

IN THE SUPREME COURT OF THE STATE OF NEVADA

FARIBORZ SADRI, IN HIS CAPACITY
AS TRUSTEE OF THE STAR LIVING
TRUST, AND INDIVIDUALLY,
Appellant,

vs.

JACOB D. BINGHAM; AND MJJ
DEVELOPMENT COMPANY, A
NEVADA LIMITED LIABILITY
COMPANY,
Respondents.

No. 43848

FILED

MAY 09 2007

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

ORDER AFFIRMING IN PART, VACATING IN PART AND
REMANDING

This is an appeal from a district court summary judgment in a breach of contract action. Eighth Judicial District Court, Clark County; Michael A. Cherry, Judge.

The parties are familiar with the facts, and we do not recount them except as pertinent to our disposition.

This court reviews a district court's grant of summary judgment de novo, without deference to the findings of the lower court.¹ Summary judgment is appropriate and "shall be rendered forthwith" when the pleadings and other evidence on file demonstrate that no "genuine issue as to any material fact [remains] and that the moving party is

¹Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (citing Caughlin Homeowner's Ass'n v. Caughlin Club, 109 Nev. 264, 266, 849 P.2d 310, 311 (1993)).

entitled to a judgment as a matter of law.”² This court has noted that when reviewing a motion for summary judgment, the evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party.³

On appeal, appellant Fariboz Sadri, in his capacity as trustee of Star Living Trust and individually, contends that the district court erred by granting respondent MJJ Development Company’s motion for summary judgment because no discovery had been conducted and because genuine issues of material fact existed. Overall, Sadri argues that respondent MJJ Development Company and respondent Jacob D. Bingham fraudulently induced him to enter into the underlying contract for the sale of land.

MJJ and Bingham respond by asserting that Sadri’s request for discovery was implausible because facts for Sadri’s defense were within his control and custody and that Sadri’s discovery request was just an attempt to delay the proceedings. Additionally, MJJ and Bingham argue that summary judgment was nevertheless proper because Sadri’s discovery request never stated what discovery was needed or how discovery would impact the case. MJJ and Bingham further contend that the parol evidence rule precludes Sadri from trying to substitute his contractual obligation with his version of the agreement because Sadri’s

²NRCP 56(c); Wood, 121 Nev. at 729, 121 P.3d at 1029 (citing Tucker v. Action Equip. and Scaffold Co., 113 Nev. 1349, 1353, 951 P.2d 1027, 1029 (1997)).

³Wood, 121 Nev. at 729, 121 P.3d at 1029 (citing Lipps v. Southern Nevada Paving, 116 Nev. 497, 498, 998 P.2d 1183, 1184 (2000)).

version contradicts the written agreement. Moreover, MJJ and Bingham argue that Sadri's counterclaim and third-party complaint are redundant because they repeat his affirmative defenses, and they argue that the district court properly concluded that the parol evidence rule barred Sadri's fraud-in-the-inducement defense.

We conclude that the fraud exception to the parol evidence rule does not apply to this matter. Under the parol evidence rule, all prior negotiations and agreements are deemed merged in the written contract, and parol evidence is not admissible to vary or contradict its terms.⁴ Thus, in general, the parol evidence rule does not permit the admission of evidence that would change the contract terms when, as here, the terms of a written agreement are clear, definite, and unambiguous.⁵ However, parol evidence is admissible to prove a separate oral agreement regarding any matter not included in the contract or to clarify ambiguous terms, so long as the evidence does not contradict the terms of the written agreement.⁶ Nonetheless, parol evidence may be introduced to demonstrate the invalidity of a contract, if fraud is independently alleged and established.⁷

“Where fraud or mistake is alleged and proved, it is then proper to admit testimony to show the real

⁴Tallman v. First Nat. Bank, 66 Nev. 248, 257, 208 P.2d 302, 306 (1949).

⁵Ringle v. Bruton, 120 Nev. 82, 91, 86 P.3d 1032, 1037 (2004).

⁶Id. (citing Crow-Spieker #23 v. Robinson, 97 Nev. 302, 305, 629 P.2d 1198, 1199 (1981)).

⁷Tallman, 66 Nev. at 258, 208 P.2d at 306-07.

agreement between the parties, but it is not proper, simply on the allegation of fraud or mistake, and without proof to establish the averment, to permit parties to offer parol evidence to contradict the writing which purports to contain the contract between them.” [Internal citations omitted.]

“Our conception of the rule which permits parol evidence of fraud to establish the invalidity of the instrument is that it must tend to establish some independent fact or representation, some fraud in the procurement of the instrument, or some breach of confidence concerning its use, and not a promise directly at variance with the promise of the writing.[”] [Internal citations omitted.]⁸

Therefore, to fall within the fraud exception to the parol evidence rule, Sadri must, as an initial matter, demonstrate independent facts or representations constituting fraud, fraud in the procurement of the land sale agreement, or some breach of confidence concerning the land sale agreement. Here, however, the fraud alleged by Sadri was not pleaded with particularity in Sadri’s affirmative defenses.⁹ At the very

⁸Id.

⁹NRCP 9(b) states that “[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.”

Additionally, “[a]ffirmative defenses are subject to the general pleading requirements of Rules 8(a), 8(e) and 9(b), generally requiring only a short and plain statement of the facts but demanding particularity as to the circumstances constituting fraud and mistake.” Instituto Nacional De Comercializacion Agricola v. Continental Illinois Nat. Bank and Trust Co., 576 F. Supp. 985, 988 (D. Ill. 1983); Alan Wright & Arthur R. Miller, 5 Wright & Miller, Federal Practice & Procedure: Civil § 1274 (2006).

least, Sadri did not plead with particularity his justifiable reliance on misrepresentations made by MJJ and Bingham.¹⁰ Accordingly, the fraud exception to the parol evidence rule cannot apply in MJJ's contract action because Sadri did not plead with particularity how the alleged fraud was induced in the procurement of the land sale agreement, how the alleged fraud established any independent representations made by MJJ or Bingham, or how the alleged fraud breached any confidences between the parties.¹¹ Thus, because the fraud alleged by Sadri in his affirmative defenses was not pleaded with particularity, the district court did not err when it determined that the fraud exception to the parol evidence rule did not apply.

Consequently, because the land sale agreement is clear, definite, and unambiguous on its face, and because Sadri did not properly plead fraud in his affirmative defenses, we conclude that MJJ was entitled to summary judgment as a matter of law.

However, whether the district court erred in granting MJJ summary judgment in MJJ's contract action also turns on whether the district court erred in denying Sadri's request for a discovery continuance under NRCP 56(f).¹² We conclude that the district court did not err in denying Sadri's request for a discovery continuance.

¹⁰See Lubbe v. Barba, 91 Nev. 596, 599, 540 P.2d, 115, 117 (1975) (holding that, inter alia, justifiable reliance is a required element for relief for intentional misrepresentation).

¹¹See Tallman, 66 Nev. 248, 258, 208 P.2d 302, 306-07 (1949).

¹²NRCP 56(f) states that:

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This court reviews a district court's decision to refuse a continuance under NRCP 56(f) for an abuse of discretion.¹³ A motion for continuance under NRCP 56(f) is appropriate only when the movant expresses how further discovery will lead to the creation of a genuine issue of material fact.¹⁴

In MJJ's contract action, Sadri's request for a discovery continuance under NRCP 56(f) did not state how discovery would enable him to produce a disputed material fact. We recognize that Sadri has claimed that there is a disputed material fact with regards to fraudulent inducement on the part of MJJ and Bingham. However, as we concluded above, Sadri is not able to sustain his fraud defense because he did not properly plead fraud with particularity in his affirmative defenses.

Consequently, we conclude that it was not abuse of discretion for the district court to deny Sadri's request for a discovery continuance

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Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

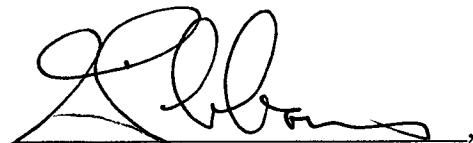
¹³Aviation Ventures v. Joan Morris, Inc., 121 Nev. 113, 118, 110 P.3d 59, 62 (2005) (citing Harrison v. Falcon Products, 103 Nev. 558, 560, 746 P.2d 642, 643 (1987)).

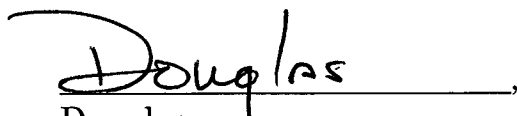
¹⁴Id. at 118, 110 P.3d at 62 (citing Bakerink v. Orthopedic Associates, Ltd., 94 Nev. 428, 431, 581 P.2d 9, 11 (1978)).

under NRCP 56(f). Accordingly, we affirm that part of the district court's order granting MJJ's motion for summary judgment in MJJ's contract action against Sadri.

Nonetheless, we conclude that the district court erred in granting summary judgment to Bingham with respect to Sadri's third-party complaint, as the district court did not make any findings as to whether summary judgment was proper on this third-party complaint.¹⁵ Further, we conclude that the district court erred in not considering and determining whether Sadri's third-party complaint was appropriate under NRCP 14.¹⁶ Accordingly, we vacate that part of the district court's order granting summary judgment to Bingham with respect to Sadri's third-party complaint, and we remand this matter to the district court to determine the appropriateness of Sadri's third-party complaint.

It is so ORDERED.


Gibbons, J.


Douglas, J.

¹⁵On appeal, Sadri does not argue that the district court erred in granting summary judgment with regards to his counterclaim against MJJ. Accordingly, we do not address whether the district court erred in granting summary judgment on Sadri's counterclaim.

¹⁶See Reid v. Royal Insurance Co., 80 Nev. 137, 140-41, 390 P.2d 45, 46-47 (1964) (noting that the third-party practice rule is based upon the theory of indemnity).

cc: Eighth Judicial District Court Dept. 17, District Judge
Lansford W. Levitt, Settlement Judge
Lemons Grundy & Eisenberg
Brownstein Hyatt Farber Schreck, P.C.
Eighth District Court Clerk

MAUPIN, C.J., concurring in part and dissenting in part:

I would affirm the summary judgment entered below in its entirety. First, appellants' affirmative defense that respondent MJJ Development Company fraudulently induced appellants to enter into the subject real estate sales agreement was not pleaded with particularity in violation of NRCP 9(b). Second, appellants' counterclaim failed to state with any particularity how any fraud on the part of any of the respondents negated the underlying obligation to perform the subject real estate sales agreement. This was a further violation of NRCP 9(b). Third, to the extent that the purported counterclaim could be construed as having attempted joinder of respondent Jacob Bingham as a party to the counterclaim, it likewise fails for want of particularity under NRCP 9(b). Fourth, the purported third-party complaint against Bingham was, as a matter of law, procedurally defective. Third party practice under NRCP 14 allows a defendant to join a third party "who may be liable to the [defendant] for all or part of the plaintiff's claim against the [defendant]." This procedure is designed to permit a defendant to seek indemnification or contribution—it does not contemplate separate actions where "pass-through" liability is not sought.¹ Unless respondent Bingham was a

¹See 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1442 (2d 1990) (noting that the federal equivalent of NRCP 14 "is available only against persons who are or may be liable to defendant for part or all of plaintiff's claim; it cannot be used as a way of combining all controversies having a common relationship in one action"); see also Reid v. Royal Insurance Co., 80 Nev. 137, 141, 390 P.2d 45, 47 (1964) (noting that in the context of tort law, the "the third-party practice device is not available in a case involving joint or

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guarantor of appellants' performance under the subject agreement, the third-party action must fail. No allegation of that kind appears of record. Rather, the third-party complaint seeks damages on the theory that Bingham failed to perform on a separate but allegedly related agreement. Accordingly, in addition to the fact that the third-party complaint violates NRCP 9(b),² it is procedurally defective.

I take issue with a remand for more particularized findings as to the third-party complaint or for NRCP 56(f) discovery in aid of it. Respondents defectively pled their cause and chose to utilize an unavailable remedy. This decision should not be the responsibility of respondents. In short there is nothing left for the district court to do and this matter, as I indicated above, should be affirmed in all respects.


C.J.
Maupin

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concurrent tort-feasors having no legal relation to one another, and each owing a duty of care to the injured party”) (emphasis in original).

²The counterclaim and third-party complaint are actually the same pleading, containing allegations against all respondents.