IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RONALD J. ROBINSON,
Appellant,
vs.
STEVEN A. HOTCHKISS; ANTHONY WHITE; ROBIN SUNTHEIMER; TROY SUNTHEIMER; STEPHENS GHESQUIERE; JACKIE STONE; GAYLE CHANY; KENDALL SMITH; GABRIELE LAVERMICOCCA; AND ROBERT KAISER,
Respondents.

No. 83250-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 under NRCP 54(b). Eighth Judicial District Court, Clark County; Cristina D. Silva, Judge.

Robinson was the CEO of Virtual Communications Corporation (VCC), a Nevada corporation.[1] In 2013 and 2014, VCC raised capital by issuing promissory notes to individual investors from numerous states, including Steven Hotchkiss.[2] To incentivize the purchase of the notes, the promissory notes came with a personal guaranty signed by Robinson. The personal guaranty "unconditionally" guaranteed investors like Hotchkiss a return on their investment. VCC also mentioned the personal guaranty in its marketing materials and used a PowerPoint presentation to explicitly

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

[2]The other respondents in this case purchased promissory notes like Hotchkiss and sued on the same theories. The parties stipulated to the consolidation of the two suits before trial. Hotchkiss was the only plaintiff to testify at trial.

show that Robinson's net worth was over 17 million dollars to demonstrate that Robinson was capable of honoring the personal guaranty. 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.

Hotchkiss, a note purchaser from Nebraska, received a call from Retire Happy about VCC's offering of promissory notes. An employee of Retire Happy described the notes and explained that VCC needed startup capital to get its new technological invention to market. If Hotchkiss provided the capital, the representative explained, he would receive a promissory note upon which VCC agreed to pay interest-only payments before returning his principal investment later. Hotchkiss's experience was typical of the many other people that provided money to VCC in exchange for a promissory note.

The promissory notes were generally for an 18-month duration, during which time VCC would pay nine percent annual interest to the noteholder. Upon the completion of the note's duration, VCC pledged to return the investors' 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. Hotchkiss agreed to invest $75,000 in exchange for a promissory note.

From there, Hotchkiss 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. Provident facilitated the transactions between the plaintiffs

and VCC by accepting the transfer of the plaintiffs' funds into the IRA account and then transferring the funds to VCC and receiving a promissory note in return to hold for the benefit of Waldo. Provident's agreement with Hotchkiss and the other noteholders made it clear that Provident was only a passive intermediary. Provident did not direct, reallocate, or otherwise manage funds of noteholders; it simply performed the transaction between VCC and the noteholders in the amounts the noteholders directed.

Pursuant to the notes, VCC made the interest-only payments through January 2015. In February 2015, VCC defaulted on the notes. In September 2017, Hotchkiss filed his complaint against Robinson. His suit alleged breach of contract on Robinson's personal guaranty and violations of Nevada securities laws. The suit named other parties, including VCC itself and Vernon Rodriguez, VCC's CFO.

Prior to trial, VCC filed Chapter 11 reorganization bankruptcy.[3] As a result, Hotchkiss's lawsuit against VCC was stayed in accordance with the bankruptcy code. The bankruptcy court confirmed VCC's bankruptcy prior to trial in this matter. As a part of its bankruptcy, VCC issued a "pro rata share" of stock to the noteholder creditors. For example, Hotchkiss received 15,000 shares of VCC stock. According to VCC's Chapter 11 bankruptcy plan, its issuance of these shares represented full and final satisfaction of VCC's debt on the promissory notes. However, the same plan listed the noteholders' interest, including Hotchkiss's, as an "impaired" interest under the bankruptcy code.

Shortly after the resolution of VCC's bankruptcy, the case proceeded to bench trial. Hotchkiss explained his experience with VCC and

[3]Robinson, in his individual capacity, was not a party to the bankruptcy proceeding.

that he gave VCC $75,000 in exchange for a promissory note. When responding to Retire Happy's information about VCC, Hotchkiss noted the favorable nine percent interest rate and Robinson's personal guaranty were main selling points. After Hotchkiss's testimony, Robinson's assistant, Alisa Davis, testified and discredited Robinson's version of events. In particular, she stated she sent the pre-signed notes out and she did not take any actions without Robinson's directions, rebutting Robinson's claim that his signature was used without his knowledge or permission. Hotchkiss produced other evidence, including internal VCC emails and marketing materials, that tended to prove Robinson knew of and intended to personally guarantee the promissory notes.

After trial, the district court ordered the parties to submit closing arguments in writing. After considering the evidence elicited at trial and closing arguments, the district court found Robinson liable as both a control person under Nevada securities statutes and for breach of contract as the personal guarantor of the promissory note. The district court also determined Provident was not a necessary party and proceeded to find Robinson liable to Hotchkiss and the other noteholders. After finding Robinson liable, the district court requested additional briefing on damages. By this time, Robinson's co-defendant, Rodriguez, retained different counsel. Rodriguez submitted his brief on the issue of damages and Robinson joined that pleading and filed his own motion regarding damages. In his motion, Robinson reargued liability and challenged the propriety of the district court's order.

Unpersuaded by either Robinson's arguments or his joinder to Rodriguez's motion, the district court explained its award of damages against Robinson and Rodriguez:

> Because plaintiffs prevailed on both their breach of contract claim and securities law claim against Defendant Ronald Robinson, Plaintiffs are entitled to damages and attorney's fees on both claims. . . . As a result, Plaintiffs are awarded damages and attorney's fees *on their breach of contract claims* against Defendant Robinson in the amount of $1,098,782. . . .
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> *As to Defendant Rodriguez*, he is also liable as a control person, and per NRS §90.660 Plaintiffs are entitled to an award of damages and attorney's fees on this successful claim in the amount of $960,401.

Despite having the final issue of damages resolved, Rodriguez, through his new counsel, still had motions pending before the district court. Robinson, hoping to appeal the issue as soon as possible, moved for NRCP 54(b) certification. The district court granted that motion, and Robinson appeals from the district court's NRCP 54(b) certified order.

In this appeal, we consider several of Robinson's arguments. First, we answer whether the district court's judgment is flawed for failure to join a necessary party. Next, we address Robinson's claim that the VCC bankruptcy should completely offset his liability here. We conclude by briefly addressing Robinson's challenges to the district court's finding of liability under NRS 90.660, as well as his challenge to the amount of attorney fees awarded by the district court.

We first address Robinson's argument that the judgment against him is void for the district court's failure to join Provident as a necessary party. This issue arises under rules of procedure, and we review decisions of law, like those made under the Nevada Rules of Civil Procedure, de novo. *See Power Co. v. Henry*, 130 Nev. 182, 186, 321 P.3d 858, 860-61 (2014). Robinson argues that the judgment of the district court is fatally flawed because the district court failed to join Provident as a necessary

party. 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 necessary party. We disagree with Robinson's assertion that Provident was a trustee under the facts and circumstances of this case.

Self-directed IRA accounts create atypical scenarios. 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 agreements at issue gave the noteholders, not Provident, the power to direct the investment of their assets. The noteholders elected to send money to VCC; Provident merely facilitated those transactions. There is no evidence that Provident reallocated or otherwise managed the noteholders' funds without the express direction of the noteholders themselves. For all intents and purposes, the noteholders acted as trustees and were the managers of their own funds, as beneficiaries of the self-directed IRA, and are therefore permitted to sue on the breach as the proper plaintiffs.

Because the noteholders were permitted to proceed as the proper plaintiffs, as they were the beneficiaries on self-directed IRA

accounts, we do not find error with the district court's decision to decline to join Provident as a necessary party.

We turn now to Robinson's argument that VCC's bankruptcy reorganization plan satisfied both VCC's debt and, consequently, any debt owed on his personal guaranty. Robinson argues that VCC's issuance of stock to individual noteholders through its bankruptcy operated as a "full and final satisfaction" of VCC's debt and, in turn, operated to similarly satisfy any liability he may have owed under a promissory note. In other words, because any debts owed to the promissory noteholders like Hotchkiss were fully satisfied by the issuance of VCC stock through the bankruptcy plan, there is nothing left for Robinson to guarantee. As a final note, Robinson testified that VCC will be profitable; he used this point to argue the shares distributed to the noteholders possess value or will increase in value soon, permitting the noteholders to recover their investments. Hotchkiss argues that Robinson's debt as a personal guarantor exists independent of VCC's bankruptcy and any distribution of VCC stock.

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). To begin with, 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) ("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 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. The personal guaranty "unconditionally guarantee[d]" TBI's debts. *Id.* at 620. TBI later filed Chapter 11 bankruptcy, and the bankruptcy 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 notes. Robinson is incorrect that the bankruptcy plan's payout of a pro rata share of VCC stock on the noteholders' "impaired" interest in the promissory notes fully satisfies his unconditional guaranty. As discussed in *First Interstate Bank*, a guarantor may be partially liable for debts owed after a primary debtor pays what it can. Thus, the relevant question becomes by what amount must the plaintiffs' award be offset given their receipt of VCC stock?

The defense of offset or payment of an obligation is an affirmative defense; the onus is therefore 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 "Vision'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 the VCC stock issued to satisfy VCC's debt in its bankruptcy. The district court heard Hotchkiss's contradictory testimony on the issue. On one hand, Hotchkiss believed the shares of VCC stock were worthless. On the other hand, Hotchkiss testified vaguely that another source told him his 15,000

shares were worth five dollars each. This was the extent of quantitative evidence presented at trial on the issue, and we cannot fault the district court for placing more weight in Hotchkiss's firsthand opinion. The bankruptcy plan speaks to this point in two additional and important ways. First, it provides that Hotchkiss and the other noteholders would receive a pro rata share of VCC stock. Second, it notes that the noteholders possess an "impaired" interest, meaning bankruptcy altered their rights under the notes. However, the bankruptcy plan does not address the value of the VCC stock awarded on the noteholders' impaired interest. Therefore, we conclude the plan further supports Hotchkiss's position that the stock's value cannot be determined to reduce Robinson's debt due and owing under his personal guaranty.

Nonetheless, Robinson asked the district court to find Hotchkiss and the other noteholders were paid in full by the VCC stock. The district court disagreed and determined that the VCC shares of stock were worthless. We cannot say this constituted an abuse of discretion because Robinson failed to present competent evidence of the stock's current value. *See Yount v. Criswell Radovan, LLC*, 136 Nev. 409, 414-15, 469 P.3d 167, 171-72 (2020) (refusing to disturb lower court factual rulings absent clear error or insubstantial evidence).

Next, we address Robinson's challenges under Nevada securities laws. We first note that the district court found Robinson liable under NRS Chapter 90 because it determined the promissory notes were securities.[4] Problematically, the district court's order is unclear as to

[4]For the first time, Robinson argues here that the statute of limitations should have barred the claims under Nevada's securities statutes. This argument is untimely. Statute of limitations is an

whether it awarded damages against Robinson under Chapter 90. As quoted in full above, the award distinguishes between Robinson's penalty on breach of contract theory and Rodriguez's penalty under Nevada's securities laws, despite finding Robinson liable under both theories.

Nevertheless, we affirm the district court's application of *State v. Friend*, 118 Nev. 115, 40 P.3d 436 (2002), because Robinson did not rebut the presumption that notes are securities below and his argument is unpersuasive on appeal. The "family resemblance" test governs whether a note is a security under Nevada's securities act. *Id.* 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

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affirmative defense. NRCP 8(c)(1)(R). A defendant waives an affirmative defense where his later invocation of the defense deprives the opposing party of an opportunity to address the same. *See Williams v. Cottonwood Cove Dev. Co.*, 96 Nev. 857, 860, 619 P.2d 1219, 1221 (1980) ("Failure to timely assert an affirmative defense may operate as a waiver if the opposing party is not given reasonable notice and an opportunity to respond."). Robinson did not assert the statute of limitations defense at trial, so Hotchkiss did not have an opportunity to respond. We conclude here that Robinson waived any defense under the statute of limitations by continuing through trial without raising it.

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 stock or shares in the corporation. *Id.* at 123, 40 P.3d at 441.

Every factor supports Hotchkiss's position. The notes were sold to raise capital for VCC, and such a motivation suggests the notes are securities. Robinson and VCC broadly distributed the notes to several states, suggesting again that the notes were securities. Finally, Hotchkiss indicated that he purchased a note because he found the nine-percent interest rate appealing; he expected to make money on the note. This also suggests the notes were securities. Thus, the district court properly applied the *Friend* test; the notes are securities and Robinson failed to register the securities, violating securities law.[5]

Having affirmed the district court's conclusion that a securities violation occurred, we next address damages. Because of the note's interest rate and penalty terms, the amount awarded against Robinson under the breach of contract theory would necessarily be greater than the amount awardable under the securities law. This is likely why the district court did not award damages against Robinson on the securities theory. Therefore, Robinson's damages challenge is inconsequential. *See Elyousef v. O'Reilly & Ferrario, LLC*, 126 Nev. 441, 444, 245 P.3d 547, 549 (2010) ("When a plaintiff asserts claims under different legal theories, he or she is not entitled to a separate compensatory damage award under each legal theory." (internal quotes omitted)). Moreover, considering our affirmance of Robinson's liability as the personal guarantor of the note, and without

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[5]The parties do not argue under the "other security laws" prong of the *Friend* test.

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Rodriguez as a party here, we decline to address the district court's calculations under NRS 90.660 as those relate only to Rodriguez. Further, we take no position on the extent to which Robinson is jointly and/or severally liable with Rodriguez.

Finally, we analyze Robinson's challenge of the plaintiffs' attorney fee award based on their contingency fee agreement with counsel. Robinson challenges the noteholders' fee award on the basis that their attorney took the case on a contingent fee basis and did not keep adequate track of his time. Robinson further argues the attorney's "educated guess" on the hours he dedicated to this litigation is insufficient to support the award.

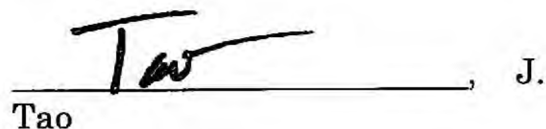
We will not disturb an award of fees absent an abuse of discretion. *Kahn v. Morse & Mowbray*, 121 Nev. 464, 479, 117 P.3d 227, 238 (2005). "In determining the amount of fees to award, the [district] court is not limited to one specific approach; its analysis may begin with any method rationally designed 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").

The district court here considered the *Brunzell* factors when determining an appropriate attorney fee award based on the contingency fee agreement. The district court expressly considered the factors and concluded Hotchkiss and the other noteholders were entitled to an award equal to the contingent fee agreement. Therefore, we cannot conclude that the district court abused its discretion in awarding attorney fees. Accordingly, we

ORDER the judgment of the district court AFFIRMED.[6]

_______________, C.J.
Gibbons



_______________, J.
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cc: Chief Judge, Eighth Judicial District Court
Eighth Judicial District Court, Department 9
Law Offices of Michael F. Bohn, Ltd.
The Law Offices of David Liebrader, APC
Eighth District Court Clerk

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