IN THE SUPREME COURT OF THE STATE OF NEVADA

DUSTY RHODES,
Appellant,
vs.
DESIGNER DISTRIBUTION SERVICES, LLC, A NEVADA LIMITED LIABILITY COMPANY AND MOVERS PAK-MAN, INC., A CALIFORNIA CORPORATION,
Respondents.

No. 55522

DUSTY RHODES,
Appellant,
vs.
DESIGNER DISTRIBUTION SERVICES, LLC, AND MOVERS PAK-MAN, INC.,
Respondents.

No. 56615

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

These are consolidated appeals from a district court judgment in a contract and tort action and a post-judgment order awarding attorney fees and costs. Eighth Judicial District Court, Clark County; Mark R. Denton, Judge.

Appellant Dusty Rhodes entered into an agreement with respondent Designer Distribution Services, LLC (DDS) whereby DDS, working with respondent Movers Pak-Man, Inc. (MPM), was to ship Rhodes's household belongings from Las Vegas to Hawaii. DDS picked up Rhodes's property after Rhodes signed a credit card authorization with DDS and a letter of acceptance with MPM. However, Rhodes's property weighed more than was originally estimated. As a result, DDS contacted Rhodes to arrange for full payment by requesting that he sign a credit

card authorization for the remaining balance. Rhodes submitted an authorization with an inserted provision that required delivery of Rhodes's belongings by a specific date. A specific delivery date was contrary to the letter of acceptance, and because Rhodes failed to provide a credit card authorization based on the original terms, DDS refused to ship Rhodes's property. Rhodes's property remained in DDS's storage and he did not seek to reclaim it.

Rhodes sued DDS and MPM (collectively DDS unless otherwise specified). DDS filed a counterclaim for breach of contract, breach of covenant of good faith and fair dealing, and unjust enrichment. DDS later filed summary judgment motions against Rhodes on his claims for fraud, misrepresentation, unjust enrichment, civil conspiracy, conversion, and request for specific performance and injunctive relief. The district court entered summary judgment against Rhodes on his claims for unjust enrichment, conversion, and request for injunction and specific performance. DDS then filed a partial summary judgment motion against Rhodes on his 49 U.S.C. §14704 claim. DDS also filed a motion to dismiss Rhodes's remaining state law claims. The district court granted partial summary judgment against Rhodes on his 49 U.S.C. §14704 claim. The district court dismissed Rhodes's remaining state law claims as preempted by the federal Carmack Amendment.

Following the district court's dismissal of Rhodes's remaining state law claims, Rhodes filed a motion to dismiss DDS's counterclaims. In response, DDS filed a countermotion for summary judgment on all of its counterclaims. Rhodes then filed for summary judgment on DDS's counterclaims as well. The district court granted summary judgment against Rhodes on DDS's counterclaims. After the district court's grant of

summary judgment on DDS's counterclaims, DDS filed a motion for attorney fees and costs. The district court granted the motion for attorney fees and costs as well.

Rhodes now argues on appeal that the district court erred in (1) granting DDS summary judgment on Rhodes's claims for unjust enrichment, conversion, specific performance and injunctive relief, violations of the Carmack Amendment, and DDS's counterclaims; (2) granting DDS's motion to dismiss Rhodes's remaining state law claims; and (3) granting DDS's motion for attorney fees and costs.[1] The parties are familiar with the facts, and we do not recount them further except as is necessary for our disposition.

DISCUSSION

Standard of review

Statutory construction and unambiguous contractual construction are questions of law reviewed de novo. State, Dep't of Taxation v. DaimlerChrysler, 121 Nev. 541, 543, 119 P.3d 135, 136 (2005); Ellison v. C.S.A.A., 106 Nev. 601, 603, 797 P.2d 975, 977 (1990).

A district court's grant of summary judgment is reviewed de novo and without deference to the district court's findings. Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper if, viewing the evidence in the light most favorable to

---

[1]We decline to address Rhodes's other claims of error where he fails to provide any argument or citation to authority regarding those issues in his opening brief. See NRAP 28(a)(8)(A); Edwards v. Emperor's Garden Rest., 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (providing that this court need not consider arguments not cogently made or supported by citations to salient authority).

the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Id. The party opposing a motion for summary judgment must set forth specific facts demonstrating the existence of a genuine factual issue. Id. at 731, 121 P.3d at 1030-31. "[T]he 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.

The district court erred by granting DDS summary judgment on Rhodes's claim that DDS violated 49 U.S.C. § 14704

Rhodes argues that the district court erred in its interpretation of 49 U.S.C. § 14704 and 49 U.S.C. § 14706's "actual loss" requirement because Rhodes was entitled to damages for non-delivery. We agree.

The Carmack Amendment was first enacted in 1906 as an amendment to the Interstate Commerce Act and has been altered and recodified over the last century. Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp., 561 U.S. ___, ___, 130 S.Ct. 2433, 2440 (2010). The Carmack Amendment imposes liability on an interstate carrier "for the actual loss or injury to the property" that the carrier agrees to transport. Id. at ___, 130 S.Ct. at 2441 (citing 49 U.S.C. §§ 11706, 14706). 49 U.S.C. § 14706(a) imposes liability on motor carriers "for the actual loss or injury to the property." 49 U.S.C. § 14706(a) (2006).

Liability may be imposed on a "carrier for all reasonably foreseeable consequential damages resulting from a breach of the contract of carriage, including those resulting from nondelivery of the shipped goods" such as "loss, damage, or delay arising out of the contract to transport the goods." Air Products & Chemicals v. Ill. Cent. Gulf R.R., 721 F.2d 483, 485-86 (5th Cir. 1983) (citing N. Y. & Norfolk R. R. v. Peninsula

Exch., 240 U.S. 34, 37-38 (1915)). Rhodes notes that the "Carmack Amendment is the exclusive cause of action for contract claims alleging delay, loss, failure to deliver or damage to property." Hall v. North American Van Lines, Inc., 476 F.3d 683, 688 (9th Cir. 2007)). Rhodes asserts that there were substantial foreseeable damages after DDS took possession of his property, held the property hostage, and refused to deliver the property by the date Rhodes specified.

Rhodes presented evidence demonstrating that the non-delivery of his goods resulted in a loss of business opportunities, the depreciation in value of the non-delivered goods, and costs associated with the replacement of his property. Because this evidence demonstrates that Rhodes may have experienced consequential damages as a result of DDS's non-delivery, we conclude that there are genuine issues of material fact regarding the damages that Rhodes suffered. Therefore, the district court erred in entering summary judgment against Rhodes on his Carmack Amendment claim.

The district court properly granted DDS summary judgment on Rhodes's claims for unjust enrichment, conversion, and request for specific performance and an injunction

Rhodes argues that the district court erred in granting DDS summary judgment on Rhodes's claims for unjust enrichment, conversion, and request for specific performance and an injunction. We disagree.

The district court properly granted DDS summary judgment on Rhodes's unjust enrichment claim

"'[U]njust enrichment or recovery [under] quasi-contract [principles] applies to situations where there is no legal contract but where the person sought to be charged is in possession of money or property which in good conscience and justice [should not be retained].'" LeasePartners Corp. v. Brooks Trust, 113 Nev. 747, 756, 942 P.2d 182, 187

(1997) (quoting 66 Am. Jur. 2d Restitution § 11 (1973)). "An action based on a theory of unjust enrichment is not available when there is an express, written contract, because no agreement can be implied when there is an express agreement." LeasePartners Corp. v. Brooks Trust, 113 Nev. 747, 755, 942 P.2d 182, 187 (1997).

Because Rhodes's unjust enrichment claim was based on the same subject matter as the express contract and was not separate and distinct, we conclude that the district court properly granted summary judgment for DDS on the unjust enrichment claim. See Lipshie v. Tracy Investment Co., 39 Nev. 370, 379, 566 P.2d 819, 824 (1977) ("To permit recovery by quasi-contract where a written agreement exists would constitute a subversion of contractual principles."); LeasePartners, 113 Nev. at 756, 942 P.2d at 187.

The district court properly granted DDS summary judgment on Rhodes's conversion claim

"Conversion is 'a distinct act of dominion wrongfully exerted over another's personal property in denial of, or inconsistent with [that person's] title or rights [to the property].'" Evans v. Dean Witter Reynolds, Inc., 116 Nev. 598, 606, 5 P.3d 1043, 1048 (2000) (quoting Wantz v. Redfield, 74 Nev. 196, 198, 326 P.2d 413, 414 (1958)). Conversions are divided between four classes: (1) wrongful taking, (2) alleged assumption of ownership, (3) illegal user or misuser, and (4) wrongful detention. Robinson M. Co. v. Riepe, 40 Nev. 121, 129, 161 P. 304, 305 (1916). Only wrongful detention requires proof of a demand and refusal. Id.

Rhodes argues that the district court failed to acknowledge that DDS was holding Rhodes's property hostage for seventeen months, which Rhodes asserts amounts to conversion. Yet, Rhodes cannot demonstrate that his property was wrongfully taken or that he made a

demand for his property. DDS also offered Rhodes the opportunity to retrieve his property and suggests that Rhodes could have sought a writ of restitution. Rhodes fails to demonstrate a genuine issue of material fact regarding the existence of a conversion claim and fails to demonstrate that the district court erred by finding that DDS did not wrongfully obtain and retain Rhodes's property. Thus, we conclude that the dismissal of Rhodes's conversion claim was proper.

The district court properly granted DDS summary judgment on Rhodes's request for specific performance and an injunction

Rhodes, citing to Harmon v. Tanner Motor Tours, 79 Nev. 4, 377 P.2d 622 (1963), argues that because the contract concerned a specific and unique obligation on the part of DDS, specific performance was a valid request and the district court erred by granting summary judgment in favor of DDS. However, Harmon does not state that a party may compel another to perform a personal service, and Rhodes provides no analysis as to how Harmon might apply to his case. Harmon, 79 Nev. 4, 377 P.2d 622 (1963).

Instead, Harmon imposed specific performance to grant an exclusive franchise, not personal services, and it is a fundamental rule that specific performance is not available to enforce a contract for personal services. See id. at 17-20, 377 P.2d at 630 (noting that a franchise is a property right); Woolley v. Embassy Suites, Inc., 278 Cal. Rptr. 719, 727 (Cal. App. 1991) (stating that specific performance is not available to enforce a contract for personal services). Therefore, we conclude that Rhodes's request for specific performance and an injunction to enforce delivery of his property was improper. We hold that the district court did not err by dismissing Rhodes's state law claims for unjust enrichment, conversion, and his request for specific performance and an injunction.

The district court erred by granting DDS's motion to dismiss Rhodes's remaining state law claims because genuine issues of material fact exist as to whether DDS was a "carrier"

Rhodes argues that the district court erred when granting DDS's motion to dismiss Rhodes's state law claims by concluding that Rhodes was bound by the allegation that DDS and MPM were "carriers" under the Carmack Amendment and in finding that Rhodes's state law claims were preempted by the Carmack Amendment. We agree.

Standard of review for NRCP 12(b)(5) motion to dismiss

An order granting an NRCP 12(b)(5) motion to dismiss is reviewed de novo. Buzz Stew, LLC v. City of N. Las Vegas, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008).[2] A decision dismissing a complaint pursuant to NRCP 12(b)(5) is rigorously reviewed on appeal with all alleged facts in the complaint presumed true and all inferences drawn in favor of the complaint. Id. at 228. 181 P.3d at 672. Dismissing a complaint is appropriate "only if it appears beyond a doubt that [the complaint] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief." Id. All legal conclusions are reviewed de novo. Id.

[2]It is not clear whether the district court granted DDS's motion to dismiss under NRCP 12(b)(5) or NRCP 12(c) because DDS inadvertently cited to NRCP 12(b)(5) in its initial motion to dismiss, but then argued for dismissal as a matter of law under NRCP 12(c) in its reply to Rhodes's opposition to the motion to dismiss. On appeal, both Rhodes and DDS reference the standard of review for a district court's dismissal under NRCP 12(b)(5). Therefore, we construe the dismissal of Rhodes's remaining state law claims under the standard of review for a dismissal pursuant to NRCP 12(b)(5).

Rhodes was not bound by his complaint

Rhodes contends that the district court would not have preempted his state law claims if it would have first considered evidence that DDS was not a "carrier" under the Carmack Amendment and that substantial questions of material fact exist as to whether DDS was a "carrier." DDS answers that Rhodes named DDS and MPM as "carriers" throughout the case, in his pleadings, interrogatories, and 49 U.S.C. § 14706 claim, and that DDS and MPM defended themselves accordingly.

After discovery closed and Rhodes failed to seek leave of the court to further amend his pleadings, the district court concluded based on Rhodes's first amended complaint that DDS and MPM were "carriers." Rhodes argues that he clearly pleaded that DDS and MPM misrepresented their roles and that he pleaded alternative theories as a result of their deceit. Because there is uncertainty as to whether Rhodes's pleadings only identified DDS and MPM as "carriers," we conclude that Rhodes was not bound by his complaint. See Kingsbury v. Copren, 43 Nev. 448, 455, 189 P. 676 (1920) (concluding that "it appeared from the complaint itself, as a matter of law, that there was no uncertainty as to the capacity in which plaintiff [sought] to hold the defendant responsible" and that the plaintiff was "bound by the material allegations in the complaint").

Genuine issues of material fact exist regarding whether DDS was a "carrier" under the Carmack Amendment

Rhodes also argues that the district court erred in dismissing all of his state law claims because DDS may not be a "carrier" within the meaning of the Carmack Amendment, and therefore, the amendment does not preempt Rhodes's remaining claims. We agree.

The Carmack Amendment creates a uniform rule for carrier liability when goods are shipped in interstate commerce. Adams Express

Co. v. Croninger, 226 U.S. 491, 505-06 (1913). To accomplish uniformity, the Carmack Amendment preempts state law claims arising from failures in the transportation and delivery of goods. Id. at 505-06; see also Pacific Intermountain v. Leonard E. Conrad, 88 Nev. 569, 571, 502 P.2d 106, 107 (1972) (stating that federal law controls liability for a carrier under the Carmack Amendment). The evidence demonstrates that DDS may have only acted as a broker or agent for MPM with regard to the shipment of Rhodes's belongings. Because genuine issues of material fact exist regarding whether DDS is a "carrier" within the meaning of the Carmack Amendment, we conclude that the district court erred by dismissing all of Rhodes's state law claims based on preemption.

The district court erred by granting DDS summary judgment on its breach of contract counterclaim for storage fees because genuine issues of material fact exist relating to Rhodes's fraud claim

Rhodes argues that the district court erred by granting DDS summary judgment on its breach of contract counterclaim for storage fees because genuine issues of material fact exist regarding whether DDS fraudulently induced Rhodes to retain its services.[3] We agree.

---

[3]Rhodes also argues that the Carmack Amendment prohibits the district court from awarding damages relating to services not provided for in the bill of lading, and that any breach of contract claim must relate to the letter of acceptance as the bill of lading. However, the Carmack Amendment does not allow a carrier to sue a shipper based on breach of contract and such a claim does not arise under the Carmack Amendment. Intransit v. Excel North American Road Transport, 426 F. Supp. 2d 1136, 1143 (D. Or. 2006); Transit Homes of America v. Homes of Legend, 173 F. Supp. 2d 1185, 1187-88 (N.D. Ala. 2001)). In fact, nothing in the Carmack Amendment indicates that it applies to claims against a shipper. The intent was to facilitate shippers' recoveries against carriers. Intransit,

continued on next page . . .

Rhodes argues that the evidence demonstrates that he did not agree to pay for the storage of his items for more than thirty days. DDS asserts that it sent Rhodes a bid detailing the terms of his property shipment and outlining the scope of storage that would be provided by DDS to Rhodes, Rhodes signed the letter of acceptance with MPM, and Rhodes pleaded in his first amended complaint that he entered into a contract with DDS. Rhodes presented evidence that DDS informed him that his goods would need to be stored in order to meet his requested delivery date. Based on this evidence, Rhodes alleges that DDS used its offer of free storage for thirty days to induce him into retaining DDS's services. We conclude that genuine issues of material fact exist regarding whether DDS committed fraud against Rhodes with regard to the terms of the contract and storage fees. Therefore, the district court erred by granting DDS summary judgment on its breach of contract counterclaim.

The district court abused its discretion in awarding attorney fees and costs

Rhodes argues that DDS was not allowed attorney fees under the Carmack Amendment because it failed to offer him arbitration pursuant to the Carmack Amendment. Because we conclude that the district court erred by granting DDS summary judgment on Rhodes's 49 U.S.C. § 14704 claim and dismissing Rhodes's remaining state law claims, we vacate the district court's award of attorney fees and costs. However,

---

. . . continued

426 F. Supp. 2d at 1140, citing Southern Pac. Transp. Co. v. United States, 456 F. Supp. 931, 937 (E.D.Cal. 1978)).

we also seek to clarify when the Carmack Amendment entitles a carrier to attorney fees.

The decision to award attorney fees is within the sound discretion of the district court and is not overturned absent a manifest abuse of discretion. Kahn v. Morse & Mowbray, 121 Nev. 464, 479, 117 P.3d 227, 238 (2005). Attorney fees are generally not recoverable absent a statute, rule, or contractual provision. Horgan v. Felton, 123 Nev. 577, 583, 170 P.3d 982, 986 (2007).

Based on our conclusion above, we vacate the district court's award of attorney fees and costs. For clarification purposes on remand, we further conclude that although § 14708(e) provides attorney fees to carriers for "any court action to resolve a dispute between a shipper of household goods and a carrier," the carrier must first offer arbitration to the shipper. See All In The Family Moving & Storage v. Latka, 935 So.2d 87, 88 (Fla. Dist. Ct. App. 2006). Therefore, DDS is not entitled to attorney fees under the Carmack Amendment because DDS failed to offer arbitration pursuant to 49 U.S.C. § 14708.

Accordingly, we ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART and REMAND this matter to the district court for proceedings consistent with this order.

Cherry, J.

Cherry

Gibbons, J.

Gibbons

Pickering, J.

Pickering

cc: Hon. Mark R. Denton, District Judge
The Bach Law Firm
Shumway Van & Hansen
Eighth District Court Clerk