IN THE SUPREME COURT OF THE STATE OF NEVADA

RESTROOM FACILITIES, LTD.,
Appellant
vs.
CHARLES E. KAUFMAN, III,
Respondent

No. 55765

FILED

NOV 30 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court's judgment, certified as final under NRCP 54(b), calculating the amount of an offset and denying certain prejudgment interest. Second Judicial District Court, Washoe County; Brent T. Adams, Judge.

The district court determined that respondent Charles E. Kaufman's contract claim against appellant Restroom Facilities, Ltd., was founded upon an "instrument in writing" and thus subject to the six-year statute of limitations stated in NRS 11.190(1)(b), as opposed to the shorter four-year limitation period that NRS 11.190(2)(c) applies to oral contract claims. This determination rests on an erroneous interpretation of NRS 11.190. Our review is de novo, see Day v. Zubel, 112 Nev. 972, 977, 922 P.2d 536, 539 (1996), and we reverse.

The district court did not specify the writing or writings that led it to give Kaufman six, as opposed to four, years of contract damages. Kaufman identifies four such potential writings: (1) a claims list, (2) copies of old paychecks, (3) board of director's meeting minutes naming Kaufman the company's president, and (4) a noncompete agreement. We do not consider the noncompete agreement because Kaufman did not argue it before the district court. "A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and

will not be considered on appeal." Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).[1]

NRS 11.190(1)(b) requires a written instrument showing an obligation to pay. El Ranco, Inc. v. New York Meat & Prov., 88 Nev. 111, 113-15, 493 P.2d 1318, 1320-21 (1972), disapproved of on other grounds by State v. American Bankers Insurance, 105 Nev. 692, 696 n.2, 782 P.2d 1316, 1318 n.2 (1989). The mere existence of a written document related to the cause of action does not establish the six-year statute of limitation; the writing must evidence a contract that goes to the heart of, and in some way forms the basis for, the claim asserted. Stephens v. McCormack, 50 Nev. 383, 390, 263 P. 774, 776 (1928); McMahan v. Snap on Tool Corp., 478 N.E.2d 116, 123 (Ind. Ct. App. 1985).

Here, Kaufman's unpaid-salary claim was not founded upon an instrument in writing within the meaning of NRS 11.190(1)(b). The list of claims, copies of old paychecks, and board minutes[2] may evidence other

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[1]Kaufman executed the non-compete agreement in 1989 after he sold the company to Hawley, with Kaufman staying on as an officer. Kaufman also appears to argue that Restroom Facilities should be estopped from claiming there is no written employment agreement because its complaint includes allegations respecting, and attached a copy of, the noncompete agreement. Judicial estoppel is an extraordinary measure, Mainor v. Nault, 120 Nev. 750, 765, 101 P.3d 308, 318 (2004), applied where the party takes a position entirely inconsistent from an earlier position upon which it prevailed. Restroom Facilities' allegations concerned the noncompete and confidentiality covenants and it did not assert that it had a written agreement to employ Kaufman, and so its complaint alleging an agreement is not inconsistent with its current position.

[2]Kaufman argues we should presume missing portions of Restroom Facilities' appendix support the district court's decision. See Prabhu v.

continued on next page . . .

aspects of Kaufman's and Restroom Facilities' relationship with each other, but they do not establish a salary-based employment contract between them.[3] The copies of old paychecks show only that, in the past, certain payment obligations were satisfied. Likewise, although the meeting minutes show Kaufman was an officer of Restroom Facilities, they do not show any salary, payment, or employment obligation. The claims list—which was generated after the lawsuit began and after Restroom Facilities and Kaufman severed ties—is also insufficient. This list constitutes Restroom Facilities' internal accounting of the amounts Kaufman claimed to be owed; it does not memorialize an employment relationship.

The several canceled checks, board minutes, and claims list may be evidence of an oral employment agreement. However, Kaufman's contract claims are not "founded upon" them. They thus do not qualify as an instrument in writing for purposes of NRS 11.190. The district court should have calculated Kaufman's contract damages with reference to NRS 11.190's four-, not six-, year statute of limitations, and we reverse and remand with instructions that it do so.

. . . *continued*

Levine, 112 Nev. 1538, 1549, 930 P.2d 103, 111 (1996). However, the appendix includes all materials necessary for this court's review. See NRAP 30.

[3]We acknowledge that all parties orally agreed that Kaufman's salary was $60,000 per year. However, their oral agreements cannot be considered for whether the salary is documented in writing.

Restroom Facilities also appeals the district court's denial of prejudgment interest on its recovery for fraud and misappropriation.[4] We agree the district court erred by failing to award prejudgment interest on those claims under NRS 17.130. See Paradise Homes v. Central Surety, 84 Nev. 109, 116, 437 P.2d 78, 83 (1968) (interpreting NRS 99.040 and holding that "interest is recoverable as a matter of right in actions upon contracts . . . upon all money from the time it becomes due"). NRS 17.130 mandates prejudgment interest and, like NRS 99.040, contains no apparent exception. Restroom Facilities did not waive its right to interest on its fraud and misrepresentation claims under NRS 17.130 by failing to raise the issue before this appeal. See Schoepe v. Pacific Silver Corp., 111 Nev. 563, 567, 893 P.2d 388, 390 (1995).

Accordingly, we

ORDER the judgment be REVERSED, and REMAND this matter to the district court for proceedings consistent with this order.

Cherry, C. J.

Saitta, J.

Pickering, J.

[4]The doctrine of invited error does not apply here because the interest is a matter of right, and Restroom Facilities had no hope of profiting from the error. Additionally, Restroom Facilities meaningfully briefed the issue because it cites sufficient law to support its argument. See NRAP 28(a)(9).

cc: Hon. Brent T. Adams, District Judge
Jack I. McAuliffe, Chtd.
Molof & Vohl
Washoe District Court Clerk