IN THE SUPREME COURT OF THE STATE OF NEVADA

ALLAN EDWARDS,
Appellant,
vs.
CASHMAN EQUIPMENT COMPANY, A NEVADA CORPORATION,
Respondent.

No. 45718

FILED

DEC 0 4 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order granting summary judgment in a contract dispute. Fourth Judicial District Court, Elko County; Steve L. Dobrescu, Judge. Because the parties are familiar with the factual and procedural background of this case, we recount it only as necessary for this appeal's disposition.

Standard of review

This court reviews questions of law de novo.[1] It also reviews a district court's grant of summary judgment de novo.[2]

Novation

Appellant Allan Edwards (Allan) argues that a novation occurred when Benton Edwards (Benton) accepted respondent Cashman Equipment Company's offer of judgment without Allan's consent. Allan further argues that the novation released him of his obligation under the guarantee agreement.

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[1]Keife v. Logan, 119 Nev. 372, 374, 75 P.3d 357, 359 (2003).

[2]Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

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In this case, Allan is asserting novation as an avoidance or affirmative defense, which must be affirmatively set forth in a pleading.[3] Here, Edwards acknowledges that he did not raise the issue of novation in his answer and counterclaim or in his opposition to Cashman's motion for summary judgment. Since Allan did not raise novation as a defense in district court, he may not assert this issue for the first time on appeal,[4] and we need not consider this argument.

Summary judgment

Next, we address Allan's argument that the district court erred in entering summary judgment against him. Summary judgment is appropriate where "no 'genuine issue as to any material fact [remains] and . . . the moving party is entitled to a judgment as a matter of law.'"[5] Having reviewed the parties' briefs and the record, we conclude that there are no genuine issues of material fact that remain unresolved in this case and that Cashman is entitled to summary judgment as a matter of law.

Reconsideration

Allan argues that the district court improperly reconsidered Cashman's motions for summary judgment, which initially had been denied. We disagree. "A district court may reconsider a previously decided issue if [one of the parties introduces] substantially different

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[3]NRCP 8(c).

[4]State of Washington v. Bagley, 114 Nev. 788, 792, 963 P.2d 498, 501 (1998).

[5]Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (quoting NRCP 56(c) (alteration in original)).

evidence . . . or the [previous] decision is clearly erroneous."[6] In this case, final judgment had not been entered and Cashman set forth newly discovered evidence in its motion for reconsideration. We conclude that the new evidence gave the district court cause to reconsider Cashman's summary judgment motions.

Ambiguity in the promissory note

Allan further argues that ambiguities in the promissory note create genuine issues of material fact. Specifically, he argues that the promissory note is ambiguous because it references a document, Attachment A, which is absent from the contract, and because the method of how the interest on the outstanding balance is to be calculated and the method of calculating attorney fees are also absent from the contract. We disagree.

This court has held that a contract provision is ambiguous when it refers to a missing extrinsic document that is relevant to that provision and the contents of that document cannot be ascertained from the terms of the contract.[7] In this case, Attachment A is absent. Attachment A purportedly contains a list of additional parts, services, and other charges that secure the promissory note. We conclude that

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[6]Masonry and Tile v. Jolley, Urga & Wirth, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997); see also NRCP 54(b).

[7]Trans Western Leasing v. Corrao Constr. Co., 98 Nev. 445, 448, 652 P.2d 1181, 1183 (1982) (holding that because the contract provision in that case referred to "'specifications,' without indicating which specifications were meant," the contract was ambiguous and "the district court properly admitted extrinsic evidence to aid in the interpretation of the ambiguous contract term").

Attachment A's absence has no effect on the remaining provisions of the contract because those provisions are unambiguous and do not rely on Attachment A for clarity. Likewise, the absence of the noted calculation methods does not create an ambiguity with respect to the note's material terms.

Allan's counterclaims

Allan argues that the district court erred in granting summary judgment on his counterclaims because genuine issues of material fact remain unresolved concerning those claims. We disagree.

When considering a motion for summary judgment, this court views "the evidence, and any reasonable inferences drawn from it . . . in a light most favorable to the nonmoving party."[8] While a genuine issue of material fact will preclude summary judgment,[9] "[w]here an essential element of a claim for relief is absent, the facts, disputed or otherwise, as to other elements are rendered immaterial and summary judgment is proper."[10]

Additionally, "[t]he trial court is vested with broad discretion in determining the admissibility of evidence."[11] This court reviews the district court's decisions regarding evidentiary matters for abuse of

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[8]Wood, 121 Nev. at 729, 121 P.3d at 1029.

[9]See id. at 731, 121 P.3d at 1031.

[10]Bulbman, Inc. v. Nevada Bell, 108 Nev. 105, 111, 825 P.2d 588, 592 (1992).

[11]State ex rel. Dep't Hwys. v. Nev. Aggregates, 92 Nev. 370, 376, 551 P.2d 1095, 1098 (1976).

discretion.[12] "Generally, the trial court's determination to admit or exclude evidence is given great deference and will not be reversed absent manifest error."[13] Concerning parol evidence, this court has held that "[t]he parol evidence rule does not permit the admission of evidence that would change [a] contract['s] terms when the terms of [that contract] are clear, definite, and unambiguous" and "the evidence does not contradict the terms of the written agreement."[14]

In this case, the agreement at issue is the guaranty between Cashman and Allan. The terms of that agreement are clear and unambiguous. As evidence to support his counterclaims, Allan filed affidavits alleging contractual terms that are inconsistent with the written terms of that agreement. We conclude that the district court did not abuse its discretion by determining that those affidavits contain parol evidence and refusing to admit them.[15] We further conclude that absent those affidavits, Allan failed to submit evidence to support at least one essential element of each of his counterclaims against Cashman. Therefore, the district court did not err in granting summary judgment.

NRS Chapter 104

Allan argues that the district court improperly relied on NRS Chapter 104 because the promissory note is not a negotiable instrument.

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[12]See id.

[13]Baltazar-Monterrosa v. State, 122 Nev. 606, 613-14, 137 P.3d 1137, 1142 (2006).

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

[15]Id.

Specifically, he argues that NRS Chapter 104 does not apply because the note does not contain the language "to bearer" or "to order" and contains provisions for additional undertakings beyond the promise to pay. We disagree.

The elements of a negotiable instrument are set forth in NRS 104.3104(1). They include, among other things, requirements that the instrument "[be] payable to bearer or to order" and "[d]oes not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money." However, NRS 104.3104(1)(c)(3) does allow "[a] waiver of the benefit of any law intended for the advantage or protection of an obligor."

In this case, we conclude that the promissory note is negotiable because it satisfies NRS 104.3104(1)'s requirements. In the promissory note, Benton clearly promised "to pay to Cashman Equipment Company or order the total principal sum of $426,374.59." (Emphasis added.). In addition, a covenant within a promissory note requiring the payment of collection costs and attorney fees does not destroy a note's negotiability. Other states also embrace this position.[16] Therefore, we

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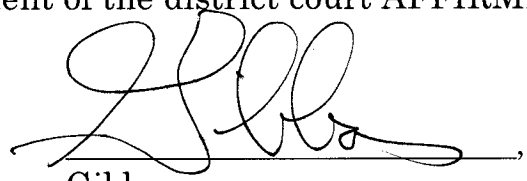
[16]Wood v. Ferguson, 230 P. 592, 594 (Mont. 1924); see also Mecham v. United Bank of Arizona., 489 P.2d 247, 251 (Ariz. 1971) (holding that the covenant to pay attorney fees did not prevent the promissory note from being negotiable); Anaheim Nat. Bank v. Dolph, 255 P. 184, 185 (Cal. 1927) (holding that the inclusion of a provision providing for the recovery of collection costs against the maker did not destroy negotiability); Philadelphia Nat. Bank v. Buchman, 171 A. 589, 591 (Pa. 1934) (holding that the negotiability of an instrument was not impaired by a provision in the instrument that provided for costs and attorney fees).

conclude that the district court did not err in relying on the provisions of NRS Chapter 104.

We have considered the parties' other arguments and conclude that they lack merit. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



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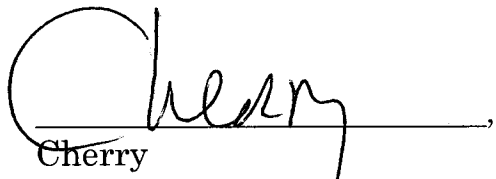
Gibbons



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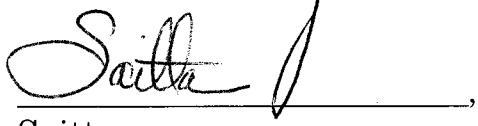

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cc: Hon. Steve L. Dobrescu, District Judge
Carolyn Worrell, Settlement Judge
Kummer Kaempfer Bonner Renshaw & Ferrario/Carson City
Hale Lane Peek Dennison & Howard/Reno
Elko County Clerk