IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL D. MADISON AND RICHARD R. RAMSEY,

Appellants,

vs.

THE LONG FAMILY TRUST,

Respondent.

No. 35532

FILED

JUL 16 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY [signature]
CHIEF DEPUTY CLERK

MODIFIED ORDER OF REVERSAL AND REMAND[1]

Appellants Michael D. Madison and Richard R. Ramsey (the "consultants") appeal the district court's order, which granted pretrial judgment in favor of respondent the Long Family Trust (the "Trust"). The consultants contend on appeal that the district court overlooked a material question of fact. We agree, and thus we reverse the district court's award of pretrial judgment and attorney fees.

First, the parties dispute the proper standard of review to be applied to this case. Although the district court granted the Trust's motion for judgment on the pleadings, we will review it as one for summary judgment because the consultants' opposition to the Trust's motion included affidavits, "matters outside the pleadings," that were

[1]After considering the Trust's petition for rehearing, we take this opportunity to modify our previous order.

02-12161

"presented to and not excluded by the court."[2] After viewing the facts in the light most favorable to the nonmoving party, summary judgment may be granted only when no genuine issue of material fact remains for trial and one party is entitled to judgment as a matter of law.[3]

The consultants contend that there were various issues of material fact that the district court overlooked, but they center their appeal primarily on their allegation that George Kucera, corporate counsel of Devco Properties, Inc.,[4] had represented to them that the Trust would act as the "guarantor" of the anticipated buyout of their stock. This allegation was mentioned in their complaint but developed further in their opposition to the Trust's motion for judgment on the pleadings and in their supporting affidavits.[5] But in granting judgment against the consultants,

---

[2]NRCP 12(c) ("If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.").

[3]Posadas v. City of Reno, 109 Nev. 448, 452, 851 P.2d 438, 441 (1993).

[4]There is a question of fact as to whether Kucera was in a position to bind the Trust. This is demonstrated in part by the consultants' allegation that Kucera drafted the stock-restriction agreements in question and by the fact that the Trust was a party to the agreements, not Devco.

[5]The Trust's contention that the consultants' allegation was raised for the first time on appeal is without merit. We conclude that the Trust had an opportunity to respond to the issue and the district court, although it apparently overlooked the issue, had the chance to consider it. See Oliver v. Barrick Goldstrike Mines, 111 Nev. 1338, 1344-45, 905 P.2d 168, 172 (1995) (noting that the purpose of this court's rule barring litigants from raising new issues on appeal "is to prevent appellants from raising new issues on appeal concerning which the prevailing party had no

continued on next page . . .

the district court focused only on the language of the stock-restriction agreement. In doing so, the district court overlooked the consultants' allegation and its significance under the exceptions to the parol evidence rule, which allows a court to consider "agreements and negotiations prior to or contemporaneous with the adoption of a writing . . . to establish," among other things, "illegality, fraud, duress, mistake, lack of consideration, or other invalidating cause."[6] In light of this oversight, we conclude that the consultants' action against the Trust should have survived the motion for pretrial judgment, at least with enough time to determine whether any of the exceptions to the parol evidence rule apply. It appears that the consultants did not invoke the parol evidence rule by name, but they were not required to do so because their allegations were sufficient to put the Trust on notice regarding the legal theory invoked.[7]

In responding, the Trust contends that judgment in its favor was proper because the consultants' "guarantee" argument fails for two reasons. First, the Trust argues that there is no obligation on the part of Devco for the Trust to guarantee. Although the "guarantee" alleged in this case may not be a "guarantee" in the commonly understood sense of that

---

. . . *continued*
opportunity to respond and the district court had no chance to intelligently consider during proceedings below").

[6]Restatement (Second) of Contracts § 214 (1981); see also Russ v. General Motors Corp., 111 Nev. 1431, 1438, 906 P.2d 718, 723 (1995) (acknowledging the admissibility of parol evidence in various circumstances).

[7]See Hay v. Hay, 100 Nev. 196, 198, 678 P.2d 672, 674 (1984) (noting that our courts liberally construe pleadings to "place into issue matters which are fairly noticed to the adverse party").

legal term, we note that the basic thrust of the consultants' argument is that the Trust, through Kucera, agreed to purchase the shares if Devco failed to do so. This alleged arrangement could be found to bind the Trust under ordinary principles of contract if all the elements of contract are proven. Next, the Trust argues that guarantees are subject to the statute of frauds, requiring the consultants to produce a signed writing rather than mere verbal assurances. This argument fails, however, if as the Trust argues, the consultants hold no guarantee.[8]

Because the Trust is no longer the prevailing party in this action, we also reverse the district court's award of attorney fees to the Trust. Further, we instruct the district court to allow the consultants to amend their complaint as necessary to more specifically allege any appropriate exceptions to the parol evidence rule.

We conclude that the district court's grant of judgment in the Trust's favor was premature. Accordingly, we

ORDER the judgment of the district court REVERSED AND

---

[8]As it has not yet had the opportunity to do so, we leave the district court to first decide the applicability of NRS 104.8113.

REMAND this matter to the district court for proceedings consistent with this order.[9]

Shearing, J.

Rose, J.

Becker, J.

cc: Hon. Brent T. Adams, District Judge
Mirch & Mirch
Lionel Sawyer & Collins/Reno
Washoe District Court Clerk

[9]In view of our modifications, we deny the Trust's Petition for Rehearing.