

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JAY KVAM,
Appellant,
vs.
BRIAN MINEAU; AND LEGION
INVESTMENTS, LLC,
Respondents.

No. 84443-COA

FILED

DEC 22 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Jay Kvam appeals from a district court order granting summary judgment in a contract action. Second Judicial District Court, Washoe County; Lynne K. Simons, Chief Judge.

Kvam entered into an agreement with respondents Brian Mineau and Legion Investments, LLC (together Mineau) to purchase, renovate, and resell real property in Illinois.¹ The parties discussed costs and potential profit margins but did not incorporate those discussions into a written agreement. Kvam wire-transferred funds directly to an escrow account to purchase the property and to cover closing costs. The parties then signed the following written agreement:

Terms of Agreement between Legion Investments LLC (its Members) and Jay Kvam (Initial Funding Member of Same)

Re:

7747 S. May Street, Chicago Illinois

With Regards to acquisition of the aforementioned property, it is understood that the membership of Legion Investments LLC for this acquisition is Brian Mineau, Jay Kvam, and Michael J. Spinola. All parties are entitled to 33.33% of net profit, after all

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

expenses are accounted for, to include interest due on funds dispersed. Initial purchase is being funded by Jay Kvam, who is there by assigned any remedies due should the transaction fail in anyway. Initial funder will be due a 7% annual return on any funds provided due from date of disbursement. There is expected to be 3 renovation draws necessary on this project. First draw to be funded by Mr. Kvam, Due to present and ongoing business dealings between Jay and Michael, Michael has agreed to allot %50 of his 1/3 profit to Mr. Kvam for both initial funding's.

Mineau began work with TNT Complete Facility Care, Inc. (TNT) to renovate the property. Per the contract with TNT, TNT would renovate the property for \$80,000, with progress payments made per a defined schedule, and for the project to be completed on June 1, 2018. Kvam sent an initial payment to TNT directly. Kvam also directly contacted Derek Cole, TNT's field operations vice president, and Todd Hartwell, TNT's CEO, before wiring the second progress payment directly to TNT. Thereafter, Kvam and Cole communicated directly regarding project progress, including Kvam making the third progress payment directly to TNT. However, TNT did not complete the project by June.

By December 2018, Kvam expressed concerns that TNT may have defrauded the parties, and there were no photos proving progress on the property. Mineau sought to recoup Kvam's investment and, upon instruction, sold the property for \$41,000.00. After prorated property taxes, closing costs, and commission owed to the real estate brokers, the net proceeds from the sale equaled \$24,473.77.

Kvam filed a complaint in 2018 asserting eleven claims for relief against Mineau. Mineau filed an answer and counterclaim with eleven claims for relief. The district court dismissed three of Mineau's claims and granted Kvam's motion for a more definite statement on three others.

Mineau then filed a First Amended Counterclaim (FACC). Kvam moved to dismiss and for summary judgment relating to the FACC. The district court entered judgment in favor of Kvam on the majority of Mineau's claims, leaving only a claim for declaratory relief. Kvam failed to file an answer to Mineau's FACC but amended his complaint twice, making Kvam's Second Amended Complaint (SAC) his operative pleading. Kvam asserted the following causes of action in the SAC: (1) declaration of joint venture, (2) rescission or reformation of agreement, (3) breach of contract - loan, (4) breach of contract and tortious breach of implied covenant of good faith and fair dealing - joint venture agreement, (5) accounting, (6) court supervision of dissolution and winding up, and appointment of receiver, (7) temporary and permanent injunction, (8) fraud, fraudulent inducement and fraudulent concealment, (9) conversion, (10) RICO, and (11) derivative claim. In September 2019, Mineau filed an answer to the SAC.

Discovery proceeded and Kvam filed two separate motions to compel. The first motion was denied and Kvam filed a motion for reconsideration on the grounds that Mineau had changed his affidavit regarding the source of funds Mineau provided to the joint venture and Kvam should be allowed to discover more about the source of funding. Kvam's second motion to compel sought documents relating to invoicing and financial documents between TNT and Mineau as related to Kvam's fraud, RICO, and conversion claims. The district court referred the second motion to compel to the discovery commissioner, who recommended granting the motion in large part.

Before the second motion to compel and the motion for reconsideration were decided by the district court, Mineau filed a motion for summary judgment. In early 2020, the district court held a hearing during which it notified the parties that it intended to grant summary judgment in

favor of Mineau on his declaratory relief counterclaim pursuant to NRCP 56(f). The district court offered Kvam an opportunity to respond, but Kvam declined. In June 2020, the district court issued an order granting summary judgment to Mineau on his counterclaim, deeming the pleading admitted due to Kvam's failure to answer. The court also granted summary judgment to Mineau on the majority of Kvam's claims, except Kvam's claims for declaratory relief, accounting, and dissolution.

Kvam appealed the June 2020 summary judgment order, but this court only considered the injunctive relief claim at that time. Upon further proceedings in the district court, Kvam sought summary judgment on the remaining claims, which the district court granted in March 2022. In its order, the district court found, as sought by Kvam in his declaratory relief claim, that the parties had formed a joint venture. The court further found that Kvam was entitled to an accounting, and that the conclusion of the joint venture had occurred as a result of the subject property being sold and Kvam receiving the proceeds through the district court. This resolved all remaining claims. Kvam then filed this appeal.

Kvam primarily argues that the district court erred in finding that there was no genuine dispute as to any material fact and that various conclusions reached by the district court are erroneous as a matter of law.

Mineau responds that Kvam's claims are baseless and are not supported by evidence. Mineau argues that the district court's orders properly construed the terms of the agreement between the parties and should not be disturbed on appeal. Finally, Mineau argues that the district court's factual findings and conclusions of law are not clearly erroneous.

This court reviews a district court's 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 dispute 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.* General allegations and conclusory statements do not create genuine disputes of fact. *Id.* at 731, 121 P.3d at 1030-31.

This court notes that Kvam's appellate arguments center around the district court's June 2020 partial summary judgment order. As the district court's March 2022 order is in Kvam's favor and is not challenged here, we do not disturb the district court's declaration that the parties had a joint venture,² or the court's findings that Kvam was entitled to an accounting and that the joint venture has been dissolved. Additionally, Kvam does not re-address his injunctive relief claim. As for Kvam's other eight claims for relief rejected in the district court's June 2020 order, we analyze each below.

Claim two: rescission or reformation of agreement

Rescission is an equitable remedy that seeks to place the parties in the position they occupied prior to executing the contract by making the contract void *ab initio*. *Bergstrom v. Estate of DeVoe*, 109 Nev. 575, 577, 854 P.2d 860, 861-62 (1993). Following a lawful rescission, the injured party

²Consequently, we reject Kvam's argument that the district court erred in deeming that he admitted the counterclaim raised by Mineau, as he was not prejudiced by the ruling. *Cf.* NRCP 61 ("At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights."). We further conclude that Kvam waived this argument. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.").

cannot recover damages for breach “just as though the contract had never been entered into by the parties.” *Id.* at 577-78, 854 P.2d at 862. Further, a court may reform an instrument in accordance with the parties’ intention when that intention is frustrated by mutual mistake. *Grappo v. Mauch*, 110 Nev. 1396, 1398, 887 P.2d 740, 741 (1994). Reformation is based upon equitable principles, applied when a written instrument fails to conform to the parties’ previous understanding or agreement. *Id.*

In Kvam’s claim for rescission he specifically asks for Mineau to repay funds, or, in the alternative, reformation of the parties’ agreement to incorporate prior oral agreements and other writings. However, Kvam misunderstands the remedy of rescission in seeking repayment; Kvam admits in his briefing that the joint venture agreement was not executed until after escrow had closed on the purchase of the subject property. Rescission would result merely in Kvam holding the property for which he paid. That condition has been satisfied following the sale and transfer of sale proceeds to Kvam. As for equitable grounds to reform the contract, the exhibits upon which Kvam argues for reformation are examples of progress proposals and updates, not mistaken material terms. Kvam does not point to any admissible evidence that information known to him prior to signing the written terms but not incorporated into the agreement was a result of mutual mistake and the terms of agreement as written were incomplete. *See* NRCP 56(c)(2)-(4). Thus, Kvam failed to demonstrate any genuine disputes of material fact on his claim for rescission or reformation.

Claim three: breach of contract on a loan agreement

Kvam argues that the district court was inconsistent in finding that he was due all proceeds pursuant to the joint venture agreement but then rejecting his breach of contract claim. The essential element missing from Kvam’s breach of contract claim, however, is not the existence of a

contract as the district court determined the parties had a joint venture agreement. *See Iliescu v. Reg'l Transp. Comm'n of Washoe Cty.*, 138 Nev., Adv. Op. 72, ___ P.3d ___ (Ct. App. 2022) (listing the elements of a claim for breach of contract as (1) existence of a valid contract, (2) claimant's performance, (3) defendant's breach, and (4) defendant's breach caused claimant damages).

Rather, Kvam's contract claim fails because he did not present evidence that the joint venture agreement required that he be reimbursed in the event the project failed. Indeed, Kvam did not present any evidence that the agreement obligated Mineau to personally repay Kvam. As such, Kvam failed to establish a breach of the agreement. *See Cuzze v. Univ. & Comm. Coll. Sys. of Nev.*, 123 Nev. 598, 602-03, 172 P.3d 131, 134 (2007) (noting that an absence of evidence to support the nonmoving party's case is sufficient to satisfy the moving party's burden of persuasion for summary judgment). Therefore, Mineau was entitled to judgment as a matter of law on this claim. *Claim four: breach of contract and tortious breach of the covenant of good faith and fair dealing*

In Nevada, every contract imposes the duty of good faith and fair dealing on the parties. *Hilton Hotels Corp. v. Butch Lewis Prods., Inc.*, 109 Nev. 1043, 1046, 862 P.2d 1207, 1209 (1993). "Where the terms of a contract are literally complied with but one party to the contract deliberately countervenes the intention and spirit of the contract, that party can incur liability for breach of the implied covenant of good faith and fair dealing." *Hilton Hotels Corp. v. Butch Lewis Prods., Inc.*, 107 Nev. 226, 232, 808 P.2d 919, 922-23 (1991). An action in tort for breach of the covenant arises only in rare and exceptional cases where there is a special relationship between the victim and tortfeasor, which is characterized by elements of public

interest, adhesion, and fiduciary responsibility. *Ins. Co. of the W. v. Gibson Tile Co.*, 122 Nev. 455, 461, 134 P.3d 698, 702 (2006).

Such a fiduciary responsibility is established in joint venture partnerships by statute. NRS 87.4336 provides that a partner owes a duty of loyalty and care to the other partners and to the partnership. The duty of loyalty requires a partner to account to the partnership, refrain from dealing adversely to the partnership, and refrain from competing with the partnership. NRS 87.4336(2)(a)-(c). A partner's duty of care prevents the partner from engaging in "grossly negligent or reckless conduct, intentional misconduct or a knowing violation of law." NRS 87.4336(3).

In his operative complaint, Kvam attempted to allege an additional breach of contract relating to the joint venture agreement alongside a breach of the covenant of good faith and fair dealing. However, both theories of liability are predicated on Kvam's allegations that Mineau failed to supervise the project, failed to complete the project, failed to provide Mineau's share of the funding, and failed to pay Kvam from the proceeds of the sale. As the proceeds of the sale were deposited with the district court, the alleged failure to pay the proceeds of the sale cannot provide a basis for liability. Kvam's other allegations likewise fail as they are built on "gossamer threads of whimsy, speculation, and conjecture." *See Wood*, 121 Nev. at 732, 121 P.3d at 1031 (noting the non-moving party cannot withstand summary judgment with such allegations). Even when viewed in the light most favorable to Kvam, the record shows that Mineau relayed all information available, that Kvam had the same if not more information from his personal interactions with TNT (which counters Kvam's assertions that he relied upon Mineau's representations throughout the joint venture), and that the contractor failed to finish the project. The evidence simply does not bear out an act of intentional misconduct, fraud, or a knowing violation of

the law by Mineau. Although Kvam is understandably dismayed with the result of the joint venture, that is insufficient to sustain his theories of liability. As such, Mineau was entitled to judgment as a matter of law on this claim.

Claim eight: fraud, fraudulent inducement, and fraudulent concealment

Kvam claims the district court erred when it granted summary judgment on his eighth claim because the court erroneously concluded that Kvam did not establish that he relied on any false information to his detriment. Kvam points to a declaration in which he averred that he relied on Mineau's experience and the information Mineau provided.

Each alternative theory of fraud here requires a measure of material falsity, either by representation or concealment. *See Bulbman, Inc. v. Nev. Bell*, 108 Nev. 105, 111, 825 P.2d 588, 592 (1992) (outlining the elements of fraud); *see also J.A. Jones Constr. Co. v. Lehrer McGovern Bovis, Inc.*, 120 Nev. 277, 290, 89 P.3d 1009, 1018 (2004) (outlining the elements of fraudulent inducement); *Dow Chem. Co. v. Mahlum*, 114 Nev. 1468, 1485, 970 P.2d 98, 110 (1998), *abrogated on other grounds by GES, Inc. v. Corbitt*, 117 Nev. 265, 21 P.3d 11 (2001) (outlining the elements of fraudulent concealment). Kvam's averments rest on conclusory allegations of misrepresentation. But the record does not reveal a genuine dispute on the material issue of falsity. *See Wood*, 121 Nev. at 731, 121 P.3d at 1031 ("The substantive law controls which factual disputes are material and will preclude summary judgment; other factual disputes are irrelevant."). While Kvam repeatedly argues that he relied on Mineau's assertions, Kvam's unsupported allegations are not enough to establish a dispute over whether Mineau made a representation that was false or concealed information that Mineau was under a duty to disclose. Kvam gave emphasis to his concern over where Mineau's funding for the joint venture originated, but the source

of Mineau's funding is immaterial. Further, Kvam has not even attempted to show how the source of Mineau's funding caused Kvam to sustain damages. *See Dow Chem. Co.*, 114 Nev. at 1485, 970 P.2d at 110 (noting that a claim for fraudulent concealment requires a showing that the concealment or suppression of the material fact caused the claimant damages). Thus, Mineau was entitled to judgment as a matter of law on this claim.

Claim nine: conversion

Kvam's conversion claim relies on an argument that Mineau comingled funds between the joint venture and other projects and did not provide the proceeds of the property sale to Kvam. Kvam argues that it is irrelevant whether he transferred funds directly to TNT as Mineau should not have allowed any comingling.

"Conversion is a distinct act of dominion wrongfully exerted over personal property in denial of, or inconsistent with, title or rights therein or in derogation, exclusion or defiance of such rights." *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 328, 130 P.3d 1280, 1287 (2006). "Moreover, an act, to be a conversion, must be essentially tortious; a conversion imports an unlawful act, or an act which cannot be justified or excused in law." *Wantz v. Redfield*, 74 Nev. 196, 198, 326 P.2d 413, 414 (1958) (internal quotation marks omitted). Kvam's averments and limited evidentiary support³

³To the extent that Kvam argues that potential discovery would have enabled him to generate a genuine dispute of material fact on his conversion claim, he has failed to show how the potential discovery would meet the substantive elements of conversion. *See Wood*, 121 Nev. at 731, 121 P.3d at 1031. Moreover, Kvam's arguments that the district court abused its discretion in not addressing his pending attempts to compel additional discovery are not cogently argued and lack legal authority. *See Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38 (noting we need not consider such arguments). Kvam's arguments do not show how he would present a

regarding the handling of funds for the project do not create a genuine dispute of material fact that Mineau's actions were unlawful, unjustifiable, or inexcusable. As such, Mineau was entitled to judgment as a matter of law on this claim.

Claim ten: RICO

NRS 207.470(1) allows a plaintiff to pursue civil causes of action for racketeering activity in violation of NRS 207.400. To establish a RICO violation under Nevada law: (1) the claimant's injury must flow from the defendant's violation of a predicate act; (2) the injury must be proximately caused by the defendant's violation of the predicate act; and (3) the claimant must not have participated in the commission of the predicate act. *Allum v. Valley Bank of Nev.*, 109 Nev. 280, 283, 849 P.2d 297, 299 (1993). In addition, NRS 207.400 generally requires the plaintiff to demonstrate that the defendant acted with criminal intent.

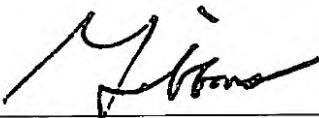
As the basis for his RICO claim, Kvam avers that his signature was obtained under false pretenses on the agreement and that the wire transfers were induced by misrepresentation. Kvam, however, does not proffer any evidence to support criminal intent or furtherance of criminal activity as required under NRS 207.400. As such, Mineau was entitled to judgment as a matter of law on this claim.

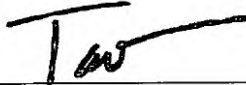
fact essential to justify his opposition as required under NRCP 56(d) nor did Kvam preserve his NRCP 56(d) argument below. See *Schuck v. Signature Flight Support of Nev.*, 126 Nev. 434, 436, 245 P.3d 542, 544 (2010) (“[A] de novo standard of review does not trump the general rule that ‘[a] point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.’” (quoting *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981))).


Claim eleven: derivative claim

Although Kvam argues that he is asserting his claims on his own behalf and on behalf of the joint venture, the district court recognized that Kvam was asserting his rights under NRS 87.4337(2) as a partner as opposed to asserting independent claims on behalf of the joint venture pursuant to NRS 87.4337(1). See NRS 87.4337(1) (“A partnership may maintain an action against a partner for a breach of the partnership agreement, or for the violation of a duty to the partnership, causing harm to the partnership.”); see also *Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1, 19, 62 P.3d 720, 732 (2003) (recognizing a derivative claim is one brought by a shareholder on behalf of the corporation to recover for harm done to the corporation). The district court found that the joint venture partnership did not have any independent claims against Mineau, nor does Kvam argue otherwise. And as our review does not reveal any genuine issues of material fact on any of Kvam’s other claims, his derivative claim necessarily fails. Thus, the district court did not err in granting summary judgment for Mineau.⁴ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

⁴Insofar as the parties have raised any other arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.

cc: Hon. Lynne K. Simons, Chief Judge
Matuska Law Offices, Ltd.
Gunderson Law Firm
Washoe District Court Clerk