

IN THE SUPREME COURT OF THE STATE OF NEVADA

KWIK BOND POLYMERS, LLC, A  
CALIFORNIA LIMITED LIABILITY  
COMPANY,  
Appellant,  
vs.  
WESTERN INSURANCE COMPANY, A  
NEVADA CORPORATION,  
Respondent.

No. 40868

FILED

MAY 05 2004

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

ORDER OF AFFIRMANCE

This is an appeal from a district court order dismissing appellant's complaint for recovery on a contractor's bond and breach of contract.

Respondent Western Insurance Company issued a contractor's bond on behalf of general contractor Accurate Companies for a project involving the construction of a portion of a highway. Appellant Kwik Bond Polymers provided construction materials to Accurate for the project. Before Accurate paid Kwik Bond for the materials, Accurate filed for bankruptcy.

NRS 408.363(2) sets forth a six-month period of repose for individuals to file a claim against the surety on a contractor's bond.<sup>1</sup>

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<sup>1</sup>NRS 408.363(2) provides that any person who has furnished materials for a project and whose work has not been paid may seek protection under the contractor's bond:

at any time within 6 months . . . [by]  
commenc[ing] an action against the surety or  
sureties on the bond for the recovery of the  
amount of the claim and the filing of such claim  
shall not constitute a claim against the

*continued on next page . . .*

Kwik Bond allowed the six-month period to pass without taking action. After the six-month period passed, Kwik Bond sought and obtained a bankruptcy court order lifting the automatic stay. Long after the six-month period passed, Kwik Bond filed suit against Western: (1) seeking recovery on the contractor's bond, and (2) asserting that Western breached a separate, oral agreement.

Western filed a motion to dismiss, which the district court granted after considering all supporting and opposing documents. Because the district court reviewed the affidavits and exhibits provided by the parties when considering the motion to dismiss, we conclude that the district court treated the motion to dismiss like a motion for summary judgment.<sup>2</sup> Thus, we review the alleged assignment of errors under a summary judgment standard of review.

This court reviews orders granting summary judgment de novo.<sup>3</sup> Summary judgment is appropriate when the record, viewed in a light most favorable to the non-prevailing party, demonstrates that no genuine issue of material fact remains in dispute and that the prevailing party is entitled to judgment as a matter of law.<sup>4</sup>

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*... continued*

department. Failure to commence such action upon the bond and the sureties within 6 months after date of the department's final acceptance will bar any right of action against such surety or sureties.

<sup>2</sup>See NRCPC 12(b).

<sup>3</sup>Auckenthaler v. Grundmeyer, 110 Nev. 682, 684, 877 P.2d 1039, 1040 (1994).

<sup>4</sup>Id.

First, Kwik Bond argues that the district court erred in not equitably tolling the six-month period under NRS 408.363(2) because it pursued and obtained a bankruptcy court order lifting the automatic stay. We conclude that Kwik Bond was barred from bringing any action against Western against the contractor's bond pursuant to NRS 408.363(2).

NRS 408.363 prescribes a condition precedent for a claimant's right to sue on a contractor's bond.<sup>5</sup> Because NRS 408.363 is a statute of repose, equitable tolling does not apply.<sup>6</sup> However, even if it were to apply, we conclude that equitable tolling would not be warranted because Kwik Bond did not move to lift the automatic stay until after the six-month period passed. Accordingly, we conclude the district court did not err in dismissing Kwik Bond's claim against the bond.

Finally, Kwik Bond argues that the district court erred by dismissing Kwik Bond's breach of contract claim. Specifically, Kwik Bond asserts that a separate, oral contract was created when it accepted Western's offer to pay Kwik Bond's claim against the bond in exchange for Kwik Bond waiving attorney fees and interest.

Viewing the record in a light most favorable to Kwik Bond, we conclude that no separate, oral contract existed. All discussions and/or communications pertaining to the alleged separate contract were merely settlement negotiations involving Kwik Bond's claim against the bond.

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<sup>5</sup>See Zalk-Josephs v. Wells Cargo, 77 Nev. 441, 448, 366 P.2d 339, 342 (1961) (concluding that equitable estoppel does not apply to an action against a surety on a bond under former NRS 408.900, which is now NRS 408.363).

<sup>6</sup>See Munoz v. Ashcroft, 339 F.3d 950, 959 (9th Cir. 2003) (indicating that statutes of repose are not subject to equitable tolling).

Moreover, Western informed Kwik Bond of the statutory time limitation prior to the time passing. We conclude the district court did not err in dismissing Kwik Bond's breach of contract claim. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Becker, J.  
Becker

Agosti, J.  
Agosti

Gibbons, J.  
Gibbons

cc: Hon. Steven P. Elliott, District Judge  
Stephens Knight & Edwards  
Faux & Associates, P. C.  
Washoe District Court Clerk