

IN THE SUPREME COURT OF THE STATE OF NEVADA

THOMAS F. BURNS, INDIVIDUALLY
AND AS TRUSTEE OF THE BURNS
REVOCABLE TRUST, AND BARBARA
BURNS, INDIVIDUALLY AND AS
TRUSTEE OF THE BURNS
REVOCABLE TRUST,

Appellants,

vs.

ROBERT O. KURTH, INDIVIDUALLY
AND AS TRUSTEE OF THE KURTH
REVOCABLE TRUST; LAURA L.
KURTH, AS TRUSTEE OF THE KURTH
REVOCABLE TRUST; MICHAEL W.
ZECH, INDIVIDUALLY AND AS
TRUSTEE OF THE ZECH REVOCABLE
TRUST; MICHAEL T. STACY,
INDIVIDUALLY AND AS TRUSTEE OF
THE STACY REVOCABLE TRUST;
KAREN L. STACY, AS TRUSTEE OF
THE STACY REVOCABLE TRUST;
AND STEEL ENGINEERS, INC., A
NEVADA CORPORATION,

Respondents.

No. 34015

FILED

DEC 04 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

STEEL ENGINEERS, INC., A NEVADA
CORPORATION, ROBERT O. KURTH,
INDIVIDUALLY AND AS TRUSTEE OF
THE KURTH REVOCABLE TRUST,
LAURA L. KURTH, AS TRUSTEE OF
THE KURTH REVOCABLE TRUST,
MICHAEL W. ZECH, INDIVIDUALLY
AND AS TRUSTEE OF THE ZECH
REVOCABLE TRUST, MICHAEL T.
STACY, INDIVIDUALLY AND AS
TRUSTEE OF THE STACY
REVOCABLE TRUST AND KAREN L.
STACY, AS TRUSTEE OF THE STACY
REVOCABLE TRUST,

Appellants,

vs.

THOMAS F. BURNS, INDIVIDUALLY
AND AS TRUSTEE OF THE BURNS
REVOCABLE TRUST AND BARBARA
BURNS, TRUSTEE OF THE BURNS
REVOCABLE TRUST,

Respondents.

No. 34819

01-20292

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

These are appeals from an order granting summary judgment in a business/wrongful termination dispute and from an order denying attorney fees.

Steel Engineers, Inc., fired Thomas Burns after fifteen years of employment. Burns then sued the corporation and the directors/majority shareholders (collectively "SEI") on a variety of theories. These included, inter alia, breach of the employment contract, improper notice of termination, civil conspiracy, intentional interference with a contractual relationship, intentional infliction of emotional distress, breach of the covenant of good faith and fair dealing, and breach of fiduciary duty of the directors to a minority shareholder. SEI also sued Burns, seeking enforcement of a non-competition clause.

After three years of contentious litigation, the district court granted summary judgment in favor of SEI on all claims, except for Burns's breach of contract claims alleging (1) failure to pay Burns's automobile and similar expenses, and (2) SEI's repurchase of Burns's stock at an undervalued price; and the claims for breach of the covenant of good faith and fair dealing and breach of fiduciary duty regarding these contract claims. SEI stipulated to entry of judgment on the automobile expenses claim. The district court thereafter entered summary judgment on Burns's remaining claims. The district court also, without explanation, denied SEI's request for attorney fees. Burns now appeals from the orders granting summary judgment; SEI appeals from the order denying attorney fees.

I. Summary judgment

Summary judgment should be granted only when, based upon the pleadings and discovery on file, no genuine issue of material fact exists for trial.¹ A genuine issue of material fact exists when a reasonable jury could return a verdict for the non-moving party.² "[I]f the facts set forth in support of a motion for summary judgment are not controverted by the

¹NRCP 56(c).

²Posadas v. City of Reno, 109 Nev. 448, 452, 851 P.2d 438, 441-42 (1993).

opposing party, then those facts are presumed to be true.”³ But “conclusory statements along with general allegations do not create an issue of material fact.”⁴ “To the contrary, the non-moving party must, by competent evidence, produce specific facts that demonstrate the presence of a genuine issue for trial.”⁵ This court reviews orders granting summary judgment de novo.⁶

We note preliminarily that the majority of Burns’s arguments regarding the propriety of the order granting summary judgment are conclusory, or are based upon general allegations without reference to specific facts that could be proved by competent evidence at trial. We need not address naked allegations unsupported by applicable legal argument and relevant authority.⁷ We, therefore, decline to review the orders granting summary judgment as to Burns’s claims of intentional infliction of emotional distress, breach of the covenant of good faith and fair dealing in the employment contract, breach of fiduciary duty, interference with economic advantage and interference with contractual relations.⁸

We also note that an additional theory urged by Burns on appeal was not pleaded below. Specifically, Burns claims that SEI further breached the employment agreement by firing him for an “improper purpose,” i.e., in retaliation for his confrontation of the directors for misappropriating corporate funds. Burns first presented this theory, without any evidentiary support, in his opposition to the respondents’ final summary judgment motion. During oral argument on this motion, Burns

³Ortega v. Reyna, 114 Nev. 55, 58, 953 P.2d 18, 20 (1998) (quoting Tamsen v. Weber, 802 P.2d 1063, 1067 (Ariz. Ct. App. 1990)).

⁴Id. (quoting Michaels v. Sudek, 107 Nev. 332, 334, 810 P.2d 1212, 1213 (1991)).

⁵Elizabeth E. v. ADT Security Systems West, 108 Nev. 889, 892, 839 P.2d 1308, 1310 (1992) (citing Michaels, 107 Nev. at 334, 810 P.2d at 1213-14).

⁶Bulbman, Inc. v. Nevada Bell, 108 Nev. 105, 110, 825 P.2d 588, 591 (1992).

⁷Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (citing Carson v. Sheriff, 87 Nev. 357, 360-61, 487 P.2d 334, 336 (1971)).

⁸Regarding the last two claims, Burns merely presents a conclusory allegation that SEI sought an injunction against his future employment with SEI’s competitors for an unconscionably long period. We note that the injunction lasted for only approximately one year and enforced Burns’s contractual covenant not to compete. These facts alone do not establish a cause of action.

moved to further amend his pleadings to include this theory. The district court stated that Burns could bring a written motion to amend, but noted that it would probably be denied as untimely and prejudicial.

Burns never brought a written motion to amend and does not challenge the district court's denial of the oral application to do so. There is no reason to question this ruling.⁹ Accordingly, because Burns did not plead this cause of action, it was not a subject of the order granting summary judgment. Thus, Burns's arguments based upon termination for "improper purpose" are not properly before this court.

Burns has further included an argument on appeal directed toward SEI's corporate attorney, Shaun Landrum, in her individual capacity. On March 19, 1997, the district court dismissed, without prejudice, Burns's complaint against Landrum. Burns did not serve Landrum or her counsel with the notice of appeal; thus, we will not address this claim.¹⁰ We now turn to the remaining claims of error.

A. Breach of contract

Burns contends that SEI was contractually bound to pay him the fair market value of his stock. We find no merit to this argument. Burns contractually agreed to accept the appraised value of his stock. The mere fact that SEI's appraiser used a "reasonable estimate" of fair market value in setting the appraised value does not alter the Burns-SEI contract. As discussed below, Burns presented no evidence that SEI, the individual respondents or SEI's appraiser intentionally undervalued Burns's stock. Accordingly we hold that Burns had no contractual right to the fair market value of his stock. We, therefore, need not consider Burns's argument that the district court denied him discovery concerning the stock's fair market value.¹¹

⁹See NRCP 15(a); see also Burnett v. C.B.A Security Service, 107 Nev. 787, 789, 820 P.2d 750, 752 (1991) ("Delay, bad faith, or a dilatory motive are all sufficient reasons to deny a motion to amend a pleading.") (citing Stephens v. Southern Nevada Music Co., 89 Nev. 104, 507 P.2d 138 (1973)).

¹⁰See NRAP 3(d).

¹¹We note, however, that contrary to Burns's argument, the district court never stayed discovery. The record reveals no stay order. Additionally, during the May 13, 1997 oral argument the district court directly informed Burns that he should bring a motion to compel to resolve his discovery disputes. Burns never brought such a motion. The district court did not err in finding Burns dilatory in conducting discovery.

B. Civil conspiracy

"An actionable conspiracy consists of a combination of two or more persons who, by some concerted action, intend to accomplish an unlawful objective for the purpose of harming another, and damage results from the act or acts."¹²

Burns maintains that the directors conspired to terminate him and buy his stock at an artificially low price. This was allegedly accomplished by the issuance of substantial bonuses to the directors, after which they loaned the bonus proceeds back to the corporation ("the loan-back transaction"). The directors claim that the loan-back transaction was a proper financial strategy effected for the purpose of federal tax planning. Burns claims there is a material issue of fact as to whether this devalued SEI's 1996 qualified Employee Stock Ownership Plan or "ESOP."

Burns offered no evidence demonstrating that the loan-back transaction affected the value of his stock. The sole support of his contention in this regard is an affidavit by Carl L. Sheeler, an appraiser who reviewed the ESOP valuation performed by SEI's appraiser. Sheeler concluded that SEI's appraisal report contained violations of several professional standards and speculated that SEI's actual value may have been undervalued by five to six hundred percent. Sheeler did not address whether the loan-back transaction affected the price paid to Burns pursuant to the buy-back provisions of the agreement. The directors, on the other hand, presented the affidavit of Stephan Nicolatus, SEI's original appraiser, who stated that the loan-back transaction had no impact on the value of the stock held in the 1996 ESOP.

In addition, there is no evidence that the directors intentionally undervalued the ESOP, an element of civil conspiracy.¹³ On the contrary, in his affidavit, Nicolatus stated that he used the same methods of calculating the 1996 ESOP as he had for all previous years. Because Burns has not presented competent evidence that satisfies the

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It appears that Burns has abandoned his claims regarding improper notice of termination. We therefore find no error in the district court's grant of summary judgment on those claims.

¹²Sutherland v. Gross, 105 Nev. 192, 196, 772 P.2d 1287, 1290 (1989) (citing Collins v. Union Fed. Savings & Loan, 99 Nev. 284, 303, 662 P.2d 610, 622 (1983)).

¹³Id.


elements of civil conspiracy, we conclude that summary judgment was appropriate as to that claim.

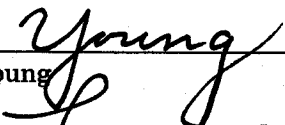
II. Attorney fees


SEI sought an award of attorney fees and costs as the prevailing party in the action. Although it awarded costs of the suit, the district court declined to award attorney fees without further explanation. The failure to substantiate this denial prevents a meaningful review on appeal. Thus, the matter must be remanded for further proceedings to either grant or explain the denial of the application for attorney fees.¹⁴

In sum, we conclude that the district court properly granted the respondents' motion for summary judgment. We additionally conclude that the district court erred in failing to explain its rationale for denying the respondents' request for attorney fees. Accordingly, we

ORDER the district court's summary judgment AFFIRMED AND ORDER the district court's order denying attorney fees REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.


_____, C.J.
Maupin


_____, J.
Young


_____, J.
Leavitt

cc: Hon. Gene T. Porter, District Judge
Hon. Valorie Vega, District Judge
Foley & Foley
J. Michael Oakes
John Peter Lee Ltd.
Clark County Clerk

¹⁴Sack v. Tomlin, 110 Nev. 204, 214, 871 P.2d 298, 305 (1994); Lyon v. Walker Boudwin Constr. Co., 88 Nev. 646, 503 P.2d 1219 (1972).