

IN THE SUPREME COURT OF THE STATE OF NEVADA

RODNEY DEWALT,
Appellant,

vs.

SOUTH TECH HACIENDA, LLC, A
NEVADA LIMITED LIABILITY COMPANY;
AND SOUTH TECH CONSTRUCTION
CORP., A NEVADA CORPORATION,
Respondents.

No. 48387

FILED

AUG 07 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Bloom*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from a district court judgment in a case instituted to recover tort damages and sums paid under a commercial lease agreement. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

Appellant Rodney DeWalt contracted with respondent South Tech Hacienda, LLC ("Hacienda"), to lease premises from Hacienda. Under the contract, Hacienda was to construct improvements on the premises so that DeWalt could open a nightclub. Although DeWalt paid to have the improvements commence, construction was not completed due to delays in obtaining a building permit. In September 2003, when DeWalt learned that the improvements would not be completed until November, he terminated the lease agreement and sued Hacienda and the company constructing the improvements, respondent South Tech Construction Corp. ("STC"). Hacienda subsequently was placed under receivership and a default was entered against it in the underlying case.

During the district court action, STC served DeWalt with a request for admissions. After STC asserted that DeWalt had failed to respond to that request, the court deemed the matters therein admitted.

Based on DeWalt's deemed admissions, the district court granted summary judgment to STC on DeWalt's breach of contract and fraud claims. Because DeWalt's jury trial request was denied, the case proceeded to a bench trial on DeWalt's remaining claims against STC for unjust enrichment, intentional infliction of emotional distress, and negligent misrepresentation. Apparently, DeWalt called only one witness, his realtor, who testified that no progress had been made on the improvement's construction. DeWalt did not testify. After DeWalt presented his evidence, STC moved for judgment as a matter of law, which the district court ultimately granted on all remaining claims against STC, dismissing DeWalt's action.¹

DeWalt appeals, challenging the district court's decision to deem admitted the matters alleged in STC's request for admissions, the district court's summary judgment on his breach of contract and fraud claims, which necessarily involved an alter ego claim, and the district court's judgment as a matter of law on all remaining claims against STC. DeWalt also challenges the district court's denial of his jury trial request. STC has filed a timely response, as directed, and DeWalt has filed a reply.²

¹Although no default judgment was entered against Hacienda, Hacienda did not participate in any further proceedings. Nevertheless, the October 12, 2006 judgment disposed of all issues by dismissing the entire case on its merits. See Lee v. GNLV Corp., 116 Nev. 424, 996 P.2d 416 (2000). On appeal, DeWalt does not challenge the dismissal of his claims against Hacienda.

²As DeWalt's reply was filed in this court on February 20, 2007, we deny as moot his motion for leave to file a reply.

Admissions by DeWalt

On appeal, DeWalt claims that he mailed, on May 19, 2006, his response to STC's February 14, 2006 request for admissions. According to DeWalt, at the August 22, 2006 hearing on STC's motion to have the request for admissions deemed admitted, he explained that he could provide telephonic testimony from a witness who allegedly could have verified that the response had been mailed. But the hearing was not recorded, and the record contains no documentary evidence supporting DeWalt's assertion that he had mailed his response, which would have nevertheless been untimely under NRCPC 36(a).

This court has previously presumed that a district court's factual findings were correct when the record was devoid of a transcript or statement of the proceedings.³ It was DeWalt's burden to ensure that the record contained any transcripts necessary to support his assertions, and his failure to establish an adequate record for review results in a presumption that the record supports the district court's factual findings.⁴ Consequently, we presume that the evidence presented during the hearing supports the district court's conclusion that DeWalt did not provide a response to the requested admissions.

Under NRCPC 36(a), if a party does not respond to a request for admissions within thirty days of the request's service, the matter is deemed admitted. Thus, as we have previously recognized, when a party

³Ute, Inc. v. Apfel, 90 Nev. 25, 518 P.2d 156 (1974).

⁴See Carson Ready Mix v. First Nat'l Bk., 97 Nev. 474, 635 P.2d 276 (1981); Stover v. Las Vegas Int'l Country Club, 95 Nev. 66, 589 P.2d 671 (1979).

fails to respond to a request for admissions, the matter is conclusively established.⁵ As a result, the district court did not abuse its discretion in deeming admitted the matters raised in STC's request for admissions.

Summary judgment on breach of contract and fraud claims

Based on DeWalt's deemed admissions, the district court granted summary judgment to STC on DeWalt's breach of contract and fraud claims.⁶ This court reviews summary judgments de

⁵Smith v. Emery, 109 Nev. 737, 742-43, 856 P.2d 1386, 1390 (1993) (citations omitted); see also Woods v. Label Investment Corp., 107 Nev. 419, 425, 812 P.2d 1293, 1297 (1991) (citing Dzack v. Marshall, 80 Nev. 345, 393 P.2d 610 (1964)), abrogated on other grounds by Hanneman v. Downer, 110 Nev. 167, 871 P.2d 279 (1994); Wagner v. Carex Investigations & Sec. Inc., 93 Nev. 627, 630, 572 P.2d 921, 923 (1977).

⁶DeWalt also argues that STC's August 25, 2006 motion for summary judgment was untimely, as it was submitted after the discovery commissioner set a July 28, 2006 deadline for all dispositive motions to be filed.

NRCP 16(b)(5) states that "[a] schedule shall not be modified except by leave of the judge . . . upon a showing of good cause." Although it appears that STC failed to seek the court's permission to modify the pre-trial schedule, the district court implicitly allowed the modification when it granted STC's summary judgment motion. As STC's summary judgment motion immediately followed the district court's August 22, 2006 order deeming DeWalt's admissions admitted, good cause supports the district court's implicit decision to modify the schedule and to consider the summary judgment motion. Wagner, 93 Nev. at 630, 572 P.2d at 923 (recognizing that matters deemed admitted may properly serve as the basis for summary judgment). Also, as the purpose of summary judgment is to avoid a needless trial when there is no genuine issue of material fact to be tried, the defending party may move for summary judgment "at any time" before trial. See NRCP 56(b); Coray v. Hom, 80 Nev. 39, 389 P.2d 76 (1964).

novo.⁷ Summary judgment is appropriate when no genuine issue of material fact exists and the moving party is entitled to a judgment as a matter of law.⁸ The pleadings and other proof must be construed in the light most favorable to the non-moving party.⁹ But once the movant has properly supported the summary judgment motion, the non-moving party may not rest upon general allegations and conclusions and must instead set forth, by affidavit or otherwise, specific facts demonstrating the existence of a genuine issue of material fact for trial to avoid summary judgment.¹⁰ Even if a dispute as to some facts exists, summary judgment is appropriate when an essential element of a claim remains absent.¹¹

Alter ego

With respect to the summary judgment on his breach of contract claim, DeWalt appears to argue that STC and/or STC's president¹² was the alter ego of Hacienda, so that STC is liable for Hacienda's actions.

⁷Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

⁸Id.

⁹Id.

¹⁰Id. at 731, 121 P.3d at 1030-31; NRCP 56(e).

¹¹Bartmettler v. Reno Air, Inc., 114 Nev. 441, 447, 956 P.2d 1382, 1386 (1998).

¹²Any arguments by DeWalt regarding STC's president, Tom Hallett, are not properly before this court, as Hallett is not a party to this appeal.

NRS 78.747 expressly limits the individual liability of a stockholder, director, or officer of a corporation, unless the district court determines that, as a matter of law, that person acts as the alter ego of the corporation.¹³ As a policy matter, this court has recognized that the “corporate cloak is not lightly thrown aside.”¹⁴

Here, DeWalt failed to demonstrate the existence of any issues of material fact with respect to any allegations of an alter ego relationship between Hacienda or STC.¹⁵ While evidence in the record shows that STC sometimes used the same mailing address and phone number as Hacienda, other documents show a different address for STC. In any case, the mere use of the same mailing address and phone number is insufficient, as a matter of law, to suggest an alter ego relationship.¹⁶ Accordingly, because DeWalt failed to show any disputed issues of

¹³We note that Hacienda is a limited liability company. NRS 86.371 similarly limits the individual liability for a limited liability company’s member or manager. Additionally, NRS 86.381 states that a member of a limited liability company is not a proper party to proceedings against the company.

¹⁴Baer v. Amos J. Walker, Inc., 85 Nev. 219, 220, 452 P.2d 916, 916 (1969).

¹⁵LFC Mktg. Group, Inc. v. Loomis, 116 Nev. 896, 904, 8 P.3d 841, 846-47 (2000) (setting forth the elements that a plaintiff must demonstrate to invoke the alter ego doctrine); Bonanza Hotel v. Bonanza No. 2, 95 Nev. 463, 466, 596 P.2d 227, 229 (1979) (stating the alter ego test in the case of corporate entities).

¹⁶See Wood, 121 Nev. at 731, 121 P.3d at 1031 (explaining that the substantive law defines material factual issues as those disputed facts that might affect the outcome of the case under the governing law).

material fact with respect to STC's alleged liability for Hacienda's acts, the district court properly entered summary judgment on DeWalt's breach of contract claim to the extent that it was based on an alter ego theory.

Breach of Contract Claim

Based on DeWalt's deemed admissions, the district court entered summary judgment on DeWalt's purported breach of contract claim. DeWalt's final amended complaint made no express claim for damages based on breach of contract. But even if DeWalt had properly pleaded such a claim, he failed to demonstrate the existence of any contract between himself and STC, or between STC and Hacienda, and he failed to show that any consideration was paid to STC.¹⁷ Accordingly, the district court properly granted summary judgment, as a matter of law, in favor of STC with respect to any breach of contract claim.

Fraud and Intentional Misrepresentation

By admitting that STC had no intent to defraud him, DeWalt failed to demonstrate the existence of a triable issue of material fact with respect to an essential element of his fraud and intentional misrepresentation claims.¹⁸ Thus, the district court properly granted summary judgment to STC, as a matter of law, on both of these claims.

¹⁷See May v. Anderson, 121 Nev. 668, 119 P.3d 1254 (2005) (describing the basic elements of a contract as being offer and acceptance, meeting of the minds, and consideration).

¹⁸Barmettler, 114 Nev. 441, 956 P.2d 582 (1998) (establishing necessary elements for fraud and intentional misrepresentation).

Judgment as a matter of law on remaining issues

At the close of DeWalt's case in the bench trial, the district court rendered a judgment on partial findings on all remaining issues against STC, including unjust enrichment, negligent misrepresentation, and intentional infliction of emotional distress.

Under NRCP 52(c), the court may reach judgment as a matter of law on partial findings if the claim cannot be maintained under the law without a favorable finding on a particular issue that the court found lacking. We will uphold a district court's decision under NRCP 52(c) if it can be determined that the court applied the law correctly.¹⁹

Here, having reviewed the record and considered the parties' briefs, we conclude that the district court correctly granted judgment as a matter of law under NRCP 52(c) on DeWalt's claims for unjust enrichment,²⁰ negligent misrepresentation,²¹ and intentional infliction of emotional distress.²²

¹⁹See NRCP 52(a) and (c); Gupta v. East Texas State University, 654 F.2d 411, 415 (5th Cir. 1981) (interpreting the corresponding federal rule, FRCP 52(a), and stating that an appellate court may uphold a judgment on partial findings, even if the judgment did not meet the rule's technical written findings requirements, when it can be determined that the district court did not clearly err in making its findings of facts and correctly applied the proper legal standards in reaching its conclusions); see also Nelson v. Heer, 121 Nev. 832, 122 P.3d 1252 (2005) (recognizing that federal decisions involving the federal civil procedure rules provide persuasive authority when this court examines Nevada rules).

²⁰Nevada Industrial Dev. v. Benedetti, 103 Nev. 360, 363 n.2, 741 P.2d 802, 804 n.2 (1987) (defining unjust enrichment as "the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience").

Timeliness of Jury Trial Request

Finally, DeWalt argues that the district court abused its discretion in denying his motion to waive the jury fee deposit, and that his claims should have been resolved in a jury trial, not a bench trial.

Regardless of whether the district court abused its discretion in denying DeWalt's motion, however, any error resulting from the district court's failure to schedule a jury trial is harmless, because the district court could have properly entered a judgment as a matter of law due to the lack of evidence presented by DeWalt at trial.²³ Consequently, the district

. . . continued

²¹Bill Stremmel Mtrs. v. First Nat'l Bank, 94 Nev. 131, 134, 575 P.2d 938, 940 (1978) (adopting the Restatement (Second) of Torts § 552 (1977) definition of negligent misrepresentation).

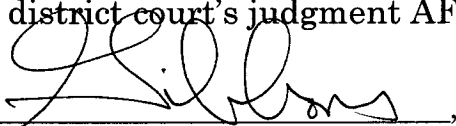
²²Bartmettler, 114 Nev. at 447, 956 P.2d at 1386; cf. Miller v. Jones, 114 Nev. 1291, 970 P.2d 571 (1998) (holding that summary judgment was proper when plaintiff merely provided brief depositions testimony of his depression, but no objectively verifiable indicia of the severity of his emotional distress).


²³NRCP 50(a) (permitting the district court to grant judgment as a matter of law, without submitting the matter to the jury, against a party that has been fully heard and has failed to prove a sufficient issue for the jury to decide); see NRCP 52(c) Drafter's Note (2004) (explaining that NRCP 52(c) parallels NRCP 50(a), but applies to non-jury trials); Alford v. Harolds Club, 99 Nev. 670, 675, 669 P.2d 721, 724 (1983) (concluding that, even if the district court erred in excluding evidence of an alleged continuing conspiracy, this court's review of the record showed insufficient evidence to support the claim, and thus, the district court did not err in refusing to submit the case to the jury).

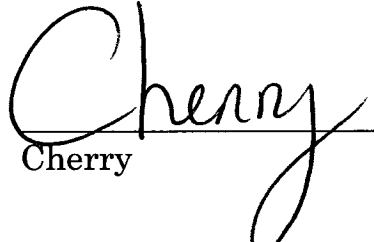
court's error, if any, in denying DeWalt's jury trial motion, does not warrant reversal.²⁴

Thus, having reviewed the record and considered DeWalt's civil proper person appeal statement, STC's response, and DeWalt's reply to that response, we conclude that the district court did not err in granting summary judgment or in entering judgment as a matter of law in favor of STC on all claims.²⁵ Accordingly, we

ORDER the district court's judgment AFFIRMED.


_____, J.
Gibbons


_____, J.
Douglas


_____, J.
Cherry

cc: Hon. Sally L. Loehrer, District Judge
Rodney DeWalt
Schwartz & McPherson Law Firm
Eighth District Court Clerk

²⁴See NRCP 61; Carr-Bricken v. First Interstate Bank, 105 Nev. 570, 779 P.2d 967 (1989) (concluding that the district court's error was harmless under NRCP 61).

²⁵We have considered all of DeWalt's other contentions on appeal, including his allegations of judicial bias and disqualification and his March 21, 2007 "Statement of Facts," and we conclude that his contentions are without merit. Consequently, his motions "to examine" unrelated cases are denied. See generally Occhiuto v. Occhiuto, 97 Nev. 143, 625 P.2d 568 (1981) (recognizing the general rule that courts will not take judicial notice of other district court records, even if the cases are connected).