

IN THE SUPREME COURT OF THE STATE OF NEVADA

NEVADA CONTRACTORS
INSURANCE COMPANY, INC., A
NEVADA CORPORATION; AND
CONTRACTOR'S LIABILITY
INSURANCE COMPANY, A RISK
RETENTION GROUP,

Appellants,

vs.

JAMES M. KUKURIN, INDIVIDUALLY
AND D/B/A KUKURIN CONCRETE,
INC.,
Respondent.

No. 54738

FILED

JUL 29 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *Angela*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court summary judgment in an insurance action. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

Respondent James Kukurin, president, secretary, treasurer, and sole director of Kukurin Concrete, Inc., obtained commercial general liability insurance policies through appellants Nevada Contractors Insurance Company, Inc. (NCIC), and Contractor's Liability Insurance Company (CLIC) to cover Kukurin Concrete from May 2001 through May 2005. Between December 2002 and January 2006, NCIC and CLIC accepted tender of defense and indemnity in seven construction defect claims during the time of coverage made against the policies and eventually settled them all.

On January 31, 2005, Kukurin Concrete was sold to MS Concrete. James received an initial down payment of \$400,000, and subsequently, an installment payment of \$858,885. James never notified NCIC or CLIC that Kukurin Concrete was sold. After Kukurin Concrete was sold, NCIC and CLIC audited Kukurin Concrete's insurance policies and found that Kukurin Concrete owed additional premiums on the policies. NCIC and CLIC filed a complaint against Kukurin Concrete and James individually, alleging causes of action for breach of contract, unjust enrichment, and alter ego/deceptive trade practices, and seeking reimbursement for monies paid in settlement, the costs of defending the construction defect lawsuits, and the additional premiums owed. James moved for summary judgment, arguing that he could not be found liable for the debts of the corporation. NCIC and CLIC opposed the motion and filed a countermotion for summary judgment. The district court granted summary judgment in favor of James individually and denied NCIC's and CLIC's countermotion.¹ This appeal followed. The parties are familiar with the facts and we do not recount them further except as pertinent to our disposition.

¹We note that default judgment was entered against Kukurin Concrete because it failed to timely file an answer to NCIC's and CLIC's complaint. However, the district court found that James may raise the defenses of Kukurin Concrete in order to defend himself.

DISCUSSION

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 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. (alteration in original) (quoting NRCP 56(c)). Under NRCP 56, the burden of proving that there is no genuine issue of material fact lies with the moving party. Maine v. Stewart, 109 Nev. 721, 726-27, 857 P.2d 755, 758 (1993). However, once the moving party satisfies his or her burden as required by NRCP 56, the burden shifts to the nonmoving party to show the existence of a genuine issue of material fact for trial. Id. at 727, 857 P.2d at 759. A party opposing a motion for summary judgment is required to present specific facts showing that there is a genuine issue for trial. Schuck v. Signature Flight Support, 126 Nev. ___, ___, 245 P.3d 542, 545 (2010); NRCP 56(e).

We conclude that James met his burden by demonstrating, as a matter of law, that he is protected by a corporate veil, shielding him from individual liability for the debts of Kukurin Concrete, and that he was not obligated to reimburse NCIC and CLIC for monies spent in defending and settling the construction defect claims, and for additional premiums owed. Therefore, the burden is shifted to NCIC and CLIC to present specific facts demonstrating that a genuine issue of material fact remains for trial.

NCIC and CLIC argue that James is individually liable for the debts of Kukurin Concrete because he acted as the alter ego of the

corporation. A stockholder, director, or officer acts as the alter ego of a corporation if:

(1) [t]he corporation [is] influenced and governed by the person asserted to be its alter ego[;] (2) [t]here [is] such unity of interest and ownership that one is inseparable from the other; and (3) [t]he facts [are] such that adherence to the fiction of [a] separate entity would, under the circumstances, sanction a fraud or promote injustice.

McCleary Cattle Co. v. Sewell, 73 Nev. 279, 282, 317 P.2d 957, 959 (1957), overruled on other grounds by Callie v. Bowling, 123 Nev. 181, 185, 160 P.3d 878, 880 (2007); NRS 78.747; see also Baer v. Amos J. Walker, Inc., 85 Nev. 219, 220, 452 P.2d 916, 916 (1969).

In this case, NCIC and CLIC did not satisfy any of the elements necessary for the court to conclude that James was the alter ego of Kukurin Concrete, and the district court properly granted James' motion for summary judgment. NCIC's and CLIC's claims are based solely on their conclusion that the payments from MS Concrete to James to purchase Kukurin Concrete prove that the company was influenced and governed by James. Even if NCIC's and CLIC's claims of James' influence and governance were factually accurate, simply stating that it is undisputed that Kukurin Concrete was influenced and governed by James because he was the sole shareholder and director is not enough to meet the first requirement of the test.

NCIC and CLIC also failed to show that there was a unity of interest and ownership such that James was inseparable from Kukurin Concrete. James stated in his answers to interrogatories that he placed the first payment for the sale of Kukurin Concrete into a money market


savings account to pay for taxes and the second payment into Kukurin Concrete's bank account to pay for storage, legal fees, equity draws, and employee compensation. NCIC and CLIC failed to demonstrate that James treated the money as his own, and there is nothing in the record that suggests James treated Kukurin Concrete's money as his own. NCIC and CLIC failed to show the existence of a genuine issue of material fact by not including evidence to support their claim that James was acting as the alter ego of Kukurin Concrete and paying himself with the money received from MS Concrete.

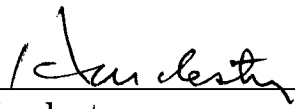
As to the final element, NCIC and CLIC have failed to show that adherence to the corporate fiction of a separate entity would sanction fraud or promote a manifest injustice. Both NCIC and CLIC claim that adhering to the corporate fiction would promote a manifest injustice because James paid himself with the money from MS Concrete; that being said, NCIC and CLIC have not provided any evidence except for the check requests from MS Concrete, not the actual checks issued. NCIC and CLIC have pointed to no evidence that James took the money for his personal use rather than the corporation's use.

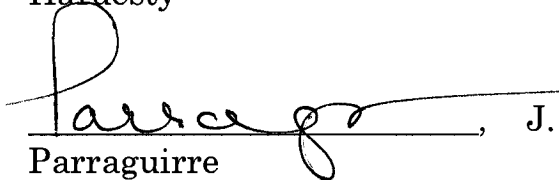
It is not the responsibility of the district court to search through the record for specific facts that might support the nonmoving party's claim; this would be giving the nonmoving party an advantage over the moving party as the court would, in practical effect, become the lawyer creating a genuine issue for trial. Schuck, 126 Nev. at ___, 245 P.3d at 545. Because NCIC and CLIC were unable to produce evidence supporting their arguments, they failed to meet their burden that a genuine issue of material fact existed and the district court properly

granted summary judgment in favor of James, who demonstrated that he was entitled to judgment as a matter of law.² Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Saitta


_____, J.
Hardesty


_____, J.
Parraguirre

cc: Hon. Valerie Adair, District Judge
M. Nelson Segel, Settlement Judge
Ryan, Mercaldo, & Worthington, LLP
Michael R. Pontoni
Eighth District Court Clerk

²This court will not entertain NCIC's and CLIC's challenge, raised in their opening brief, to the order granting attorney fees and costs to Kukurin because it is an independently appealable order and it appears that NCIC and CLIC failed to appeal from it. See Smith v. Crown Financial Services, 111 Nev. 277, 280 n.2, 890 P.2d 769, 771 n.2 (1995); NRAP 3A(b)(8).