

IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANCIS L. RAINES,  
Appellant,  
vs.  
NASSER EDIN ZIAI AND PARIVASH  
ZIAI,  
Respondents.

No. 50252

**FILED**

OCT 07 2008

TRACIE A. LINDEMAN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
CHIEF DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

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

Proper person appellant Francis L. Raines, a chiropractor, treated respondent Parivash Ziai and her minor child as a result of injuries they sustained in an automobile accident. Parivash and her husband, respondent Nasser Edin Ziai, signed two doctor's lien agreements with Raines to defer payment for his services until settlement or termination of their lawsuit against a third party. The agreement, however, further stated that it was for the "doctor's additional protection and in consideration of his awaiting payment" and that "such payment is not contingent of any settlement, claim, judgment or verdict by which [the patient] may eventually recover said fee."

On August 14, 2006, the two liens were recorded with the Clark County Recorder by "Dr. Frances Raines POA Jane Raines." The Ziais learned that the liens had been recorded when they attempted to refinance their home around September 2006, and they contend that the liens prevented them from obtaining a loan that they had sought.

Consequently, the Ziais filed and served a district court complaint against Raines and his wife, Jane, for slander of title and damages and to quiet title. Although Jane never filed an answer, Raines filed a proper person answer and counterclaim on June 20, 2007, seeking payment on the liens that allegedly totaled \$3,546, plus interest.

Before Raines's answer and counterclaim were filed, the Ziais filed an answer to his counterclaim on April 9, 2007. On July 20, 2007, the Ziais also filed a motion for summary judgment or default judgment, claiming that Raines was not statutorily authorized to file a doctor's lien against the property and that his counterclaim was barred by the statute of limitations. Raines opposed the motion.

Following a hearing that neither Raines nor Jane attended, the district court entered an order on August 31, 2007, that granted the Ziais' motion for summary judgment against Raines and default judgment against Jane. The order did not provide any findings of fact or conclusions of law and simply stated that there were no disputed issues of fact. The order did, however, quiet title to the property in the Ziais' name and further awarded the Ziais \$134,906.22, plus prejudgment interest at the legal rate from March 9, 2007, and attorney fees and costs against both Raines, f.d.b.a. Raines Chiropractic and as trustee of Francis L. Raines, D.C., a revoked professional corporation, and Jane Raines, individually and as purported attorney in fact for Francis L. Raines.

Raines has appealed from the summary judgment.<sup>1</sup> The Ziais have filed a response, as directed. In his civil proper person appeal statement, Raines argues, among other things, that the lien agreement itself tolled the statute of limitations because the settlement in the Ziais' underlying litigation was not reached until 2006, so the statute of limitations began to run at that time. Additionally, Raines claims that there are genuine issues of material facts based on his allegations and denials in his counterclaim and answer<sup>2</sup> and that the Ziais were improperly awarded damages for an "imaginary debt."

The Ziais respond that (1) Raines' counterclaim is barred by the statute of limitations, (2) their damages for slander of title are proper under Horgan v. Felton,<sup>3</sup> (3) there is no legal basis for recording a medical lien, and (4) Raines did not provide admissible evidence or law to defeat the summary judgment motion.

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<sup>1</sup>Raines also appealed the default judgment entered against Jane, which Jane does not appeal. As Raines is not an active member of the State Bar of Nevada or otherwise authorized to practice law in this state, we will not consider his arguments on Jane's behalf. NRS 7.285; see Salman v. Newell, 110 Nev. 1333, 1336, 885 P.2d 607, 608 (1994) (recognizing that a person is entitled to represent himself in the district court, but a non-lawyer cannot "represent any other person, a company, a trust, or any other entity in the district courts or in this court").

<sup>2</sup>Raines raises additional new facts and arguments on appeal that were not presented to the district court. We need not consider issues raised for the first time on appeal. Diamond Enters., Inc. v. Lau, 113 Nev. 1376, 1378, 951 P.2d 73, 74 (1997).

<sup>3</sup>123 Nev. \_\_\_, 170 P.3d 982 (2007).

This court reviews an order granting summary judgment de novo.<sup>4</sup> 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.<sup>5</sup> The pleadings and other proof must be construed in a light most favorable to the nonmoving party.<sup>6</sup> But once the movant 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 summary judgment.<sup>7</sup>

Statute of limitations

Raines' counterclaim in the district court alleged that under the liens the Ziais signed in September 1998, they owe him the amount of \$2,042 for Paravish and \$1,522 for the child, plus interest. The Ziais contend that Raines' counterclaim is barred by NRS 11.190(1)(b)'s six-year statute of limitations for contract claims,<sup>8</sup> since the child was last treated

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<sup>4</sup>Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

<sup>5</sup>Id.

<sup>6</sup>Id.

<sup>7</sup>Id. at 731, 121 P.3d at 1030-31; NRCP 56(e).

<sup>8</sup>The Ziais also argue that NRS 11.190(2)(a) provides a four-year statute of limitations on open accounts, but this provision refers to "goods, ware and merchandise sold and delivered," not to medical services such as that provided by Raines.

in 1998 and Parivash was last treated in 1999.<sup>9</sup> On appeal, Raines argues that the lien agreement tolled the statute of limitations, as he had agreed to defer collection of payment and waited until 2006 to collect the debt from the Ziais.

Under NRS 11.190(1)(b), “[a]n action upon a contract, obligation or liability founded upon an instrument in writing” may be commenced within six years. Here, the lien agreement plainly stated that the Ziais were directly and fully responsible for all bills and the agreement was entered for Raines’ “additional protection and in consideration of his awaiting payment” and was not contingent on any settlement that the Ziais may eventually recover. By agreeing to postpone collection and not demanding performance by the Ziais for payment of his deferred bills until August 2006, Raines could not have brought a breach of contract action against the Ziais before then. Consequently, August 2006 is when his cause of action for breach of contract would have accrued and the statute of limitations began to run.<sup>10</sup> Therefore, Raines had six years from August

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<sup>9</sup>The Ziais also hint at a res judicata argument based on a September 7, 2006, order in Ziai v. Webster, Eighth Judicial District Court Case No. A418662, which granted their motion to purportedly adjudicate Raines’ lien with respect to Paravish. But their motion was not included in the appellate record, and thus, the adjudication’s terms are not clear. We cannot consider matters not properly appearing in the appellate record. Carson Ready Mix v. First Nat’l Bk., 97 Nev. 474, 476, 635 P.2d 276, 277 (1981).

<sup>10</sup>State, Dep’t of Transp. v. PERS, 120 Nev. 19, 21-22, 83 P.3d 815, 817 (2004) (stating that the statute of limitations begins to run when a cause of action accrues, defined as “when a suit may be maintained thereon”).

2006 to bring his breach of contract counterclaim against the Ziais and timely did so in 2007.

Slander of title and damages

Raines contends that the Ziais sued him for an “imaginary debt” for damages on a loan that they never obtained. The Ziais alleged in their complaint that Raines’ filing of his lien slandered their title and prevented them from refinancing their home. In their answer, the Ziais claimed damages in excess of \$130,000 under Horgan v. Felton,<sup>11</sup> based on the additional interest charges on credit cards that they had intended to pay off with the refinancing and the increased cost of refinancing a 30-year mortgage at a higher interest rate than what they could have obtained if Raines had not slandered their title.

There is nothing in the record to show that the Ziais have actually obtained a loan. Additionally, Horgan does not allow the type of expectancy damages being claimed by the Ziais, but merely clarifies that attorney fees can be recovered as special damages only in slander of title cases, and not simply when a litigant seeks to remove a cloud upon title.<sup>12</sup>

Moreover, the damage award to the Ziais was improper because they failed to meet their burden of proof with respect to their slander of title claim. In particular, slander of title requires a false and

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<sup>11</sup>123 Nev. \_\_\_, \_\_\_, 170 P.3d 982, 987 (2007) (stating that recoverable pecuniary loss for slander of title includes “(a) the pecuniary loss that results directly and immediately from the effect of the conduct of third persons, including impairment of vendibility or value caused by disparagement, and (b) the expense of measures reasonably necessary to counteract the publication, including litigation”).

<sup>12</sup>Id. at \_\_\_, 170 P.3d at 988.

malicious communication disparaging a party's title to property and causing damage.<sup>13</sup> Although the Ziais have attacked the admissibility of Raines' unauthenticated billing statements for Parivash and the child, Nasser's affidavit attached to the summary judgment motion admitted that Raines provided treatment to them on a lien basis. Nasser further averred that it was his information and belief that Raines was paid \$1,920 by the Ziais' insurance carrier for Parivash's lien, but provided no evidence of payment to Raines for the balance of Parivash's \$2,042 lien or the child's \$1,522 lien, which Raines alleges remain outstanding. Consequently, there exists a genuine issue of material fact as to whether Raines had falsely asserted claims against the Ziais.

Additionally, 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.<sup>14</sup> Even if the claim proves to be false, there is no malice when a defendant has reasonable grounds for belief in his claim.<sup>15</sup> The existence of malice is ordinarily a question of fact precluding summary judgment.<sup>16</sup> Here, the Ziais provided no evidence of malicious intent by Raines in recording the

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<sup>13</sup>Higgins v. Higgins, 103 Nev. 443, 445, 744 P.2d 530, 531 (1987).

<sup>14</sup>Rowland v. Lepire, 99 Nev. 308, 313, 662 P.2d 1332, 1335 (1983).


<sup>15</sup>Id. at 313-14, 662 P.2d at 1335-36.


<sup>16</sup>See Posadas v. City of Reno, 109 Nev. 448, 454-55, 851 P.2d 438, 443-44 (1993) (concluding that summary judgment was improper when genuine issues of material fact remained as to whether a statement had been made with actual malice regarding a defamation claim brought by a public official).


liens that he alleged had not been satisfied by them, so summary judgment could not have been properly granted on their slander of title claim.<sup>17</sup>

Having reviewed the appellant's civil proper person appeal statement, respondents' response, and the record, we conclude that the district court erred when it granted summary judgment against Raines, and thus we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.<sup>18</sup>

  
\_\_\_\_\_, J.  
Cherry

  
\_\_\_\_\_, J.  
Maupin

  
\_\_\_\_\_, J.  
Saitta

<sup>17</sup>The Ziais further alleged that Raines's recording of the liens was not statutorily authorized, and thus was without legal basis. But their complaint was limited to a claim for slander of title and did not include a claim for abuse of process. Consequently, summary judgment would have been improper if rendered on an abuse of process theory of recovery. See id. at 457, 851 P.2d at 444-45 (recognizing that the elements for the tort of abuse of process require that a defendant has clandestine reasons for pursuing the action other than resolving a legal dispute, and is intentionally and improperly using the legal process within the proceeding).

<sup>18</sup>In light of this decision, it is unnecessary to address Raines' arguments concerning his request to appear by telephone before the district court. Additionally, we conclude that our review of the requested transcripts is not necessary for the resolution of this appeal, therefore we deny appellant's request for transcripts.



cc: Hon. James M. Bixler, District Judge  
Francis L. Raines  
Beverly J. Salhanick  
Eighth District Court Clerk