IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DUDLEY KAUFMAN; AND DELORES KAUFMAN, HUSBAND AND WIFE,
Appellants,
vs.
THE PUBLIC RESTROOM COMPANY, A NEVADA CORPORATION; AND CHARLES KAUFMAN, III,
Respondents.

No. 68970

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from a partial grant of summary judgment and a judgment following a jury trial in a contract dispute. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge.

At issue on appeal is whether Charles Kaufman's or The Public Restroom Company's (TPRC) offer to pay retirement benefits to Dudley Kaufman was supported by legal consideration, making it enforceable via a claim for breach of contract.[1] The district court granted partial summary judgment on this issue in favor of the respondents, and after Dudley voluntarily dismissed certain other claims, Dudley proceeded to jury trial only on his claim of promissory estoppel. The jury returned a verdict in favor of the respondents, and Dudley now appeals from the pre-trial grant of partial summary judgment on his claim for breach of contract.[2]

---

[1]We do not recount the facts except as necessary to our disposition.

[2]Appellants also challenge the jury's verdict on the promissory estoppel claim, arguing that the district court erred during trial when it admitted "evidence of Dudley's alleged undue influence on their mother.

continued on next page...

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.*

"Consideration is the exchange of a promise or performance, bargained for by the parties." *Jones v. SunTrust Mortgage, Inc.*, 128 Nev.

...continued
and other conduct in her estate," arguing to the district court that "res judicata and/or collateral estoppel bar defendants from reaching beyond a settlement agreement to assert any such defenses." First, the district court found that the motion in limine was untimely under the applicable local rules, and the motion could have been denied for this reason alone. But even if it had been timely filed, appellants fail to cogently argue their point on appeal or provide us with any relevant authority for their evidentiary objections. Thus, we decline to consider these issues, and affirm the trial judgment. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006). However, we note that claim preclusion is an affirmative defense—not a rule of evidence—to the reassertion of a *claim*, and here, respondents have asserted no claims or counterclaims. *See Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 194 P.3d 709 (2008); *Weddel v. Sharp*, 131 Nev. ___, 350 P.3d 80 (2015). And even if respondents had asserted claims or counterclaims, appellants would have had to include this affirmative defense in their pleadings, not for the first time in a motion in limine. NRCP 8(c), 12(a)(2). Issue preclusion applies only when the parties already have "actually" litigated, on the merits, a specific issue of fact, though here, the prior case resulted in settlement without any findings of fact. *See Five Star Capital Corp.*, 124 Nev. at 1052, 194 P.3d at 711.

___, ___, 274 P.3d 762, 764 (2012). Consideration may be any benefit conferred or any detriment suffered, and the law will not enter into an inquiry as to its adequacy. *See Nyberg v. Kirby*, 65 Nev. 42, 51, 188 P.2d 1006, 1010 (1948) (interpreting California law). Further, the performance may be "(a) an act other than a promise, or (b) a forbearance, or (c) the creation, modification, or destruction of a legal relation." Restatement (Second) of Contracts § 71(3) (Am. Law. Inst. 1981), *cited with approval in Southwest Gas Corp. v. Ahmad*, 99 Nev. 594, 598, 668 P.2d 261, 263 (1983).

Under the common law of contracts, for an agreement that modifies an existing contract to be enforceable, the agreement must be supported by independent consideration, and a promise to perform an act the promisor already owed a pre-existing duty to perform does not constitute independent consideration. *See Zhang v. District Court*, 120 Nev. 1037, 1040–41, 103 P.3d 20, 22–23 (2004), *abrogated on other grounds by Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224, 228 n.6, 181 P.3d 670 672 n.6 (2008) (holding a modification without new consideration to be unenforceable); *Clark County v. Bonanza No. 1*, 96 Nev. 643, 650–51, 615 P.2d 939, 943–44 (1980).

We agree with appellants that genuine issues of material fact exist regarding whether the parties formed an enforceable contract for these retirement benefits. Specifically, the record reveals that there exist plausible interpretations of the evidence under which respondents may have made a binding promise, supported by consideration, to award retirement benefits to Dudley. *See Ringle v. Bruton*, 120 Nev. 82, 91, 86 P.3d 1032, 1037 (2004).

First, an ambiguity exists as to whether the parties intended the initial 2004 written employment contract to be fully integrated; the written document itself is unclear. If not, then the promised retirement benefits might have been intended to constitute an additional negotiated term of the 2004 contract that failed to make its way into the writing. If the retirement benefits were always intended to have been part of the original negotiation, then the promise to pay them was legally enforceable, and the district court should have examined parol evidence of the parties' intent to determine whether this may have been true. *See M.C. Multi-Family v. Crestdale*, 124 Nev. 901, 913–14, 193 P.3d 536, 544–45 (2008); *State ex rel. List v. Courtesy Motors*, 95 Nev. 103, 106, 590 P.2d 163, 165 (1979); *see Agric. Aviation Engineering Co. v. Board of Clark Cty. Com'rs*, 106 Nev. 396, 398–400, 794 P.2d 710, 712–13 (1990) (holding that "the district court should have resolved the ambiguity of the [contract] by examining the intentions of the parties. To determine the parties' intentions, the credibility of their statements must be decided, which should be an issue for consideration by the trier of fact.").

Second, based upon the existing record, it appears plausible that, at some point between 2004 and 2007, the parties modified the original employment agreement to add the retirement benefits as an additional term in exchange for Dudley's continued employment or modified work duties. The addition of these benefits could have been supported by two sources of consideration. One, Charles testified that Dudley left and returned to TPRC on numerous occasions throughout 2004 to 2007, and upon his return, they would renegotiate Dudley's employment contract and modify his job duties to try to find a better fit for him within the company. Thus, the addition of retirement benefits to the original

2004 contract might have been negotiated in exchange for Dudley's agreement to become re-employed at TPRC and perform new job duties.

Alternatively, when an employee is free to quit employment at will without committing a legal breach of an employment contract, then an employer's promise to add benefits is legally binding if it induces him to stay. *See Southwest Gas Corp. v. Ahmad*, 99 Nev. 594, 595, 668 P.2d 261, 261–62 (1983). This is so because, by electing to continue with the company under the newly offered terms when he could have quit, the employee forbears the exercise of an act which he had a legal right to do (quit), and simultaneously performs an act that he need not perform under the terms of the original employment (continuing to work). *See id.* at 595, 668 P.2d at 261–62 ("since the employee was free to leave her employment, her continued employment after receiving the [new terms] provided sufficient consideration for the modifications."); *see also* Restatement (Second) of Contracts § 71(3).[3]

Here, the 2004 contract is ambiguous as to whether Dudley could have quit without committing a breach. The contract specifies a "term" of employment of six years, but this can be construed in two reasonable ways: it may have simply provided Dudley the *right* to work for six years but allowed him to freely quit prior to then; but it can also be read to mean that Dudley had *promised* to work for six years and quitting

---

[3]We disagree, however, with appellant's argument that an employee's choice to continue working for a company would constitute consideration even if she had promised to work for a minimum term of years. Although appellants are correct that courts are reluctant to enforce such contracts through the equitable remedy of specific performance, such contractual breaches may still be enforceable by legal damages, and thus, the pre-existing duty doctrine of contract modification still governs.

early would constitute a breach of the contract. Either interpretation is plausible under the plain language of the 2004 contract, and thus the district court should have entertained parol evidence to determine whether the parties intended that Dudley's continued employment made Charles' promise to pay retirement benefits into legally sufficient consideration. *See Agric. Aviation Engineering Co.*, 106 Nev. at 398–400, 794 P.2d at 712–13. If Dudley was free to quit, then the promise of additional retirement benefits became legally binding if it induced him to stay, and we can draw a reasonable inference on this record that he was so induced. If he was not free to quit, then that promise did not constitute legal consideration. In either case, the question cannot be answered without examining parol evidence of the parties' intent which the district court did not do.

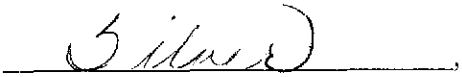
Finally, the record can be read to mean that, in 2007, the parties may have modified the existing employment contract to release each other from the original 2004 contract in exchange for Dudley's early retirement from TPRC with additional retirement benefits that were not part of the original 2004 contract. "[T]he creation, modification, or destruction of a legal relation" can constitute consideration for a new promise if the promise was not already a pre-existing duty. *See Zhang*, 120 Nev. at 1040, 103 P.3d at 22–23; Restatement (Second) of Contracts § 71(3)(c). Here, construing the record in the light most favorable to Dudley, on September 6, 2007, Respondents appeared to make two alternative offers to Dudley: he could choose either to (1) remain working at TPRC so long as he changed his behavior, or (2) accept early retirement and release TPRC from any remaining obligations to Dudley in exchange for the payment of additional retirement benefits not already owed.

Respondents argue that the September 6, 2007 offer did not constitute an enforceable legal promise because TPRC stood nothing to gain by its offer when it could have simply fired Dudley. But, construing all ambiguities in the record in Dudley's favor, the employment contract contained a clause specifying that Dudley could be terminated only "for cause." Thus, TPRC's offer of early retirement to Dudley in return for the payment of additional benefits involved an exchange of consideration because it allowed TPRC to break its employment contract with Dudley early without cause, something it could not have done without breaching the contract itself. *See Nyberg*, 65 Nev. at 51, 188 P.2d at 1010 (holding that consideration may be any benefit conferred or any detriment suffered, and the law will generally not inquire into its adequacy).

Because these are all plausible interpretations of the record that cannot be either accepted or rejected without examining parol evidence of the parties' intent, the grant of summary judgment was premature.

Accordingly, we

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.


, C.J.
Silver


, J.
Tao


, J.
Gibbons

cc: Hon. Patrick Flanagan, District Judge
David Wasick, Settlement Judge
Bradley Drendel & Jeanney
Molof & Vohl
Washoe District Court Clerk