IN THE SUPREME COURT OF THE STATE OF NEVADA

ELI APPLEBAUM IRA F/K/A HIGH DESERT INVESTMENT GROUP DEFINED BENEFIT PENSION PLAN, A NEVADA CORPORATION,
Appellant,
vs.
ARIZONA ACREAGE, LLC, A NEVADA LIMITED LIABILITY COMPANY; LEONARD MARDIAN, AN INDIVIDUAL; SUSAN MARDIAN, AN INDIVIDUAL; OCOTILLO RANCH, LLC, A NEVADA LIMITED LIABILITY COMPANY; AUSTIN WILLIAMS, AN INDIVIDUAL; AND LORI A. MARDIAN-WILLIAMS, AN INDIVIDUAL,
Respondents.

No. 57634

FILED

JUN 21 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court summary judgment in a contract action. Eighth Judicial District Court, Clark County; Jessie Elizabeth Walsh, Judge.

Respondent Arizona Acreage, LLC, granted appellant Eli Applebaum IRA a deed of trust on certain real property in exchange for a $50,000 loan. In addition, two of Arizona Acreage's individual owners, respondents Leonard and Susan Mardian, guaranteed the loan.

When Arizona Acreage defaulted, Applebaum brought a breach-of-contract action against respondents.[1] Before filing an answer to

[1]The parties are familiar with the facts, and we do not recount them further except as necessary to our disposition. We note that the remaining respondents (Ocotillo Ranch, LLC; Austin Williams; and Lori Mardian-

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Applebaum's complaint, respondents moved for summary judgment on the ground that NRS 40.430, Nevada's "one-action rule," required Applebaum to first foreclose on the secured property as a means of satisfying the debt. The district court agreed and granted summary judgment in favor of respondents.

On appeal, Applebaum contends that (1) summary judgment in favor of Arizona Acreage was improper because the one-action rule does not require a creditor to first foreclose on the debtor's secured property, (2) summary judgment in favor of the Mardians was improper because NRS 40.495(5)'s "farm products" exception does not encompass cattle-grazing, and (3) the district court improperly refused to grant a continuance so that Applebaum could conduct discovery. As explained below, we affirm.

Standard of review

We review a district court's grant of summary judgment de novo. Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is appropriate "when the pleadings and other evidence on file 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)). "If the moving party will bear the burden of persuasion, that party must present evidence that would entitle it to a judgment as a matter of law in the absence of contrary evidence." Cuzze v. Univ. & Cmty. Coll. Sys. of Nev., 123 Nev. 598, 602, 172 P.3d 131, 134 (2007).

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Williams) were involved in a similar transaction with Applebaum. As is relevant to this appeal, the details of this transaction were the same as those in the Arizona Acreage / Mardian transaction. As such, our analysis applies with equal effect to the remaining respondents.

Summary judgment in favor of Arizona Acreage was proper because Applebaum was required to first foreclose on the secured property

The one-action rule is an affirmative defense that a debtor may choose to raise in response to a creditor's lawsuit seeking to collect on a debt secured by real property. Nevada Wholesale Lumber v. Myers Realty, 92 Nev. 24, 28, 544 P.2d 1204, 1207 (1976) ("[A] trustor may waive the benefits of [NRS 40.430] by failing to call the court's attention to the security on the note, even though NRS 40.453 precludes a mortgagor or trustor from waiving a right secured by the laws of the state in any document relating to the sale of real property.").

Within this context, we have repeatedly held that when a debtor timely raises this affirmative defense, the creditor must first exhaust the secured property. See, e.g., id. ("The 'one-action' rule, NRS 40.430, requires the holder of a secured note to first exhaust the security before action on the note and ancillary attachment is permissible."); McDonald v. D.P. Alexander, 121 Nev. 812, 816, 123 P.3d 748, 751 (2005) ("Under the one-action rule, a debtor can require a creditor to foreclose on real estate security before suing on the note . . . .").

Here, it is undisputed that Arizona Acreage timely raised the one-action rule as an affirmative defense. Thus, summary judgment in favor of Arizona Acreage was proper.[2] Wood, 121 Nev. at 729, 121 P.3d at 1029.

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[2]Applebaum's reliance on Hyman v. Kelly, 1 Nev. 179, 186 (1865), is misplaced. In Keever v. Nicholas Beers Co., 96 Nev. 509, 611 P.2d 1079 (1980), we expressly clarified that the creditor's "choice" suggested by Hyman arises only once the debtor has failed to timely raise the one-action rule as an affirmative defense. Id. at 513 n.1, 611 P.2d at 1082 n.1.

Summary judgment in favor of the Mardians was proper because NRS 40.495(5)'s "farm products" exception encompasses cattle-grazing

NRS 40.495(2) affords the protections of the one-action rule to guarantors, but it also permits a guarantor to contractually waive the rule's protections.[3] Walters v. Dist. Ct., 127 Nev. ___, ___, ___, 263 P.3d 231, 232, 235 (2011) (noting NRS 40.495(2)'s effect). However, NRS 40.495(5) invalidates a guarantor's waiver in several situations, such as when the secured property is "used primarily for the production of farm products as of the date the mortgage or lien upon the real property is created." NRS 40.495(5)(c) (emphasis added).

In their summary judgment motion, the Mardians acknowledged that their guarantee agreement contained a waiver of the one-action rule. However, they attached to their motion an affidavit from a former Bureau of Land Management employee, which stated: "I know of my own personal knowledge that the [secured] Properties have not been used for any purpose other than [cattle] grazing since at least 1971." Concluding that cattle-grazing fell within the meaning of NRS 40.495(5)(c)'s "farm products" exception, the district court found the Mardians' waiver to be invalid. Consequently, it granted summary judgment in their favor.

[3]Applebaum's reliance on First National Bank of Nevada v. Barengo, 91 Nev. 396, 397, 536 P.2d 487, 487 (1975), is also misplaced. Barengo indeed held that the one-action rule did not apply to guarantors, but the subsequent enactment of NRS 40.495 superseded this holding.

On appeal, Applebaum suggests that the term "farm products," as used in NRS 40.495(5)(c), is confined to "crops" (e.g., wheat, corn) and that summary judgment was therefore improper.[4] We disagree.

Although NRS 40.495(5) does not define "farm products," the term is broadly defined elsewhere in the Nevada Revised Statutes. Notably, these definitions encompass both crops and cattle-grazing. For instance, Article 9 of Nevada's Uniform Commercial Code provides the following definition:

> (hh) "Farm products" means goods . . . with respect to which the debtor is engaged in a farming operation and which are:
>
> (2) Livestock, born or unborn . . . ;
>
> . . . [or]
>
> (4) Products of crops or livestock in their unmanufactured states.

NRS 104.9102(1)(hh). Other statutory provisions likewise define "farm products" to encompass more than crops. See, e.g., NRS 576.0155 (defining "farm products" for purposes of the Livestock and Farm Products Chapter to include "livestock and livestock products"); NRS 244.336(2) (applying NRS 576.0155's definition to a separate statutory chapter).

It is evident that the Legislature has used "farm products" as a term of art elsewhere in the Nevada Revised Statutes to encompass cattle-grazing. By using this term in NRS 40.495(5)(c), the Legislature

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[4]Applebaum has not made any argument on appeal regarding how "farm products" should be defined. Cf. Edwards v. Emperor's Garden Rest., 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (noting that it is a party's responsibility to "cogently argue, and present relevant authority, in support of his appellate concerns"). Thus, for purposes of this disposition, we confine our analysis to the argument he made in district court.

presumably intended a similar meaning. Cf. Beazer Homes Nevada, Inc. v. Dist. Ct., 120 Nev. 575, 587, 97 P.3d 1132, 1139-40 (2004) ("Generally, when a legislature uses a term of art in a statute, it does so with full knowledge of how that term has been interpreted in the past, and it is presumed that the legislature intended it to be interpreted in the same fashion."). Thus, we conclude that NRS 40.495(5)(c)'s "farm products" exception is not limited solely to "crops" and that cattle-grazing falls within this exception.

Given this conclusion, the BLM employee's affidavit provided an evidentiary basis for the district court to find that the secured property had been used primarily for the production of farm products at the time the deed of trust was granted. NRS 40.495(5)(c). Thus, in the absence of contrary evidence, summary judgment in the Mardians' favor was proper. Cuzze, 123 Nev. at 602, 172 P.3d at 134.

The district court did not abuse its discretion in denying Applebaum's request for a continuance

The district court entertained respondents' summary judgment motion before Applebaum had conducted any discovery. Consequently, Applebaum asked the district court to postpone ruling on the motion until discovery had been completed. The district court denied this request and proceeded to grant summary judgment. On appeal, Applebaum contends this was improper.

"The decision to grant or deny a continuance of a motion for summary judgment to allow further discovery is reviewed for an abuse of discretion." Choy v. Ameristar Casinos, 127 Nev. ___, ___, 265 P.3d 698, 700 (2011). As explained below, the district court did not abuse its discretion in denying Applebaum's request for a continuance.

When requesting a continuance, a party must explain in an affidavit why he or she is currently unable to present evidence sufficient to oppose the summary judgment motion. Id. (citing NRCP 56(f)). Here, although Applebaum provided the district court with an affidavit, the affidavit failed to articulate what facts he believed were essential to proving his case. Cf. NRCP 56(e), (f) (requiring more from an affidavit than a general assertion that discovery needs to be undertaken).

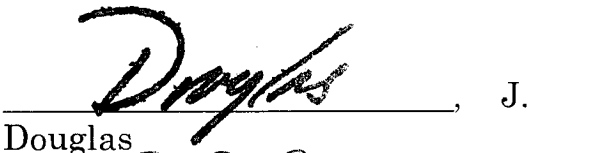
Again at the summary judgment hearing, Applebaum failed to articulate whether he was contesting the factual accuracy of the BLM employee's affidavit (which could warrant discovery) or whether he simply disputed the definition of "farm products" (which would make discovery meaningless). Even when asked directly by the district court what his position was with respect to the BLM employee's affidavit, Applebaum provided the following equivocal response:

> Right. I said livestock, horses would not necessarily fit the definition of producing farm products. . . . Farm—producing farm products, if you take the literal meaning of producing farm products, that would be producing cotton, corn, things you grow. Putting three cows on the land doesn't necessarily indicate it's a—there's a difference between a farm and a ranch. . . . There's no evidence of actual farm products produced other than they have three cows grazing there.

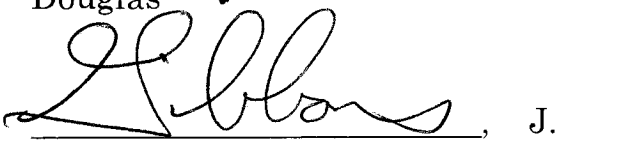
We acknowledge the "general rule" that "the non-moving party must be allowed to conduct discovery in order to oppose [a motion to dismiss that contains extraneous evidence]." Inlandboatmens Union of Pacific v. Dutra Group, 279 F.3d 1075, 1083 (9th Cir. 2002). However, for this "general rule" to apply, the non-moving party must first articulate what factual issues warrant discovery. See NRCP 56(e)-(g). Given Applebaum's aforementioned response to the district court's direct

question, the district court was within its discretion in denying Applebaum's request for a continuance.[5] Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Douglas



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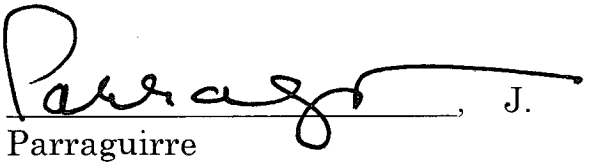

_____, J.
Parraguirre

cc: Hon. Jessie Elizabeth Walsh, District Judge
M. Nelson Segel, Settlement Judge
Law Office of Daniel Marks
Hutchison & Steffen, LLC
Eighth District Court Clerk

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[5]We note that, on appeal, Applebaum has more clearly articulated that he disagrees with the BLM employee's factual assertions. Given our standard of review, however, the proper time and place to make this articulation was in district court. Choy, 127 Nev. at ___, 265 P.3d at 700 (reviewing a district court's decision to deny a continuance request for an abuse of discretion).