IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JACK FERM,
Appellant,
vs.
THE STATE OF NEVADA, OFFICE OF
THE ATTORNEY GENERAL,
Respondent.

No. 72753

ORDER OF AFFIRMANCE

Jack Ferm appeals from a district court order dismissing his amended complaint. Eighth Judicial District Court, Clark County; Nancy L. Allf, Judge.

Ferm filed an amended complaint against respondent, the State of Nevada, Office of the Attorney General, for, among other things, breach of contract and breach of the covenant of good faith and fair dealing. The claims arise out of allegations that the Attorney General's office falsely identified Ferm as a person convicted of a felony in relation to mortgage fraud to a media researcher. Ferm alleged this communication was a breach of contract where the plea agreement he entered into with the Attorney General's office provided that he was pleading nolo contendre to a felony, but that adjudication would be held in abeyance while he paid $192,168.00 in restitution and that, if he paid restitution, the State would allow him, with court approval, to withdraw his plea and enter a plea of guilty to a gross misdemeanor. He further alleged that this was a breach of the covenant of good faith and fair dealing because the Attorney General's office provided the media with false information for publication on the internet, knowing it was untrue, and for the purpose of creating an atmosphere

18-901483

where Ferm would not be able to pay restitution and would thereafter be convicted of a felony. The Attorney General's office filed a motion to dismiss, which was granted over Ferm's opposition. This appeal followed.[1]

An order granting an NRCP 12(b)(5) motion to dismiss is reviewed de novo. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008); *see also Alcantara v. Wal-Mart Stores, Inc.*, 130 Nev. 252, 256, 321 P.3d 912, 914 (2014). A decision to dismiss a complaint under NRCP 12(b)(5) is rigorously reviewed on appeal with all alleged facts in the complaint presumed true and all inferences drawn in favor of the plaintiff. *Buzz Stew*, 124 Nev. at 227-28, 181 P.3d at 672. Dismissing a complaint is appropriate "only if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief." *Id.* at 228, 181 P.3d at 672. While the court generally may not consider matters outside of the complaint when ruling on a motion to dismiss for failure to state a claim, it can take into account any exhibits attached to the complaint. *Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 847, 858 P.2d 1258, 1261 (1993).

A breach of contract arises when there is a "material failure to perform a duty arising under or imposed by agreement." *State Dep't of Transp. v. Eighth Judicial Dist. Court*, 133 Nev. ___, ___, 402 P.3d 677, 682 (2017) (internal quotation marks omitted). A contract will be enforced as written. *Id.* Courts cannot "interpolate in a contract what the contract does

---

[1]Ferm's amended complaint contained numerous causes of action, all of which were dismissed; however, on appeal Ferm only challenges the dismissal of his breach of contract and breach of the covenant of good faith and fair dealing claims and therefore, this order only addresses those claims.

not contain." *Id.* Here, even assuming Ferm could bring a civil action for money damages arising out of an alleged breach of a criminal plea agreement,[2] his claim fails as a matter of law. Ferm failed to identify any duty imposed by the plea agreement which the Attorney General's office breached. Contrary to Ferm's arguments on appeal, the Attorney General's office's communication with the media did not work to adjudicate his plea. Further, the plea agreement, which was attached to Ferm's amended complaint, does not contain a non-disclosure provision and Ferm does not allege that it does. Because Ferm failed to identify a promise that was breached by the Attorney General's office, he failed to state a claim for breach of contract and dismissal was proper. *See id.*; *Buzz Stew*, 124 Nev. at 228, 181 P.3d at 672.

Similarly, because the plea agreement did not contain a non-disclosure provision, the Attorney General's office did not breach the covenant of good faith and fair dealing by communicating with the media regarding Ferm. The covenant of good faith and fair dealing requires each party to act in a manner that is faithful "to the purpose of the contract and the justified expectations of the other party." *Hilton Hotels Corp. v. Butch Lewis Prods., Inc.*, 107 Nev. 226, 234, 808 P.2d 919, 923 (1991). While the covenant of good faith and fair dealing can be breached even if the terms of the contract are literally complied with, *see id.* at 232, 808 P.2d at 922-23, the covenant "cannot be extended to create obligations not contemplated by the contract." *Pasadena Live, LLC v. City of Pasadena*, 8 Cal. Rptr. 3d 233, 237 (Ct. App. 2004) (internal quotation marks omitted). The plea

---

[2]Because Ferm's claims otherwise fail, we need not address and therefore make no comment on the propriety of a civil damages suit relating to an alleged breach of a criminal plea agreement.

agreement did not require the Attorney General's office to refrain from disclosing information regarding Ferm or his plea agreement and to impose such a requirement would contradict the terms of the agreement. Therefore, Ferm had no justified expectation that the Attorney General's office would refrain from engaging in the communication at issue here. *See Hilton Hotels*, 107 Nev. at 234, 808 P.2d at 923. Thus, his claim fails as a matter of law and dismissal was proper. *See Buzz Stew*, 124 Nev. at 228, 181 P.3d at 672.

        Accordingly, we

        ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Silver

_____, J.
Tao

_____, J.
Gibbons

cc: Hon. Nancy L. Allf, District Judge
       Jack Ferm
       Attorney General/Carson City
       Attorney General/Las Vegas
       Eighth District Court Clerk