

IN THE SUPREME COURT OF THE STATE OF NEVADA

RESTAURANT CONCEPTS OF  
NEVADA, LLC, A NEVADA LIMITED  
LIABILITY COMPANY; ANTHONY S.  
DI PRIMA, AN INDIVIDUAL; AND  
NICHOLAS BIMONTE, AN  
INDIVIDUAL,  
Appellants,  
vs.  
AMERICAN PACIFIC CAPITAL  
GATEWAY ROADHOUSE PAD  
COMPANY, LLC, A NEVADA LIMITED  
LIABILITY COMPANY,  
Respondent.

No. 51788

**FILED**

**FEB 25 2010**

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

ORDER OF AFFIRMANCE

This is an appeal from a district court summary judgment in a commercial lease action. Eighth Judicial District Court, Clark County; Valorie Vega, Judge.

Appellants Restaurant Concepts of Nevada, LLC, Anthony S. Di Prima, and Nicholas Bimonte (collectively, Restaurant Concepts) raise three arguments on appeal: (1) that a material question of fact remains as to the reasonableness of its reliance on respondent American Pacific Capital Gateway Roadhouse Pad Company, LLC's (APC), representation that the property did not require a fire sprinkler system; (2) that a material question of fact remains as to whether APC failed to timely provide Restaurant Concepts with a parking tabulation; and (3) that the district court erred, as a matter of law, in concluding that Restaurant

Concepts was responsible for installing the sprinkler system.<sup>1</sup> We address each in turn and conclude that Restaurant Concept's arguments are without merit. The parties are familiar with the facts, and we do not recount them here except as necessary to our disposition.

Standard of review

"This court reviews a district court's grant of summary judgment de novo, without deference to the findings of the lower court." Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is appropriate "when the pleadings and other evidence on file demonstrate that no 'genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law.'" Id. (quoting NRCP 56(c)). "A factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party." Id. at 731, 121 P.3d at 1031. In reviewing a motion for summary judgment, "the evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party." Id. at 729, 121 P.3d at 1029.

"A cause of action for breach of contract requires proof of the following elements: (1) existence of the contract; (2) plaintiff's performance or excuse for nonperformance; (3) defendant's breach; and (4) damages to

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<sup>1</sup>Restaurant Concepts asserts, in its reply brief, that it was constructively evicted and that its contract with APC was frustrated. These arguments, however, were conclusory and without cites to relevant authority. We decline to consider them. SIIS v. Buckley, 100 Nev. 376, 382, 682 P.2d 1387, 1390 (1984) (this court need not consider conclusory arguments unsupported by legal authority).

plaintiff as a result of the breach.” CDF Firefighters v. Maldonado, 70 Cal. Rptr. 3d 667, 679 (Ct. App. 2008).

Restaurant Concepts’ reliance on APC’s representation

Restaurant Concepts argues that it was excused from the performance of its contract with APC because of its reliance on APC’s representation that the property did not require a fire sprinkler system. Restaurant Concepts relies on Van Cleave v. Kietz-Mill Minit Mart, 97 Nev. 414, 633 P.2d 1220 (1981), for the proposition that whether its reliance was reasonable is an issue of fact to be determined at trial.

Van Cleave, however, is inapposite because it dealt with “foreseeability, duty, proximate cause and reasonableness” in the context of a negligence case. Id. at 417, 633 P.2d at 1222 (internal quotation omitted). Additionally, regardless of whether APC’s broker made such a representation, the lease explicitly stated that Restaurant Concepts took the property “as is,” and therefore, we conclude that the argument that Restaurant Concepts was induced to enter into the contract based on representations or statements made by APC is untenable. The lease also provided that it superseded any previous representations not contained in the lease agreement. We conclude that a rational trier of fact could not return a verdict in favor of Restaurant Concepts and consequently, that no genuine issue of fact remains as to the reasonableness of its reliance on APC’s representation.

The parking tabulation

Restaurant Concepts contends that it was excused from the performance of its contract with APC because APC failed to provide the information necessary for the parking tabulation, rendering Restaurant Concepts unable to obtain building permits. The information necessary for the parking tabulation, however, was a matter of public record and not

in APC's sole possession. We conclude that a rational trier of fact could not return a verdict in favor of Restaurant Concepts and consequently, that no genuine issue of fact remains as to whether APC failed to timely provide the information necessary for the parking tabulation.

Installation of the fire sprinkler system

Restaurant Concepts argues that the district court erred, as a matter of law, in concluding that Restaurant Concepts was required to install the fire sprinkler system. Restaurant Concepts relies on Portal Enterprises, Inc. v. Cahoon, 102 Nev. 107, 715 P.2d 1324 (1986), in support of its argument.


This court stated in Portal Enterprises that “[i]f repairs ordered by a public authority are substantial, or structural in nature, such that they could not have been contemplated by the parties when the lease was executed, the lessor, not the lessee, is responsible for making them.” Id. at 109, 715 P.2d at 1325; see Polk v. Armstrong, 91 Nev. 557, 561, 540 P.2d 96, 98 (1975).


Portal Enterprises and Polk are distinguishable from the instant case. The repairs in Portal Enterprises and Polk were absolutely required by public authorities, whereas the repairs in this case were not. Portal Enterprises, 102 Nev. at 108, 715 P.2d at 1325; Polk, 91 Nev. at 561, 540 P.2d at 98. Restaurant Concepts had to install the fire sprinkler system only if it remodeled the property and agreed, in entering into the lease, that it had performed due diligence concerning whether its use of the property complied with the applicable laws. Had Restaurant Concepts performed its due diligence, it would have discovered that on September 20, 2006, ten days before the lease was signed, Clark County adopted a new fire code that required the property to have a fire sprinkler system. Further, the lease specifically contemplated that Restaurant Concepts

would assume the risk of paying for and installing any improvements or alterations that were required by a governmental authority as a result of its proposed use of the property. Accordingly, we conclude that the district court did not err as a matter of law in finding that Restaurant Concepts was required to install the fire sprinkler system. Therefore, we

ORDER the judgment of the district court AFFIRMED.

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

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

  
\_\_\_\_\_, J.  
Gibbons

cc: Hon. Valorie Vega, District Judge  
John F. Mendoza, Settlement Judge  
John R. Hawley  
Lawrence J. Semenza  
Santoro, Driggs, Walch, Kearney, Holley & Thompson  
Eighth District Court Clerk