

IN THE SUPREME COURT OF THE STATE OF NEVADA

A & E HOLDINGS; EVERETT B. COOK AND ALICE V. COOK, AS TRUSTEES FOR THE COOK FAMILY TRUST DATED 9/22/97; JAMES ABBEY; COLEEN ABBEY; ROBERT A. ANDERSON; JOHN CARNEY; CURTIS F. CLARK; FIRST TRUST COMPANY OF ONAGA C/F CURTIS F. CLARK DATED 12/4/97; ANTHONY DELLA; CALVIN GREGORY DULL; PERLITA DULL; DELORES A. FLOOD; ALAN FRANKEL; BLAINE W. FREW; EDMOND GARFIELD; GAIL GARFIELD; GILFADA, L.L.C.; ROBERT LEROY GOOCH; MAUDE GOOCH; ROBERT LEROY GOOCH AND MAUDE MARGARET GOOCH AS TRUSTEES OF THE GOOCH LIVING TRUST DATED 12/6/91; JANET HAGIN; DICK SANDER; STANLEY S. HALL AND JEANNINE M. HALL AS TRUSTEES OF THE STANLEY S. HALL AND JEANNINE M. HALL LIVING TRUST DATED 3/7/00; DARLENE J. KING; BRETT LAUREN; SCOTT LAUREN; MARVIN LAUREN; DIANE LAUREN; MARVIN LAUREN AND DIANE LAUREN AS TRUSTEES OF THE LAUREN LIVING TRUST DATED 4/25/90; ANTHONY M. MADONIA; JEANNIE MADONIA; ANTHONY MADONIA, SR.; LYNN MADONIA; RAY MILLISOR; LONNIE MOON; YVONNE MOON; SOL MUNN AND EVELYN MUNN AS TRUSTEES OF THE MUNN TRUST OF 1975 DATED 5/23/75; LEWIS PANOZZA; WILLIAM POWERS; PEARL ROSEN; GERALDINE SCHOEN;

No. 43327

FILED

JUN 30 2006

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

DONALD SCHOEN; BETTY SHIELDS;
GEORGE SWARTZ AND MILDRED
SWARTZ, AS TRUSTEES OF THE MSG
TRUST DATED 10/24/89; ELAINE
TAYLOR; JAN UHLIR; JOHN
WALTERS; ELAINE WALTERS;
CLIFFORD WIEHE, JR.; E. JEANETTE
WIEHE; CLIFFORD WIEHE, JR. AND
E. JEANETTE WIEHE AS TRUSTEES
OF THE JOHN AND LORRAINE
WALTERS TRUST DATED 9/3/98; MIKE
YOUNG; LINDA ZIEFF; PAUL
BENEDICT; PHYLLIS JACOBSON;
AND KAREN O'CONNELL,
Appellants,
vs.
PACIFIC WEST MORTGAGE, INC.;
PATRICK TYLL; AND
DISBURSEMENT GROUP, INC.,
Respondents.

ORDER AFFIRMING IN PART, REVERSING IN PART, AND
REMANDING

This is an appeal from a district court order granting summary judgment, certified as final under NRCP 54(b), and a post-judgment order awarding attorney fees in a failed real estate development project. Eighth Judicial District Court, Clark County; Michael L. Douglas, Judge.

A & E Holdings and numerous other parties (collectively "Investors") invested in a deed of trust marketed by Patrick Tyll on behalf of Pacific West Mortgage, Inc. (Pacific). The deed of trust was security for a construction loan to Azra Investments Corporation (Azra) to construct an assisted living center in Las Vegas. Azra and Pacific hired Project Disbursement Group, Inc. (PDG) to perform construction control services

to verify that the construction services were performed before authorizing payment.

Construction, however, was never completed. Once the project fell through, the Investors foreclosed on the property and sought compensation from Azra in its bankruptcy. In the district court, the Investors also sought damages from Tyll as Pacific's alter ego; Pacific and Tyll for fraud and/or misrepresentation, embezzlement, conversion, and deceptive trade practices; from PDG for breach of contract; and from others for similar causes of action. Pacific, Tyll, and PDG moved for summary judgment, which the district court granted as to all claims against them. We affirm the district court's summary judgment on the alter ego cause of action against Tyll.¹ We reverse the district court's grant of summary judgment in favor of Pacific, Tyll, and PDG on all other causes of action.²

"Orders granting summary judgment are reviewed de novo."³ NRCP 56(c) provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a

¹To the extent that the Investors argue that they should have had an opportunity to conduct more discovery before summary judgment, we affirm the district court's refusal to grant a continuance under NRCP 56(f), as the Investors did not move for a continuance for further discovery.

²In light of this order, we vacate the district court's order granting attorney fees to PDG, and conclude that the Investors' concerns regarding amending their complaint are rendered moot.

³Bulbman, Inc. v. Nevada Bell, 108 Nev. 105, 110, 825 P.2d 588, 591 (1992).

judgment as a matter of law.” “In determining whether summary judgment is proper, the nonmoving party is entitled to have the evidence and all reasonable inferences accepted as true.”⁴

Alter ego against Tyll

The district court granted summary judgment to Tyll for the Investors’ alter ego cause of action. While the Investors appeal the summary judgment, they do not provide any analysis in their briefs regarding their alter ego cause of action.⁵ Moreover, the Investors have not provided information in the record regarding Pacific’s ownership or that piercing Pacific’s corporate veil was necessary for justice to be done.⁶ Therefore, we conclude that there are no genuine issues of material fact, and the district court correctly granted summary judgment to Tyll regarding the alter ego cause of action.

Embezzlement, conversion, misrepresentation, and deceptive trade practices against Tyll and Pacific

The Investors claimed that Pacific and Tyll embezzled or converted money they invested and that Pacific and Tyll misrepresented and deceptively portrayed the investment opportunity. Regarding conversion and embezzlement, Pacific argued that the evidence it presented to the district court shows that all of the money was accounted

⁴Wiltsie v. Baby Grand Corp., 105 Nev. 291, 292, 774 P.2d 432, 433 (1989).

⁵See Wittenberg v. Wittenberg, 56 Nev. 442, 456, 55 P.2d 619, 624 (1936) (concluding that if a party has not briefed an issue they appeal, it may be decided against them).

⁶LFC Mktg. Group, Inc. v. Loomis, 116 Nev. 896, 904, 8 P.3d 841, 846-47 (2000).

for. However, the Investors provided affidavits and other evidence in support of their claim that Pacific and Tyll approved the disbursement of money paid to entities unrelated to the assisted living center project. In light of the disputed factual record, we conclude that there are genuine issues of fact as to whether Pacific or Tyll converted or embezzled money and the district court erred when it granted summary judgment.

Regarding the Investors' misrepresentation and deceptive trade practices claims, the Investors provided both a letter from Tyll stating that construction was almost complete and pictures of the construction site that belied Tyll's claim that construction was nearly complete. The Investors also included affidavits from individuals with personal knowledge of the alleged deceptive practices. This, together with the Investors' other evidence, when viewed in a light most favorable to the Investors, raises genuine issues of fact. Therefore, we conclude that the district court erred when it granted summary judgment to Pacific and Tyll on these causes of action.

Breach of contract against PDG

In the district court, PDG argued that the Investors were not parties to the construction control contract and that they did not have third-party standing. The district court granted summary judgment to PDG, finding that the construction control contract explicitly rejected any third-party rights.

The paragraph in question provides:

8. LIMITATIONS ON LIABILITY:

....

Neither [Azra], [Pacific], nor any other party, shall be entitled to rely upon [PDG] for any purposes other than to approve disbursement of funds in compliance with the terms of this agreement, nor

shall any right of action arise hereunder or in connection with the subject matter hereof in favor of any such person for any other reason whatsoever, nor shall [PDG] be liable for funds disbursed or losses incurred as a result of misrepresentation or fraud committed by any third-party.

The first clause of the paragraph states that no entity is entitled to rely on PDG for anything except to approve disbursement of funds in compliance with the contract. The second clause reinforces this liability, stating that no rights arise in any person for any other reason. Thus, it is plain on the contract's face⁷ that Azra, Pacific, and other parties may rely on PDG to approve disbursement of funds in compliance with the contract, but not for anything else.

Therefore, we conclude that the paragraph does not exclude PDG's liability to third parties, if the contract demonstrates the requisite intent to benefit those third parties.⁸ Consequently, on remand, the district court must determine whether the Investors are third-party beneficiaries who can enforce the contract,⁹ i.e. whether the contract clearly demonstrated "a promissory intent to benefit the [Investors]," and whether the Investor's reliance on the contract was foreseeable.¹⁰

Accordingly, we


⁷Ringle v. Bruton, 120 Nev. 82, 93, 86 P.3d 1032, 1039 (2004).


⁸We express no opinion regarding the Investor's successor-in-interest argument.

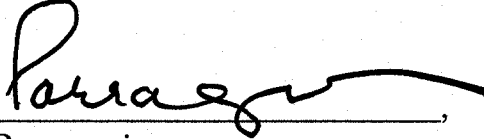
⁹We have reviewed and rejected PDG's contention that it should be granted summary judgment because it did not breach the contract.

¹⁰Lipshie v. Tracy Investment Co., 93 Nev. 370, 379, 566 P.2d 819, 824-25 (1977).

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.


_____, C.J.
Rose


_____, J.
Becker


_____, J.
Parraguirre

cc: Eighth Judicial District Court Dept. 11, District Judge
Janet Trost, Settlement Judge
Lee & Russell
Callister & Reynolds
Sylvester & Polednak, Ltd.
Clark County Clerk