IN THE COURT OF APPEALS OF THE STATE OF NEVADA

STEVIE K. SWAIN,
Appellant,
vs.
MARY GAFFORD,
Respondent.

No. 81743-COA

ORDER OF AFFIRMANCE

Stevie K. Swain appeals from a district court summary judgment, certified as final under NRCP 54(b), dismissing her tort action against Mary Gafford. Eighth Judicial District Court, Clark County; Jim Crockett, Judge.

In 2018, "Pompom," a Pomeranian dog owned by Michelle Gafford, bit Swain on the face.[1] Swain and her two-year old daughter had been residing with Michelle and other roommates for approximately two months at the time. The day before the incident, Michelle put up a baby gate to separate Pompom from Swain and her daughter. Michelle suggested Swain put Pompom behind it when feeding her daughter to prevent Pompom from begging for or stealing food. When Swain picked up Pompom to place him behind the gate, he bit her on the lip. Pompom had never attacked anyone or shown signs of aggression, but Swain indicated that Pompom has a food fixation and would steal it whenever possible.

Michelle's mother, respondent Mary Gafford, owned the home that Michelle and Swain were residing in and where the incident occurred.

[1]We recount the facts only as necessary for our disposition.

Mary[2] permitted Michelle to live in the house and Mary paid for the majority of maintenance and repairs on the property. Mary, however, did not live in the house and she rarely visited due to health issues.

After Swain sued Mary and Michelle for negligence, Mary moved for summary judgment, asserting that she was not liable to Swain as a matter of law. The motion included Mary's declaration, which was uncontroverted in Swain's opposition, that she had no knowledge that Pompom was aggressive or dangerous and, as such, had no reason to "do anything" to protect against the possibility of Pompom attacking someone. Swain filed an opposition and countermotion for attorney fees and costs. Her reply in support of this countermotion included, in the alternative, a request for additional time to conduct discovery under NRCP 56(d). The district court granted summary judgment in favor of Mary, determining that Swain failed to demonstrate that Mary assumed a duty, individually or through Michelle, to protect Swain from Pompom. The court also denied Swain's countermotion, NRCP 56(d) request, and subsequent motion for reconsideration.[3] In addition, the district court certified its order granting summary judgment as final under NRCP 54(b). Swain now appeals the summary judgment decision.

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[2]For clarity, we refer to Mary Gafford and Michelle Gafford by their first names in this order.

[3]We note that for the first time in Swain's motion for reconsideration she attached her own declaration suggesting in general terms that Mary was aware of "how Pom Pom (sic) behaved." The district court appropriately determined that the declaration as well as the motion for reconsideration did not set forth any newly discovered evidence that was unavailable at the time Swain filed her opposition to the motion, and therefore properly denied reconsideration.

Whether the district court erred in granting summary judgment

On appeal, Swain argues that summary judgment was improper because there is a genuine dispute of material fact as to whether Michelle is Mary's agent for matters regarding the property, and therefore, Mary is liable for Michelle's actions. Mary counters that, regardless of whether Mary and Michelle had an agency or landlord-tenant relationship, Swain cannot prove that Mary owed a duty to protect Swain from Pompom.[4] We generally agree with Mary.

We review a district court's grant of summary judgment de novo. *Wood v. Safeway Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is appropriate when the pleadings and other evidence on file demonstrate that no genuine dispute as to any material fact remains and that the moving party is entitled to judgment as a matter of law. *Id.* When reviewing a motion for summary judgment, the evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party. *Id.* A defendant who moves for summary judgment on a negligence claim need only show that one of the elements—duty, breach, causation, or damages—is clearly lacking as a matter of law. *Butler v. Bayer*, 123 Nev. 450, 461, 168 P.3d 1055, 1063 (2007). And "[b]ecause the existence of a 'duty' is a question of law, if this court determines that no duty exists, it will affirm summary judgment for the defendant in a case involving negligence." *Id.*

A property owner may assume a duty to protect third parties from dog bites if she takes affirmative steps to assume such a duty. *Harry v. Smith*, 111 Nev. 528, 534, 893 P.2d 372, 375 (1995); *Wright v. Schum*, 105

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[4]It appears that Swain concedes that Mary did not owe her an individual duty but only one based on agency.

Nev. 611, 615-16, 781 P.2d 1142, 1144-45 (1989). However, the dog bite must be foreseeable. *See generally Sparks v. Alpha Tau Omega Fraternity*, 127 Nev. 287, 296-97, 255 P.3d 238, 244 (2011) (explaining that there is no duty to control the dangerous conduct of another unless (1) a special relationship exists between the parties and (2) the harm created by the defendant's conduct is foreseeable). Mere knowledge that a tenant owns a dog does not impose any type of duty upon the property owner to investigate the dog's nature. *See Georgianna v. Gizzy*, 483 N.Y.S.2d 892, 894 (N.Y. Sup. Ct. 1984); *Robison v. Stokes*, 882 P.2d 1105, 1106 (Okla. Civ. App. 1994).

Here, Swain presented no evidence that Mary took affirmative steps to assume a duty of care regarding Pompom. Foremost, Swain in her opposition to summary judgment below did not refute Mary's argument that Mary did not owe a duty to Swain and Swain failed to argue the same on appeal even though the district court granted summary judgment based on the duty issue and Mary argued it again to this court. *See Spencer v. Klementi*, 136 Nev., Adv. Op. 35, 466 P.3d 1241, 1249 (2020) (concluding that a failure to oppose a motion constitutes a concession); *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (explaining that issues not argued below are "deemed to have been waived and will not be considered on appeal").

Regardless, Mary's sworn declaration indicates she did not protect against the possibility of Pompom attacking someone because she had no reason to believe that Pompom would attack anyone. Indeed, Mary asserts that she had never known or suspected Pompom to be aggressive.

Swain produced no admissible evidence to rebut Mary's assertions.[5] And Mary's mere knowledge that Michelle owned a dog did not impose a duty upon her to investigate his nature. *See Georgianna*, 483 N.Y.S.2d at 894; *Robison*, 882 P.2d at 1106. Therefore, the record supports that Mary did not assume an independent duty of care regarding Pompom.

However, a property owner or landlord may also assume a duty to protect third parties through an agency relationship with her tenant if the tenant herself owes a duty of care. *See Harry*, 111 Nev. at 534, 893 P.2d at 375. A property owner or landlord does not owe a duty of care unless there is a special relationship with the tenant or occupant and the harm created by her conduct is foreseeable. *See Sparks*, 125 Nev. at 297, 255 P.3d at 244; *Harry*, 111 Nev. at 534, 893 P.2d at 375.

Here, Swain also points to no evidence in the record to create a genuine dispute as to whether Mary delegated a duty to Michelle regarding Pompom, particularly in light of Mary's uncontroverted declaration.[6] *See Harry*, 111 Nev. at 533-34, 893 P.2d at 375. Foremost, although Swain points to Michelle's placement of a baby gate, she points to no evidence in the record to demonstrate that Mary directed Michelle to put up that gate

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[5]Swain's failure to respond to Mary's argument regarding Pompom's lack of dangerous propensities is a concession of the merit of Mary's position. *See Colton v. Murphy*, 71 Nev. 71, 72, 279 P.2d 1036, 1036 (1955) (concluding that when respondents' argument was not addressed in appellants' opening brief, and appellants declined to address the argument in a reply brief, "such lack of challenge . . . constitutes a clear concession by appellants that there is merit in respondents' position").

[6]We only analyze whether Michelle owed Swain a duty to the extent that it is necessary to decide this appeal especially because Swain has argued an agency theory. We do not address the merits of any pending matters concerning the remaining party in this case.

or do anything else with regard to Pompom. Further, Swain did not demonstrate that Mary knew or had reason to know that Pompom was dangerous such that delegating the duty of placing the gate to Michelle would have been to keep Swain safe from Pompom. Swain asserts that Mary's knowledge of vicious propensities is "entirely irrelevant," contrary to our jurisprudence, which supports otherwise. And the record shows that Michelle put up the gate to relieve Michelle and Swain from the "monotonous" task of chasing away the dog when Swain's daughter was eating, not because Pompom had dangerous propensities.[7] Thus, the district court did not err in granting Mary summary judgment.[8]

Whether the district court abused its discretion by denying Swain's NRCP 56(d) request for additional time to conduct discovery

Swain argues that the district court abused its discretion by

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[7]We note that even if Swain had argued a genuine dispute regarding whether Mary knew that Pompom allegedly had dangerous propensities, dogs are presumed to not have vicious or dangerous propensities unless proven otherwise. *See Goennenwein by Goennenwein v. Rasof*, 695 N.E.2d 541, 544 (Ill. App. Ct. 1998). The evidence Swain argues here on appeal does not overcome this presumption. As the record demonstrates, no one had ever seen Pompom behave in a manner that would have made the incident foreseeable. Swain's assertion that Pompom is a "fiend for food," who will beg and try to steal food, and has barked or growled at people is not enough to establish that Pompom has any vicious or dangerous propensities, even when viewed in a light most favorable to Swain. These are normal dog behaviors and are insufficient to show that Pompom had vicious or dangerous propensities. *See Collier v. Zambito*, 807 N.E.2d 254 (N.Y. 2004).

[8]We note that Swain did not argue on appeal, or in her opposition to the motion for summary judgment, how Mary or Michelle breached the duty of care, even assuming that Mary undertook such a duty. *See Butler*, 123 Nev. at 461, 168 P.3d at 1063 (summary judgment is proper when a plaintiff fails to generate a triable question of fact regarding any of the essential elements of a negligence claim, including breach of an alleged duty).

refusing to grant her additional time for discovery under NRCP 56(d). We disagree.

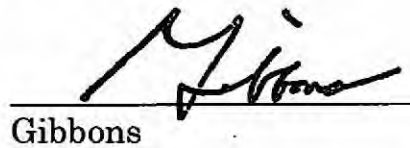
We review the denial of a request for a continuance in the face of a motion for summary judgment for abuse of discretion. *Aviation Ventures, Inc. v. Joan Morris, Inc.*, 121 Nev. 113, 117-18, 110 P.3d 59, 62 (2005). NRCP 56(d) provides that a district court may allow additional time to conduct discovery if the nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition. A request for a continuance to conduct further discovery contained within an opposition to a motion for summary judgment is not sufficient to meet the "unequivocal" requirement for an affidavit. *Choy v. Ameristar Casinos, Inc.*, 127 Nev. 870, 873, 265 P.3d 698, 700 (2011). In addition, such a request is only appropriate when the movant expresses how further discovery will create a genuine dispute of material fact. *Aviation Ventures*, 121 Nev. at 118, 110 P.3d at 62.

Here, Swain failed to present any affidavit or sworn declaration in support of her request for a continuance. She further failed to identify any "specified reasons" for her inability to present facts essential to justify her opposition. Instead, Swain only stated that additional time for discovery was necessary because she had not yet received responses to her first set of interrogatories, which were propounded after the motion for summary judgment was filed. Swain did not provide any indication as to what information these interrogatories would elicit or how such information would create a genuine dispute of material fact. Under these

circumstances, the district court was well within its discretion in denying Swain's NRCP 56(d) request.[9]

Accordingly, we

ORDER the judgment of the district court AFFIRMED.



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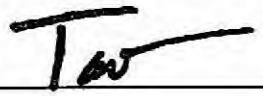

_____, J.
Tao

_____, J.
Bulla

cc: Chief Judge, Eighth Judicial District Court
Eighth Judicial District Court, Department 24
Thomas J. Tanksley, Settlement Judge
Isso & Associates Law Firm, PLLC
Anderton & Associates
Eighth District Court Clerk

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[9]We decline to consider the arguments regarding NRCP 56(d) that Swain raised for the first time in her motion for reconsideration because she did not properly identify these issues on appeal and the district court does not appear to have reached the merits in denying her motion. *Cf. Arnold v. Kip*, 123 Nev. 410, 416-17, 168 P.3d 1050, 1054 (2007) (considering the appellant's motion for reconsideration on appeal because it was part of the record and the district court entertained the motion on the merits). We also recognize that the parties may still have had some time to complete discovery in the ordinary course; nevertheless, it remained incumbent upon Swain, in the face of a motion for summary judgment, to explain what additional discovery was necessary to defeat the motion, which the district court found Swain could not do. Based on our review of the record, we cannot conclude that the court abused its discretion in reaching this decision, particularly in light of Mary's uncontroverted declaration.