

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN KERRIGAN,
Appellant,
vs.
RICHARD ROBERTS,
Respondent,

No. 53723

FILED

JUL 08 2010

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

ORDER OF AFFIRMANCE

This is an appeal from a district court judgment after a short trial in an eviction action. Eighth Judicial District Court, Clark County; James M. Bixler, Judge.

Upon respondent's motion, District Court Judge James Bixler granted partial summary judgment to respondent on all claims and counterclaims, except for appellant's abuse of process counterclaim. The case then proceeded into the short trial program. At the start of trial, the short trial judge sua sponte reconsidered the partial summary judgment order and granted summary judgment to respondent on the abuse of process counterclaim. Respondent ultimately prevailed at trial and was awarded \$3,290.72 in damages and \$20,000 in attorney fees. Judge Bixler then approved the judgment entered by the short trial judge and this appeal followed.

Appellant's abuse of process claim

We first address the short trial judge's sua sponte reconsideration of the district court's partial summary judgment at the start of the trial and subsequent grant of summary judgment to respondent on appellant's abuse of process counterclaim.

As an initial matter, we note that appellant has not provided this court with a copy of the trial transcript. As a result, we are unable to determine what, if any, arguments were made by the parties during the short trial judge's reconsideration of the abuse of process claim. It is

appellant's duty to ensure that an adequate trial court record is prepared, see Carson Ready Mix v. First Nat'l Bk., 97 Nev. 474, 476, 635 P.2d 276, 277 (1981), and we presume that items not contained in the record on appeal support the district court's conclusions. Cuzze v. Univ. & Cmty. Coll. Sys. of Nev., 123 Nev. 598, 603, 172 P.3d 131, 135 (2007). Additionally, nothing in the record indicates that appellant ever objected to the reconsideration of the prior summary judgment and the subsequent grant of summary judgment on his abuse of process claim or otherwise sought relief regarding this issue from either the short trial or district court judge. Accordingly, we reject appellant's court rule and due process based challenges to the grant of summary judgment.¹ See Southern Pac. Transp. Co. v. Fitzgerald, 94 Nev. 241, 244, 577 P.2d 1234, 1235-36 (1978) (stating that to preserve a contention for appellate review, specific objections must be made); cf. Canyon Villas v. State, Tax Comm'n, 124 Nev. 832, 845 n.27, 192 P.3d 746, 755 n.27 (2008) (refusing to consider an argument raised by appellant for the first time on appeal); Levingston v. Washoe Co., 112 Nev. 479, 483, 916 P.2d 163, 166 (1996) (recognizing that this court has the discretion to consider constitutional arguments raised for the first time on appeal); Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (stating that a point not raised in the district court is deemed to have been waived and will not be considered on appeal).

We now turn to the merits of the summary judgment on appellant's abuse of process counterclaim. Having reviewed the parties'

¹We note that Judge Bixler approved the short trial decision, including the reconsideration of the summary judgment on appellant's abuse of process claim, by entering judgment thereon as required by NSTR 3(d)(4), and thus, no violation of DCR 18(1) occurred in the short trial judge's reconsideration of Judge Bixler's partial summary judgment order.


arguments and the record on appeal, we conclude that summary judgment was properly granted in respondent's favor as no genuine issues of material fact remained with regard to appellant's abuse of process claim. See Posadas v. City of Reno, 109 Nev. 448, 457, 851 P.2d 438, 444-45 (1993) (noting that an abuse of process claim requires a demonstration of an ulterior purpose other than resolving a legal dispute and a willful act in the use of the legal process not proper in the regular conduct of the proceeding); Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (discussing when summary judgment is proper).

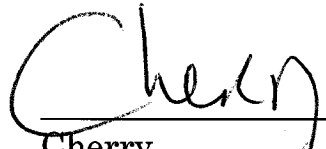
Attorney fees award

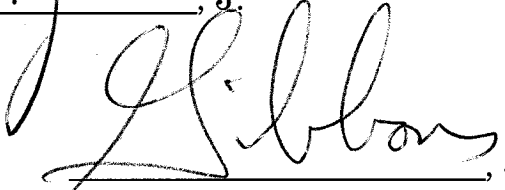
Turning to appellant's challenge to the attorney fees award, the record shows that the parties' lease agreement required the prevailing party in any litigation stemming from the agreement to be paid reasonable attorney fees. In awarding attorney fees, the district court must consider the factors set forth in Brunzell v. Golden Gate National Bank, 85 Nev. 345, 349-50, 455 P.2d 31, 33 (1969). Having considered the parties' arguments and the record before us, we find no abuse of discretion with the attorney fees award. Albios v. Horizon Communities, Inc., 122 Nev. 409, 417, 132 P.3d 1022, 1027-28 (2006) (providing that an award of attorney fees is reviewed for an abuse of discretion).

Accordingly, for the reasons set forth above, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Saitta


_____, J.
Cherry


_____, J.
Gibbons

cc: Hon. James M. Bixler, District Judge
Philip J. Dabney, District Judge, Pro Tem
Paul H. Schofield, Settlement Judge
Thomas D. Harper, Ltd.
Miles, Bauer, Bergstrom & Winters, LLP
Eighth District Court Clerk