

IN THE SUPREME COURT OF THE STATE OF NEVADA

LARRY ROTHMAN,
Appellant

vs.

BISON CONSTRUCTION; JOHN
MARTIN; AND RHONDA MARTIN,
Respondents.

LARRY ROTHMAN,
Appellant,

vs.

BISON CONSTRUCTION; JOHN
MARTIN; AND RHONDA MARTIN,
Respondents.

No. 46443

FILED

JUN 07 2007

No. 46834 JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

These are consolidated proper person appeals from a district court order granting summary judgment in a contract action and a post-judgment order awarding attorney fees and costs. Ninth Judicial District Court, Douglas County; Michael P. Gibbons, Judge.

Appellant Larry Rothman contends that the district court erred when it granted summary judgment to respondent Bison Construction because a genuine issue of material fact exists concerning whether Bison breached an enforceable contract with Rothman's assignor Charles (Chuck) Baur. The parties are familiar with the facts, and we do not recount them here except as necessary for 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 under NRCP 56 when the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, that are properly before the court [when viewed in a light most favorable to the non-moving party] demonstrate that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law.”² In addition, “[t]he substantive law controls which factual disputes are material and will preclude summary judgment; other factual disputes are irrelevant.”³ “A factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party.”⁴

On February 1, 1999, Bison Construction entered into a contract (first contract) with the Topaz Nugget to construct the Topaz Nugget Motel at Topaz Lake, Nevada. Chuck Baur signed the first contract, purportedly as owner of the Topaz Nugget.⁵ In June 1999, Bison

¹Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (citing GES, Inc. v. Corbitt, 117 Nev. 265, 268, 21 P.3d 11, 13 (2001)).

²Id. at 731, 121 P.3d at 1031.

³Id.

⁴Id.

⁵Although Chuck Baur signed the contract as the owner of the Topaz Nugget, it is unclear in the record whether Chuck Baur had an actual ownership interest in the property. However, Rothman contends that ENC and Chuck Baur did have an ownership interest in the property. Rothman indicates that a reasonable inference of ownership can be drawn

continued on next page . . .

abandoned the construction job because of an unpaid bill. On September 29, 1999, this bill was paid by Bentley Hospitality. At about the same time, Bentley Hospitality Group, LLC, was formed by Edward Baur, Thomas Baur, and Thom O'Rourke.

On September 29, 1999, the same day that the overdue June bill was paid, the property upon which the Topaz Nugget Motel was to be located was transferred from Edward Baur to Bentley Hospitality. In addition, Bison Construction and Bentley Hospitality executed a new contract (second contract) for the construction of the Topaz Nugget Motel. The second contract was predated to February 1, 1999—the same date that the first contract was executed.

On April 14, 2003, Chuck Baur and ENC, Inc. dba Ed's Topaz Nugget assigned to appellant Rothman "all right, title and interest in and to their contract with Bison Construction." On April 24, 2003, Rothman filed a district court complaint alleging breach of contract against Bison.⁶

In July 2003, Rothman filed a second amended complaint alleging breach of contract and seeking damages against Bison for delays in completing the construction of the Topaz Nugget Motel. In November 2005, the district court granted Bison's motion for summary judgment. In

... continued

from the fact that Chuck Baur signed the first contract as owner and was listed as an owner on the mechanic's lien filed by Bison.

⁶Rothman's initial complaint also alleged a breach-of-contract claim against Fidelity and Deposit Company of Maryland. However, Fidelity filed a motion to dismiss, which the district court granted on March 7, 2005. Rothman does not challenge that order on appeal.

its order, the district court determined that there were no “material disputes of fact” for the purposes of the summary judgment motion. The district court also determined that neither Chuck Baur nor ENC had any rights to assign to Rothman because “[t]he second contract (with Bentley Hospitality) superseded the first contract with ENC” and the “obligations under the first contract were modified and subsumed by the second contract.”

Rothman claims that although ENC and Chuck Baur were owners of the Topaz Lake property, an issue of material fact exists as to whether ENC still had a valid and binding contract with Bison. Rothman argues that ENC and Chuck were the developers of the Topaz Nugget property, which was owned by Bentley Hospitality only after the execution of the first contract. Neither the parties nor the district court order stated a legal basis for concluding that Bison’s “obligations under the first contract were modified and subsumed by the second contract.” By this language, however, it appears that the district court relied upon the doctrine of novation.

A novation is “the substitution of a new obligation for an existing one . . . because the first debt is extinguished and all parties are discharged on the first contract.”⁷ “Ordinarily, novation applies if the new agreement involves a substituted debtor or creditor as a new party.”⁸ In addition, this court has determined that new consideration is required for

⁷Zuni Constr. Co. v. Great Am. Ins. Co., 86 Nev. 364, 368, 468 P.2d 980, 982 (1970).

⁸Zhang v. Dist. Ct., 120 Nev. 1037, 1041, 103 P.3d 20, 23 (2004).

there to be a novation.⁹ However, this court has also recognized that the intent of the parties to enter into a novation must be clear.¹⁰

In this case there was a change of parties. Under the second contract, Bentley Hospitality was substituted in place of Chuck Baur and/or ENC. Additionally, there are several handwritten and typed changes in the second contract that may constitute new consideration. However, the record is devoid of any evidence establishing that ENC or Chuck Baur intended a novation. The record establishes that Chuck Baur was still working on the construction project after the property transfer, as evidenced by several letters concerning the project signed by Chuck Baur after Bentley Hospitality took ownership of the property. Although not conclusive, it can be inferred that Chuck Baur may not have intended for the second contract to constitute a novation. We conclude that a genuine issue of material fact exists concerning whether the parties clearly intended a novation of the first contract upon execution of the second contract for the construction of the Topaz Nugget Motel. Because of this determination, we also conclude that the district court's award of attorney fees and costs must also be reversed.¹¹

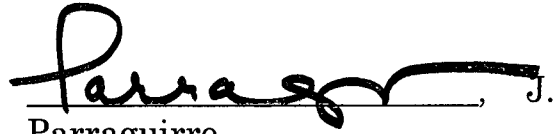
Accordingly, we

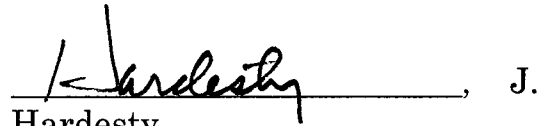
⁹Id.


¹⁰Zuni, 86 Nev. at 368, 468 P.2d at 983.

¹¹In light of this order, we deny Bison Construction's request for sanctions.

ORDER the summary judgment and order of the district court
REVERSED AND REMAND this matter for further proceedings.


Parraguirre


Hardesty


Saitta

cc: Hon. Michael P. Gibbons, District Judge
Larry Rothman
Walsh, Baker & Rosevear, P.C.
Douglas County Clerk