

IN THE SUPREME COURT OF THE STATE OF NEVADA

KILEY RANCH COMMUNITIES, A  
NEVADA CORPORATION,  
Appellant,  
vs.  
BRANCH BANKING AND TRUST  
COMPANY, A NORTH CAROLINA  
CORPORATION, AS SUCCESSOR IN  
INTEREST TO COLONIAL BANK,  
Respondent.

No. 57108

FILED

OCT 01 2012

TRAGIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *A. Anger*  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order granting summary judgment in a real property contract action. Second Judicial District Court, Washoe County; Brent T. Adams, Judge.

The underlying case arose from four loan agreements between appellant Kiley Ranch Communities and Colonial Bank for the purchase and development of a master-planned community located in Sparks, Nevada. The loans were to be repaid within one year. After multiple extensions, Kiley Ranch failed to repay the loans when they became due in July 2009. Colonial Bank and its successor in interest, respondent Branch Banking & Trust Company (BB&T), did not respond to Kiley Ranch's requests for disbursements of additional money, asserting that Kiley Ranch was in default and requesting full repayment. Kiley Ranch filed suit for breach of contract, and discovery commenced.

During discovery, Kiley Ranch requested admissions from BB&T, including that BB&T breached the loan agreements and that Kiley Ranch did not. After BB&T failed to timely serve its responses, Kiley

Ranch filed a motion in limine seeking to have these matters deemed admitted based on BB&T's failure to respond. BB&T subsequently moved for summary judgment, served its responses to the requests for admission, and filed a cross-motion for relief under NRCP 36(b) seeking to amend its default responses to the requests for admission. The district court granted BB&T's motion for summary judgment and concluded that BB&T did not breach the loan agreements by failing to grant the disbursement requests because Kiley Ranch was in default. However, the district court failed to expressly rule on Kiley Ranch's motion in limine and BB&T's cross-motion for NRCP 36(b) relief.<sup>1</sup>

On appeal, Kiley Ranch argues that (1) the district court erred in granting summary judgment in BB&T's favor because its requests for admission were deemed admitted under NRCP 36(a) and the district court did not grant BB&T relief, and (2) genuine issues of material fact remain that preclude summary judgment. We disagree.

Requests for admission

Kiley Ranch contends that the district court erred in granting summary judgment because the requests for admissions were automatically deemed admitted, which precluded summary judgment. Discovery matters are within the district court's sound discretion, and we will not disturb a district court's ruling regarding discovery unless the court has clearly abused its discretion. Matter of Adoption of Minor Child, 118 Nev. 962, 968, 60 P.3d 485, 489 (2002).

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<sup>1</sup>The parties are familiar with the facts, and we do not recount them further except as necessary to our disposition.

When a party fails to timely respond to requests for admission, “matters contained therein are deemed admitted.” Smith v. Emery, 109 Nev. 737, 741, 856 P.2d 1386, 1389 (1993) (quotation omitted); NRCP 36(a). NRCP 36(b) provides that any matter admitted under this rule is conclusively established unless the court grants a motion to withdraw or amend the admissions. Further, when a response is not lacking but merely late, the district court has broad discretion in determining whether to accept “as true a request for admission.” Woods v. Label Investment Corp., 107 Nev. 419, 425, 812 P.2d 1293, 1297 (1991) (finding no abuse of discretion where the district court determined the merits of the case without ruling on a pending NRCP 36(b) motion), disapproved of on other grounds by Hanneman v. Downer, 110 Nev. 167, 180 n.8, 871 P2d. 279, 287 n.8 (1994).

In this case, because NRCP 36(b) relief was requested, the district court could properly permit withdrawal or amendment of the admissions. NRCP 36(b). The district court ultimately granted summary judgment in favor of BB&T, implicitly granting BB&T’s motion for NRCP 36(b) relief.<sup>2</sup> We conclude that the district court did not abuse its

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<sup>2</sup>We conclude that any error in failing to expressly rule on Kiley Ranch’s motion in limine or BB&T’s motion for relief was harmless in light of the fact that the district court’s ruling on the parties’ motions was indicated in the grant of BB&T’s motion for summary judgment and was within the district court’s discretion. NRCP 61; see Stitt v. Williams, 919 F.2d 516, 526 n.15 (9th Cir. 1990); Brown v. Webb, 567 P.2d 450, 453 (Mont. 1977). Regardless, as the district court has discretion whether to accept as true a request for admission, even where a late response has been filed, Woods, 107 Nev. at 425, 812 P.2d at 1297, it was within the district court’s discretion not to accept the admissions as true in making its summary judgment ruling in this case.

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discretion in granting BB&T's request for relief, as this decision promoted the presentation of the merits of the action. See NRCP 36(b). Additionally, Kiley Ranch suffered no prejudice from the grant of NRCP 36(b) relief. See Sonoda v. Cabrera, 255 F.3d 1035, 1039 (9th Cir. 2001) (construing the federal counterpart to NRCP 36(b) and stating, “[t]he prejudice contemplated by [FRCP] 36(b) is not simply that the party who obtained the admission will now have to convince the factfinder of the truth; rather, it relates to the difficulty a party may face in proving its case, for example by the unavailability of key witnesses in light of the delay.”).<sup>3</sup>

Genuine issues of material fact

Kiley Ranch argues that, even absent the admissions, genuine issues of material fact remain outstanding on three issues—whether (1) BB&T was obligated to fund the draw requests, (2) BB&T's failure to disburse funds described in an agreement that existed between Colonial Bank/BB&T and Belimo Aircontrol constituted a breach of contract, and (3) BB&T's prevention of the sale of the water rights created a breach of contract precluding summary judgment. We conclude that summary

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<sup>3</sup>We note that several of the requests for admission propounded by Kiley Ranch were impermissible because they asked for legal concessions that concerned the salient issue in the case, which is contrary to the purpose of NRCP 36 admissions as determined by this court—“to obtain admission of facts which are in no real dispute and which the adverse party can admit cleanly, without qualifications.” Morgan v. Demille, 106 Nev. 671, 675-76, 799 P.2d 561, 564 (1990), superseded by court rule on other grounds as recognized in RTTC Communications v. Saratoga Flier, 121 Nev. 34, 42 n.20, 110 P.3d 24, 29 n.20 (2005).

judgment was proper. See Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (explaining that summary judgment is proper when no genuine issues of material fact remain in dispute and the moving party is entitled to judgment as a matter of law).

First, the district court properly determined that Kiley Ranch failed to raise a genuine issue of material fact regarding whether BB&T was obligated to fund the draw requests from Kiley Ranch after Kiley Ranch failed to pay its outstanding debts as required by the agreements. Kiley Ranch failed to perform under the agreements when it did not pay the loans as required in July 2009, conceded that it did not have the ability to repay the loans, and failed to repay the loans when BB&T requested full repayment in September 2009. As Kiley Ranch failed to repay the loans, BB&T did not breach the contract by its delay in responding to the disbursement requests.

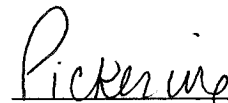
Second, the district court properly concluded that Kiley Ranch was not an intended third party beneficiary to the agreement between Colonial Bank and Belimo. The fact that Kiley Ranch may have incidentally benefited from the agreement is insufficient for it to be considered a third party beneficiary. See Lipshie v. Tracy Investment Co., 93 Nev. 370, 379, 566 P.2d 819, 824-25 (1977); Olson v Iacometti, 91 Nev. 241, 245, 533 P.2d 1360, 1363 (1975). Accordingly, this agreement does not obligate BB&T to release disbursements to Kiley Ranch.

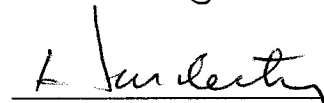
Third, the district court properly granted summary judgment regarding the issue of BB&T's prevention of Kiley Ranch's sale of water rights. The loan agreements provided that the sale of the water rights was at Colonial Bank/BB&T's discretion. As there were no terms in the contract that required BB&T to allow Kiley Ranch to sell the water rights,

there can be no breach of the loan agreements. Accordingly, we conclude that no genuine issues of material fact remain in dispute and the district court properly granted summary judgment in favor of respondent,<sup>4</sup> and we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Saitta

  
\_\_\_\_\_, J.  
Pickering

  
\_\_\_\_\_, J.  
Hardesty

cc: Hon. Brent T. Adams, District Judge  
William G. Cobb, Settlement Judge  
Gunderson Law Firm  
Holland & Hart LLP/Reno  
Washoe District Court Clerk

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<sup>4</sup>We conclude that all other arguments on appeal lack merit.