IN THE SUPREME COURT OF THE STATE OF NEVADA

SSI STRICKLAND, INC., F/K/A STRICKLAND SYSTEMS, INC., A FLORIDA CORPORATION,
Appellant,
vs.
DICK CORPORATION, A PENNSYLVANIA CORPORATION,
Respondent.

No. 41285

FILED

JUN 30 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court judgment in a breach of contract action. Eighth Judicial District Court, Clark County; Allan R. Earl, Judge.

The parties are familiar with the facts, and we do not recount them except as pertinent to our disposition.

The question of whether an offset is permissible is a question of law which this court reviews de novo.[1] However, where an offset is permissible, the district court's decision to allow the offset is reviewed for an abuse of discretion.[2]

Offset is an affirmative defense that must be pleaded or it is waived.[3] An exception to the pleading requirement exists if the

[1]In re Equity Funding Corp. of America Sec. Lit., 603 F.2d 1353, 1362-63 (9th Cir. 1979).

[2]Id. at 1365.

[3]See NRCP 8(c).

affirmative defense is tried by implied consent.[4] The court may consider a number of factors in determining whether an affirmative defense has been tried by consent, including whether the defense was explored in pre-trial discovery; whether the plaintiff's counsel was surprised by the newly introduced evidence and prejudiced by the surprise; and whether the plaintiff objected to the trial court's consideration of the new defense, "on the ground that the issue had not been raised in the pleadings."[5]

First, the back-charges sought as an offset were at issue long before the commencement of this litigation. While the defense of offset was not formally explored in pre-trial discovery, Dick sent Strickland's predecessor-in-interest, International Forms Corporation (IFC), numerous notices of equipment failures and had informed IFC at least once that Dick intended to offset the equipment failures against any monies owing to IFC.

Second, Strickland cannot claim that it was surprised or prejudiced as a result of Dick's failure to plead back-charges as an offset. Strickland admitted to receiving the list of back-charges as early as August of 2001, more than a year before trial. More importantly, IFC investigated the purported equipment failures and was well aware of a

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[4]See NRCP 15(b).

[5]Schwartz v. Schwartz, 95 Nev. 202, 206, 591 P.2d 1137, 1140 (1979); see also Adelman v. Arthur, 83 Nev. 436, 440, 433 P.2d 841, 844 (1967) (where plaintiff offers evidence on its own behalf disclosing or raising an affirmative defense, the "defendant is entitled to take advantage of such a disclosure, notwithstanding the fact that he has made no plea").

potential offset for back-charges as early as 1998, and such notice would be imputed to Strickland as IFC's assignee and successor-in-interest.[6]

Third, while Strickland objected to testimony regarding back-charges, Strickland specifically referred to and relied upon evidence of the back-charges while presenting its own case, to help prove its claim that Dick used Strickland's forming equipment beyond the twelve-month contractual rental period.[7] Strickland referred to both the list of back-charges compiled by Dick, as well as the videotaped testimony of IFC's former employees.

Consequently, we hold that offset was tried by implied consent.

Once offset is permissible, the district court's decision to allow an offset will not be overturned absent an abuse of discretion.[8] Dick compiled a list of back-charges and IFC's former employees admitted during videotaped testimony that they had investigated equipment failures on the jobsite and that some of the rented equipment was indeed defective. Therefore, sufficient evidence was presented to the district court to support an offset for the back-charges.[9]

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[6]See generally 28 Am. Jur. 2d Estoppel and Waiver § 134; 55 Am. Jur. 2d Mortgages § 1040.

[7]We note that Strickland was partially successful on this claim.

[8]In re Equity Funding Corp., 603 F.2d at 1365.

[9]In fact, the record indicates that Dick's back-charges may have exceeded the amount of damages claimed for Strickland's equipment shortages.

Thus, the district court did not abuse its discretion in offsetting Strickland's equipment shortages by Dick's equipment failures. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Douglas, J.
Douglas

Becker, J.
Becker

Parraguirre, J.
Parraguirre

cc: Hon. Allan R. Earl, District Judge
Eugene Osko, Settlement Judge
Albright Stoddard Warnick & Albright
Mead Pezzillo LLP
Clark County Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

A & E HOLDINGS; EVERETT B. COOK AND ALICE V. COOK, AS TRUSTEES FOR THE COOK FAMILY TRUST DATED 9/22/97; JAMES ABBEY; COLEEN ABBEY; ROBERT A. ANDERSON; JOHN CARNEY; CURTIS F. CLARK; FIRST TRUST COMPANY OF ONAGA C/F CURTIS F. CLARK DATED 12/4/97; ANTHONY DELLA; CALVIN GREGORY DULL; PERLITA DULL; DELORES A. FLOOD; ALAN FRANKEL; BLAINE W. FREW; EDMOND GARFIELD; GAIL GARFIELD; GILFADA, L.L.C.; ROBERT LEROY GOOCH; MAUDE GOOCH; ROBERT LEROY GOOCH AND MAUDE MARGARET GOOCH AS TRUSTEES OF THE GOOCH LIVING TRUST DATED 12/6/91; JANET HAGIN; DICK SANDER; STANLEY S. HALL AND JEANNINE M. HALL AS TRUSTEES OF THE STANLEY S. HALL AND JEANNINE M. HALL LIVING TRUST DATED 3/7/00; DARLENE J. KING; BRETT LAUREN; SCOTT LAUREN; MARVIN LAUREN; DIANE LAUREN; MARVIN LAUREN AND DIANE LAUREN AS TRUSTEES OF THE LAUREN LIVING TRUST DATED 4/25/90; ANTHONY M. MADONIA; JEANNIE MADONIA; ANTHONY MADONIA, SR.; LYNN MADONIA; RAY MILLISOR; LONNIE MOON; YVONNE MOON; SOL MUNN AND EVELYN MUNN AS TRUSTEES OF THE MUNN TRUST OF 1975 DATED 5/23/75; LEWIS PANOZZA; WILLIAM POWERS; PEARL ROSEN; GERALDINE SCHOEN;

No. 43327

FILED

JUN 30 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

06-13628

DONALD SCHOEN; BETTY SHIELDS; GEORGE SWARTZ AND MILDRED SWARTZ, AS TRUSTEES OF THE MSG TRUST DATED 10/24/89; ELAINE TAYLOR; JAN UHLIR; JOHN WALTERS; ELAINE WALTERS; CLIFFORD WIEHE, JR.; E. JEANETTE WIEHE; CLIFFORD WIEHE, JR. AND E. JEANETTE WIEHE AS TRUSTEES OF THE JOHN AND LORRAINE WALTERS TRUST DATED 9/3/98; MIKE YOUNG; LINDA ZIEFF; PAUL BENEDICT; PHYLLIS JACOBSON; AND KAREN O'CONNELL,
Appellants,
vs.
PACIFIC WEST MORTGAGE, INC.; PATRICK TYLL; AND DISBURSEMENT GROUP, INC.,
Respondents.

ORDER AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

This is an appeal from a district court order granting summary judgment, certified as final under NRCP 54(b), and a post-judgment order awarding attorney fees in a failed real estate development project. Eighth Judicial District Court, Clark County; Michael L. Douglas, Judge.

A & E Holdings and numerous other parties (collectively "Investors") invested in a deed of trust marketed by Patrick Tyll on behalf of Pacific West Mortgage, Inc. (Pacific). The deed of trust was security for a construction loan to Azra Investments Corporation (Azra) to construct an assisted living center in Las Vegas. Azra and Pacific hired Project Disbursement Group, Inc. (PDG) to perform construction control services

to verify that the construction services were performed before authorizing payment.

Construction, however, was never completed. Once the project fell through, the Investors foreclosed on the property and sought compensation from Azra in its bankruptcy. In the district court, the Investors also sought damages from Tyll as Pacific's alter ego; Pacific and Tyll for fraud and/or misrepresentation, embezzlement, conversion, and deceptive trade practices; from PDG for breach of contract; and from others for similar causes of action. Pacific, Tyll, and PDG moved for summary judgment, which the district court granted as to all claims against them. We affirm the district court's summary judgment on the alter ego cause of action against Tyll.[1] We reverse the district court's grant of summary judgment in favor of Pacific, Tyll, and PDG on all other causes of action.[2]

"Orders granting summary judgment are reviewed de novo."[3] NRCP 56(c) provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a

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[1]To the extent that the Investors argue that they should have had an opportunity to conduct more discovery before summary judgment, we affirm the district court's refusal to grant a continuance under NRCP 56(f), as the Investors did not move for a continuance for further discovery.

[2]In light of this order, we vacate the district court's order granting attorney fees to PDG, and conclude that the Investors' concerns regarding amending their complaint are rendered moot.

[3]Bulbman, Inc. v. Nevada Bell, 108 Nev. 105, 110, 825 P.2d 588, 591 (1992).

judgment as a matter of law." "In determining whether summary judgment is proper, the nonmoving party is entitled to have the evidence and all reasonable inferences accepted as true."[4]

Alter ego against Tyll

The district court granted summary judgment to Tyll for the Investors' alter ego cause of action. While the Investors appeal the summary judgment, they do not provide any analysis in their briefs regarding their alter ego cause of action.[5] Moreover, the Investors have not provided information in the record regarding Pacific's ownership or that piercing Pacific's corporate veil was necessary for justice to be done.[6] Therefore, we conclude that there are no genuine issues of material fact, and the district court correctly granted summary judgment to Tyll regarding the alter ego cause of action.

Embezzlement, conversion, misrepresentation, and deceptive trade practices against Tyll and Pacific

The Investors claimed that Pacific and Tyll embezzled or converted money they invested and that Pacific and Tyll misrepresented and deceptively portrayed the investment opportunity. Regarding conversion and embezzlement, Pacific argued that the evidence it presented to the district court shows that all of the money was accounted

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[4]Wiltsie v. Baby Grand Corp., 105 Nev. 291, 292, 774 P.2d 432, 433 (1989).

[5]See Wittenberg v. Wittenberg, 56 Nev. 442, 456, 55 P.2d 619, 624 (1936) (concluding that if a party has not briefed an issue they appeal, it may be decided against them).

[6]LFC Mktg. Group, Inc. v. Loomis, 116 Nev. 896, 904, 8 P.3d 841, 846-47 (2000).

for. However, the Investors provided affidavits and other evidence in support of their claim that Pacific and Tyll approved the disbursement of money paid to entities unrelated to the assisted living center project. In light of the disputed factual record, we conclude that there are genuine issues of fact as to whether Pacific or Tyll converted or embezzled money and the district court erred when it granted summary judgment.

Regarding the Investors' misrepresentation and deceptive trade practices claims, the Investors provided both a letter from Tyll stating that construction was almost complete and pictures of the construction site that belied Tyll's claim that construction was nearly complete. The Investors also included affidavits from individuals with personal knowledge of the alleged deceptive practices. This, together with the Investors' other evidence, when viewed in a light most favorable to the Investors, raises genuine issues of fact. Therefore, we conclude that the district court erred when it granted summary judgment to Pacific and Tyll on these causes of action.

Breach of contract against PDG

In the district court, PDG argued that the Investors were not parties to the construction control contract and that they did not have third-party standing. The district court granted summary judgment to PDG, finding that the construction control contract explicitly rejected any third-party rights.

The paragraph in question provides:

> 8. LIMITATIONS ON LIABILITY:
>
> . . . .
>
> Neither [Azra], [Pacific], nor any other party, shall be entitled to rely upon [PDG] for any purposes other than to approve disbursement of funds in compliance with the terms of this agreement, nor

> shall any right of action arise hereunder or in connection with the subject matter hereof in favor of any such person for any other reason whatsoever, nor shall [PDG] be liable for funds disbursed or losses incurred as a result of misrepresentation or fraud committed by any third-party.

The first clause of the paragraph states that no entity is entitled to rely on PDG for anything except to approve disbursement of funds in compliance with the contract. The second clause reinforces this liability, stating that no rights arise in any person for any other reason. Thus, it is plain on the contract's face[7] that Azra, Pacific, and other parties may rely on PDG to approve disbursement of funds in compliance with the contract, but not for anything else.

Therefore, we conclude that the paragraph does not exclude PDG's liability to third parties, if the contract demonstrates the requisite intent to benefit those third parties.[8] Consequently, on remand, the district court must determine whether the Investors are third-party beneficiaries who can enforce the contract;[9] i.e. whether the contract clearly demonstrated "a promissory intent to benefit the [Investors]," and whether the Investor's reliance on the contract was foreseeable.[10]

Accordingly, we

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[7]Ringle v. Bruton, 120 Nev. 82, 93, 86 P.3d 1032, 1039 (2004).

[8]We express no opinion regarding the Investor's successor-in-interest argument.

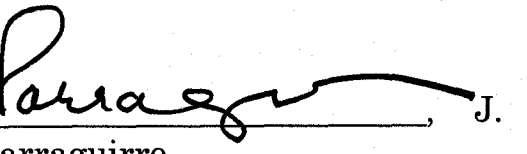
[9]We have reviewed and rejected PDG's contention that it should be granted summary judgment because it did not breach the contract.

[10]Lipshie v. Tracy Investment Co., 93 Nev. 370, 379, 566 P.2d 819, 824-25 (1977).

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.

_____, C.J.
Rose

_____, J.
Becker



_____, J.
Parraguirre

cc: Eighth Judicial District Court Dept. 11, District Judge
Janet Trost, Settlement Judge
Lee & Russell
Callister & Reynolds
Sylvester & Polednak, Ltd.
Clark County Clerk