

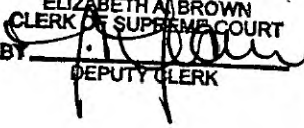
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

HEL LLC, D/B/A SEA SALT SUSHI &
OYSTER, A NEVADA LIMITED
LIABILITY COMPANY; AND DAVID
DAE SUNG LEE, A/K/A DAVID LEE,
A/K/A DAE SUNG LEE, AN
INDIVIDUAL,
Appellants,
vs.
WG CONSTRUCTORS, LLC,
Respondent.

No. 85001-COA

FILED

OCT 19 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

*ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING*

HEL, LLC (HEL) and David Lee (collectively referred to as the Lee parties where appropriate) appeal from a district court's judgment following a bench trial in a contract action. Eighth Judicial District Court, Clark County; Crystal Eller, Judge.

Lee is the sole member of HEL, which owns the restaurant Sea Salt Oyster & Sushi (Sea Salt).¹ Daniel Kim owns WG Constructors, LLC (WG), a local construction company. On December 18, 2017, HEL and WG entered into a construction contract for WG to perform renovations to Sea Salt in exchange for \$330,000 from HEL. Lee signed the contract on behalf of HEL. The Lee parties subsequently obtained a \$500,000 construction loan, and after the loan was funded, WG began construction at the restaurant in the spring of 2018.

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

By April 2, 2018, the Lee parties had made two payments to WG totaling \$380,000, but WG then reimbursed \$180,000, at the Lee parties' request, to use for certain overhead expenses incurred at Sea Salt. Thus, as of April 4, 2018, WG had been paid a total of \$200,000 on the contract.

The parties also orally agreed to several change orders for additional work not originally contemplated in the contract. This included construction of a patio and interior installations, costing WG a total of \$26,187.50. The Lee parties made no payments toward the work change orders.

By June 2018, WG had fully performed but had still not received the full payment due under either the contract or the change orders. Kim contacted Lee and demanded payment. Lee explained that he would pay the remaining contract balance with a forthcoming \$200,000 tenant improvement loan from his landlord, but that the landlord would not disburse the funds until WG released HEL from their contract. In response, Kim emailed Lee a conditional waiver and release of final payment and an invoice labeled "final payment" for the amount of \$40,000. The following day, Lee contacted Kim and explained that his landlord would not accept the conditional waiver and instead required an unconditional waiver from Kim for Lee to receive the tenant improvement loan. Lee again represented to Kim that, despite the waiver, WG would be paid the remainder of the contract price. Based on Lee's representations, Kim executed and emailed Lee an unconditional waiver and release of final payment. The unconditional waiver, however, did not include an amount to be paid by the Lee parties in exchange for the waiver.

In the weeks following Kim's execution of the unconditional waiver, appellants tendered \$120,000 to WG on the contract. On August 8, with \$10,000 left under the original contract amount and the full \$26,187.50 due for the work change orders, Kim confronted Lee at Sea Salt. A shouting match ensued, and thereafter the Lee parties did not make any further payments to WG.

In August 2018, WG filed a claim for breach of contract against the Lee parties, and the Lee parties brought counterclaims against WG for breach of contract and breach of the implied covenant of good faith and fair dealing. Several months later, WG served an offer of judgment on the Lee parties offering judgment to be entered in its favor in the amount of \$35,000. Appellants rejected the offer and after several years of litigation, the district court conducted a four-day bench trial.

On March 14, 2022, the district court issued its findings of fact, conclusions of law, and judgment in favor of WG. The district court found that the parties formed a valid contract for \$330,000 and orally agreed to \$26,187.50 in work change orders, which became a part of the contract price. The district court also found that WG had substantially performed, and therefore, the total amount due under the contract was \$356,187.50, of which the Lee parties had only paid \$320,000. Therefore, the district court found that the Lee parties breached the contract by failing to pay WG for the work performed.

In determining WG's damages, the district court found that the Lee parties made payments to WG of \$380,000 from the initial loan disbursements and \$120,000 following Kim's execution of the unconditional waiver, for total payments of \$500,000. However, the district court also

found that WG had reimbursed HEL \$180,000 for overhead expenses, which counted against payments made under the contract. Therefore, the district court found that HEL had only paid WG \$320,000 under the contract, and that \$36,187.50 remained due: \$10,000 remaining on the original contract price and \$26,187.50 for the work change orders. Because WG had not been paid the full amount due under the contract, the district court found that the unconditional waiver was unenforceable and therefore WG could recover under the contract. The district court entered judgment in WG's favor for \$36,187.50 against the Lee parties.

Following entry of the judgment, WG moved for attorney fees and costs under NRCP 68 for obtaining an amount more favorable than its offer of judgment. While that motion was pending, the Lee parties filed a motion to alter or amend judgment, arguing that the district court made errors of both fact and law in concluding that the Lee parties had breached the contract. Primarily, for the first time, Lee argued that he could not be held individually liable because he was not a party to the contract and that WG failed to prove that he was the alter ego of HEL for which liability could be imposed against him as an individual. The district court denied the Lee parties' motion based on "the arguments set forth in [WG's] Opposition and the arguments of counsel at the hearing," but without making findings regarding the applicability of the alter ego doctrine. This appeal followed. Several months later, the district court granted WG's motion for attorney fees and costs. This post-judgment order granting fees and costs was not appealed by either party.

The Lee parties raise several issues on appeal. First, they contend that the district court abused its discretion when it determined that

the unconditional waiver executed by Kim to forgo further payment under the contract was invalid, thereby permitting WG to recover damages under the contract. Second, the Lee parties argue that the court's calculation of damages is not supported by substantial evidence. Third, the Lee parties argue that the district court abused its discretion when it found Lee individually liable for WG's breach of contract claim where he was not a party to the contract and the district court made no findings to support liability against him based on alter ego. Finally, the Lee parties challenge the district court's order granting WG attorney fees and costs, contending that NRCP 68 did not apply because WG's offer of judgment was unapportioned. Conversely, WG generally asserts that the district court's determinations are all supported by substantial evidence and that this court lacks jurisdiction to consider the Lee parties' arguments concerning the district court's award of attorney fees and costs, as the Lee parties did not appeal from that order.

Parol evidence was admissible to determine the meaning of the unconditional waiver and supports the district court's conclusion that the waiver did not relieve HEL of its contractual obligations

The Lee parties contend that the district court improperly considered parol evidence to conclude that the unconditional waiver executed by Kim did not preclude WG's recovery under the contract.²

²The district court explained that parol evidence was admissible to determine the waiver's effect, but also concluded that the waiver was unenforceable under NRS 108.2457(2) because WG had not received the full contract amount. Although we disagree with the district court's interpretation of NRS 108.2457(2), we nevertheless conclude that the parol evidence supports the court's finding that the parties did not intend for the unconditional waiver to memorialize the termination of their contract, and

Alternatively, the Lee parties assert that, even considering parol evidence, substantial evidence does not support the district court's conclusion that the waiver was unenforceable.

This court reviews a district court's decision to admit or exclude parol evidence for an abuse of discretion. *M.C. Multi-Fam. Dev., L.L.C. v. Crestdale Assocs., Ltd.*, 124 Nev. 901, 913, 193 P.3d 536, 544 (2008). If a district court properly considers parol evidence to make findings of fact, this court "will not overturn [those findings] 'unless they are clearly erroneous or not supported by substantial evidence.'" *Yount v. Criswell Radovan, LLC*, 136 Nev. 409, 414, 469 P.3d 167, 171 (2020) (quoting *Wells Fargo Bank, N.A. v. Radecki*, 134 Nev. 619, 621, 426 P.3d 593, 596 (2018)). Generally, the parol evidence rule precludes courts from considering extrinsic evidence of prior or contemporaneous agreements to determine whether a waiver is unenforceable. *Aladdin Hotel Corp. v. Gen. Drapery Servs., Inc.*, 96 Nev. 516, 518-19, 611 P.2d 1084, 1085-86 (1980). However, if it is unclear whether parties executed a written waiver for any purpose besides "memorialization of the entire oral agreement between the parties," then parol evidence is admissible to ascertain the parties' true intent. *Id.* at 518, 611 P.2d at 1085.

Therefore, when considering a written waiver of final payment, the threshold question is whether the parties intended the waiver to be the

therefore, did not preclude WG from recovering the remaining payments due and owing under the contract. *See Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010) (holding that we will affirm the district court if it reaches the correct result, even if for the wrong reason).

“integration of the entire bargain between them.” *Id.* If parol evidence is considered and shows that the parties did not intend for the waiver to be the integration of the entire bargain between them, then the waiver may not preclude recovery for breach of the underlying contract. *See id.* at 519, 611 P.2d at 1086; *see also APCO Constr., Inc. v. Helix Elec. of Nev., LLC*, 138 Nev. Adv. Op. 31, 509 P.3d 49, 55 (2022) (holding that a release signed by a contractor was intended to allow recovery of retention payment, and therefore, under NRS 338.490, it did not preclude further recovery under the subject contract).

Here, we conclude that parol evidence was admissible because the waiver in the present case is ambiguous. Because the parties failed to use the uniform unconditional waiver form provided by statute, the unconditional waiver in the present case omitted essential information; namely, the amount to be paid, if any, in exchange for the waiver. *See* NRS 108.2457(5)(d) (providing the uniform form for an unconditional waiver upon final payment). “NRS 108.2457(2)(b) declares all lien waivers unenforceable unless ‘[t]he lien claimant receive[s] payment for the lien.’” *Insulation Contracting & Supply, Inc. v. S3H, Inc.*, No. 62856, 2015 WL 5774180, at *1-2 (Nev. Sept. 29, 2015) (Order Affirming in Part, Reversing in Part, and Remanding); *cf. Aladdin*, 96 Nev. at 519, 611 P.2d at 1086 (concluding that parties’ intent behind a waiver was unclear because of its indefinite language). To the extent that the Lee parties argue that the invoice labeled “final payment” for \$40,000 was the amount to be paid for the waiver, we are not persuaded. This amount is not included in the unconditional waiver, and the Lee parties do not otherwise explain why this represented the amount agreed upon in exchange for the waiver. Indeed,

the Lee parties paid WG a total of \$120,000 following the unconditional waiver, suggesting that the parties did not intend for the \$40,000 to constitute “final payment” under the contract, thereby rendering it unclear whether the parties intended the written waiver to be a “memorialization of the entire oral agreement between the parties”. See *Aladdin*, 96 Nev. at 518, 611 P.2d at 1085.

The parties’ intent behind the waiver is also unclear on its face because the parties left the space for the amount in dispute over the change orders blank. See *Pentax Corp. v. Boyd*, 111 Nev. 1296, 1301, 904 P.2d 1024, 1027 (1995) (holding that parol evidence was admissible to resolve the ambiguity created by a blank space in a contract). Thus, because it can “be properly inferred that the parties did not intend the [unconditional waiver] to be a complete and final settlement of the whole transaction between them,’ parol evidence is admissible.”³ See *Aladdin*, 96 Nev. at 519, 611 P.2d at 1086 (quoting *Alexander v. Simmons*, 90 Nev. 23, 24, 518 P.2d 160, 161 (1974)).

In this case, therefore, the district court properly considered parol evidence to address the ambiguities presented by the unconditional

³The Lee parties also offer a general argument that, to the extent there are any ambiguities surrounding the unconditional waiver, they should be resolved in their favor regardless of extrinsic evidence because WG drafted the document, and contracts are construed against the drafting party. However, when parties’ intent behind a contract is ambiguous, courts must first consider extrinsic evidence to resolve that ambiguity, then, only if extrinsic evidence does not resolve the ambiguity, should courts strictly construe the contract against the nondrafting party. See *Anvui, LLC v. G.L. Dragon, LLC*, 123 Nev. 212, 215-16, 163 P.3d 405, 407 (2007). Thus, we are not persuaded by this argument.

waiver. Kim testified that he only signed the waiver as part of a separate agreement to secure the Lee parties a tenant loan which they would then use to pay the amount remaining on the contract. A reasonable fact finder could accept Kim's testimony, along with the payments made to WG following the waiver, to determine that the parties did not intend for the waiver to represent the termination of their contractual agreement. The fact finder could also reasonably determine that the parties only executed the waiver to assist the Lee parties in obtaining a tenant loan to secure funds to pay WG the remaining amount owed on the contract. Therefore, the district court did not abuse its discretion in allowing extrinsic evidence to determine the parties' intent with respect to the unconditional waiver. *See M.C. Multi-Family Dev.*, 124 Nev. at 913, 193 P.3d at 544. Further, the district court did not abuse its discretion in finding that the waiver was not intended to terminate the parties' obligations under the contract. As such, we affirm the district court's determination that the unconditional waiver did not preclude WG's recovery under the contract.

The district court did not abuse its discretion when calculating WG's compensatory damages

The Lee parties argue that the district court abused its discretion when calculating WG's damages because substantial evidence does not support the award of \$36,187.50. A district court's award of compensatory damages is reviewed for abuse of discretion, *Diamond Enterprises, Inc. v. Lau*, 113 Nev. 1376, 1379, 951 P.2d 73, 74 (1997), and will be affirmed if it is supported by substantial evidence, *Wyeth v. Rowatt*, 126 Nev. 446, 470, 244 P.4d 765, 782 (2010). Substantial evidence does not require "mathematical exactitude, but there must be an evidentiary basis for determining a reasonably accurate amount of damages." *Mort Wallin of*

Lake Tahoe, Inc. v. Com. Cabinet Co., 105 Nev. 855, 857, 784 P.2d 954, 955 (1989). This burden may be satisfied by a party's testimony on the amounts owed, *Rd. & Highway Builders, LLC v. N. Nev. Rebar, Inc.*, 128 Nev. 384, 391, 284 P.3d 377, 382 (2012) (determining that testimony on the amount owed for breach of contract supplied substantial evidence to support an award of damages), or receipts of costs to the aggrieved party, *Hirji v. State*, No. 59629, 2013 WL 7158555, at *1 (Nev. Nov. 1, 2013) (Order of Affirmance) (concluding that the award of damages was supported by substantial evidence where receipts of damages were admitted).

In the present case, the district court heard testimony from both Lee and Kim discussing the amounts due and payments made. It also examined receipts of all payments and invoices detailing the costs of construction. This evidence supports the district court's determination that appellants only paid \$320,000 of the \$356,187.50 due under the contract. Therefore, we conclude that the district court did not abuse its discretion in determining WG's contractual damages and affirm the award of \$36,187.50. *The district court must determine whether Lee acted as HEL's alter ego*

The Lee parties further contend that the district court abused its discretion by holding Lee personally liable for the breach of a contract to which he was not a party. They argue that only HEL, a limited liability company, was a party to the contract, and that there was insufficient evidence to pierce the corporate veil and determine that Lee acted as HEL's alter ego.

Whether a person acts as the alter ego of a company is a question of law, which this court reviews de novo. NRS 78.747(3) ("The question of whether a person acts as the alter ego of a corporation must be

determined by the court as a matter of law”); *Nev. Dep’t of Corrs. v. York Claims Servs.*, 131 Nev. 199, 203, 348 P.3d 1010, 1013 (2015) (“[Appellate courts] review questions of law de novo.”). “This court will uphold a district court’s alter ego determination if substantial evidence exists to support the decision.” *Certain v. Sunridge Builders, Inc.*, 134 Nev. 923, 431 P.3d 38 (2018) (citing *LFC Mktg. Grp., Inc. v. Loomis*, 116 Nev. 896, 904, 8 P.3d 841, 846 (2000)). Typically, members of a limited liability company (LLC) may not be held personally liable for the debts or liabilities of the company unless they acted as the LLC’s alter ego. NRS 86.371; NRS 78.747 (“[N]o person other than a corporation is individually liable for a debt or liability of the corporation unless the person acts as the alter ego of the corporation.”); see also *Truck Ins. Exch. v. Palmer J. Swanson, Inc.*, 124 Nev. 629, 636, 189 P.3d 656, 661 (2008) (holding that a Nevada firm was not bound by an arbitration agreement entered into by a California firm because the record did not show that the Nevada firm acted as the California firm’s alter ego).

Here, the district court made no specific findings related to Lee’s alter ego status and failed to explain its reasoning for imposing personal liability against Lee based on alter ego. See *Webb v. Shull*, 128 Nev. 85, 93, 270 P.3d 1266, 1271 (2012) (remanding a district court’s denial of alter ego liability where it “failed to articulate its reasoning”); *N. Arlington Med. Bldg., Inc. v. Sanchez Const. Co.*, 86 Nev. 515, 520, 471 P.2d 240, 243 (1970) (explaining that a district court’s failure to make specific findings to support an alter ego determination “can constitute reversible error”). Thus, we necessarily reverse and remand for the district court to make findings as to whether Lee acted as HEL’s alter ego under the governing statute, NRS 78.474. See *Frantz v. Johnson*, 116 Nev. 455, 470-

71, 999 P.2d 351, 361 (2000) (reversing because the district court entered judgment without considering an applicable statute); *Webb*, 128 Nev. at 93, 270 P.3d at 1271.

The Lee parties' argument as to the district court's award of attorney fees and costs will not be considered

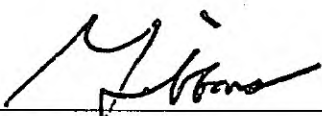
Finally, the Lee parties argue that the district court's award of attorney fees and costs under NRCP 68 is erroneous because WG's offer of judgment was unapportioned. WG contends that this court has no jurisdiction over the award of attorney fees because appellants failed to separately appeal it. We agree with WG.

Under NRAP 3A(b)(8), a post-judgment order granting attorney fees and costs is a separate appealable order; therefore, it must be appealed independently from a final judgment. *See Campos-Garcia v. Johnson*, 130 Nev. 610, 611-12, 331 P.3d 890, 891 (2014) (explaining that "a post-judgment order awarding attorney fees and costs is appealable" independently from the final judgment); *Weddell v. Stewart*, 127 Nev. 645, 649 n.3, 261 P.3d 1080, 1083 n.3 (2011) (explaining that appeals from special post-judgment orders under NRAP 3A(b)(8) are docketed as additional appeals separate from the party's appeal from the final judgment). In this case, because the Lee parties only appealed from the district court's final judgment, and not the post-judgment order awarding fees and costs as required to confer jurisdiction, we do not consider the merits of this issue on appeal.

In summary, because parol evidence is admissible to determine the parties' intent behind the unconditional waiver and because substantial evidence in the record supports the district court's conclusions, we affirm the judgment of the district court that the Lee parties breached the contract

with WG as well as the court's award of damages. However, because the district court failed to make findings regarding the applicability of the alter ego doctrine to find Lee individually liable, we necessarily remand this matter to the district court to determine whether Lee acted as HEL's alter ego. Finally, because appellants did not separately appeal the district court's post judgment order awarding WG attorney fees and costs, we do not consider this issue on appeal.⁴

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 further proceedings consistent with this order.


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

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. Crystal Eller, District Judge
Charles K. Hauser, Settlement Judge
James Kwon, LLC
Aldrich Law Firm, Ltd.
Eighth District Court Clerk