IN THE SUPREME COURT OF THE STATE OF NEVADA

SENIOR HOME CARE ASSOCIATES, LLC, A NEVADA LIMITED LIABILITY COMPANY,
Appellant,
vs.
NEVADA STATE BANK, A NEVADA CORPORATION,
Respondent.

No. 47371

FILED

JAN 30 2008

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

ORDER OF AFFIRMANCE

Appeal from a district court order dismissing a breach of contract action. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Appellant, Senior Home Care Associates, LLC ("SHCA"), maintained a checking account with respondent, Nevada State Bank ("NSB"). On January 16, 2006, Manuel Bernardo, an employee of SHCA and a signatory on its account, issued a SHCA check in the amount of $61,715.94 payable to an entity described on the check as "BAMNA."[1] On January 16, 2006, apparently after discovering that he had overpaid BAMNA in the amount $37,646.72, Bernardo and another SHCA employee, Rowena Santos, proceeded to a NSB branch office to execute a stop payment order. An NSB employee assisted Bernardo in filling out the order and entered it into NSB's computer system. The stop payment order

[1]Nothing in the record indicates whether "BAMNA" is an abbreviation for a longer company name.

states that its "effective period" began on January 17, 2006 with the following exculpatory clause:

> The Bank [NSB] shall have no liability for failure to honor a stop payment order on any check which may be presented at any office if presented during the same business day or the next business day if the stop payment order was received after the close of banking hours . . .

Shortly after execution of the stop payment order, Bernardo inquired as to when the order would take effect. He later alleged that an NSB employee, Maria Huber, indicated that it was "effective immediately." Bernardo explained that he had a substantial sum to deposit into the account but did not want to do so until the stop payment order went into effect. Notably, at that time, the account had insufficient funds to cover the BAMNA check. Bernardo apparently believed that NSB would dishonor the BAMNA check if SHCA did not have sufficient funds to cover the item.

SHCA alleges that Huber again assured Bernardo that the order was "effective immediately" and BAMNA had not yet cashed the check. Bernardo nevertheless decided not to deposit the check at that time and left the branch office. He purportedly later called NSB's customer service number. A NSB representative informed him that NSB's computer system showed that the stop payment order was in effect and BAMNA had not yet presented the check for payment. Bernardo then made a substantial deposit at a NSB branch office.

BAMNA presented the check in dispute for deposit on January 17, 2006, the same day the stop payment order was executed. The BAMNA check cleared despite the stop payment order.

SHCA filed a complaint against NSB on February 21, 2006, and sought general damages, attorney fees, and costs. NSB subsequently

filed a motion to dismiss. The district court dismissed SHCA's complaint with prejudice. SHCA then filed this timely appeal. For the reasons stated below, we now affirm.

A. Treating motion to dismiss as motion for summary judgment

SHCA asserts that NSB interjected facts outside of the pleadings in its motion to dismiss and the exhibits attached thereto, and therefore, the district court should have considered the motion to dismiss as one for summary judgment. It also claims that the district court should have given SHCA adequate time to develop its case before granting that relief. NSB asserts that it did not introduce matters outside the pleadings such that the motion to dismiss should have been treated as a motion for summary judgment. In support, NSB cites a Ninth Circuit Court of Appeals case addressing FRCP 12(b)(6) in which the court stated that "a district court ruling on a motion to dismiss may consider a document the authenticity of which is not contested, and upon which the plaintiff's complaint necessarily relies."[2]

NSB attached the following four exhibits to its motion to dismiss: (1) the stop payment order; (2) the check made payable to BAMNA; (3) a Nevada Secretary of State public record print-out providing corporation details for BAMNA; and (4) a copy of the SHCA account agreement and signature card. All of these documents were specifically referenced in the complaint.

NRCP 12(b) provides, in pertinent part:

> If, on a motion asserting the defense . . . to dismiss for failure of the pleadings to state a claim upon

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[2]Parrino v. FHP, Inc., 146 F.3d 699, 706 (9th Cir. 1998).

> which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Nevada has not explicitly adopted the authenticity rule that NSB cites. Nonetheless, assuming the rule applies, we conclude that the district court should have treated the motion to dismiss as a motion for summary judgment. Specifically, while SHCA does not appear to dispute the authenticity of the stop payment order and the check, it does take issue with the inclusion of the BAMNA corporate print-out and the signatory card in the motion to dismiss. NSB argues that because SHCA's complaint references its bank account, the signature card is a matter within the pleadings. It also argues that because SHCA's complaint references BAMNA as the payee on the check, the print-out is within the pleadings.

We conclude that the fact that SHCA has an account with NSB does not mean that the SHCA signature card is a matter within the pleadings. In addition, SHCA's complaint did not rely on the information listed in BAMNA's corporate print-out. As a result, both exhibits are matters outside of the pleadings within the meaning of NRCP 12(b)(5). We further conclude that, because the district court gave some weight to the signature cards, it should have treated the motion to dismiss as a motion for summary judgment under NRCP 56. Nonetheless, because we

determine that SHCA presents no genuine issue of material fact here, the district court's error was harmless and does not warrant reversal.[3]

B. Enforceability of the exculpatory clause

SHCA argues that under NRS 104.4103(1), Nevada's codification of U.C.C. § 4-103(a), NSB's exculpatory clause is unenforceable. It contends that NSB cannot disclaim liability for its own lack of good faith or failure to exercise ordinary care and NSB had a "reasonable opportunity to act" on the stop payment order. Given that SHCA raises these arguments for the first time in this appeal, we need not evaluate their merits.[4] Accordingly, we conclude that NSB's exculpatory clause was enforceable.

C. Oral modification of the stop payment order

SHCA contends that even if the exculpatory clause is enforceable, NSB's assurances constituted an oral modification of the stop payment order. Specifically, SHCA argues that the stop payment order was "effective immediately" as per the conversations between Bernardo and the two NSB employees and, as a result, NSB waived the period of non-liability set forth in the exculpatory clause. NSB argues that the parol evidence rule bars any evidence of the employee's statements. It further contends that the "effective" date of the stop payment order is distinct from the date on which liability attaches. In this, NSB claims

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

[4]See Diamond Enters., Inc. v. Lau, 113 Nev. 1376, 1378, 951 P.2d 73, 74 (1997). While SHCA claims that it raised this issue below, we find no evidence that it did so.

that there is a period of time, i.e. one business day, during which the stop payment order is "effective" but no liability attaches to the bank.

Initially, we conclude that NSB's argument regarding the parol evidence rule lacks merit. Specifically, the parol evidence rule bars extrinsic evidence of prior or contemporaneous agreements to alter or contradict the terms of the written agreement.[5] However, "'the existence of a separate oral agreement as to any matter on which a written contract is silent, and which is not inconsistent with its terms, may be proven by parol.'"[6] Likewise, "[p]arol evidence is proper to show subsequent oral agreements to rescind or modify a written contract."[7] NSB's oral assurances were alleged to have occurred subsequent to the execution of the stop payment order. Accepting the allegation as true for the purposes of the motion to dismiss and for the purposes of treating that motion as one for summary judgment, the parol evidence rule does not apply because parol evidence is appropriate to show subsequent oral agreements to rescind or modify a written contract.

Nonetheless, we conclude that because there was no mutual assent in this case as to whether NSB was immediately liable for a failure to honor its stop payment order, the contract was not orally modified as to

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

[6]Crow-Spieker #23 v. Robinson, 97 Nev. 302, 305, 629 P.2d 1198, 1199 (1981) (quoting Alexander v. Simmons, 90 Nev. 23, 24, 518 P.2d 160, 161 (1974)).

[7]Silver Dollar Club v. Cosgriff Neon, 80 Nev. 108, 110, 389 P.2d 923, 924 (1964).

that term. Specifically, the NSB employees with whom Huber spoke only stated that the stop payment order was "effective immediately;" they did not go so far as to waive the exculpatory clause. As a result, even though the stop payment order was "effective immediately," NSB's liability did not commence immediately. Instead, as per the exculpatory clause, the bank had no liability for one business day.

We therefore conclude that the district court properly dismissed SHCA's breach of contract claim.[8] Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Maupin, .J.
Maupin

Parraguirre, J.
Parraguirre

Douglas, J.
Douglas

cc: Hon. Douglas W. Herndon, District Judge
William F. Buchanan, Settlement Judge
Perry & Spann/Las Vegas
Jolley Urga Wirth Woodbury & Standish
Eighth District Court Clerk

[8]We have considered the parties' other arguments and conclude that they lack merit. We also note that the record indicates a relationship between SHCA and BAMNA but does not indicate whether BAMNA agreed that it was overpaid or that it agreed to repay SHCA.