IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVE BARKET,
Appellant,
vs.
KIMBERLY HART; MARY HART; AND BARRY WALKER,
Respondents.

No. 60112

FILED

DEC 13 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court summary judgment in a contract action. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Appellant Steve Barket challenges the district court's summary judgment enforcing a promissory note against him. Barket alleged below that the parties did not intend to create an enforceable note, but that the note was created at the request of respondent Kimberly Hart to conceal from her husband, respondent Barry Walker, a payment she made to appellant to purchase his interest in a business partnership that she and Barket had entered into. Barket argues on appeal that the district court erred in granting summary judgment because it improperly denied his motion for a continuance under NRCP 56(f) to allow him to conduct further discovery.

NRCP 56(f) allows for a continuance of a motion for summary judgment to provide additional time to conduct discovery to garner support to oppose the summary judgment motion. *Aviation Ventures, Inc. v. Joan Morris, Inc.*, 121 Nev. 113, 117-18, 110 P.3d 59, 62 (2005). This court reviews a district court's denial of an NRCP 56(f) motion for an

abuse of discretion. *Choy v. Ameristar Casinos, Inc.*, 127 Nev. ___, ___, 265 P.3d 698, 700 (2011). An NRCP 56(f) motion is only appropriate "when the movant expresses how further discovery will lead to the creation of a genuine issue of material fact," *Aviation Ventures*, 121 Nev. at 118, 110 P.3d at 62, and the moving party must present an affidavit explaining the need for the continuance. *Choy*, 127 Nev. at ___, 265 P.3d at 700.

We conclude that the district court abused its discretion in denying Barket's NRCP 56(f) request. Barket submitted the necessary affidavit, explained why further discovery was necessary, and showed that depositions of respondents had already been set and would be completed before the deadline establshed for conducting discovery. Barket asserted that he needed to take respondents' depositions to support his claim that the parties did not intend to create an enforceable note. As further discovery could assist Barket in opposing the summary judgment motion, and would be completed before the discovery deadline, the district court abused its discretion in denying the motion. *Aviation Ventures*, 121 Nev. at 117-18, 110 P.3d at 62.

In reaching this conclusion, we note that at this point in the proceedings it is unclear whether the parol evidence rule would apply to prevent Barket from challenging the unambiguous note, as he alleges that the parties never intended to form a binding contract. *See Schieve v. Warren*, 87 Nev. 42, 45, 482 P.2d 303, 305 (1971) (stating that parol evidence is permitted to show that the parties did not intend to create a binding contract at the time the document was executed); *see also Aviation Ventures*, 121 Nev. at 119, 110 P.3d at 63 (noting that further discovery was needed before determining whether the parol evidence rule would

apply and, as a result, the rule did not prevent allowing further discovery under NRCP 56(f)). Based on our determination that the district court improperly denied Barket's NRCP 56(f) request, we conclude that the district court erred in granting summary judgment in favor of respondents at this point in the proceedings.[1] Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

Pickering, C.J.
Pickering

Hardesty, J.
Hardesty

Cherry, J.
Cherry

cc: Hon. Douglas W. Herndon, District Judge
Janet Trost, Settlement Judge
Cohen-Johnson LLC
The Amin Law Group, Ltd.
Eighth District Court Clerk

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[1]In light of this conclusion, we need not address the parties' remaining arguments on appeal.

We deny respondents' motion to strike portions of appellant's reply brief, and we note that we did not consider arguments raised for the first time on appeal. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (stating that this court will not consider an issue raised for the first time on appeal).