IN THE SUPREME COURT OF THE STATE OF NEVADA

DUDLEY S. KAUFMAN,
Appellant/Cross-Respondent,
vs.
RESTROOM FACILITIES, LTD.,
Respondent/Cross-Appellant.

No. 47735

FILED

SEP 09 2008

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

ORDER OF AFFIRMANCE

This is an appeal and a cross-appeal from a district court judgment entered after a bench trial in a contract action. Second Judicial District Court, Washoe County; Brent T. Adams, Judge.

From 1994 until 1996, Dudley Kaufman (Kaufman) through his wholly owned company, Medical Construction Resource Group, Inc. (MCRG), periodically made loans to Restroom Facilities, Ltd. (Restroom Facilities). During the tenure in which these loans were made, Kaufman's brother, Charles Kaufman, was the President of Restroom Facilities. Restroom Facilities thereafter agreed to memorialize these loans by giving MCRG three promissory notes collectively totaling approximately one-half of the amount owed to MCRG at the time.

In approximately May of 1999, MCRG sent Restroom Facilities, via Charles Kaufman, a "Financial Transaction Summary" (FTS) of the account between the parties. The purpose of the FTS was to memorialize the series of loan transactions between the parties. Specifically, the FTS listed the three promissory notes, in the amounts of $15,000, $17,000 and $48,750. On or about May 4, 1999, Restroom Facilities returned a copy of the FTS to MCRG containing several handwritten notations. One of the handwritten notations from Restroom

Facilities appears next to the entry for the $15,000 note, indicating that Restroom Facilities questioned whether there should have been promissory notes in the amounts of both $15,000 and $17,000, or whether there should have been just one promissory note for $17,000. The handwritten notation appearing next to the entry for the $15,000 note stated "CHANGED TO $17,000."

The FTS also contained an entry for "unbilled material expenses" in the amount of $2,578.51. Next to that entry, Restroom Facilities wrote "WE HAVE INVOICE NOT BOOKED." Kaufman testified at trial that MCRG believed that Restroom Facilities acknowledged the validity of the statement of the account set forth in the FTS by making the notations on the FTS and by returning the document to MCRG.

Following Restroom Facilities return of the FTS, the parties met to discuss the repayment of the debt. After the meeting, on July 2, 1999, MCRG sent a letter to Restroom Facilities stating that "the long and short of it is that the amount due according to the terms of our June 10 meeting was to be $165,000." On July 6, 1999, Restroom Facilities wrote a letter to MCRG concerning the status of the loans. In the letter, Restroom Facilities wrote "[t]he moneys you advanced Restroom Facilities have been accounted for and will be repaid to you as soon as possible. The totals do not match the notes that you possess as some have duplicity." Furthermore, Restroom Facilities expressed an interest to settle the matter but concluded that "because of [Kaufman's] urgent needs, we may not be able to settle this matter."

Upon receiving no payment, and after MCRG was dissolved, Kaufman, as assignee, instituted an action in district court on July 21, 2003, to collect on the loan obligations from Restroom Facilities.

After a two-day bench trial, the district court determined that any oral obligations owed to MCRG were barred by the statute of limitations because: 1) the FTS did not constitute a sufficient writing to bind the parties because of the lack of agreement between the parties as to the number of promissory notes and the amount owed; and 2) Kaufman's letter and the response from Restroom Facilities were ambiguous and not sufficient to create a writing signed by the party to be bound. The district court also concluded that Restroom Facilities owed Kaufman $80,750 plus interest for the promissory notes given to MCRG.

Kaufman now appeals, arguing that the district court erred in determining that the oral loans were barred by the statute of limitations because there was a writing evidencing the loans, and the loans were an account stated.

Restroom Facilities cross-appeals, alleging that the district court erred in finding that: 1) Kaufman was an assignee of MCRG, thus arguing that Kaufman had no standing to institute this action to recover for any obligations Restroom Facilities owed to MCRG; and 2) Kaufman filed his action within six years of his unequivocal demand, allowing Kaufman to now recover on the notes because his action is not time-barred.

This court will not disturb a district court's findings of fact unless they are clearly erroneous and not based on substantial evidence.[1] On factual disputes, this court reviews the record for substantial evidence.[2] Substantial evidence is "evidence which 'a reasonable [person] might accept as adequate to support a conclusion.'"[3]

The district court found that Kaufman was the owner of all right, title, and interest in MCRG, and, thus, was the real party in interest entitled to collect on any corporate obligations owed to MCRG. The district court determined that Kaufman is the assignee of all MCRG claims against Restroom Facilities because MCRG was dissolved in 2003, the same year Kaufman instituted this action.

As a preliminary matter, we conclude that the district court's determination that Kaufman was the real party in interest, with standing to pursue the recovery of obligations owed by Restroom Facilities to MCRG, was supported by substantial evidence because Kaufman was the sole shareholder of MCRG and he acquired all of the assets of MCRG upon its dissolution. Furthermore, Kaufman testified that MCRG has no remaining right to pursue any of the claims at issue in this case, and the district court ruled that no future claim may be asserted by MCRG for the three promissory notes, precluding any risk of Restroom Facilities incurring multiple obligations.

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[1]International Fid. Ins. v. State of Nevada, 122 Nev. 39, 42, 126 P.3d 1133, 1134-35 (2006).

[2]SIIS v. Swinney, 103 Nev. 17, 20, 731 P.2d 359, 361 (1987).

[3]State, Emp. Security v. Hilton Hotels, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986).

We also conclude that the district court's factual finding that the oral agreements could not be enforced under NRS 11.190(2)(c) because they were made more than four years before Kaufman filed his complaint in district court was supported by substantial evidence. NRS 11.190 states in part:

> [A]ctions other than those for the recovery of real property, unless further limited by specific statute, may only be commenced as follows:
>
> 2. Within four years:
>
> . . . .
>
> (c) An action upon a contract, obligation or liability not founded upon an instrument in writing.

As such, Kaufman's request for relief based on oral agreements from 1996 was barred when Kaufman filed his complaint seven years later in 2003. Moreover, as the district court correctly concluded, the FTS and letters between Kaufman and Restroom Facilities were ambiguous and not sufficient to create an instrument in writing such that NRS 11.190(2) does not apply.

Next, we turn to the question of whether the district court erred in determining that Kaufman's 1999 demand was the first unequivocal demand, allowing Kaufman to now recover on the notes because his 2003 action, filed less than six years later, was not time-barred. Under NRS 104.3118(2),

> [I]f demand for payment is made to the maker of a note payable on demand, an action to enforce to the obligation of a party to pay the note must be commenced within 6 years after the demand. If no demand for payment is made to the maker, an action to enforce the note is barred if neither

> principal nor interest in the note has been paid for a continuous period of 10 years.

Consequently, the statutory limitations period of six years commences after the demand for payment is made unless any principal or interest has already been paid. The district court specifically found that no payments were made on these promissory notes. As such, Kaufman could enforce the notes if a demand for payment was made and he instituted an action within six years from the demand.

We conclude that the district court's finding that Kaufman's unequivocal demand occurred no earlier than 1999 is supported by substantial evidence based upon its hearing the testimony and making credibility determinations at trial. From this testimony, the district court adduced that the several conversations between the parties never included an unambiguous demand prior to 1999. Indeed, prior to July 1999, Kaufman never requested a specific time or date by which Restroom Facilities had to pay. Accordingly, Kaufman's action on the notes, filed in 2003, less than six years after the demand, was not time-barred.

Finally, Kaufman argues that he should recover the full amount he claims was due based on the doctrine of an account stated. This court need not address arguments raised for the first time on appeal.[4] As such, we have declined to reach the merits of an appellant's contentions where the appellant failed to raise the issues in their complaint before the

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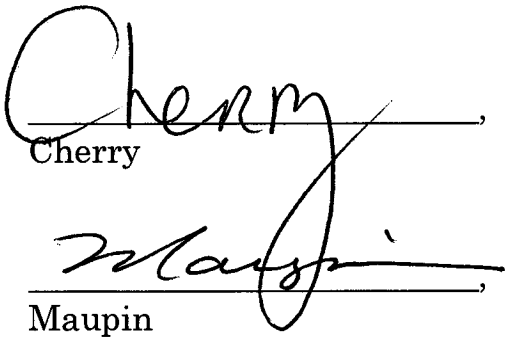
[4]State of Washington v. Bagley, 114 Nev. 788, 792, 963 P.2d 498, 501 (1998).

district court.[5] Kaufman concedes that he did not refer to the doctrine of an account stated at trial. Consequently, we decline to reach the merits of Kaufman's account stated argument because it is raised for the first time on appeal.

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Cherry

_____, J.
Maupin

_____, J.
Saitta

cc: Hon. Brent T. Adams, District Judge
Madelyn Shipman, Settlement Judge
Molof & Vohl
Jack I. McAuliffe, Chtd.
Washoe District Court Clerk

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[5]See Timber Tech v. Home Ins. Co., 118 Nev. 630, 634, 55 P.3d 952, 955 (2002).