IN THE SUPREME COURT OF THE STATE OF NEVADA

KEVIN MIRCH, Appellant, vs. MCDONALD, CARANO & WILSON, LLP, AND LEIGH GODDARD, Respondents.	No. 42333
KEVIN MIRCH, Appellant vs. MCDONALD, CARANO & WILSON, LLP, AND LEIGH GODDARD, Respondents.	No. 43153
KEVIN J. MIRCH, ESQ., Appellant, vs. MCDONALD, CARANO & WILSON, LLP, AND LEIGH GODDARD, Respondents.	No. 45663

FILED

MAR 06 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a consolidated appeal from district court orders granting summary judgment, denying relief from judgment under NRCP 60(b), and awarding attorney fees and costs under NRCP 11.[1] Second Judicial District Court, Washoe County; James W. Hardesty, Judge.

---

[1]This is a consolidation of three appeals: Docket No. 42333 (appeal from the district court's final judgment); Docket No. 43153 (appeal from order denying motion for reconsideration); Docket No. 45666 (appeal from sanctions).

08-05622

INTRODUCTION

Appellant Kevin Mirch filed various causes of action against respondent law firm McDonald, Carano and Wilson (MCW). In response, MCW filed a motion to dismiss. The district court sua sponte converted the motion to dismiss into a motion for summary judgment and following a hearing, dismissed all of Mirch's claims, as well as awarding sanctions against him. On appeal, Mirch argues that the district court erred: (1) by sua sponte granting summary judgment without providing proper notice, (2) by denying him due process by precluding discovery, (3) by mischaracterizing facts alleged and evidence submitted, and (4) by awarding sanctions against him. We disagree.

We conclude that the district court did not err by not providing the 10-day notice to Mirch. The record below adequately indicates that Mirch consented to having the motion to dismiss heard as a motion for summary judgment. We also conclude that the district court did not deny Mirch due process because the district court allowed Mirch to present witnesses and fully argue his case. We also conclude that the district court did not misstate facts or misconstrue evidence submitted. Finally, we conclude that the district court did not err by awarding sanctions against Mirch after determining that the lawsuit filed was frivolous.

RELEVANT FACTS

The parties are familiar with the facts of this case; thus, we recount them only as necessary to explain our decision.

Intentional interference with contractual relationships

Mirch argued below that MCW intentionally interfered with his relationship with clients in order to gain unfair advantage against him in a separate interpleader action to which he was a party. Mirch asserted below that MCW interfered with the contractual obligation of a former

client, Dr. Kenneth Frank, to pay Mirch over $1,000,000, by instructing Frank not to pay the contingent fee and destroying or hiding the contingent fee agreement. According to the pleadings, MCW also instructed Frank to sue Mirch for malpractice. In addition, Mirch claimed that MCW participated in a scheme to cause Denise Reed, another of Mirch's clients, to renounce her contract with Mirch, thus depriving him of those fees. Mirch claimed that these actions constituted the requisite contractual interference and that they were intentionally done to keep Mirch from disclosing Frank's bankruptcy fraud.

Conspiracy to commit bankruptcy fraud

Mirch also claimed that MCW intentionally conspired with Frank to commit bankruptcy fraud. Mirch alleged that MCW knew Frank had committed bankruptcy fraud by assigning his assets to others and hiding a judgment he had won from a separate lawsuit. Mirch alleged that MCW was aware of the judgment and participated in furthering the fraud by threatening to use its political influence to end Mirch's legal career because he disclosed the judgment.

DISCUSSION

This court reviews the grant of summary judgment de novo.[2] Summary judgment is appropriate under NRCP 56 when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law.[3] "A genuine issue of material fact is one where the evidence

---

[2]Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

[3]Id. at 731, 121 P.3d at 1031.

is such that a reasonable jury could return a verdict for the non-moving party."[4] "'In determining whether summary judgment is proper, the non-moving party is entitled to have the evidence and all reasonable inferences accepted as true.'"[5] "However, conclusory statements along with general allegations do not create an issue of material fact."[6]

Notice

Mirch argues that he was denied proper notice for the motion for summary disposition when the district court sua sponte converted MCW's motion to dismiss into a motion for summary judgment. Mirch contends that the district court improperly granted summary judgment in violation of NRCP 56, which requires a ten-day notice.[7] We disagree. It is clear that by agreeing to proceed at the trial court level, Mirch waived his right to a ten-day notice.[8]

Mirch was fully aware that the motion to dismiss was likely to be converted into a motion for summary judgment because both parties requested the district court to consider matters outside of the pleadings.

---

[4]Posadas v. City of Reno, 109 Nev. 448, 452, 851 P.2d 438, 441-42 (1993).

[5]State, Dep't Transp. v. Central Telephone, 107 Nev. 898, 901, 822 P.2d 1108, 1109 (1991) (quoting Wiltsie v. Baby Grand Corp., 105 Nev. 291, 292, 774 P.2d 432, 433 (1989)).

[6]Michaels v. Sudeck, 107 Nev. 332, 334, 810 P.2d 1212, 1213 (1991).

[7]See NRCP 56(c).

[8]We also note that while NRCP 56(c) requires a ten-day notice in a motion for summary judgment, the failure to comply with the notice requirement is subject to the harmless-error rule. See Exber, Inc. v. Sletten Construction Co., 92 Nev. 721, 733, 558 P.2d 517, 524 (1976).

Mirch even asked the district court if he could present witnesses in the event the district court chose to treat the motion to dismiss as a motion for summary judgment. When the district court notified Mirch of its intent to "convert" the motion to a motion for summary judgment, Mirch did not object. Instead, Mirch proceeded to produce the testimony of two attorneys, his law partner and then fully participated in the hearing. In light of this, we conclude that Mirch waived the notice requirement.[9]

Discovery pursuant to NRCP 56(f)

Mirch argues, without providing any factual or legal analysis in support of his contention that the district court erred in denying discovery. We disagree.

This court reviews a district court's decision to refuse a continuance pursuant to NRCP 56(f) for an abuse of discretion.[10] "NRCP 56(f) permits a district court to grant a continuance when a party opposing a motion for summary judgment is unable to marshal facts in support of

---

[9]See Cheek v. FNF Constr., Inc., 112 Nev. 1249, 1251, 924 P.2d 1347, 1351, (1996) (holding that the notice requirement of NRCP 56(c) is not violated if the opponent is not prejudiced by the shortened notice period); See also Vashi v. Charter Tp. of West Bloomfield, 159 F. Supp. 2d 608, 612 (E.D. Mich. 2001) (determining that the district court was not required to give parties prior notice of conversion of motion to dismiss to one for motion for summary judgment when parties were not likely to be surprised by conversion, given that defendant moved for dismissal and parties relied on matters outside the pleadings).

[10]Aviation Ventures v. Joan Morris, Inc., 121 Nev. 113, 118, 110 P.3d 59, 62 (2005) (citing Harrison v. Falcon Products, 103 Nev. 558, 560, 746 P.2d 642, 643 (1987)).

its opposition."[11] "[A] motion for a continuance under NRCP 56(f) is appropriate only when the movant expresses how further discovery will lead to the creation of a genuine issue of material fact."[12]

In this case, during the hearing, Mirch could not articulate how deposing two attorneys, seventy creditors, and one bankruptcy expert would lead to a genuine issue of material fact. Further, the district court determined that since the federal court had already held that there was no conspiracy to commit bankruptcy fraud, the creditors' and the attorneys' testimony could not possibly sustain the conspiracy to commit bankruptcy fraud claim. We agree and conclude that the district court did not err in denying discovery.

Mischaracterizing the facts alleged and evidence submitted

Mirch also argues that the district court erred in not reviewing the facts and evidence of the case in the light most favorable to him. Here, the district court granted summary judgment concluding that Mirch had no legal basis for his claims against MCW and that Mirch could offer no factual basis to support his claims. We agree with the district court.

In order to defeat summary judgment, the non-moving party cannot rest on mere allegations. The party opposing summary disposition

---

[11]Id. at 117-18, 110 P.3d at 62 (citing Ameritrade, Inc. v. First Interstate Bank, 105 Nev. 696, 699, 782 P.2d 1318, 1320 (1989).

[12]Aviation Ventures, 121 Nev. at 118, 110 P.3d at 62 (citing Bakerink v. Orthopaedic Associates, Ltd., 94 Nev. 428, 431, 581 P.2d 9, 11 (1978)).

must set forth specific facts to support genuine issues of material fact that would warrant a trial.[13] Mirch simply failed to do so.

A. Collateral estoppel

Given the federal court's ruling in the interpleader action the very basis of Mirch's claim against MCW, that Frank had committed bankruptcy fraud by not disclosing the judgment and that MCW aided and furthered the fraud, is without merit. In the interpleader action, the federal court held that because Frank had no duty to disclose the judgment acquired after he filed bankruptcy, he did not commit bankruptcy fraud.[14] Thus, Mirch, as an intervenor in the action, would be collaterally estopped from bringing the same claim in state court.[15] Similarly, Mirch's whistle blower claim is a non-cognizable claim because a whistle blower claim under NRS 281.641 protects only a state employee or officer for disclosing unlawful activities.[16]

Assuming arguendo that Frank had a legally binding duty to disclose the judgment and that MCW conspired with Frank in perpetuating the bankruptcy fraud, Mirch had no standing to bring the claim since he was not a creditor in Frank's bankruptcy case. In addition,

---

[13]Cuzze v. Univ. & Cmty. Coll. Sys. of Nev., 123 Nev. ____, 172 P.3d 131 (2007).

[14]Kevin Mirch v. Kenneth Frank, Advanced Physician's Products, Inc., U.S. District Court Case No. CV-N-01-0443, 2003.

[15]See City of Reno v. Nevada First Thrift, 100 Nev. 483, 488, 686 P.2d 231, 234 (1984).

[16]Simonian v. Univ. & Cmty. Coll. Sys., 122 Nev. 187, 197, 128 P.3d 1057, 1064 (2006); see also Hartman v. Mathis & Bolinger Furniture, 282 Cal. Rptr. 35, 41 (Ct. App. 1991).

the state court lacks jurisdiction to hear matters concerning conduct that occurred during the bankruptcy case.[17] Thus, we conclude that the district court did not err in dismissing the conspiracy and whistle blower claims.

B. No legal and factual basis for the contractual interference claim

We also conclude that Mirch's allegation that MCW intentionally interfered with his contractual relationship with his clients, Frank and Reed, lacks merit. The required elements of intentional interference with a present contractual relationship are: (1) a valid contract between the plaintiff and a third party; (2) the defendant's knowledge of the contract, (3) intentional act designed to interfere with the contract; (4) actual disruption of the contract; and (5) the resulting damage.[18]

Here, the district court correctly found that Mirch could not, as a matter of law, establish the elements of an existing contract and therefore, an intentional act of interference. As to Mirch's purported existing contract with Frank, the very crux of the disputes between Mirch and Frank was whether a valid contingent fee agreement existed between the two. Furthermore, Frank denied the existence of a contingent fee agreement long before MCW replaced Frank's former attorney. In the

---

[17]MSR Exploration, Ltd. v. Meridian Oil, Inc., 74 F.3d 910, 916 (9th Cir. 1996) (holding that state malicious prosecution actions for events taking place within bankruptcy court proceedings are preempted); Gonzales v. Parks, 830 F.2d 1033, 1035 (9th Cir. 1987) (holding that state courts lack jurisdiction over claim that filing of a bankruptcy petition is an abuse of process).

[18]J.J. Indus., LLC v. Bennett, 119 Nev. 269, 274, 71 P.3d 1264, 1267 (2003).

interpleader action, before MCW's involvement, Frank argued that he had no contingent fee agreement with Mirch and that he was pleading malpractice as an affirmative defense against Mirch's. Thus, the chronology of events undermines Mirch's suggestion that MCW claims intentionally interfered with his purported contract with Frank. For Mirch to establish that MCW intentionally interfered with his contingent fee agreement with Frank, Mirch would have to prove that MCW actively induced Frank to break an agreement.[19] Clearly, MCW did not induce Frank to renounce the existence of the agreement because, as Mirch admits, Frank denied the existence of the contingent agreement long before MCW became Frank's counsel. The same fact that undermines Mirch's purported contractual relationship with Frank also undermines his purported relationship with Reed. Like Frank, Reed was already involved in a legal dispute regarding her agreement with Mirch well before MCW began representing Frank. Therefore, we conclude that the district court did not err dismissing the intentional interference claim.

NRCP 11 sanction

Mirch argues that the district court erred in awarding NRCP 11 sanctions against him. We disagree. The district court's decision to award NRCP 11 sanctions is reviewed under an abuse of discretion standard.[20] NRCP 11 sanctions, including attorney fees, may be imposed on a litigant for filing a frivolous lawsuit that was not "'well-grounded in

---

[19]See Pacific Gas & Elec. v. Bear Stearns & Co., 791 P.2d 587, 591 (Cal. 1990).

[20]Bergmann v. Boyce, 109 Nev. 670, 676, 856 P.2d 560, 564 (1993).

fact and . . . warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.'"[21]

For the reasons discussed above, the district court was correct in concluding that the entire action, including the conspiracy to commit bankruptcy fraud was clearly frivolous. Mirch knew or should have known that Frank had no duty to disclose the judgment to the creditors, in light of the federal court's decision. Thus, Mirch was estopped from bringing the same claim in state court.[22] Despite this, Mirch brought the same claim in the district court and ultimately admitted that he had done no legal research to determine whether his claim, that the non-disclosure constitutes a fraud under the pertinent bankruptcy code, had any merit.[23] Therefore, the district court was correct in awarding NRCP 11 sanctions against Mirch.[24]

---

[21]Id. (quoting Golden Eagle Distributing Corp. v. Burroughs Corp., 801 F.2d 1531, 1533 (9th Cir. 1986) (quoting FRCP 11)).

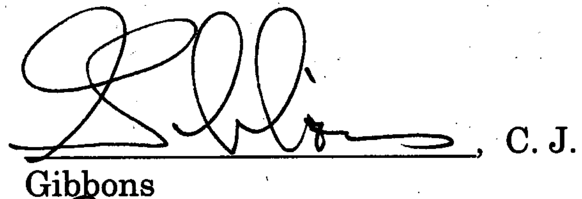
[22]See U.S. ex rel. Grynberg v. Praxair, Inc., 389 F.3d 1038, 1058 (10th Cir. 2004) (noting that sufficient justification for an award of attorney fees as a sanction does not include merely losing the case, but may include persisting with a suit in which a lack of merit has become apparent) (citing Christiansburg Garment Co. v. EEOC., 434 U.S. 412, 421 (1978)).

[23]We also note that the district court found the entire complaint to be "most scandalous," and we admonish appellant that this court need not consider arguments that lack any legal or factual analysis. See SIIS v. Buckley, 100 Nev. 376, 382, 682 P.2d 1387, 1390 (1984).

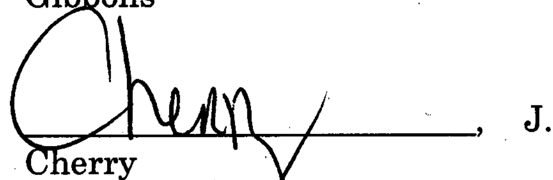
[24]Trustees v. Developers Surety, 120 Nev. 56, 63, 84 P.3d 59, 62-63 (2004) (citing S.B. 250. 72 Leg. (Nev. 2003); 2003 Nev. Stat., ch. 508, § 153, at 3478).

CONCLUSION

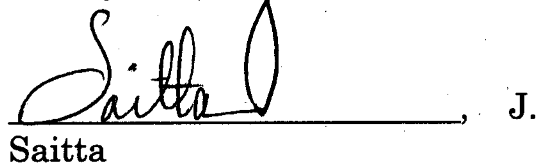
We conclude that the district court's did not err in granting summary judgment after it sua sponte converted MCW's motion to dismiss into a motion for summary judgment. We also conclude that the district court did not misstate or misapprehend facts or evidence submitted. Finally, because the district court correctly concluded that the lawsuit was frivolous, the district court did not err awarding sanctions against Mirch. Accordingly, we ORDER the judgment of the district court AFFIRMED.



_______________, C. J.
Gibbons



_______________, J.
Cherry



_______________, J.
Saitta

cc: Second Judicial District Court Dept. 7, District Judge
Second Judicial District Court Dept. 9, District Judge
Philip A. Olsen, Settlement Judge
Mirch & Mirch
Laxalt & Nomura, Ltd./Reno
Washoe District Court Clerk