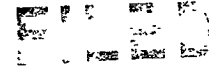


IN THE SUPREME COURT OF THE STATE OF NEVADA

GREGORY A. JACH,
Appellant,
vs.
PREMIER HOME IMPROVEMENTS OF
NEVADA, INC., A NEVADA
CORPORATION; AND GREGORY A.
HERLITZ,
Respondents.

No. 37824



OCT 06 2002

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

ORDER OF REVERSAL AND REMAND

This is an appeal of a district court order granting judgment in favor of Premier Home Improvements of Nevada ("PHI") and Gregory Herlitz in a civil action arising from a contract dispute.

Jach claims that the district court erred in granting judgment for PHI because there was no evidence that he agreed to modify the compensation agreement. He further claims that the district court erred in granting judgment for PHI based on affirmative defenses which were not pleaded and were, in fact, barred by the district court. We conclude that Jach's arguments have merit.

NRCP 52(a) provides that in a bench trial, "the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." However, we "will imply findings of fact and conclusions of law so long as the record is clear and will support the judgment."¹

NRCP 52(a) also provides that these "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to

¹Luciano v. Diercks, 97 Nev. 637, 639, 637 P.2d 1219, 1220 (1981).

the opportunity of the trial court to judge . . . the credibility of the witnesses.” This court has also held that “[t]he district court's findings of fact supported by substantial evidence will not be set aside unless clearly erroneous. Substantial evidence is that evidence which a reasonable mind might accept as adequate to support a conclusion.”²

Here, the district court’s findings of fact and conclusions of law are sparse and do not clearly articulate the basis on which the decision was made. In rendering the decision from the bench, the district court appears to have based its decision as to the compensation agreement on the acceptance of PHI’s argument that the terms of the initial agreement were modified.

Modification of a contract requires separate consideration,³ and a meeting of the minds.⁴ Agreement may be inferred from the circumstances and conduct.⁵ “In order to justify modification, the evidence must be clear and convincing.”⁶

We conclude that the district court’s findings of fact and conclusions of law do not clearly support its judgment. As to the compensation agreement, the judgment appears to be based on a theory that the contract was modified. However, other than Jach’s acceptance of

²Schmanski v. Schmanski, 115 Nev. 247, 251, 984 P.2d 752, 755 (1999).

³Jensen v. Jensen, 104 Nev. 95, 98 n.5, 753 P.2d 342, 345 n.5 (1988).

⁴Clark Co. Sports v. City of Las Vegas, 96 Nev. 167, 172, 606 P.2d 171, 175 (1980).

⁵Id.

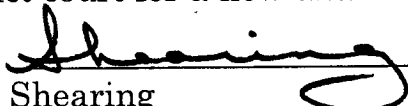
⁶Id.


the checks tendered by the company, the district court does not set forth findings of fact to support this decision. Specifically, the district court did not specify how it determined that there was a meeting of the minds or what constituted the purported consideration for the modification. The evidence in the record before us does not clearly support the judgment on these issues.


As to the stock ownership issue, the district court appears to have concluded that the agreement called for Jach to pay consideration for the shares and that he failed to do so. Jach claims that the judgment was erroneous because "accord and satisfaction" and "failure of consideration," are both listed as affirmative defenses under NRCP 8(c) and have to be raised in a responsive pleading. Herlitz failed to assert them in his answer—and his subsequent motion to add these defenses was denied by the district court.

Without complete findings of fact and conclusions of law, we are also unable to decide this portion of the appeal since we can only speculate as to the basis for the district court's decision. The record does not support the judgment and the findings of fact and conclusions of law are inadequate. Accordingly we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for a new trial.


_____, J.
Shearing


_____, J.
Leavitt


_____, J.
Becker

cc: Hon. Kathy A. Hardcastle, District Judge
Nersesian & Sankiewicz
Spilotro & Kulla
Clark County Clerk