IN THE SUPREME COURT OF THE STATE OF NEVADA

U.S.A. COMMERCIAL MORTGAGE COMPANY, A NEVADA CORPORATION, Appellant/Cross-Respondent, vs. JAMES J. LEE, ESQ., Respondent/Cross-Appellant.	No. 46363
U.S.A. COMMERCIAL MORTGAGE COMPANY, A NEVADA CORPORATION, Appellant, vs. JAMES J. LEE, ESQ., Respondent.	No. 46781

FILED

MAR 28 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal and cross-appeal from a district court judgment entered after a bench trial in a contract action and a consolidated appeal from a district court post-judgment order awarding attorney fees and costs. Eighth Judicial District Court, Clark County; Mark R. Denton, Judge.

Summary judgment, equitable estoppel, and attorney fees

Respondent/cross-appellant James J. Lee argues that a genuine issue of fact existed because he presented material evidence that proved that (1) appellant/cross-respondent U.S.A. Commercial Mortgage Company (Commercial Mortgage) had authorized him to charge legal services against the loan in an amount greater than $20,000 and (2) the doctrine of equitable estoppel applies. We conclude that summary judgment was improper because material facts remain.

This court reviews the district court's grant of summary judgment de novo.[1] Under NRCP 56(c), summary judgment is appropriate "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 judgment as a matter of law." We view the evidence, and any reasonable inferences that may be drawn from it, in the "light most favorable to the nonmoving party."[2] A genuine issue of fact exists if "the evidence is such that a rational trier of fact could return a verdict for the nonmoving party."[3]

"Equitable estoppel operates to prevent a party from asserting legal rights that, in equity and good conscience, they should not be allowed to assert because of their conduct."[4] The elements of equitable estoppel include

> (1) the party to be estopped must be apprised of the true facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting estoppel has the right to believe it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; [and]

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

[2]Id.

[3]Id. at 731, 121 P.3d at 1031.

[4]Nevada State Bank v. Jamison Partnership, 106 Nev. 792, 799, 801 P.2d 1377, 1382 (1990).

(4) he must have relied to his detriment on the conduct of the party to be estopped.[5]

Further, "silence can raise an estoppel quite as effectively as can words."[6] Whether equitable estoppel applies "depends upon the particular facts and circumstances of a given case."[7]

From the record before us, we conclude that issues of fact remain as to whether Commercial Mortgage should be estopped from arguing that it did not authorize Lee to work against the loan. In Lee's affidavit in support of his opposition to the motion for summary judgment, he asserted that Tom Hantges had authorized an offset through Kreg Rowe. Lee then continued to provide legal services in excess of $20,000 for Rowe and Double Diamond Ranch, LLC (Double Diamond). Viewing the evidence in a light most favorable to Lee, we conclude that genuine issues of fact existed regarding whether Commercial Mortgage had authorized an offset greater than $20,000 and whether the doctrine of equitable estoppel precludes Commercial Mortgage from denying that it instructed Lee to work against the loan. Therefore, the district court erred when it determined that any offset would be limited to $20,000. As the district court had partially granted summary judgment and capped the alleged offset at $20,000, we conclude that trial testimony was limited on the amount of the offset, which could have exceeded $20,000. Therefore, we remand to the district court for a new trial. We further conclude that, on

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[5]Cheqer, Inc. v. Painters & Decorators, 98 Nev. 609, 614, 655 P.2d 996, 998-99 (1982).

[6]Id. at 614, 655 P.2d at 999.

[7]Id.

remand, the district court should apportion any attorney fees awarded to Commercial Mortgage, depending on the district court's decision regarding the alleged offset.

Interest rate

Commercial Mortgage contends that the district court erred when it ordered interest at 15% per year from November 1, 2001, rather than applying the 20% per year default rate from October 2, 2002, when Lee defaulted. We agree.

On appeal, if substantial evidence supports the district court's findings of fact, this court will not disturb them.[8]

We conclude that the district court erred when it failed to apply the default interest rate from the date of default. The promissory note set the maturity date at October 2, 2002, and the default rate at 20% per year. However, when the district court concluded that Lee was in default for the promissory note less the $20,000 offset, the district court calculated the interest at 15% from November 1, 2001. We conclude that the district court erred by failing to apply the 20% default interest rate as of Lee's default on October 2, 2002. Therefore, on remand, the district court must calculate the interest according to the 20% default interest rate from October 2, 2002, upon any amounts owing to Commercial Mortgage.

Based upon this conclusion, we do not need to address the other arguments raised by the parties. Accordingly, we reverse the district court's judgment in Docket No. 46363 and the attorney fee award

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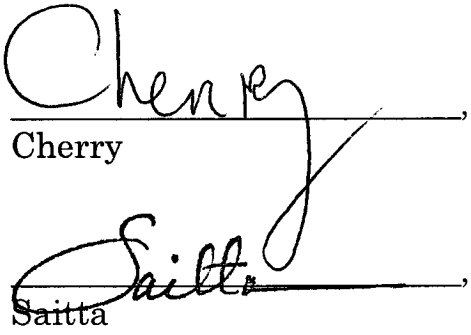
[8]Keife v. Logan, 119 Nev. 372, 374, 75 P.3d 357, 359 (2003).

in Docket No. 46781, and we remand this matter to the district court for further proceedings consistent with this order.

It is so ORDERED.



Cherry, J.

Saitta, J.

cc: Hon. Mark R. Denton, District Judge
William F. Buchanan, Settlement Judge
Schwartzer & McPherson Law Firm
Law Offices of James J. Lee
Eighth District Court Clerk

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

At the bench trial conducted below, the district court determined that the $50,000.00 loan to Lee by U.S.A. should be offset in the amount of $20,000.00.[1] Because substantial evidence supports this finding, I would affirm the judgment below to that extent. I would however, in line with the majority, reverse the partial summary judgment entered before trial finding that, as a matter of law, Lee's claim of offset could not exceed $20,000.00. I conclude that the total allowable extent of the offset was materially at issue and that Lee should be allowed an opportunity to prove his contentions on this subject at trial.

I also agree with the majority position that any attorney fee award on remand should be re-apportioned and that the district court erroneously failed to use the default rate of interest.

_____, J.
Maupin

[1]In this, I conclude that the agreement to let Lee work off some of the loan was supported by new consideration and that the offset agreement satisfied the statute of frauds.