IN THE SUPREME COURT OF THE STATE OF NEVADA

KAMRAN FARHADI AND SUZIE FARHADI, HUSBAND AND WIFE; AND PARVIS M. HARRARI, A/K/A PARVIZ A. HARIRI, INDIVIDUALLY,
Appellants,
vs.
WALTER E. FOSTER, PERSONAL REPRESENTATIVE OF THE ESTATE OF JACK VALLEGA, DECEASED, D/B/A DELTA FREIGHT COMPANY,
Respondent.

No. 42169

WALTER E. FOSTER, PERSONAL REPRESENTATIVE OF THE ESTATE OF JACK VALLEGA, DECEASED, D/B/A DELTA FREIGHT COMPANY,
Appellant,
vs.
KAMRAN FARHADI AND SUZIE FARHADI, HUSBAND AND WIFE; AND PARVIS M. HARRARI, INDIVIDUALLY, A/K/A PARVIS M. HARIRI,
Respondents.

No. 43058

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

These are consolidated appeals from a final judgment in a contract action. Second Judicial District Court, Washoe County; Janet J. Berry, Judge.

In 1992, Kamran Farhadi, Suzie Farhadi and Parvis Harrarri (Farhadi) brought an action against Jack Vallega, Scolari's Warehouse Markets, Ironwood Investments, and Fabricland (Vallega) for the alleged breach of a lease agreement. The parties entered into a settlement agreement in 1993 to resolve the action. The agreement provided, in part, that Vallega would release all leasehold interest in Farhadi's building in

exchange for Farhadi making $1,000 monthly payments to Vallega from August 1993 to November 2007. Vallega also agreed to assign Farhadi 32% of any monies recovered in a separate, bifurcated litigation.

Vallega filed the underlying lawsuit in 2002, alleging Farhadi had stopped making the monthly payments in 1997. In response, Farhadi alleged the parties had orally agreed to postpone the payments until after Vallega's bifurcated litigation ended.

The district court granted Vallega's motion for summary judgment on its breach of contract claim. The court concluded Vallega was entitled to past and future damages because Farhadi had anticipatorily repudiated the agreement. After further briefing by the parties, the court also concluded Farhadi was entitled to a 32 percent offset of Vallega's recovery in the bifurcated litigation.

Farhadi appeals, arguing the district court erred in concluding the alleged oral modification was void and in awarding future damages based on the doctrine of anticipatory repudiation. Vallega appeals from the district court's award of an offset.

Oral Modification

"Summary judgment is appropriate . . . when the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, that are properly before the court demonstrate that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law."[1] "A factual dispute is genuine when the evidence is such

[1]Wood v. Safeway, Inc., 121 Nev. ___, ___, 121 P.3d 1026, 1031 (2005).

that a rational trier of fact could return a verdict for the nonmoving party."[2]

The district court concluded there was insufficient evidence as a matter of law that any oral modification was ever reached and, alternatively, that any oral modification was void under the statute of frauds and the terms of the contract. We disagree.

First, Farhadi presented sufficient evidence of an oral modification to survive summary judgment. Vallega argues the only evidence of an oral modification was Farhadi's own self-serving deposition testimony. The court, however, cannot make credibility determinations on a motion for summary judgment.[3] Thus, Farhadi's testimony was sufficient to present a genuine issue of material fact, and the court erred to the extent it granted summary judgment on factual grounds.

Second, the district court's conclusion that the statute of frauds barred Farhadi's purported oral modification was erroneous. Every agreement that, by its terms, is not to be performed within one year is within Nevada's statute of frauds and thus void unless it is in writing and signed by the party to be charged.[4] Generally, any material modification to an agreement within the statute of frauds must also be in writing.[5] The district court determined the settlement agreement was not to be

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[2]Id.

[3]Id.

[4]NRS 111.220(1).

[5]Linton v. E.C. Cates Agency, Inc., 113 P.3d 26, 32 (Wyo. 2005) ("It is also the general rule that if the original agreement was required to comply with the statute of frauds, any material modification of that agreement must also conform to the statute of frauds.").

performed within one year because the agreement required Farhadi to tender monthly payments for over fourteen years.

However, the settlement agreement contained a prepayment clause allowing Farhadi to pay off all his obligations at any time. We have previously stated that whether a contract is within the statute of frauds depends on whether the parties contemplated that the contract would be performed within one year.[6] By including a prepayment clause, the parties clearly contemplated the possibility that Farhadi would pay off his obligations early.[7] Therefore, because the settlement agreement could be performed within one year, neither it nor any subsequent modifications are within the statute of frauds.

Finally, the purported oral modification is not barred by the settlement agreement's terms requiring all modifications be in writing. Under the common law, parties can impliedly waive contract provisions requiring all modifications be in writing.[8] This court has previously recognized this rule:

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[6]Stanley v. Levy & Zentner Co., 60 Nev. 432, 444 112 P.2d 1047, 1052 (1941) (noting that the determination whether an agreement is within the statute of frauds is based on whether performance within one year "could fairly and reasonably be said to have been within the contemplation of the parties" or was an "unforeseen or remote possibility").

[7]See Lacy v. Bennett, 207 Cal.App.2d 796, 800 (1962) (stating that a $2,500 loan was not within the statute because "[i]t is possible within the terms of such an agreement that the money might be repaid within one year."); cf Sherman v. Haines, 652 N.E.2d 698, 701 (Ohio 1995) (providing that an oral settlement agreement to pay $3,000 in $25 dollar monthly installments was within the statute of frauds when it was not indefinite and did not include a provision for early payoff).

[8]Colorado Inv. Services, Inc. v. Hager, 685 P.2d 1371, 1376-77 (Colo. Ct. App. 1984); Forster v. West Dakota Veterinary Clinic, 689 N.W.2d 366, 386 (N.D. 2004); Bennett v. Farmers Ins. Co., 26 P.3d 785, 792 n.7 (Or.

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> [I]f a written agreement can be modified by a subsequent oral agreement any of its provisions likewise may be modified.
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> "Parties may change, add to, and totally control what they did in the past. They are wholly unable by any contractual action in the present, to limit or control what they may wish to do contractually in the future. Even where they include in the written contract an express provision that it can only be modified or discharged by a subsequent agreement in writing, nevertheless their later oral agreement to modify or discharge their written contract is both provable and effective to do so."[9]

Thus, the parties could have waived the settlement agreement provision requiring all modifications be in writing. Vallega's approximate five-year delay in seeking redress after Farhadi stopped making the payments further implies that the parties had agreed to suspend Farhadi's obligations. As a result, the agreement's requirement that all modifications be in writing does not bar evidence of Farhadi's purported oral modification.

For the foregoing reasons, the district court's grant of summary judgment in Vallega's favor was erroneous.

Anticipatory Repudiation

The district court concluded Farhadi's failure to make the monthly payments constituted an anticipatory repudiation of the entire

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2001); see 29 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts § 73:22, at 70 (4th ed. 2003); see also Restatement (Second) of Contracts § 283 cmt. b (1981).

[9]Silver Dollar Club v. Cosgriff Neon, 80 Nev. 108, 111, 389 P.2d 923, 924 (1964) (quoting Simpson on Contracts § 63, at 228) (emphasis added).

agreement, entitling Vallega to past and future damages. Because we conclude Farhadi did not breach the agreement, we reverse this ruling.[10]

Determination of offset

On its appeal, Vallega contends the district court lacked authority to order it to pay Farhadi 32 percent of the judgment recovered in its bifurcated litigation. We conclude the district court's decision was proper.

Vallega's failure to timely object to Farhadi raising the offset issue precludes him from claiming error on appeal.[11] Vallega did not object to the court's consideration of the offset issue during oral argument when Farhadi first brought the issue to the court's attention nor did he include any waiver argument in his subsequent reply to Farhadi's motion for determination of offset. Indeed, Vallega did not object until after the district court had issued two orders allowing supplemental briefing on the issue. Only in a supplemental memorandum, filed after the second court order, did Vallega first argue the offset issue should have been brought as a counterclaim.

We further note that the purpose of the compulsory counterclaim rule is to discourage circuitry of actions and ensure entire

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[10]Despite not having to reach the issue, we note that Farhadi's deposition testimony indicated he intended to only temporarily suspend the monthly payments and make them in the future. Thus, his conduct was not so "clear, positive, and unequivocal" to justify a finding of anticipatory repudiation. Covington Bros. v. Valley Plastering, Inc., 93 Nev. 355, 360, 566 P.2d 814, 817 (1977).

[11]Fick v. Fick, 109 Nev. 458, 462, 851 P.2d 445, 448 (1993) ("[A] failure to object in the trial court bars the subsequent review of the objection.").

controversies are settled in one action.[12] The offset determination did not require a second action. Vallega was given a full opportunity to brief the offset issue and has failed to demonstrate how it was prejudiced by the district court's decision.

Conclusion

We conclude that Farhadi presented sufficient evidence to raise a genuine issue of material fact whether the parties orally agreed to suspend the $1,000 monthly payments. Thus, the district court's order granting summary judgment was erroneous. We further conclude the district court acted properly in granting Farhadi's motion for offset.

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 proceedings consistent with this order.

Douglas, J.
Douglas

Becker, J.
Becker

Parraguirre, J.
Parraguirre

[12]Great W. Land & Cattle v. District Ct., 86 Nev. 282, 285, 467 P.2d 1019, 1021 (1970).

cc: Hon. Janet J. Berry, District Judge
Peter Toft Combs
Kreitlen & Walker
Robison Belaustegui Sharp & Low
Washoe District Court Clerk