IN THE COURT OF APPEALS OF THE STATE OF NEVADA

LOUIS LEVIN,
Appellant,
vs.
RED ROCK FINANCIAL SERVICES, LLC,
Respondent.

No. 70006

ORDER OF AFFIRMANCE

This is an appeal from a grant of summary judgment. Eighth Judicial District Court, Clark County; James Crockett, Judge.

After Appellant Louis Levin and his wife defaulted on their HOA dues for their home in Nevada, Levin and Red Rock, the collection agent for the HOA, spoke on the phone numerous times in an attempt to resolve the default. Levin alleges that some of these calls were recorded without his consent, which he argues violated both NRS 200.620 and Fla. Stat. § 934.03. Red Rock agrees that the calls were recorded, but contends that every call began with the playing of a pre-recorded message announcing that the call would be recorded, and therefore that Levin consented to the call being recorded by continuing to speak on the phone after hearing the pre-recorded announcement. The district court granted summary judgment in favor of Red Rock, concluding that Levin consented to be recorded and that the applicable statute of limitations expired on Levin's claims.

Levin's complaint identifies numerous calls that he claimed to have been recorded illegally, but he limits the scope of the instant appeal

to only nine calls recorded between September 12, 2010 and August 4, 2011.[1] *See Foster v. State*, 121 Nev. 165, 170, 111 P.3d 1083, 1087 (2005) ("Appellate counsel is entitled to make tactical decisions to limit the scope of an appeal to issues that counsel feels have the highest probability of success.").

This court reviews an order granting summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005); *see also Costello v. Casler*, 127 Nev. 436, 439, 254 P.3d 631, 634 (2011). Summary judgment is proper if the pleadings and all other evidence on file demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Wood*, 121 Nev. at 729, 121 P.3d at 1029. When deciding a summary judgment motion, all evidence must be viewed in a light most favorable to the nonmoving party. *Id.*

Both Nevada's and Florida's wiretapping statutes require prior consent from the party to be recorded before another party may record a phone call. NRS 200.620(1); Fla. Stat. § 934.03(2)(d); *Lane v. Allstate Ins. Co.*, 114 Nev. 1176, 969 P.2d 938 (1998). Levin concedes that under each statute, consent need not be express but may be implied in fact based on whether the surrounding circumstances demonstrate that the recorded party knew of the recording.

Here, Red Rock submitted affidavits signed by two Red Rock employees, Julia Thompson and Rhonda Leavitt, which unequivocally

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[1]Before the district court, Levin filed a countermotion seeking a continuance of Red Rock's summary judgment motion for more discovery pursuant to NRCP 56(f), but he also does not include or discuss this countermotion in the instant appeal.

declare that Red Rock began recording all its incoming calls in 2010 and that every call included the pre-recorded announcement. Indeed, during her deposition, Julia Thompson testified that Red Rock began playing the pre-recorded announcement as early as 2007 even before it began to actually record the calls in 2010. Therefore, Red Rock asserts that summary judgment was properly granted because Levin necessarily heard the pre-recorded announcement during every phone call conducted between September 12, 2010 and August 4, 2011, and consequently gave implied consent to be recorded during each call by continuing with the call.

In opposing these affidavits, Levin presents no affirmative evidence of his own, not even his own affidavit or any verified or sworn pleadings (his complaint was not verified). Instead, Levin relies upon the unsworn allegations of his complaint (which do not constitute evidence sufficient to defeat summary judgment) and the deposition testimony of Julia Thompson, which he characterizes as containing some testimony inconsistent with her summary judgment affidavit. In particular, he avers that Ms. Thompson's deposition testimony suggests that she might not have had personal knowledge of how the recording system operated and whether the pre-recorded announcement was actually played during every call, as her affidavit states.

But Levin's argument suffers from two flaws. First, questioning the credibility or completeness of Thompson's affidavit falls short of meeting Levin's burden to provide affirmative evidence demonstrating that a genuine issue of material fact exists sufficient to preclude summary judgment. *See Tom v. Innovative Home Systems LLC*, 132 Nev. ___, ___, 368 P.3d 1219, 1224 (Ct. App. 2015) (once the moving

party has met its burden of production, the burden shifts to the opposing party "to show the existence of a genuine issue of material fact"). A dispute is "genuine" only if a jury could return a verdict in favor of the non-moving party based upon the evidence presented. *See Wood v. Safeway*, 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005). Merely chipping away at the credibility of an affiant—without providing any evidence affirmatively demonstrating that the affiant's contentions are actually untrue or even legitimately in question—does not meet this standard. *See id.* at 731, 121 P.3d at 1030-31 ("the nonmoving party may not rest upon general allegations and conclusions, but must, by affidavit or otherwise, set forth specific facts demonstrating" a genuine issue).

Second, Levin completely fails to rebut any contention contained in Rhonda Leavitt's affidavit, and summary judgment could have been granted on Leavitt's uncontested affidavit alone even if Thompson's affidavit were discounted entirely.[2]

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[2]Because we conclude Levin failed to demonstrate any genuine issue of material fact and summary judgment was therefore appropriate, we need not address whether his claims may have been time-barred under the applicable statute of limitations. Nonetheless, we note that the Nevada Supreme Court has clearly ruled, "In dealing with statutes that do not specify when a cause of action accrues, we have held that the discovery rule would apply." *Bemis v. Estate of Bemis*, 114 Nev. 1021, 1025 n.1, 967 P.2d 437, 440 n.1 (1998) (citing *Oak Grove Inv. v. Bell & Gossett Co.*, 99 Nev. 616, 622–23, 668 P.2d 1075, 1079 (1983), *overruled on other grounds by Calloway v. City of Reno*, 116 Nev. 250, 993 P.2d 1259 (2000) (holding that where the "catch all" statute of limitations, NRS 11.220, was silent as to time of accrual, the discovery rule would apply)). Therefore, whether we apply the Nevada or Florida statute of limitations to any of Levin's claims arising from these calls, the result would be the same: the discovery rule would apply. *See* NRS 11.190(4)(b), 200.610–690 (not specifying when

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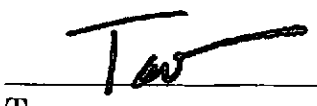
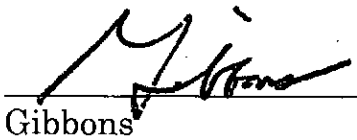
For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Silver



_____, J.
Tao



_____, J.
Gibbons

cc: Hon. James Crockett, District Judge
Lansford W. Levitt, Settlement Judge
Benjamin B. Childs
Morgan & Morgan/Tampa
The Law Office of Seth Shich, LLC
Koch & Scow, LLC
Eighth District Court Clerk

...continued
Levin's claims accrue); Fla. Stat. §§ 934.03, 934.10 (expressly applying the discovery rule).