

IN THE SUPREME COURT OF THE STATE OF NEVADA

TERRY L. SCHNEIDER, AN  
INDIVIDUAL, AND JANA M.  
SCHNEIDER, D/B/A STAGELINE CO.,  
Appellants,  
vs.  
NEVADA STATE BANK,  
Respondent.

No. 43124

**FILED**

**JAN 06 2006**

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Richards*  
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE AND REMAND

This is an appeal from a district court order for summary judgment in a contract action. Fourth Judicial District Court, Elko County; Andrew J. Puccinelli, Judge.

Terry and Jana Schneider owned property subject to several deeds of trust, including one held by Nevada State Bank (NSB). The deed of trust held by NSB originally secured a promissory note in favor of NSB for \$40,000 (the commercial loan) and later also secured a credit line through a cross-collateralization clause. The Schneiders personally guaranteed the credit line. When the Schneiders sold their property, they attempted to have all debt owed to NSB satisfied. After the sale of the property, the Schneiders ceased making payments on their loans. NSB sued, seeking to collect on the credit line debt. The parties are familiar with the remaining facts, and we do not recite them further, except as needed.

The district court granted NSB summary judgment. We affirm the judgment of the district court, concluding that the Schneiders have produced no admissible evidence that shows a genuine issue of fact

as to whether NSB agreed to accept the \$25,000 short payoff in satisfaction of anything other than the commercial loan.<sup>1</sup> We also remand this case to the district court for a determination of attorney fees as provided by the applicable contracts.

Summary judgment

Summary judgment shall be granted where the admissible evidence shows that “there is no genuine issue as to any material fact.”<sup>2</sup> We construe all facts and reasonable inferences in favor of the nonmoving party.<sup>3</sup> We review orders granting summary judgment de novo.<sup>4</sup>

The only evidence that the Schneiders provided that NSB agreed to accept a short payoff of \$25,000 for all loans it made to the Schneiders was Terry Schneider’s affidavit and the escrow documents. However, Terry’s affidavit testimony regarding Robert C. Klan’s negotiations with NSB is hearsay, and thus not admissible.<sup>5</sup> Moreover,

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<sup>1</sup>There is some dispute as to whether NSB accepted short payoff in full or partial satisfaction of the commercial loan. As another case is pending regarding that question, Case No. CV-C-02-832 in the Fourth Judicial District, we make no determination of the parties’ rights in that matter.

<sup>2</sup>NRCP 56(c).

<sup>3</sup>Wiltsie v. Baby Grand Corp., 105 Nev. 291, 292, 774 P.2d 432, 433 (1989).

<sup>4</sup>Bulbman, Inc. v. Nevada Bell, 108 Nev. 105, 110, 825 P.2d 588, 591 (1992).

<sup>5</sup>Inadmissible hearsay evidence may not be considered for summary judgment. Adamson v. Bowker, 85 Nev. 115, 119, 450 P.2d 796, 799 (1969). We find the Schneiders’ arguments that this testimony is admissible to be without merit.

NSB did not sign the escrow documents and is not bound by them.<sup>6</sup> These documents are evidence of the Schneiders' intent to have both of the loans paid off, but we cannot infer NSB's commitment to release both the commercial loan and the credit line for a payment of \$25,000 from documents that NSB did not sign.

The only evidence presented that was signed by NSB was the letter from NSB to Stewart Title Company. It stated that "[t]his letter is sent as confirmation that Nevada State Bank will accept a short payoff in the amount of \$25,000.00 for NSB Loan no. 7732406-9001 [the commercial loan]." The letter clearly states that NSB was only accepting the \$25,000 payoff for the commercial loan.

The Schneiders have not provided evidence that Robert Klan and NSB may have negotiated anything different.<sup>7</sup> Nor do they provide any evidence that NSB knew that it was accepting, or represented that it agreed to, a short payoff for all outstanding debt. Therefore, we conclude

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<sup>6</sup>NSB's knowledge and acknowledgement of the language in the escrow documents in court filings does not show that it knew of and acquiesced to that language when it was releasing its deed of trust.

<sup>7</sup>The Schneiders allege that such evidence exists, but have not submitted any documents to this court or to the district court.

The Schneiders' argument that NSB did not comply with the discovery rules is untimely on appeal. If the Schneiders needed further discovery or felt that NSB was not complying with the discovery rules, motions to that effect should have been made in the trial court before summary judgment.

that there is no genuine issue of material fact, and the district court correctly granted summary judgment.<sup>8</sup>

Additionally, the commercial loan, the credit line agreement, and the commercial guaranty all provide for attorney fees. In Musso v. Binick, this court determined that when a contract calls for a grant of attorney fees, not to give the prevailing party attorney fees on appeal would defeat that party's rights under the contract.<sup>9</sup> We therefore remand this case to the district court for a determination of whether NSB should receive attorney fees and, if so, in what amount.

Accordingly, we

ORDER the judgment of the district court AFFIRMED and REMAND this matter to the district court for proceedings consistent with this order.

Douglas, J.  
Douglas

Rose, J.  
Rose

Parraguirre, J.  
Parraguirre

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<sup>8</sup>We find the Schneiders' arguments regarding equitable estoppel, waiver, and set-off to be without merit.

<sup>9</sup>104 Nev. 613, 614-15, 764 P.2d 477, 477-78 (1988).

cc: Hon. Andrew J. Puccinelli, District Judge  
Glade L. Hall  
J. Randall Call  
Prince, Yeates & Geldzahler  
Elko County Clerk