redhawk. See R., at 91, 124.

The members of Redhawk Development had entered into an Operating Agreement that contained an arbitration clause requiring arbitration of "[a]ny claim and disputes between the Members arising out of or related to this [Operating] Agreement." See R. at 24, 91 (quoting Operating Agreement, ¶ 16.1). The arbitration provision also stated that "[t]he decision of the arbitrator or arbitrators shall be final and binding and may be entered into a final judgment by any court having jurisdiction thereof." Id.

Soon after the Dissolution Lawsuit was filed, the matter was submitted to arbitration pursuant to the parties' stipulation, and the parties proceeded to litigate the Dissolution Lawsuit before a panel of three arbitrators, chaired by James R. Holbrook ("Holbrook"). The panel determined, early in the proceedings, that MRI was entitled to 60.6% of the equity of the company, and Nielsen Redhawk was entitled to 39.4%. Id. at 53, 91, 106.

After determining the parties' respective equity ratios, the panel then requested "baseball-style" arbitration proposals (meaning that the panel would be required to select one proposal or the other in its entirety) from each side regarding how the company's real property should be divided, on the ground, consistent with the 60.6-39.4% equity ratios. In December 1999, the parties submitted their competing "baseball" proposals to the panel.

These proposals appear in the record at R. 53-71 and R. 106-120.

Nielsen Redhawk's Proposal

To assist it in putting together its proposal, Nielsen Redhawk retained a real estate appraisal expert, Mr. Walter Chudleigh (“Chudleigh”), who allocated the Company’s real property by *whole lots according to specific lot numbers*. *Id.* at 54-56. That is, Chudleigh opined that, based on his professional judgment, a fair division of the company’s real property would be to award MRI certain lots, some of which were platted and some of which were not, and to award Nielsen Redhawk certain other lots, again, both platted and unplatted. Specifically, Chudleigh opined that Nielsen Redhawk should receive Lots 4, 5, 9, 11, 14, 16, 22, 25, 26, 30, 31, 32, 34, 35, 36, 37, 38, 39, 79, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, and 100. *Id.* at 55. As part of the same analysis, Chudleigh opined that MRI should receive Lots 41, 42, 43, 44, 45, 46, 49, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 62, 63, 64, 65, 66, 67, 68, 69, 78, 101, 102, 103, 104, 105, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, and 119. *Id.*

Nielsen Redhawk incorporated Chudleigh’s analysis as its baseball arbitration proposal. *See* R. at 53-71.

MRI's Proposal

MRI also retained a real estate appraisal expert, Mr. John Romney (“Romney”). Romney’s proposal was partially based on whole lots, and partially based on per-acre valuations. *See* R. at 112-20. A summary of Romney’s appraisal recommendations is included in Nielsen Redhawk’s baseball proposal. *Id.* at 107-11. As opposed to Chudleigh, Romney did not recommend that one party or the other be awarded Lot 78; rather, Romney

recommended that the section of the development that contained Lot 78 (known as “Plat E&F” in his proposal) be divided according to *gross acreage*. *Id.* at 107, 116.

MRI’s baseball proposal was that the Romney property division be adopted by the panel. *See R.* at 106-120.

The Arbitration Award

On December 15, 1999, the arbitration panel issued a brief, three-sentence letter adopting Nielsen Redhawk’s baseball proposal, and stating as follows:

As per your simultaneously telephoned instructions, this letter is to let you know that the Arbitration Panel has selected the Nielsen Baseball Arbitration Proposal dated December 8, 1999 as its Arbitration Award. I understand from your respective instructions that you do not need (at least at this time) a “reasoned” Award explaining its basis. Please let me know if you need a separate form of Award in captioned format signed by all three panel members.

See R. at 52. Thus, the Nielsen Redhawk proposal, based on the Chudleigh valuation and division of the property by *whole lots*, was adopted by the arbitration panel in its entirety and without any modifications.

The arbitration panel gave no additional written explanation of its award.

Judicial Confirmation of the Arbitration Award

Soon after receiving the December 15, 1999 letter, the parties sought judicial confirmation of the arbitration award. On March 27, 2000, District Judge Homer Wilkinson signed an Order Confirming Arbitration Award, which had been approved as to form by counsel for both sides. The order contains only two substantive paragraphs, which read as follows:

1. The Arbitration Award granted and issued by the Arbitration Panel . .
. dated the 15th day of December, 1999, is confirmed pursuant to Utah Code

Ann. § 78-31a-12.

2. The foregoing shall not prevent any party to the Arbitration from initiating appropriate action to enforce or compel performance of the Award or to seek resolution of disputes in connection with the implementation of the Award, including, without limitation, disputes concerning water rights, access rights, and payment of obligations.

See R. at 124-25.

Recent Events

Since the judicial confirmation of the arbitration award, MRI has endeavored to resolve title to all of the lots it was awarded by the panel. As things stand now, MRI has record title to certain parcels of land that the panel awarded to Nielsen Redhawk, and Nielsen Redhawk (through Appellee The Ridges at Redhawk, LLC, its affiliate and successor-in-interest) retains record title to certain parcels of land that the panel awarded to MRI. Several times, MRI has proposed to Nielsen Redhawk's principal (C. Michael Nielsen) and to successor-in-interest The Ridges at Redhawk that the parties finalize an exchange of deeds to the respective parcels. Appellants have consistently refused to participate in the proposed deed exchanges, asserting that the 1999 arbitration award was substantively flawed and that the panel should have awarded Nielsen Redhawk more of the Redhawk Project land than it did. Id. at 94.

On July 8, 2004, pursuant to stipulation before Holbrook, the parties' respective attorneys met to discuss the deed exchange (and other) issues. MRI's counsel believed that a deed exchange agreement was reached and prepared documents to implement it. When the Nielsen parties refused to execute the documents, MRI filed a motion before arbitrator Holbrook asking him to compel the Nielsen parties to participate in the deed exchange, in

keeping with the arbitration award. Id.

On March 25, 2005, the parties' counsel participated in a conference call with Holbrook to discuss MRI's motion to compel the deed exchange. At that time, Holbrook stated that his recollection was that the arbitration award divided the property based on whole lots, and not by gross acreage. See id. at 94-95, 103.

During the conference call, Holbrook also stated that since the arbitration award had been confirmed by the district court, he no longer had any jurisdiction to act as a binding arbitrator, and therefore would not rule on MRI's motion to enforce the deed exchange agreement, even though the parties had previously agreed to a hearing on the motion. He did offer to act in the capacity of a non-binding mediator if the parties so desired. However, Holbrook further stated that if the parties desired a binding resolution, they would either have to enter into a new arbitration agreement or proceed in court, because in his view the issuance of the Award and its subsequent confirmation by the district court had divested the arbitration panel of any further jurisdiction. See id.

As a result of the March 25, 2005 conference call, the parties agreed to meet with Holbrook on April 7, 2005 in an attempt to mediate the deed exchange issue. On April 7, 2005, Holbrook met with counsel for both sides in an attempt to facilitate a mediated settlement. However, the parties fundamentally disagreed about the meaning of the arbitration award and were unable to reach a mediated resolution. Once it became clear that a mediated resolution would not be reached, Holbrook reiterated his earlier expression that the jurisdiction of the arbitration panel ended when the award was issued and then judicially confirmed and that, in light of the lack of jurisdiction, the parties had three options: (1) reach

another agreement to arbitrate the present dispute before the panel; (2) reach agreement to arbitrate the present dispute before Holbrook as the sole arbitrator; or (3) proceed to district court. See id.

MRI ultimately decided to pursue a judicial resolution in the district court, and to that end filed the instant quiet title lawsuit (“the Quiet Title Lawsuit”).

STATEMENT OF THE CASE

On April 28, 2005, Appellees MRI; Redhawk Development Company, LLC; and MacDonald Utah Holdings, LLC (collectively “MacDonald”) filed a Complaint for Declaratory Relief against Appellants The Ridges at Redhawk, LLC; Nielsen Redhawk, LLC; Redhawk Management, LLC; and C. Michael Nielsen (collectively “Appellants” or “Nielsen”), seeking to quiet title in their favor to lots 78, 118, and 119, which had been awarded to MRI in the 1999 arbitration. See id. at 1-5.

On June 7, 2005, Nielsen responded by filing a motion to compel arbitration, claiming that the matters at issue in the Quiet Title Lawsuit were governed by the arbitration clause in Redhawk Development’s operating agreement. Id. at 8-9, 23-82. On June 22, 2005, MacDonald responded by filing a memorandum in opposition to the motion to compel, arguing, *inter alia*, that the arbitration clause governed the initial dissolution of Redhawk Development, that the arbitration panel had already given MacDonald the relief it sought, namely, ownership of the three lots in question, and that the Quiet Title Lawsuit was simply an action to enforce the arbitration award itself and not an action related to the dissolution of the LLC. Id. at 83-126.

After full briefing, the district court heard oral argument on November 7, 2005. After

the argument, the court took the matter under advisement. On November 8, 2005, the district court issued a written ruling denying Nielsen's motion to compel. The operative paragraph of the district court's decision is as follows:

The court agrees with plaintiffs in this case. The court believes that any interpretation of an arbitration award, which is now a court judgment, should be done by the court, not an arbitration panel. The arbitration award is broad, but does not amount to a contract or agreement to arbitrate these issues. The award confirmed by the court should now be interpreted by the court.

See R. at 174.

On November 18, 2005, Nielsen filed its notice of appeal from the district court's ruling. Id. at 168-69. Although the court's ruling is not a final order, Nielsen has the statutory right to take a direct appeal from that ruling. See Utah Code Ann. §78-31a-129(a).

SUMMARY OF THE ARGUMENT

The district court correctly denied Nielsen's motion to compel arbitration. Although the parties agreed to arbitrate "claim[s] and disputes arising out of or related to" the Redhawk Development Operating Agreement, there was never an agreement to submit to arbitration any issues related to the scope, meaning, and enforcement of any arbitration award, much less an arbitration award that has already been confirmed by the district court and reduced to judgment. Once an arbitration award is confirmed and reduced to judgment by a district court, the arbitration panel cannot modify, interpret, or enforce that award. Once the award has been confirmed and reduced to a judgment, that award may be modified or clarified only by a court pursuant to the Utah Rules of Civil Procedure.

The arbitration panel clearly awarded lots 78, 118, and 119 to MacDonald, and MacDonald is entitled to enforce that award in a court of law.

ARGUMENT

I. THE ISSUES PRESENTED BY THE INSTANT LAWSUIT ARE NOT SUBJECT TO AN ARBITRATION AGREEMENT

The issues presented in MacDonald's Quiet Title Lawsuit—whether MacDonald is entitled to free and clear title to Lots 78, 118, and 119—are not subject to an arbitration agreement. Resolution of the issues depends upon interpretation of an arbitration award that was confirmed by the district court in 2000. The parties have only agreed to arbitrate “claim[s] and disputes arising out of or related to” the Company's Operating Agreement. Those issues have already been submitted to arbitration and resolved by the arbitration panel and confirmed by the district court. Those issues do not need to—and indeed cannot—be relitigated before the arbitration panel that issued its ruling more than five years ago and no longer believes that it has any authority over the parties or their controversy.

The issues presented in the Quiet Title Lawsuit are issues arising out of the interpretation of the arbitration award, not out of interpretation of the limited liability company Operating Agreement. The parties have never agreed to arbitrate any issues other than issues related to the Operating Agreement, and those issues have already been arbitrated. The new issues presented by the Quiet Title Lawsuit arise out of the arbitration award itself, and require the district court to interpret and enforce the arbitration award it confirmed and reduced to a judgment in March 2000.

Indeed, by asking the district court to refer the matter back to arbitration, Nielsen is essentially asking the district court to order that its own judgment be interpreted by an arbitration panel. Arbitrators do not interpret and enforce court judgments; judges do. See

San Francisco Elec. Contractors Ass’n, Inc. v. Int’l Brotherhood of Elec. Workers, 577 F.2d 529, 534 (9th Cir. 1978) (stating that if “the court is to have authority to enforce the [arbitration] award, it must have the authority to construe it” and that “[t]o hold otherwise could in effect deny the court power to enforce, since every effort made in that direction would successively and interminably require further arbitration”); Staniszewski v. Grand Rapids Packaging Corp., 336 N.W.2d 10, 11 (Mich. Ct. App. 1983) (stating that “[s]ince the trial court has the authority and obligation to enforce the [arbitration] award, it must have the authority to determine the meaning of the arbitration’s award”). In fact, the Utah Arbitration Act allows arbitration awards to be clarified and/or modified on various grounds within 20 to 90 days after the award is entered, or while proceedings to confirm the award are pending. See Utah Code Ann. §§ 78-31a-121, 125. Once the award has been confirmed and reduced to a judgment, however, that award may be modified or clarified only by the district court pursuant to the Utah Rules of Civil Procedure.

The chair of the arbitration panel in the Dissolution Lawsuit, James Holbrook, worked over a number of years to resolve other issues between the parties, but recognized that he had no jurisdiction to decide the issues presented in the Quiet Title Lawsuit, because the district court had already confirmed the award and reduced it to a judgment, and because the parties had not entered into a new agreement to arbitrate those issues. Accordingly, he declined to arbitrate those issues when they were presented to him in the form of a motion, and he instructed the parties either to (a) enter into a new arbitration agreement conferring jurisdiction on him, or (b) seek relief in court.

This suggestion is entirely in keeping with the instructions of the district court’s own

Order Confirming Arbitration Award, which plainly states that confirmation of the award “shall not prevent any party to the Arbitration from initiating appropriate action to enforce or compel performance of the Award or to seek resolution of disputes in connection with the implementation of the Award, including, without limitation, disputes concerning water rights, access rights, and payment of obligations.” See R. at 124-25.

MacDonald has done precisely what Holbrook and the district court’s own Order suggested—it has filed for relief in the district court. Under Utah law, “arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to so submit.” See Central Fla. Investments, Inc. v. Parkwest Assocs., 2002 UT 3, ¶10, 40 P.3d 599; see also Intermountain Power Agency v. Union Pac. R. Co., 961 P.2d 320, 323 (Utah 1998) (stating that “[t]he scope of the parties’ dispute as defined in their written agreement to arbitrate establishes the scope of the arbitrator’s authority in resolving the conflict”); Buzas Baseball, Inc. v. Salt Lake Trappers, Inc., 925 P.2d 941, 949 (Utah 1996) (stating that “[t]he powers of an arbitrator are defined by agreement of the parties; the question they submit both establishes and limits the arbitrator’s jurisdiction” (citations omitted)). Nielsen argues that “Utah law strongly favors arbitration,” see Aplt. Br., at 14, but overlooks the fact that “the policy of liberally construing agreements in favor of arbitration is conditioned upon the prior determination that arbitration is a remedy freely bargained for by the parties and which provides a means of giving effect to the intention of the parties,” see McCoy v. Blue Cross and Blue Shield of Utah, 2001 UT 31, ¶15, 20 P.3d 901.

Here, the parties have simply not agreed to arbitrate issues related to the scope, meaning, and enforcement of the December 15, 1999 arbitration award itself, and Holbrook

recognized that fact. In the absence of any such agreement, MacDonald's Quiet Title Lawsuit should go forward, and Nielsen's motion was correctly denied.

CONCLUSION

For all of the foregoing reasons, the district court's order denying Appellants' motion to compel arbitration should be affirmed, and the case should be remanded to the district court for further proceedings.

DATED this 17th day of May, 2006.

JONES, WALDO, HOLBROOK & McDONOUGH

By: _____

James S. Lowrie

R. L. Knuth

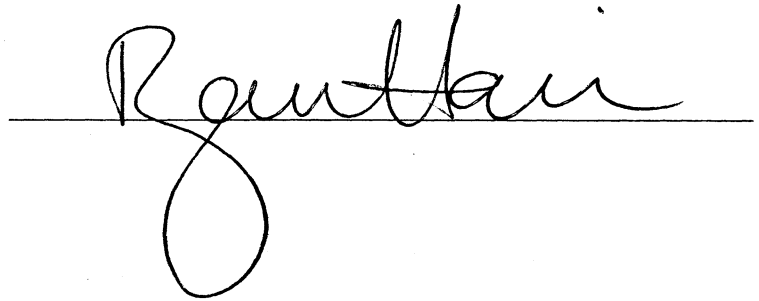
Ryan M. Harris

Attorneys for Plaintiffs/Appellees

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of May, 200~~8~~⁶, I caused to be sent, via hand-delivery, two (2) true and correct copies of the foregoing **BRIEF OF APPELLEE** to the following:

David W. Scofield
PETERS SCOFIELD PRICE
340 Broadway Centre
111 East Broadway
Salt Lake City, Utah 84111

A handwritten signature in cursive script, appearing to read "R. G. Hain", is written over a horizontal line. The signature is fluid and stylized, with a large loop at the bottom.