

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM R. MARSHALL,

No. 36913

Appellant,

vs.

MEYER PROPERTIES, A CALIFORNIA
LIMITED PARTNERSHIP
CONDUCTING BUSINESS IN THE
STATE OF NEVADA,

Respondent.

FILED

JAN 02 2002

JANEITE M BLOOM
CLERK OF SUPREME COURT
BY *J. Richard*
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

This is an appeal from a summary judgment. Respondent, Meyer Properties ("Meyer"), obtained a \$180,000.00 default judgment against appellant, William Marshall ("Marshall"), in December 1998, after Marshall defaulted on two commercial leases in a Reno shopping center.

Marshall then commenced an action on May 24, 2000, alleging fraud, unjust enrichment and racketeering. Marshall claimed that Meyer committed fraud by failing to disclose, at the time of negotiating the release, that Meyer was re-letting one of the subject properties and thereby satisfying a portion of the judgment for future rent damages. Marshall also based his other claims, including unjust enrichment and racketeering, on this failure to disclose.

The district court granted summary judgment to Meyer on each of Marshall's claims. The district court also awarded Meyer attorney fees six days after receiving Meyer's application for fees, before Marshall could file a timely opposition pursuant to the rules of the Second Judicial District Court. Marshall now appeals the summary judgment and award of attorney fees and costs.

1. Legal Fraud

A plaintiff alleging fraud must prove the following: (1) that the defendant made a false representation, (2) with knowledge of its falsity, (3) with the intent to induce reliance on the misrepresentation, (4) that he justifiably relied upon the misrepresentation, and (5) that he suffered

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damages as a result of his reliance.¹ The plaintiff must prove each element by clear and convincing evidence.²

“Where an essential element of a claim for relief is absent, the facts . . . as to other elements are . . . immaterial and summary judgment is proper.”³ Marshall claims that the re-letting of 5029 S. McCarran reduced Meyer’s damages for future rents as to that premise alone by \$99,780.00, but fails to produce or cite any evidence in the record supporting or explaining this assertion. In fact, Marshall relies solely on the broad allegations in his complaint that Meyer had the “intent to secretly benefit” from re-letting the properties and, thus, should return monies paid by Marshall “for damages attributed to future rents.”

In his opposition to Meyer’s summary judgment motion, Marshall again made blanket assertions that Meyer “undeniably obtained double rent,” but failed to attach any exhibits showing any damages. Marshall first presented evidence of damages in his reply brief submitted to this court on July 10, 2001, through an unverified “accounting,” claiming to show damages in excess of \$99,000.00.⁴

In contrast, Meyer’s reply in support of summary judgment included exhibits and an affidavit detailing the damages caused by Marshall’s default on each of the properties, including lease commissions, tenant improvements, and rent concessions. Marshall presented no evidence to refute this calculation of damages. When confronted with a motion for summary judgment, the adverse party must submit specific facts, by affidavit or otherwise, rather than general conclusions.⁵ Marshall’s conclusory statements regarding Meyer’s alleged double

¹See Sanguinetti v. Strecker, 94 Nev. 200, 206, 577 P.2d 404, 408 (1978).

²See Bulbman, Inc. v. Nevada Bell, 108 Nev. 105, 110-11, 825 P.2d 588, 592 (1992).

³See id. at 111, 825 P.2d at 592 (citing Sims v. General Telephone & Electric, 107 Nev. 516, 815 P.2d 151 (1991)).

⁴Because Marshall did not present this document to the district court, this court may not consider it as an issue first brought on appeal. See Rivera v. American Nat’l Property & Casualty, 105 Nev. 703, 707, 782 P.2d 1322, 1325 (1989).

⁵See Bird v. Casa Royale West, 97 Nev. 67, 70, 624 P.2d 17, 19 (1981).

recovery do not create a genuine issue of material fact regarding damages, an essential element of fraud.⁶

2. Equitable Fraud

Extrinsic fraud, or fraud that “keeps one party away from court by conduct preventing a real trial on the issues,” is the only basis upon which a party may seek equitable relief for fraud.⁷ In short, the fraud must be “in some matter other than the issue in controversy in the action.”⁸ Here, the sufficiency of Marshall’s substantive claim of fraud against Meyer is both the issue on appeal and the basis for his claim of equitable relief. Marshall had an opportunity to address his fraud claim before the district court, which ultimately granted summary judgment to Meyer. Marshall’s equitable fraud claim must fail.⁹

3. Attorney Fees

The rules of practice for the Second Judicial District Court direct the party responding to a motion to file and serve answering points and authorities within ten days after service of the motion.¹⁰ Instead of waiting ten days to allow Marshall to file an opposition, the district court awarded attorney fees to Meyer only six days after Meyer filed its motion. In considering a court rule of the First Judicial District Court similar to the one at issue here,¹¹ we held that the district court erred in granting a

⁶See, e.g., Ortega v. Reyna, 114 Nev. 55, 58, 953 P.2d 18, 20 (1998).

⁷Libro v. Walls, 103 Nev. 540, 543, 746 P.2d 632, 634 (1987).

⁸Villalon v. Bowen, 70 Nev. 456, 469, 273 P.2d 409, 415 (1954) (quoting 3 Freeman on Judgments (5th ed.) 2567, § 1233)).

⁹We have considered Marshall’s unjust enrichment and RICO claims, and find that they are without merit. Because it was raised for the first time on appeal, we decline to consider Marshall’s contention that his fraud claim is supported by Meyer’s failure to file satisfactions of judgment. See Frontier Ins. Serv. v. State, Comm’r Ins., 109 Nev. 231, 239, 849 P.2d 328, 333 (1993).

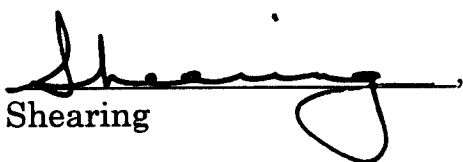
¹⁰See WDCR 12(2).

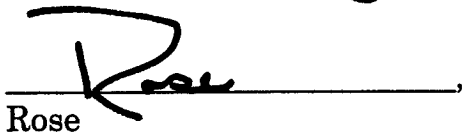
¹¹See FJDCR 15(3) (“An opposing party, unless otherwise ordered by the Court, shall have 10 days after service of the moving party’s memorandum within which to serve and file a memorandum of points and authorities in opposition to the motion”). This was FJDCR 13(C) at the time the court decided Salins v. Gulick, 100 Nev. 125, 676 P.2d 801 (1984).

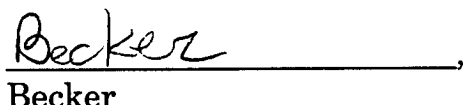
motion the day after it was filed, without providing the opposing party an opportunity to respond.¹²

It is a fundamental principle of the adversary system that both sides be allowed a fair opportunity to present their arguments. The district court thus committed reversible error in denying Marshall the opportunity to oppose Meyer's motion for attorney fees. Having considered the parties' contentions, we

ORDER the summary judgment AFFIRMED, REVERSE the award of attorney fees, and REMAND with instructions to the district court to consider Marshall's opposition to Meyer's motion for attorney fees.


_____, J.
Shearing


_____, J.
Rose


_____, J.
Becker

cc: Hon. Brent T. Adams, District Judge
Robert J. Bennett
Virgil D. Dutt
Guild Russell Gallagher & Fuller
Washoe County Clerk

¹²See Salins, 100 Nev. at 127-28, 676 P.2d at 803.