IN THE SUPREME COURT OF THE STATE OF NEVADA

FIREMAN'S FUND INSURANCE COMPANY,
Appellant,
vs.
Q & D CONSTRUCTION, INC., A NEVADA CORPORATION; N.L. DIANDA & SONS CONSTRUCTION & MANAGEMENT, INC.; N.L. DIANDA & SONS MANUFACTURING, INC.; AND NORMAN L. DIANDA AND LAURA J. DIANDA 1979 LIVING TRUST AGREEMENT,
Respondents.

No. 50647

FILED

DEC 14 2009

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

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court order dismissing a contract action. Second Judicial District Court, Washoe County; Brent T. Adams, Judge.

Respondent Q&D Construction, Inc., entered into a construction contract with Leviton Manufacturing Co., Inc., in which Q&D was to build a warehouse for Leviton. Pursuant to the contract, Q&D obtained a performance bond with appellant Fireman's Fund Insurance Company (Fireman's Fund). After Q&D completed the construction, Leviton sued Fireman's Fund and Q&D in Nevada federal district court under a contractor's default claim. The federal district court found for Fireman's Fund and Q&D and awarded them attorney fees and costs. Leviton appealed, and the Ninth Circuit Court of Appeals reversed the award of attorney fees and costs. Afterwards, Fireman's Fund demanded under a preexisting indemnity agreement that Q&D reimburse its attorney fees and costs. Q&D refused the demand. Fireman's Fund sued

Q&D[1] in Nevada state district court for breach of contract and contractual indemnity. Q&D moved to dismiss the complaint under NRCP 12(b)(5) pursuant to the statute of limitations. The district court granted the motion, and Fireman's Fund appeals.

Fireman's fund argues that the district court erred in granting Q&D's motion to dismiss because: (1) the district court's reliance on evidence outside the pleadings converted the motion to dismiss into a summary judgment motion and there are genuine issues of material fact; (2) the breach of contract and contractual indemnity claims did not arise until Fireman's Fund made a demand on Q&D and Q&D refused that demand, which was in 2007, and therefore, the statute of limitations does not bar its claims; and (3) alternatively, Q&D's actions and words tolled the statute of limitations or estopped Q&D from asserting the statute of limitations.

We conclude that: (1) the district court converted the motion to dismiss into a summary judgment motion because it considered evidence outside the complaint; (2) the district court erred in granting Q&D summary judgment because genuine issues of material fact exist regarding when the statute of limitations began running; and (3) Fireman's Fund did not preserve its estoppel and equitable tolling arguments for appeal because it did not plead or argue them in the district court.

---

[1]Fireman's Fund also sued N.L. Dianda & Sons Construction and Management, Inc., N.L. Dianda & Sons Manufacturing, Inc., and the Norman L. Dianda and Laura J. Dianda Living Trust Agreement, all of which are respondents in this case, but are collectively referred to as "Q&D."

The parties are familiar with the facts and procedural history, and therefore, we do not recount them here except as necessary for our disposition.

DISCUSSION

I. The district court converted the motion to dismiss to a summary judgment motion by relying on evidence outside the complaint

The parties disagree regarding whether this court should review this case as a dismissal or a summary judgment. Firemans' Fund argues that the district court converted Q&D's motion to dismiss to a summary judgment motion by considering evidence outside the pleadings. Q&D argues that the evidence the district court relied upon was part of the pleadings, public record, and subject to judicial notice. We conclude that the district court converted the motion to dismiss to a summary judgment motion by considering evidence outside the complaint and relying on that evidence in its written order.

When considering an NRCP 12(b)(5) motion to dismiss for failure to state a claim upon which relief can be granted, if the district court considers evidence outside the pleading being attacked, the motion is converted to a motion for summary judgment to be resolved pursuant to NRCP 56. NRCP 12(b); Breliant v. Preferred Equities Corp., 109 Nev. 842, 847, 858 P.2d 1258, 1261 (1993). The motion converts to one for summary judgment when the district court renders a decision that relies on the evidence outside the pleading. Gallen v. District Court, 112 Nev. 209, 212, 911 P.2d 858, 859-60 (1996). However, the district court may rely on "matters of public record, orders, items present in the record of the case, and any exhibits attached to the complaint." Breliant, 109 Nev. at 847, 858 P.2d at 1261. To determine whether the district court rendered summary judgment or dismissed the complaint for failure to state a claim,

this court looks at two factors: (1) whether the district court "affirmatively excluded material outside the pleading" and (2) whether the reason for dismissal indicates that the district court considered matters outside the pleadings. Montesano v. Donrey Media Group, 99 Nev. 644, 648, 668 P.2d 1081, 1084 (1983).

A. The district court considered evidence outside the pleadings

In this case, the district court relied on a letter dated June 5, 2001, that Leviton sent to Fireman's Fund. In the letter, Leviton declared a contractor's default and made a claim against the performance bond. The district court found that Fireman's Fund received the letter on June 11, 2001, and that this is when Fireman's Fund's indemnity claim arose, thereby starting the statute of limitations running. Applying the six-year statute of limitations under NRS 11.190(1)(b), the district court found that Fireman's Fund's claim was barred by the statute of limitations and granted Q&D's motion to dismiss.

Fireman's Fund's complaint alleges two causes of action, namely, breach of contract and contractual indemnity. The complaint contains no dates regarding when Q&D breached the indemnity agreement. Further, there were no attachments to the complaint, and the complaint does not mention the June 5, 2001, letter. Therefore, the statute of limitations defense was not apparent on the face of the complaint and Q&D needed to establish the statute of limitations as an affirmative defense. Kellar v. Snowden, 87 Nev. 488, 491, 489 P.2d 90, 92 (1971); see NRCP 8(c).

The parties agree that the district court relied on hundreds of pages of documents that were filed in the federal Leviton litigation, which Q&D submitted with its motion to dismiss. These documents included pleadings, contracts, and letters from that litigation. There is no evidence

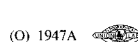
in the record that the district court excluded any of this evidence in its consideration of the motion to dismiss. In fact, the district court's order states that it relied on the June 5, 2001, letter from Leviton in making its ruling. Therefore, the district court relied on evidence outside the complaint. Thus, we now address whether the district court's reliance on this evidence converted the motion to dismiss into a summary judgment motion.

B. The evidence the district court considered was neither subject to judicial notice nor was it public records that may properly be considered with a motion to dismiss

Q&D argues that the district court properly considered the Leviton-litigation evidence because it was subject to judicial notice or was public record. We disagree.

A fact subject to judicial notice must be generally known in the jurisdiction and capable of ready determination so that it is not subject to reasonable dispute. NRS 47.130. We conclude that the evidence from the prior litigation, especially when it consists of hundreds of pages of documents, including pleadings, contracts, and letters, is not generally known or immune from reasonable dispute. Therefore, the Leviton-litigation evidence is not subject to judicial notice.

The remaining issue is whether the district court properly considered the Leviton-litigation evidence as part of the public record. Q&D argues that the district court properly considered the prior litigation evidence as part of the public record, as done in Breliant, 109 Nev. 842, 858 P.2d 1258 (1993). In Breliant, the district court relied on the plaintiff's pretrial memorandum in addition to the amended complaint. Id. at 847, 858 P.2d at 1261. The pretrial memorandum discussed extinguishment of an easement, which the complaint did not mention. Id.



The Breliant court reversed the district court's dismissal of the extinguishment claim because the plaintiff raised it in the pretrial memorandum. Id.

This case is distinguishable from Breliant for three reasons. First, in Breliant, the court relied on a document filed by the plaintiff. In this case, it was the defendant, Q&D, who filed hundreds of pages of evidence in support of a statute-of-limitations defense that was not apparent on the face of the complaint. Second, in Breliant, the plaintiff's trial memorandum was part of the record, whereas here, the documentation was evidence from separate litigation. Third, the Breliant court considered the trial memorandum to determine if the plaintiff raised the issue for the district court's consideration. In contrast, here, Q&D was attempting to use the Leviton-litigation evidence to establish the statute of limitations as an affirmative defense. Therefore, Breliant is not controlling here.

Further, the public records exception mentioned in Breliant does not include evidence from separate, prior litigation. When considering a motion to dismiss for failure to state a claim, courts may only consider the pleadings, documents attached to the pleadings, undisputed documents incorporated by reference to the pleadings, and matters proper for judicial notice. 2 James Wm. Moore, Moore's Federal Practice § 12.34[2] (3d ed. 2008). Public records are not a separate category of evidence that the district court may consider on a motion to dismiss; rather, it is a type of evidence of which the court may take judicial notice. The court may take notice of the existence of a proceeding or the existence of evidence, but may not consider the contents. For example, in Occhiuto v. Occhiuto, 97 Nev. 143, 145, 625 P.2d 568, 569

(1981), this court recognized the general rule that a court may not take judicial notice of its records in other cases. However, the Occhiuto court made an exception where the district court took notice of prior divorce proceedings because the prior case and the case at issue were closely related. Id. Similarly, two federal circuit courts have held that courts may take judicial notice of a decision for purposes of res judicata analysis, but not for the contents of the order or opinion. Day v. Moscow, 955 F.2d 807, 811 (2d Cir. 1992); Winget v. JP Morgan Chase Bank, N.A., 537 F.3d 565, 576 (6th Cir. 2008).

Here, the statute-of-limitations defense is only evident in Q&D's motion to dismiss and the supporting Leviton-litigation evidence. Thus, the district court relied on the content of the Leviton-litigation evidence, rather than simply taking judicial notice of the litigation. Therefore, we conclude that the contents of the Leviton-litigation evidence were matters outside the pleadings, and the district court's consideration of and reliance upon this evidence converted the motion to dismiss to a summary judgment motion. We now consider whether the district court properly granted Q&D summary judgment.

II. The district court erred in granting Q&D summary judgment because genuine issues of material fact exist regarding when the statute of limitations began running

Fireman's Fund argues that genuine issues of material fact remain regarding when the cause of action arose and triggered the statute of limitations. We agree.

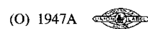
"This court reviews a district court's grant of summary judgment de novo." Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper when, viewing the evidence in the light most favorable to the non-moving party, there is no

genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Id. Further, "[s]ummary judgment is proper when a cause of action is barred by the statute of limitations." Clark v. Robison, 113 Nev. 949, 950-51, 944 P.2d 788, 789 (1997). However, summary judgment is improper if genuine issues of material fact remain regarding when the statute of limitations began to run. Stalk v. Mushkin, 125 Nev. ___, ___, 199 P.3d 838, 844 (2009).

A. The statute of limitations began running when Q&D breached the indemnity agreement

The statute of limitations for a written contract is six years. NRS 11.190(1)(b). The statute of limitations begins running when the cause of action arises. See State Farm Mut. Auto. Ins. Co. v. Fitts, 120 Nev. 707, 711, 99 P.3d 1160, 1162 (2004) (holding that a cause of action for breach of contract against an insurer arises when the insurer formally denies UIM coverage benefits). When the statute of limitations starts running is a question of fact unless the facts are uncontroverted, in which case it is a question of law. Day v. Zubel, 112 Nev. 972, 977, 922 P.2d 536, 539 (1996). The question here is when an indemnity cause of action arises when the indemnitee has not made any payments to the claimant, but has incurred costs and attorney fees in defending against the claimant.

Indemnity contracts are generally interpreted like any contract. Travelers Cas. and Sur. Co. v. A.G. Carlson, 858 N.E.2d 491, 500 (Ill. App. Ct. 2006), overruled on other grounds by Travelers Cas. & Sur. Co. v. Bowman, 893 N.E.2d 583 (Ill. 2008). There are two types of indemnity contracts: those indemnifying for liability and those indemnifying for loss. Amoco Oil Co. v. Liberty Auto & Elec. Co., 810 A.2d 259, 264 (Conn. 2002). Regarding liability indemnity contracts, the cause of action arises as soon as the indemnitee incurs liability. Id. Regarding



loss indemnity contracts, the cause of action arises when the indemnitee has made a payment or suffered damages. Id.; Gerill v. Jack L. Hargrove Builders, 538 N.E.2d 530, 539 (Ill. 1989) (holding that an indemnity claim arises when the indemnitee has judgment entered against it for damages or has made payments or suffered an actual loss). This case involves a liability and loss indemnity agreement, but only the loss indemnity is at issue. Therefore, to determine when Fireman's Fund's claim arose, we now analyze when Fireman's Fund either made a payment or suffered damages.

Although both parties rely on Sanchez v. Alonso, 96 Nev. 663, 615 P.2d 934 (1980), to support their arguments, we conclude that Sanchez is inapplicable in the instant matter due to the narrowness of this court's holding. Id. at 667, 615 P.2d at 937 (limiting this court's decision to "the context of this case"). This court limited the holding of Sanchez to the specific fact of that case, including the specific indemnity agreements at issue there. We stated that the right of action accrued in favor of the appellant upon a demand from the creditors, regardless of actual damages sustained at the time "[u]nder the instant indemnity contracts." Id. at 668, 615 P.2d at 937. Given the limited holding in Sanchez, we conclude that it is not instructive regarding this case.

This case is also distinguishable from cases where an insured pays a claimant and seeks indemnification from a third party. In such cases, this court has held that "[a] cause of action for indemnity or contribution accrues when payment has been made." Aetna Casualty & Surety v. Aztec Plumbing, 106 Nev. 474, 476, 796 P.2d 227, 229 (1990) (discussing insurer's cause of action against a subcontractor arising after paying a claim regarding construction defect). In this case, Fireman's

Fund made no payment to Leviton, but instead defended itself and Q&D in litigation with Leviton, thereby incurring attorney fees and costs. Also, when an insurer or indemnitee makes a payment to a claimant, the date of the payment is a single, identifiable date. In contrast, when an indemnitee is defending litigation, the costs and attorney fees are continuously accruing. As such, Fireman's Fund's cause of action did not accrue as soon as it started defending against Leviton, but rather, it accrued when Q&D breached the indemnity agreement.[2]

A recent Illinois Supreme Court case is directly on point and discusses when an indemnitee's cause of action arises for costs incurred in defending against a claimant on a performance bond. In Travelers Casualty & Surety Co. v. Bowman, 893 N.E.2d 583 (Ill. 2008), Travelers issued Bowman performance bonds, and Bowman entered into an indemnity agreement with Travelers against all loss and liability. Id. at 586, 588. Travelers sued Bowman for the attorney fees and costs it incurred in defending claims against the performance bonds. Id. at 586. Bowman moved to dismiss based on the statute of limitations. Id. But the indemnity agreement expressly required Bowman to pay Travelers on demand. Id. at 593. The court held that once Travelers made the demand and Bowman refused to pay, Travelers' cause of action accrued, and the

---

[2]Fireman's Fund argues that if this court holds that its cause of action arose as Fireman's Fund incurred expenses, then a cause of action arose each time Fireman's Fund incurred an expense. Thus, the statute of limitations would bar only a small portion of Fireman's Fund's attorney fees and costs. Because we conclude that the cause of action did not arise until Q&D breached the indemnity agreement and reverse and remand for further findings on this issue, we do not address this argument.

statute of limitations started running. Id. Similarly, in this case, Fireman's Fund's cause of action accrued when Q&D breached the indemnity agreement. Thus, we now discuss when the breach occurred.

B. Genuine issues of material fact remain regarding when the breach occurred

In this case, neither party included the entire indemnity agreement in the record, but instead quoted only one paragraph, which does not address when Q&D was required to pay Firemans' Fund. However, Q&D does not dispute Fireman's Fund's claim that the indemnity agreement did not state a time for payment. Fireman's Fund argues that the indemnity agreement therefore implies that payment should be made within a reasonable time and that it was reasonable for Fireman's fund to wait to demand payment until after the conclusion of the Leviton litigation. This court has stated that when a contract does not make time of the essence, one party may make it so by demanding performance by a certain date or time as long as it is reasonable. Mayfield v. Koroghli, 124 Nev. 34, ___, 184 P.3d 362, 366-67 (2008). Given that the agreement at issue does not state a specific time that Q&D was required to pay Fireman's Fund, we then turn to the standard of reasonable time. What constitutes a reasonable time for performance is a question of fact involving the terms of the agreement and the circumstances of the case. Soper v. Means, 111 Nev. 1290, 1294, 903 P.2d 222, 224 (1995). Similarly, if the contract requires a demand for performance, the demand must be made in a reasonable time, which is a question of fact. Id.

Fireman's Fund argues that the claim arose in either February 2005 when it made a demand, or on April 22, 2005, when Q&D rejected the demand, or even later, when Q&D refused to pay after Fireman's Fund filed suit. Therefore, Fireman's Fund argues that when it

sued Q&D on June 18, 2007, the statute of limitations had not run on its claims. Q&D argues that a breach is not required for a claim of indemnification to accrue, but if a breach is required, Q&D breached the general indemnification agreement when it failed to pay Fireman's Fund after Fireman's Fund's demand in February 2001. Thus, Q&D argues that the statute of limitations bars Fireman's Fund's claims. We conclude that when Q&D breached the indemnity agreement is a genuine issue of material fact. Because this determines when Fireman's Fund's cause of action arose and when the statute of limitations started running, the district court erred in granting Q&D summary judgment based on the statute of limitations.[3]

III. Fireman's Fund did not preserve its arguments regarding estoppel and the tolling of the statute of limitations

Fireman's Fund argues that Q&D is estopped as a matter of law from asserting the statute of limitations, or that its words and conduct tolled the statute of limitations. Alternatively, Fireman's Fund argues that there are genuine issues of material fact regarding equitable estoppel and the tolling of the statute of limitations. Q&D argues that Fireman's Fund did not preserve the issue for appeal. We conclude that Fireman's fund did not preserve the estoppel or tolling arguments for appeal.

"A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal." Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52, 623

---

[3]The parties also argue the public policy behind the statute of limitations and when causes of action should arise in indemnity claims for loss. Because we reverse and remand on other grounds, we do not address the public policy arguments.

P.2d 981, 983 (1981). Fireman's Fund did not plead or directly argue estoppel or tolling of the statute of limitations before the district court. Therefore, we do not address these issues on appeal.

Accordingly, we ORDER the judgment of the district court REVERSED and REMAND this matter to the district court for proceedings consistent with this order.

_______________, J.
Cherry

_______________, J.
Saitta

_______________, J.
Gibbons

cc: Hon. Brent T. Adams, District Judge
Lansford W. Levitt, Settlement Judge
Laxalt & Nomura, Ltd./Reno
Lemons Grundy & Eisenberg
McDonald Carano Wilson LLP/Reno
Washoe District Court Clerk