

IN THE SUPREME COURT OF THE STATE OF NEVADA

VEGAS VALLEY DISTRIBUTING
COMPANY, D/B/A M. J.
DIBIASE/SIMMONS CONTRACTING, A
NEVADA CORPORATION,
Appellant,
v.
CLARK COUNTY SCHOOL DISTRICT,
BY AND THROUGH ITS BOARD OF
TRUSTEES,
Respondent.

No. 42605

FILED

JUL 11 2005

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

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court order granting summary judgment in a contract action. Eighth Judicial District Court, Clark County; Valorie Vega, Judge.

Clark County School District (CCSD) entered into three contracts for the building of three public schools in Las Vegas, Nevada. Target General was the general contractor and Vegas Valley dba DiBiase (DiBiase) was the subcontractor on the projects. DiBiase was to install gypsum board and framing at the projects. CCSD building inspectors told DiBiase that horizontal strapping was required, per the contract and building code, on the gypsum board installation. DiBiase disagreed that the strapping work was part of the contract, because the contract language did not require it and because their bid did not include the labor and materials for installation of the gypsum board with horizontal strapping. DiBiase completed the work under protest and filed suit to recover the cost of labor and materials for the strapping.

CCSD filed a motion to dismiss in the district court. With no answer filed or discovery conducted, the district court converted CCSD's

motion to dismiss to a motion for summary judgment, because of attached supporting documentation and affidavits. DiBiase informally asked for additional time to conduct discovery. The district court denied the request, found that no contract existed between CCSD and DiBiase and granted summary judgment. DiBiase appeals, arguing that summary judgment was improperly granted as: (1) the court failed to provide an opportunity for discovery, (2) an oral contract existed and (3) CCSD was unjustly enriched.

Summary judgment

NRCP 12(b)(5) permits dismissal for failure to state a claim upon which relief can be granted. If matters outside the pleading are considered by the district court, then the motion is treated as one for summary judgment.¹ This court reviews a summary judgment order de novo.² “Summary judgment is only appropriate when, after a review of the record viewed in the light most favorable to the non-moving party, there remain no issues of material fact.”³

To prevail, the party opposing summary judgment must show specific facts demonstrating the existence of a genuine issue of fact.⁴

¹Tahoe Village Homeowner v. Douglas Co., 106 Nev. 660, 661, 799 P.2d 556, 557 (1990).

²Medallion Dev. v. Converse Consultants, 113 Nev. 27, 31, 930 P.2d 115, 118 (1997).

³Id.

⁴Boland v. Nevada Rock and Sand Co., 111 Nev. 608, 610, 894 P.2d 988, 990 (1995).

NRCP 56(f) permits postponement of summary judgment so that discovery can be conducted. Where NRCP 12(b)(5) motions are treated as having been brought under NRCP 56, “all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.”

DiBiase asserts that issues of fact remained that precluded the district court from granting summary judgment. We agree. Whether the horizontal strapping was contemplated as part of the contract requires additional discovery. Whether the actions of the CCSD inspector constituted a new agreement, and if so, whether CCSD is estopped because of his actions also requires additional discovery. These questions of material fact must be addressed before judgment can be granted.

DiBiase submitted no affidavit pursuant to NRCP 56(f), detailing what discovery was needed and what that discovery would have produced. However, DiBiase did indicate in a footnote in its opposition brief that it objected to the additional documents submitted with the motion to dismiss and that, if the motion was to be converted to one for summary judgment, additional time to conduct discovery was requested.⁵ A similar request was made orally at the motion hearing. We consider

⁵See Halimi v. Blacketor, 105 Nev. 105, 770 P.2d 531 (1989), cited with approval in Aviation Ventures v. Joan Morris, Inc., 121 Nev. ____, 110 P.3d 59, 62-63 (2005). Halimi concerned a breach of contract action, wherein the district court granted summary judgment against the plaintiff notwithstanding the plaintiff's request for additional time to conduct discovery in his opposition memorandum. This court reversed the grant of summary judgment concluding that the plaintiff's request for additional time was the equivalent of an NRCP 56(f) affidavit of a party opposing summary judgment on the grounds that he cannot obtain essential facts in support of his opposition. *Id.* at 106, 770 P.2d at 531-32.

these requests sufficient to warrant allowing the additional discovery in the matter.

Considering the nature of the litigation, there is a need for further inquiry. The court notes that summary judgment may be appropriate at some stage of the litigation, but there is a distinction between granting summary judgment at the inception of a litigation, and at a later date where the case is more fully developed. We, therefore, reverse the district court's order granting summary judgment.

Privity of Contract

DiBiase asserts that, while it had no direct written contract with CCSD, an oral contract was created when CCSD building inspectors required horizontal strapping as part of the gypsum board installation. In DiBiase's view, this requirement constituted a modification of the original terms and created privity between DiBiase and CCSD.


CCSD has maintained throughout the proceeding that the order for the alleged additional work by the building inspectors did not create an oral contract because of this court's decision in Lund v. Washoe County.⁶ In Lund, an engineer for Washoe County authorized additional work not included in the original contract. Lund performed the additional work and sought compensation after completion. This court held that because the engineer was not a member of the board of commissioners, he could not bind the county. As part of the rationale for the determination, the court stated that since the contract was one for public works, and the value of the change order was over \$100, the prevailing statute required

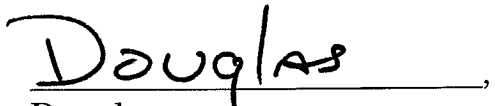
⁶31 Nev. 227, 101 P. 550 (1909).

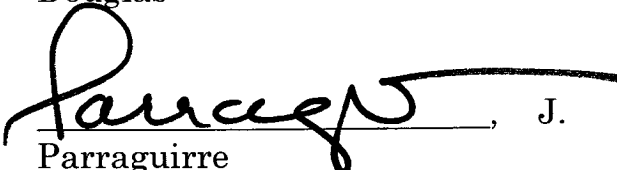
the work to be noticed and given to the lowest bidder.⁷ However, Lund did not analyze the impact of estoppel on the additional work.⁸

Because resolution of this matter depends upon a number of questions of material fact, we hereby reverse the district court's summary judgment order and remand the matter to allow necessary discovery to be pursued. Also, because questions of material fact remain, we need not address the issue of unjust enrichment.

It is so ORDERED.

 J.
Maupin

 J.
Douglas

 J.
Parraguirre

⁷Id. at 235-36, 101 P. at 552.

⁸We call into question the continuing validity of Lund in this context. NRS 386.350 vests the school board of trustees exclusive authority to financially obligate the public. However, the statute may not require approval of the board in this instance, because approval may have been given or delegated. Whether an owner, in this case the county, can order a change in the scope of the work per Lund, is a question to be addressed. In stating this, we make no comment as to whether a public entity owner is entitled to use Lund in order to shield itself from liability where they instigate a change in the scope of work.

cc: Hon. Valorie Vega, District Judge
Nitz Walton & Heaton, Ltd.
C. W. Hoffman Jr.
Donna M. Mendoza-Mitchell
Clark County Clerk