

IN THE SUPREME COURT OF THE STATE OF NEVADA

NIMBLE INVESTMENT, LLC, A
NEVADA LIMITED LIABILITY
COMPANY,
Appellant,

vs.

SAU LAN WOO; DAVID J.
WINTERTON, INDIVIDUALLY; AND
DAVID J. WINTERTON &
ASSOCIATES, LTD., A NEVADA
PROFESSIONAL CORPORATION,
Respondents.

No. 49840

FILED

SEP 05 2008

TRACE K. LINDEMAN
CLERK OF SUPREME COURT
BY *J. [Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order dismissing a real property action. Eighth Judicial District Court, Clark County; Jessie Elizabeth Walsh, Judge.

Appellant Nimble Investments, LLC, filed a district court complaint against respondents, seeking declaratory relief and to quiet title to real property. Respondents David J. Winterton and David J. Winterton & Associates Ltd. (collectively "Winterton") and respondent Sau Lan Woo were named as defendants in Nimble's action. Nimble's complaint alleged, among other things, that Winterton, on behalf of Woo and other defendants, recorded notices of interest on a property allegedly owned by Nimble in order to collect a debt allegedly owed by Kelvin Chung and/or Zhi H. Liao. According to the complaint, the debt was for money damages only and did not create an interest in the property, and thus, the notices slandered Nimble's title and prevented the property's sale.

After filing an answer, Winterton and Woo jointly moved the district court to dismiss Nimble's complaint under NRCP 12 and NRCP 56, arguing, among other things, that the slander of title cause of action must be dismissed as there was no false and malicious communication

disparaging Nimble's title to the property and causing damages,¹ when Chung held himself out to be either Nimble's agent or the property's owner and authorized payment from the proceeds of the property's sale to satisfy the debt upon close of escrow. Nimble opposed the motion. After a hearing, the district court entered an order dismissing the complaint with prejudice under NRCP 12(b). Nimble appeals that order.

In resolving the motion to dismiss, because matters outside the pleading were presented to and not excluded by the district court, the motion should have properly been treated as one for summary judgment.² On appeal, we review summary judgment orders de novo.³ Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law.⁴ The pleadings and other proof must be construed in a light most favorable to the nonmoving party.⁵ The moving party bears the initial burden of production to show the absence of a genuine issue of material fact.⁶ If the nonmoving party will bear the burden of persuasion at trial, then the moving party may satisfy its burden of production by either (1) submitting

¹Higgins v. Higgins, 103 Nev. 443, 445, 744 P.2d 530, 531 (1987).

²NRCP 12(b)(5); Schneider v. Continental Assurance Co., 110 Nev. 1270, 1271, 885 P.2d 572, 573 (1994).

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

⁴Id.

⁵Id.

⁶Cuzze v. University & Community College System of Nevada, 123 Nev. ___, ___, 172 P.3d 131, 134 (2007).

evidence that negates an essential element of the nonmoving party's claim or (2) pointing out the absence of evidence to support the nonmoving party's claim.⁷ Once the moving party has properly supported the summary judgment motion, the nonmoving 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 having summary judgment entered against it.⁸

Slander of title requires the showing of false and malicious communications, disparaging to one's title in land, and causing special damages.⁹ The element of malice in a slander of title action requires a showing that the defendant knew that the communication was false or acted in reckless disregard of its truth or falsity.¹⁰ There is no malice when a defendant has reasonable grounds for belief in his claim, even if the claim proves to be false.¹¹

We conclude that Woo and Winterton met their burden of production by submitting evidence to negate an essential element of Nimble's slander of title claim by establishing that their recordation of the notices of interest was not a malicious communication. Here, Woo and Winterton demonstrated that they had reasonable grounds to believe that

⁷Id.

⁸Id.; Wood, 121 Nev. at 731, 121 P.3d at 1030-31; NRCP 56(e).

⁹Higgins, 103 Nev. at 445, 744 P.2d at 531.

¹⁰Rowland v. Lepire, 99 Nev. 308, 313, 662 P.2d 1332, 1335 (1983).

¹¹Id. at 313-14, 662 P.2d at 1335-36.

Chung owed Woo a debt that was to be repaid from the proceeds of the property's sale and to file the notice of interest in order to place third parties on constructive notice of Woo's claim to the partial proceeds. Nimble's own Exhibit 7, attached to its complaint, provided undisputed evidence of Woo's demand for payment and her belief that Chung and Liao owed her money stemming from checks that had been provided to Woo to cover a debt but allegedly had been returned for insufficient funds.

Additionally, to establish the validity of the debt, Woo and Winterton pointed to Exhibit A to their motion to dismiss, in which Chung, signing as the property's owner, instructed the escrow officer to pay Woo \$160,000 out of the proceeds from the property's sale. Although Nimble argues that Exhibit A was not properly authenticated, it failed to raise this argument below¹² and even conceded that Exhibit A "appears to be signed by Kelvin Chung as owner of the property." Moreover, Chung's affidavit in support of Nimble's opposition did not dispute Exhibit A's contents and did not deny that Chung signed that document as owner.

Moreover, Exhibit C to the motion to dismiss and Winterton's affidavit further demonstrated that Chung's debt to Woo was to be memorialized in a promissory note and secured by a deed of trust to be placed on the property. Although Chung argues that Exhibit C was unsigned and denies preparing it or having the authority to bind Nimble, he did not deny that he and Oiwo Lau, as Nimble's manager, personally delivered Exhibit C to Winterton, as averred in Winterton's affidavit.

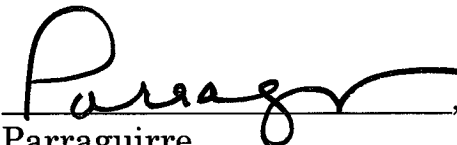
¹²An argument raised for the first time on appeal need not be considered by this court. Diamond Enters., Inc. v. Lau, 113 Nev. 1376, 1378, 951 P.2d 73, 74 (1997).

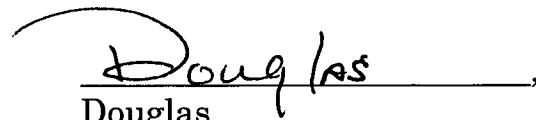
Finally, in opposing the summary judgment motion, Nimble failed to point to any evidence demonstrating that Woo and Winterton filed the notices maliciously.

Thus, as no genuine issue of material fact remained as to whether the recording of the notices was a malicious communication, Woo and Winterton were entitled to a judgment as a matter of law. Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹³


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

cc: Hon. Jessie Elizabeth Walsh, District Judge
William F. Buchanan, Settlement Judge
Herbert Sachs
David J. Winterton & Associates, Ltd.
Eighth District Court Clerk

¹³Although the district court failed to treat the motion to dismiss as one for summary judgment, as required by NRCP 12(b)(5), we nonetheless affirm the district court's order as it reached the correct result, albeit for the wrong reasons. Rosenstein v. Steele, 103 Nev. 571, 575, 747 P.2d 230, 233 (1987). Further, as Nimble provided no substantial argument regarding the dismissal of its extortion and abuse of process claims, we need not address those issues.