

IN THE SUPREME COURT OF THE STATE OF NEVADA

BOB FLEISCHMAN, A/K/A ROBERT
FLEISCHMAN,

Appellant,

vs.

GLENN SMITH, AND THE JOHN R.
AUSTIN AND SUSAN F. AUSTIN
FAMILY TRUST,

Respondents.

BOB FLEISCHMAN, A/K/A ROBERT
FLEISCHMAN, M.D.,

Appellant,

vs.

GLENN SMITH, AND THE JOHN R.
AUSTIN AND SUSAN F. AUSTIN
FAMILY TRUST,

Respondents.

No. 34226

FILED

MAY 09 2002

JANE LIE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richard*
CHIEF DEPUTY CLERK

No. 35024

ORDER OF AFFIRMANCE

These are consolidated appeals from a district court order granting summary judgment to the respondents and a second order awarding costs and attorney fees to the respondents. Appellant Bob Fleischman entered into an agreement to purchase a business known as The Radiator Shop from Michelle Verzani and respondent Glenn Smith in 1994, and assumed a promissory note in favor of respondent Austin Trust. Fleischman ceased payments in 1996, contending that the business premises did not conform to governmental regulations as promised. The district court's order granted summary judgment in favor of the respondents on their claims for breach of contract and unjust enrichment and on Fleischman's counterclaim for breach of contract.

1. Additional time for discovery.

Fleischman contends that he was unable to oppose summary judgment because the district court did not allow him adequate time for discovery. This court reviews a district court's grant or denial of additional time for discovery pursuant to NRCP 56(f) for abuse of discretion.¹ After the respondents moved for summary judgment, Fleischman requested 180 days to conduct two additional depositions. The district court granted Fleischman three months for additional discovery, and he conducted the depositions within that time. We conclude that the district court did not abuse its discretion in this regard.

2. Summary judgment.

We review de novo a district court's grant of summary judgment.² We can affirm an order of summary judgment on any correct ground, whether relied upon by the district court or not.³ Fleischman argues that The Radiator Shop violated OSHA regulations. Our review of the contract shows no promise that The Radiator Shop would conform to OSHA regulations. Smith and Verzani promised that the premises would conform to applicable EPA regulations and fire codes. OSHA regulations,

¹See Summerfield v. Coca Cola Bottling Co., 113 Nev. 1291, 1295, 948 P.2d 704, 706 (1997).

²Coury v. Robison, 115 Nev. 84, 88, 976 P.2d 518, 520 (1999) (citing Bulbman, Inc. v. Nevada Bell, 108 Nev. 105, 110, 825 P.2d 588, 591 (1992)).

³See Milender v. Marcum, 110 Nev. 972, 977, 879 P.2d 748, 751 (1994) (citing Hotel Riviera, Inc. v. Torres, 97 Nev. 399, 403, 632 P.2d 1155, 1158 (1981)).

which concern workplace safety, are wholly unrelated to EPA regulations, which concern pollutants, and fire codes. Accordingly, we conclude that Fleischman presented no evidence of a material breach of contract.

The district court also granted summary judgment to the Austin Trust on the unopposed alternative argument that any breach by Smith and Verzani did not excuse Fleischman's payment under the note. Fleischman presents no argument that the district court erred in so holding. We conclude that the district court's grant of summary judgment to the Austin Trust was correct. Under DCR 13(3) and EDCR 2.20, the district court may consider a party's failure to address a motion as an admission that the motion is meritorious.

3. Costs.

Fleischman also argues that the district court erred in awarding costs even though the respondents did not submit a memorandum of costs within five days of judgment as required by NRS 18.110(1). We note that the respondents moved for costs within five days of the district court's May 13, 1999, amended judgment. Because, however, all parties have addressed the statute in terms of the district court's original April 7, 1999, judgment, we will also use this date.

District courts have discretion to allow submission of a memorandum of costs more than five days after entry of judgment.⁴ This court has previously approved the precise action undertaken by the district court here, *i.e.*, granting costs to a party who filed his

⁴Valladares v. DMJ, Inc., 110 Nev. 1291, 1293, 885 P.2d 580, 582 (1994).

memorandum more than five days after judgment without first requesting a time extension.⁵ That case involved a three-and-a-half-month delay,⁶ as opposed to the one-month delay here. We therefore conclude that the district court did not abuse its discretion in awarding costs to the respondents.

4. Attorney fees.

Finally, Fleischman argues that the district court abused its discretion in awarding attorney fees and interest because the respondents did not move for the fees until after Fleischman filed his notice of appeal. Absent a manifest abuse of discretion, this court will not overturn a district court's award of attorney fees.⁷ The district court's discretion encompasses the determination of whether a motion for attorney fees is timely.⁸ Although the district court originally entered judgment on April 7, 1999, Fleischman promptly moved to amend judgment. The district court entered an amended judgment on May 13, 1999, four days before the respondents moved for attorney fees and interest. We conclude that the

⁵See Eberle v. State ex rel. Redfield Trust, 108 Nev. 587, 590, 836 P.2d 67, 69 (1992). This court proceeded to reverse the award of costs on other grounds. Id.

⁶Id. at 589, 836 P.2d at 69.

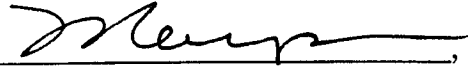
⁷Davidsohn v. Steffens, 112 Nev. 136, 139, 911 P.2d 855, 857 (1996).

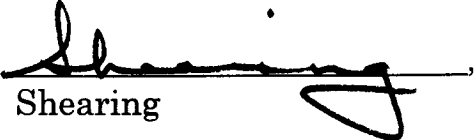
⁸Id.


district court did not abuse its discretion in finding the motion timely.⁹

We therefore

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Maupin


_____, J.
Shearing


_____, J.
Rose

cc: Hon. Valorie Vega, District Judge
R. Paul Sorenson
Markoff & Boyers
Clark County Clerk

⁹The order granting attorney fees constitutes a special order made after final judgment. See NRAP 3A(b)(2).