

IN THE SUPREME COURT OF THE STATE OF NEVADA

CONTINENTAL COMMUNITIES  
GROUP,

Appellant,

vs.

ROGER DIELEMAN, AN INDIVIDUAL;

VIOLET TRACHT, AN INDIVIDUAL;

MORTGAGE MART; CROWNE

REALTY; AND CHRISTOPHER


VILLAREALE,

Respondents.

No. 49715

**FILED**

AUG 03 2009

TRACE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court judgment in a real property contract action. Eighth Judicial District Court, Clark County; James M. Bixler, Judge.

The parties are familiar with the facts, and we do not recount them except as pertinent to our disposition.

On December 17, 2004, appellant Continental Communities Group (CCG) filed its complaint against respondents Roger Dieleman, Violet Tracht, Mortgage Mart, Crowne Realty, and Christopher Villareale. Thereafter, on June 10, 2005, respondents Roger Dieleman and Violet Tracht (collectively, original owners) filed their answer and counterclaims. CCG responded with a motion to dismiss the counterclaims. CCG failed, however, to file an answer or any other responsive pleading. Consequently, the district court entered a default judgment against CCG as to the counterclaims, based on CCG's failure to respond.

On March 14, 2007, the matter proceeded to trial on the issues raised in CCG's complaint. Following a bench trial, the district court

found against CCG and dismissed its claims with prejudice. This appeal followed.

On appeal, CCG contends that: (1) the district court erred in entering a default judgment, (2) the district court erroneously applied the statute of frauds, (3) the district court's finding that there was never a meeting of the minds on all of the terms is not supported by the evidence, (4) the district court's finding that CCG failed to perform is not supported by the evidence, (5) the district court abused its discretion by refusing to grant CCG's motion to extend discovery, and (6) the district court judge exhibited bias toward CCG. In this order, we address only CCG's arguments regarding the default judgment and the statute of frauds.

#### Default judgment

CCG contends that it is entitled to relief from the default judgment because the judgment is void. Specifically, CCG argues that the original owners' failure to comply with the three-day written notice requirement under NRCP 55(b)(2) voids the judgment. We agree.

Under NRCP 55(b)(2), a defendant that has appeared in an action is entitled to "written notice of the application for [default] judgment at least 3 days prior to the hearing on such application." "The failure to serve such notice voids the judgment." Christy v. Carlisle, 94 Nev. 651, 654, 584 P.2d 687, 689 (1978). Accordingly, we must determine whether CCG "appeared in the action" for the purposes of NRCP 55(b)(2).

This court has broadly construed the proposition of what constitutes an appearance. See Gazin v. Hoy, 102 Nev. 621, 624, 730 P.2d 436, 438 (1986) (concluding that a letter sent to plaintiff's attorney requesting an extension of time and subsequent conversations constituted an appearance for purposes of notice requirement). Here, CCG made an appearance in the action by filing both its complaint and subsequent

motion to dismiss the original owners' counterclaims.<sup>1</sup> Accordingly, we conclude that CCG was entitled to notice under NRCP 55(b)(2). Without such notice, we conclude that the default judgment is void.

Statute of frauds

Next, CCG contends that the district court erred in finding that the assignment of interest from Joseph Higgins to CCG violated the statute of frauds. In its findings of fact and conclusions of law, the district court found that “[e]vidence was presented that indicates that Mr. Higgins intended to make an assignment, however, no written evidence of an actual assignment exists or was presented, thus pursuant to NRS 111.235, the assignment is not valid.” We disagree with the district court’s findings.

In the context of real estate transactions, NRS 111.235 provides that “[e]very grant or assignment of any existing trust in lands, goods or things in action, unless the same shall be in writing, subscribed by the person making the same, or by his agent lawfully authorized, shall be void.” Whether a writing is legally sufficient to comply with the statute of frauds is a question of law. Ray Motor Lodge, Inc. v. Shatz, 80 Nev. 114, 118, 390 P.2d 42, 44 (1964).

In Edwards Indus. v. DTE/BTE, Inc., this court recognized that the statute of frauds may be avoided if the assignment is accompanied by an admission. 112 Nev. 1025, 1032, 923 P.2d 569, 573

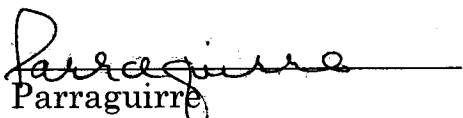
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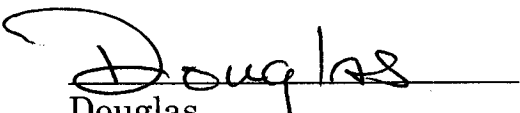
<sup>1</sup>Although the original owners contend that CCG withdrew its motion to dismiss, the district court minutes suggest that the motion was taken off calendar. Without more, we are forced to conclude that the lower court left CCG’s motion to dismiss unresolved.

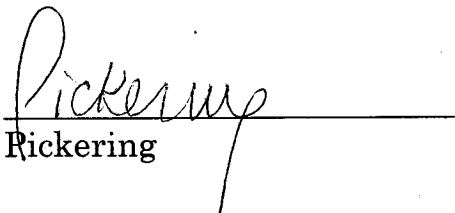
(1996) (“A complete admission in court by the party to be charged should dispense with the necessity of any writing whatever.” (quoting 2 Arthur L. Corbin, Corbin on Contracts § 498, at 683 (1950)). Here, Villareale’s testimony regarding the existence of an assignment of interest from Joseph Higgins to CCG was sufficient to dispense with the necessity of any writing. It follows, then, that Villareale’s admission removed the assignment of interest from the requirements of the statute of frauds. Therefore, we conclude that the district court erred in dismissing CCG’s claims with prejudice.

In light of our disposition, we do not reach CCG’s remaining arguments. Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

  
Parraguirre, J.

  
Douglas, J.

  
Rickerling, J.

cc: Hon. James M. Bixler, District Judge  
Jay Earl Smith, Settlement Judge  
Sklar Warren Conway & Williams, LLP  
Paul M. Gaudet  
Law Offices of Michael E. Kulwin  
Eighth District Court Clerk