

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RONALD J. ROBINSON,
Appellant,
vs.
REVA WALDO,
Respondent.

No. 82970-COA

FILED

APR 29 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *S. Young*
DEPUTY CLERK

ORDER OF AFFIRMANCE

Ronald J. Robinson appeals from a bench trial judgment, certified as final pursuant to NRCP 54(b). Eighth Judicial District Court, Clark County; Timothy C. Williams, Judge.

Robinson was the CEO of Virtual Communications Corporation (VCC), a Nevada corporation.¹ VCC raised capital by issuing promissory notes to individual investors from numerous states, including Reva Waldo. To incentivize the purchase of the notes, the promissory notes came with a personal guaranty signed by Robinson. The personal guaranty “unconditionally” guaranteed Waldo a return on her investment. VCC also mentioned a personal guaranty in its marketing materials and used a PowerPoint presentation to explicitly show that Robinson’s net worth was over 17 million dollars to demonstrate that Robinson’s personal guaranty was meaningful. To obtain investors, VCC contracted with a company called Retire Happy. Retire Happy, in exchange for soliciting potential investors on behalf of VCC, would take a small percentage of the money from each principal amount secured for VCC.

¹We recount the facts only to the extent necessary for our disposition.

Waldo is an elderly woman from Ohio who suffers from dementia. In 2014, a representative of Retire Happy contacted Waldo and offered her an opportunity to earn nine percent annual interest on her money by purchasing a VCC promissory note. The representative explained that VCC, a new corporation, was preparing to market a new technological invention. To do so, VCC required capital and expected to do well after receiving the initial funding from the promissory notes.

The promissory notes were generally for an 18-month duration, during which time VCC would pay nine percent interest to the noteholder. Upon the completion of the note's duration, VCC pledged to return the investor's principal investment in the promissory note. The notes also came with penalty provisions; if VCC defaulted, for example, the note required VCC to pay a five-percent non-compounding penalty as well as the accrued interest and any attorney fees. As a final incentive, Retire Happy's representative told Waldo of Robinson's personal guaranty of the terms of the promissory note, including the investor's initial investment in the note. Waldo agreed to invest \$111,000 in VCC and purchased a VCC promissory note.

From there, Waldo dealt with another third-party, Provident Trust Group (Provident), to create a self-directed individual retirement account (IRA) to hold the promissory note and transfer the money to VCC. In April 2014, Provident facilitated the transaction between Waldo and VCC by accepting the transfer of Waldo's retirement money into the IRA and then transferring the funds to VCC and receiving a promissory note in return to hold for the benefit of Waldo. Waldo's agreement with Provident made it clear that Provident was only a passive intermediary. Provident did not direct, reallocate, or otherwise manage Waldo's funds; it simply

performed the transaction between Waldo and VCC in the amount Waldo directed.

Pursuant to the promissory note, VCC made timely interest-only payments through January 2015. In February 2015, however, VCC defaulted, and Waldo sued. In her suit, Waldo named two corporations, VCC and Retire Happy, as well as Robinson and other prominent individuals with both corporations. In 2018, before Waldo's case went to trial, VCC filed Chapter 11 bankruptcy and her claims against VCC were stayed.² VCC prepared its bankruptcy plan in bankruptcy court as Waldo's claims against Robinson and other individuals continued in the district court.

Prior to trial, Waldo filed a motion for summary judgment on select issues, which the district court granted. Notably, the district court determined that the VCC promissory notes were securities under Nevada law. The district court also considered Robinson's pretrial motion to dismiss based on Waldo's alleged failure to join a necessary party, Provident. While litigating the necessary party issue, Waldo filed a document signed by a Provident representative that delegated and assigned any duties and rights Provident may have possessed as the custodian of the note to Waldo. On this and other evidence, the district court concluded Provident was not a necessary party because Waldo, not Provident, "directed and controlled the investments."

²Robinson, in his individual capacity, was not a party to the bankruptcy.

Waldo's trial against Robinson and other individuals from VCC and Retire Happy³ started on June 25, 2018; however, VCC's bankruptcy plan remained unconfirmed. At trial, testimony covered the general operations of VCC, detailing its relationship with Retire Happy and how individuals like Waldo came to invest in a promissory note from VCC. To rebut Robinson's assertion that his electronic signature was used on the notes without his permission, Waldo introduced the PowerPoint that VCC used to entice investors by disclosing Robinson's net worth of over 17 million dollars, to presumably show he was financially secure enough to honor his personal guaranty. Waldo also produced emails that showed Robinson's assistant sending Retire Happy the pre-signed promissory note "for the sake of . . . not having to deal with different schedules." Waldo also called Robinson's assistant, Alisa Davis, as a witness to verify she sent the pre-signed note. Davis testified that she never did anything without Robinson's approval or direction.

The parties agreed to simultaneously submit closing arguments in writing, which were due on September 4, 2018. Around this same time, the bankruptcy court confirmed VCC's bankruptcy plan. Under the bankruptcy plan, the promissory noteholders, like Waldo, held an "impaired" interest under the final plan, and the plan provided that Waldo would receive "a pro rata share" of VCC stock in satisfaction of VCC's debt to her. On September 20, to apprise the district court of the status of VCC's bankruptcy, the parties submitted the approved bankruptcy plan to the

³The other defendants, Alisa Davis from VCC and Julie Minuskin from Retire Happy, were dismissed from the case before the parties submitted it to the district court for a decision.

district court.⁴ In February, the district court found for Waldo. It concluded that Robinson intended to guarantee the promissory note and that Robinson's debt to Waldo pursuant to the guaranty survived VCC's bankruptcy. Moreover, it found Robinson liable under Nevada securities law.

To remedy Waldo's injury, the district court awarded Waldo \$208,146. The district court awarded Waldo her initial investment of \$111,000 in the promissory note, added the note's nine-percent interest rate as well as other penalties contained in the note, and attorney fees and costs. Despite finding Robinson liable for securities violations under NRS 90.660, the district court did not calculate damages under that statute.

Robinson appealed, but the supreme court dismissed the appeal after determining that the challenged judgment did not fully resolve the matter because the district court had not issued a written order dismissing defendants Minuskin and Davis, which in turn resulted in the district court order certifying the judgment as final under NRCP 54(b). This appeal followed.

On appeal Robinson argues that (1) VCC's bankruptcy paid Waldo in full, satisfying Robinson's debt under the personal guaranty; (2) the district court's judgment is flawed due to Waldo's failure to join Provident, an allegedly necessary party; (3) the district court erred when it determined Waldo presented substantial evidence to support her claims; and (4) the district court abused its discretion by awarding attorney fees in

⁴Despite coming after the close of evidence, the parties did not dispute the admissibility of the late-stage bankruptcy plan.

an amount equal to Waldo's contingency fee agreement.⁵ We address each of Robinson's arguments in turn.

First, Robinson argues that VCC's payment of stock to individual noteholders through its bankruptcy plan operated to satisfy VCC's debt and, in turn, satisfied any liability he may have had under his personal guaranty. In other words, because VCC paid its debt to Waldo in VCC stock, pursuant to the bankruptcy plan, there is no underlying obligation left for Robinson to guarantee here. Waldo argues that Robinson's debt as a personal guarantor exists independent of VCC's bankruptcy. She further contends that Robinson failed to prove the value of VCC stock, and therefore, the district court was correct to refuse to offset Robinson's debt under the guaranty.

We review a district court's damages calculations for an abuse of discretion. *Flamingo Realty v. Midwest Dev.*, 110 Nev. 984, 987, 879 P.2d 69, 71 (1994). A bankruptcy only discharges debts of the bankrupt entity. 11 U.S.C. § 524(e). And a corporate executive incurs separate, personal liability when the terms of a promissory note provide for such liability. *Threlkel v. Shenanigan's*, 110 Nev. 1088, 1093, 881 P.2d 674, 677 (1994)

⁵Robinson also, somewhat confusingly, challenges punitive damages and damages awarded under Nevada's deceptive trade practices statutes; however, the district court awarded neither damages under the deceptive trade practices statute nor did it award punitive damages. Without harm to Robinson, we decline to analyze these claims at length. However, the district court did find Robinson violated the deceptive trade practices statutes, and we take this opportunity to affirm its finding of liability. As discussed herein, Robinson violated securities law under NRS Chapter 90, and a person may be liable under Nevada's deceptive trade practice statutes when he "fails to comply with any law or regulations for the marketing of securities or other investments" in the course of his business. NRS 598.092(5)(f).

“Nothing in the other documents detracts from the conclusion that the language ‘the undersigned do hereby personally guarantee the payment of this note’ means what it says.”). It is also true that “the payment or other satisfaction or extinguishment of the principal debt . . . by the principal . . . discharges the guarantor.” *First Interstate Bank v. Shields*, 102 Nev. 616, 619-20, 730 P.2d 429, 431 (1986). However, where the personal guaranty is unconditional, it may survive partial bankruptcy payouts. *United States v. Tharp*, 973 F.2d 619, 622-23 (8th Cir. 1992) (rejecting guarantor’s argument that, because the debtor corporation’s bankruptcy was full and final satisfaction, the personal guarantor was relieved of personal obligations (following *United States v. Beardslee*, 562 F.2d 1016 (6th Cir. 1977))). And guarantors may remain liable on a deficiency judgment after a creditor collects what it can from a debtor. See *First Interstate Bank*, 102 Nev. at 619, 730 P.2d at 431 (discussing guarantors and liability on deficiency judgments).

The *Tharp* opinion provides guidance on this issue. Tharp Brothers, Inc. (TBI) obtained a loan in exchange for a promissory note. 973 F.2d at 619. Both Tharp brothers signed personal guarantees as further security for the loan. *Id.* at 619-20. Each personal guaranty “unconditionally guarantee[d]” TBI’s debts. *Id.* at 620. TBI later filed Chapter 11 bankruptcy, and the plan “proposed to transfer real and personal property . . . to extinguish TBI’s debt.” *Id.* The creditor in *Tharp* then sold the assets from TBI “in consideration of the extinguishment of all indebtedness owed by TBI to [the creditor].” *Id.* The creditor then sued the Tharp brothers for the balance of the debt not satisfied. *Id.* The Tharps argued “that the terms of the bankruptcy plan, approved by [the creditor], fully satisfied and extinguished any debt due to [the creditor], and therefore,

any obligations under the guaranty agreements.” *Id.* at 621. The Eighth Circuit held that “the discharge of TBI in bankruptcy in no way relieved the Tharps of their obligations under the guaranty agreement.” *Id.* at 622.

The facts and arguments here are analogous to those in *Tharp*. Robinson, like the Tharp brothers, “unconditionally” guaranteed the terms of the promissory note. The bankruptcy plan giving Waldo an “impaired” interest in the promissory note, to be compensated by a pro rata share of stock under the plan, does not fully exonerate his unconditional guaranty to reimburse the investment in the promissory note. As discussed in *First Interstate Bank*, a guarantor may be liable for debts owed after a primary debtor pays what it can. Thus, the relevant question becomes by what amount must Waldo’s award be offset in recognition of the VCC stock she received?

The defense of offset or payment of an obligation is an affirmative defense, and the onus is on the defendant to prove the decrease in its liability. See NRCP 8(c)(1)(N) (listing “payment” as an affirmative defense); *Res. Grp., LLC v. Nev. Ass’n Servs.*, 135 Nev. 48, 53, 437 P.3d 154, 158 (2019) (“Payment of a debt is an affirmative defense, which the party asserting has the burden of proving.”); *Lavi v. Eighth Judicial Dist. Court*, 130 Nev. 344, 353, 325 P.3d 1265, 1271 (2014) (Pickering, J., dissenting) (discussing “Lavi’s answer asserting offset as an affirmative defense”), *superseded on other grounds by* NRS 40.495; *Aviation Ventures, Inc. v. Joan Morris, Inc.*, 121 Nev. 113, 119, 110 P.3d 59, 63 (2005) (agreeing that factual issues existed with respect to a party’s “affirmative defense of setoff”). Moreover, debts paid pursuant to a bankruptcy are either “impaired” or “unimpaired.” See 11 U.S.C. § 1124(1). An interest in bankruptcy is

presumed impaired unless the plan makes clear it does not alter the legal or contractual rights of the interest. *Id.*

The record on appeal offers little evidence regarding the value of VCC's stock. In this case, the district court heard evidence at trial before the bankruptcy court confirmed VCC's bankruptcy plan. Moreover, the district court did not see the confirmed bankruptcy plan until after the parties submitted their written closing arguments. Thus, the parties were unable to argue to the district court what impact, if any, the bankruptcy plan had on Robinson's liability under the guaranty.

Nonetheless, Robinson argued briefly offset in his written closing argument submitted to the district court. However, Robinson failed to produce any evidence demonstrating an objective valuation of VCC's stock, either below or on appeal. VCC's bankruptcy plan does not address the value of the stock.

Robinson has the burden to prove that the stock satisfied, partially or otherwise, the obligation owed on the \$111,000 note, executed for the benefit of Waldo's IRA, pursuant to the affirmative defense he raised below. Robinson failed to produce evidence to the district court that VCC stock had sufficient value to fully compensate Waldo such that he should be relieved of liability under his personal guaranty. Although we note that the bankruptcy plan, which awarded Waldo an impaired interest in VCC's stock, was not finalized until after the parties submitted closing statements, this in no way prevented Robinson from demonstrating at trial the value of the shares of stock in order to offset his liability under the guaranty.

Accordingly, we cannot conclude that the district court abused its discretion in finding that the promissory note or VCC stock had no value

when it calculated damages and awarded Waldo the full amount Robinson owed pursuant to his personal guaranty.

Second, Robinson argues that the judgment of the district court is flawed because the district court failed to join Provident as a necessary party. Robinson argues that Provident is a trustee with typical trustee duties. In Robinson's view, Provident is a trustee subject to the rules generally applicable in trust-based litigation; for example, that the trustee—not the beneficiary—must bring claims for breach under the trust, or in this case, the promissory note. Robinson argues that the district court erred by failing to include Provident as a necessary party. We disagree with Robinson's assertion that Provident was a trustee under the facts and circumstances of this case.

We review the district court's legal conclusions de novo. See *Power Co. v. Henry*, 130 Nev. 182, 186, 321 P.3d 858, 860-61 (2014). On this question, a self-directed IRA creates an atypical scenario. A self-directed IRA "is unique in that the owner or beneficiary of the IRA acts as the trustee for all intent [sic] and purposes." *FBO David Sweet IRA v. Taylor*, 4 F. Supp. 3d 1282, 1285 (M.D. Ala. 2014) [hereinafter *Sweet*] (addressing the propriety of IRA beneficiary as plaintiff); see also *Brady v. Park*, 445 P.3d 395, 423 (Utah 2019) (following *Sweet*). In these cases, the beneficiary may sue on a breach, on behalf of the IRA, as the proper plaintiff. *Sweet*, 4 F. Supp. 3d at 1285.

In this case, Provident is not a trustee. The IRA agreement at issue gave Waldo, not Provident, the power to direct the investment of her assets. Waldo elected to send money to VCC; Provident merely facilitated that transaction. There is no evidence that Provident reallocated or otherwise managed Waldo's funds without the express direction of the

noteholder herself. For all intents and purposes, Waldo acted as trustee, managed her funds as the beneficiary of the self-directed IRA, and may sue on the breach as the proper plaintiff.

Waldo was the proper plaintiff as the beneficiary in a self-directed IRA; therefore, the district court did not err by proceeding.

Third, Robinson attacks Waldo's evidence as insufficient and highlights his own trial testimony to support his argument that the district court erroneously concluded that Robinson intended to personally guarantee the promissory notes. Waldo points to evidence in the record that discredits Robinson's version of events.

We defer to the district court's factual findings "unless they are clearly erroneous or not based on substantial evidence." *May v. Anderson*, 121 Nev. 668, 672-73, 119 P.3d 1254, 1257 (2005). "Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion." *Hall v. SSF, Inc.*, 112 Nev. 1384, 1389, 930 P.2d 94, 97 (1996) (internal quotations omitted).

Here, we conclude substantial evidence supports the district court's conclusion that Robinson intended to guarantee the promissory notes. Robinson approved the dissemination of the VCC PowerPoint and its description of the personal guaranty along with Robinson's net worth. This evidence supports the position that Robinson approved the use of his signature and intended to encourage contributions to VCC based on his personal guaranty as he was a wealthy individual who was able to guarantee the promissory notes. In addition, his assistant contradicted Robinson's version of events.

Thus, the district court possessed substantial evidence to conclude Robinson intended to guarantee the promissory note.

Fourth, Robinson challenges the district court's conclusion that the promissory notes are securities and contends that, because the notes are not securities, he cannot be liable under NRS Chapter 90. This issue was resolved during a pretrial hearing. On appeal, both sides argue under the relevant supreme court opinion, *State v. Friend*, 118 Nev. 115, 40 P.3d 436 (2002). Robinson argues the district court erred in finding the notes were securities while Waldo asserts it correctly applied the *Friend* test. We disagree with Robinson.

We review partial summary judgment rulings de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005); *see also Selsnick v. Horton*, 96 Nev. 944, 946, 620 P.2d 1256, 1258 (1980) (applying NRCF 56 in the partial summary judgment context). When reviewing a summary adjudication, "the evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party." *Wood*, 121 Nev. at 729, 121 P.3d at 1029.

The "family resemblance" test governs whether a note is a security under Nevada's securities act. *Friend*, 118 Nev. at 121, 40 P.3d at 439-40. To begin, the test presumes all notes are securities. *Id.* at 121, 40 P.3d at 440. The presumption is rebuttable if four factors—motivation, distribution, expectations, and other security laws—support such a rebuttal. *Id.* at 122-24, 40 P.3d at 439-41. The "motivation" factor supports a security determination "[i]f the seller's purpose is to raise money for the general use of a business enterprise or to finance substantial investments and the buyer is interested primarily in the profit . . . , the instrument is likely to be a security." *Id.* at 121, 40 P.3d at 440 (quoting *Reves v. Ernst & Young*, 494 U.S. 56, 66 (1990)). The "distribution" factor analyzes the extent the note was advertised or distributed; a broad distribution supports a

conclusion that a note is a security. *Id.* at 122-23, 40 P.3d at 440-41. The “expectation” prong asks if the purchaser reasonably viewed the note as an investment, even if she did not view the investment as stocks or shares in the corporation. *Id.* at 123, 40 P.3d at 441.

Applying the presumption that notes are securities, we cannot conclude Robinson rebutted this presumption. The promissory notes were sold to investors to raise money for VCC’s new technology, and this “motivation” of raising supports a conclusion that the notes are securities. Additionally, the “distribution” factor supports the conclusion that the promissory notes are securities because Waldo was in Ohio when she received word of the Nevada-based corporation’s offer, indicating an interstate distribution which again supports that the nature of the promissory note was that of a security. Finally, the “expectation” prong likely supports the district court’s decision because Waldo would not have given the money to VCC unless she expected to make a profit like the purchasers of the notes in *Friend*. Robinson is correct, however, that Waldo’s mental state prevented her testimony on this issue; giving him the benefit of the favorable inference, we determine this factor is neutral.⁶

Notwithstanding the indifferent factor, and assuming it pushes in Robinson’s favor, we conclude the district court reliably applied the *Friend* test, and it did not err when it concluded Robinson failed to rebut the presumption that the promissory notes were securities. Nevertheless, the district court did not award compensatory damages for Waldo’s investment in VCC based on violations of NRS Chapter 90.

⁶Robinson does not argue under the fourth prong of *Friend*’s analysis.

Finally, Robinson challenges Waldo's attorney fee award on the basis that her attorney took the case on a contingent fee and did not keep meticulous track of his time. Robinson argues the attorney's "educated guess" on the hours he dedicated to this litigation is insufficient. Unable to discern an abuse of discretion, we affirm.⁷

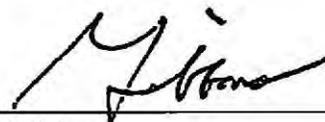
We will not disturb an award of fees absent an abuse of discretion. *Kahn v. Morse & Mowbray*, 121 Nev. 464, 479, 117 P.3d 227, 238 (2005). "In determining the amount of fees to award, the [district] court is not limited to one specific approach; its analysis may begin with any method rationally designed to calculate a reasonable amount, including . . . a contingency fee." *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 864, 124 P.3d 530, 549 (2005). In fact, we have held "district courts cannot deny attorney fees because any attorney, who represents a client on a contingency fee basis, does not submit hourly billing records." *O'Connell v. Wynn Las Vegas, LLC*, 134 Nev. 550, 551, 429 P.3d 664, 666 (Ct. App. 2018). Independent of billing method, district courts must still "consider the *Brunzell* factors in determining whether the requested fee amount is reasonable and justified." *MEI-GSR Holdings, LLC v. Peppermill Casinos, Inc.*, 134 Nev. 235, 245, 416 P.3d 249, 258 (2018); *see also Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969) (setting forth factors for "determining the reasonable value of an attorney's services"). However, the district court need not spell out each *Brunzell* factor in its order. *Logan v. Abe*, 131 Nev. 260, 266, 350 P.3d 1139, 1143

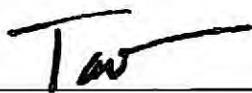
⁷We note that the parties devoted significant time to the calculation of damages under NRS 90.660; however, the district court did not perform that calculation.

(2015) (“[E]xpress findings on each factor are not necessary for a district court to properly exercise its discretion.”).

The district court reviewed the parties’ detailed moving papers and considered the *Brunzell* factors. The *Shuette* court approved of contingent fee awards in theory, so the precise question on these issues is whether the award is reasonable considering the factors set forth in *Brunzell*. The district court’s order does not spell out the factors explicitly, but it does acknowledge *Brunzell* and finds the contingency fee reasonable. Considering the age and complexity of the case, we cannot conclude that the district court abused its discretion when it awarded Waldo her attorney fees in the amount of her attorney’s contingency fee. Accordingly, we

ORDER the judgment of the district court AFFIRMED.⁸


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

⁸To the extent Robinson raised other arguments on appeal, we have considered the same and find them unpersuasive.

cc: Hon. Timothy C. Williams, District Judge
TRILAW
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