

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN RE: RECEIVERSHIP OF
SOUTHWEST EXCHANGE, INC., AND
CONSOLIDATED LITIGATION.

No. 57846

FILED

NOV 28 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *A. Malone*
DEPUTY CLERK

P.J. DEMARIGNY,
Appellant,

vs.

MICHAEL MCCORMICK; DEBORAH
MCCORMICK; ERIC G. TARR TRUST I
DATED MAY 4, 1990; LEONARD
SHAPIRO; TIC PRATT 17, LLC;
HARBOR INVESTMENT GROUP, LLC;
KERSTAN MICONE; MICHAEL
MICONE; WAYNE ALBRITTON;
GRETA ALBRITTON; BRIGITE LAND
MANAGEMENT, LLC; D&D
INVESTMENT CO.; LARRY WALLACE;
4 EVER ACES, INC.; P&D KELESIS,
LLC; RANDY CHAR; MELDRUM
FAMILY TRUST; GERALD B.
CAMPBELL TRUST U/A/D; GERALD B.
CAMPBELL; CAROLE CAMPBELL;
NAPA VALLEY I, LLC; AND NAPA
VALLEY II, LLC,
Respondents.

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

This is an appeal from several district court judgments certified as final under NRCP 54(b) in a tort action. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge.

In 2004, appellant Peter John DeMarigny (PJ) worked as an account manager at Citigroup, where he managed the investment accounts of two clients: Southwest Exchange, Inc., a holding company for tax-deferred property exchanges under IRS Code Section 1031, and an individual investor named Don McGhan. While employed at Citigroup, PJ helped orchestrate the sale of Southwest to McGhan, and he began diverting Southwest assets into accounts owned by McGhan. PJ then moved with Southwest's account to UBS. In 2005, PJ was hired by Capital Reef Management Corporation, a company created by McGhan to be the holding company for Southwest. While at Capital Reef, PJ continued to assist with diverting Southwest assets into separate accounts for McGhan's benefit. By 2007, PJ and McGhan had depleted Southwest of roughly \$97 million and the company collapsed.¹

Respondents brought suit against PJ and multiple other defendants, alleging numerous claims for relief. PJ answered the complaint by asserting his Fifth Amendment rights and denying all allegations against him. Respondents moved for summary judgment. The district court ultimately granted summary judgment against PJ on respondents' civil Racketeer Influenced and Corrupt Organizations (RICO) Act claims and awarded respondents treble damages. PJ now appeals, arguing that the district court erred (1) in granting summary judgment, and (2) in its apportionment of damages.

¹As the parties are familiar with the facts, we do not recount them further except as necessary to our disposition.

An evidentiary basis supports the grant of summary judgment

On appeal, PJ argues that the district court's grant of summary judgment is not supported by substantial evidence. We conclude that the record supports the district court's grant of summary judgment based on conduct that occurred while PJ was employed by Capital Reef.²

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.'" Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (alteration in original) (quoting NRCP 56(c)). "If the moving party will bear the burden of persuasion, that party must

²Respondents entered into settlement agreements with Citigroup and UBS that, PJ asserts, release him from liability as to his conduct while employed both at Citigroup and UBS. Because we conclude that summary judgment is supported based on PJ's conduct while employed at Capital Reef, we decline to reach this issue.

PJ also argues that respondents have waived their claims with regard to post-Citigroup and UBS allegations by failing to plead them with particularity. NRCP 9(b). We have previously held that "[a] civil RICO pleading must, in that portion of the pleading which describes the criminal acts that the defendant is charged to have committed, contain a sufficiently 'plain, concise and definite' statement of the essential facts such that it would provide a person of ordinary understanding with notice of the charges." Hale v. Burkhardt, 104 Nev. 632, 638, 764 P.2d 866, 869-70 (1988) (quoting NRS 173.075). Having reviewed the complaint, we conclude that the civil RICO claims were sufficiently pleaded, as respondents set forth numerous acts constituting the asserted racketeering-related crimes that occurred through the course of PJ's involvement with Southwest and while he was employed at Capital Reef. Specifically, the complaint alleges a pattern of misconduct over a period of years, whereby PJ both acted and conspired to embezzle and obtain funds from respondents through false pretenses.

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). To withstand summary judgment, the nonmoving party cannot rely solely on general allegations and conclusions set forth in the pleadings, however, but must instead present specific facts demonstrating the existence of a genuine factual issue. NRCF 56(e); see also Wood, 121 Nev. at 731, 121 P.3d at 1030-31 (stating that a genuine factual dispute is one where “the evidence is such that a rational trier of fact could return a verdict for the non-moving party”).

Pursuant to NRS 207.470 and NRS 207.400, a civil RICO cause of action may be based upon proof that the defendant

engag[ed] in at least two crimes related to racketeering that have the same or similar pattern, intents, results, accomplices, victims or methods of commission, or are otherwise interrelated by distinguishing characteristics and are not isolated incidents

NRS 207.390 (emphasis added).³

Here, the district court concluded that while PJ was employed by Capital Reef, he participated both directly and indirectly in racketeering activities. On review, the record supports the district court’s finding that PJ committed and conspired to commit acts of embezzlement and conversion through the affairs of Southwest in violation of NRS 207.360(25) and NRS 207.360(9) while employed at Capital Reef. See

³“Crime[s] related to racketeering” are enumerated in NRS 207.360 and include the crimes of “[e]mbezzlement” and “[t]aking property from another under circumstances not amounting to robbery.” NRS 207.360(25), (9).

Sheehan & Sheehan v. Nelson Malley & Co., 121 Nev. 481, 486, 117 P.3d 219, 223 (2005) (providing that this court will not set aside a district court's findings of fact and conclusions of law that are supported by substantial evidence unless clearly erroneous). Additionally, PJ presented no evidence in opposition to respondents' summary judgment motion other than the Citigroup and UBS settlement agreements and repeated assertions of the Fifth Amendment.⁴ Thus, we conclude that summary judgment as to PJ's civil RICO liability was proper. See NRCP 56(e) (requiring the party opposing a properly presented and supported summary judgment to set forth specific facts showing a genuine issue for trial); Francis v. Wynn Las Vegas, 127 Nev. ___, ___, 262 P.3d 705, 711 (2011) (stating that a claim of privilege against self-incrimination will not prevent summary judgment if the litigant fails to satisfy the usual evidentiary burdens).

Having concluded that the record supports an evidentiary basis for PJ's liability, we now address whether the district court erred in apportioning damages.

The amount of damages awarded is not adequately supported

PJ argues that the district court erred in apportioning damages because the record does not support the total amount awarded to

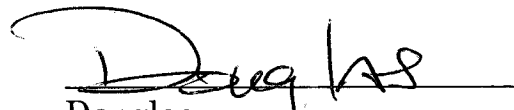
⁴PJ also argues that many of the district court's findings were incorrectly based on the adverse inferences drawn from his Fifth Amendment assertions. This argument is unpersuasive, as an adverse inference can be drawn in a civil proceeding from a party's assertion of the Fifth Amendment, so long as "independent evidence exists of the fact to which the party refuses to answer." Doe ex rel. Rudy-Glanzer v. Glanzer, 232 F.3d 1258, 1264 (9th Cir. 2000) (citing Baxter v. Palmigiano, 425 U.S. 308, 317-18 (1976)). Based on the record, we conclude that such adverse inferences were adequately corroborated.

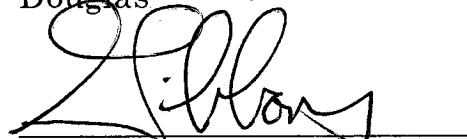
respondents. The district court's order indicates that of the roughly \$97 million lost in Southwest's 2007 collapse, the respondents in this appeal suffered a combined loss of \$56,108,602.87.⁵ The district court proceeded to apportion damages to each respondent based on money lost as the result of Southwest's collapse.

On review, we acknowledge that the master complaint summarizes the manner by which some of the respondents lost approximately \$22 million in late 2006 as the result of PJ's conduct. Otherwise, the record fails to include evidence connecting the remaining respondents to their specific investments and losses. Therefore, genuine issues of material fact remain as to the damage calculations. Accordingly, we

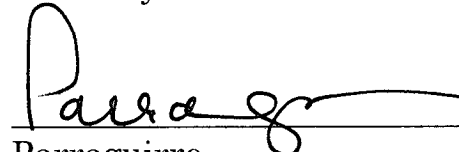
⁵Pursuant to NRS 207.470(1), the district court trebled this amount before granting PJ a \$50 million offset due to respondents' settlements with other defendants. On appeal, PJ argues that the damages should not have been trebled until after the offset was applied. Without reaching the merits of this argument, we have previously concluded that "as a matter of law, intentional tortfeasors, including persons found liable in conversion and persons in conspiracy with them, may not [be applied] credit from settlements by their joint tortfeasors . . . in reduction of judgments against them arising from the intentional misconduct." Evans v. Dean Witter Reynolds, Inc., 116 Nev. 598, 609-10, 5 P.3d 1043, 1050 (2000). Because the district court offered no explanation for its decision that neither Evans nor NRS 17.255 (barring contribution in favor of an intentional tortfeasor) precluded PJ from taking a setoff for settlement payments, we remand this matter back to the district court for further elaboration.

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.⁶

 J.
Douglas

 J.
Gibbons

 J.
Hardesty

 J.
Parraguirre

cc: Hon. Elizabeth Goff Gonzalez, District Judge
Michael R. Pontoni
Greenberg Traurig, LLP/Las Vegas
Holland & Hart LLP/Las Vegas
McCullough, Perez & Associates, Ltd.
Bailus Cook & Kelesis
Eighth District Court Clerk

⁶The Honorable Michael Cherry, Chief Justice, and the Honorable Nancy Saitta and Kristina Pickering, Justices, voluntarily recused themselves from participation in the decision of this matter.