

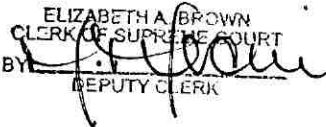
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TERRANCE WALKER, AN
INDIVIDUAL,
Appellant,
vs.
PHAZZER LLC, A FOREIGN
CORPORATION,
Respondent.

No. 85608-COA

FILED

OCT 10 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Terrance Walker appeals from a district court order granting summary judgment in favor of respondent. Second Judicial District Court, Washoe County; Egan K. Walker, Judge.

Walker filed a complaint on April 13, 2022, alleging respondent Phazzer LLC (Phazzer) was liable for money damages based upon breach of contract and unjust enrichment. Walker served Phazzer with the summons and complaint on May 3, 2022. On May 25, 2022, Walker filed notices of his intention to seek a default and he also obtained a clerk's default. On June 2, 2022, Phazzer filed its answer. Walker moved for a default judgment. Phazzer subsequently opposed Walker's motion for a default judgment and moved the district court to set aside the default. The district court ultimately entered an order denying Walker's motion for entry of a default judgment and it set aside the clerk's default.

Phazzer later moved for summary judgment, arguing that Walker was not a party to the relevant contract and thus he lacked standing to pursue a breach of contract action. Phazzer attached to the motion for summary judgment a contract and an authenticating declaration. Walker filed several documents in which he made general arguments opposing Phazzer's motion for summary judgment and requested a continuance to permit him to obtain discovery. Walker also filed a special motion to dismiss pursuant to Nevada's anti-SLAPP statute, which sought dismissal of Phazzer's defenses. Phazzer opposed Walker's motion to continue and the special motion to dismiss.

The district court conducted a hearing concerning Phazzer's motion for summary judgment and all of Walker's pending motions. The district court subsequently issued a written order granting Phazzer's motion for summary judgment and denying Walker's pending motions. The court's order notes that Phazzer produced evidence demonstrating that Walker was not a party to the relevant contract. The court also noted that Walker had repeatedly assured the court that he would produce evidence demonstrating that he was actually a party to the contract, but that Walker failed to introduce such evidence in opposition to Phazzer's motion. The district court concluded that Walker thus failed to meet his burden to produce evidence sufficient to show that a genuine dispute of material fact remained and, as a result, it granted summary judgment in favor of Phazzer. This appeal followed.

Motion for summary judgment

First, Walker argues that the district court erred by granting Phazzer's motion for summary judgment. Walker contends that Phazzer did not assert a coherent defense and that the court failed to consider whether he had the capacity to sue Phazzer. Walker also asserts the district court denied him a meaningful opportunity to discuss matters related to the motion for summary judgment at the hearing on the motion and that Phazzer failed to authenticate the evidence it submitted in support of its motion.

This court reviews a district court's order granting summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper if the pleadings and all other evidence on file demonstrate that no genuine dispute of material fact exists and that the moving party is entitled to judgment as a matter of law. *Id.* When deciding a summary judgment motion, all evidence must be viewed in a light most favorable to the nonmoving party. *Id.* General allegations and conclusory statements do not create genuine disputes of fact. *Id.* at 731, 121 P.3d at 1030-31.

The party moving for summary judgment must meet its initial burden of production to show there exists no genuine dispute of material fact. *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 602, 172 P.3d 131, 134 (2007). The nonmoving party must then "transcend the pleadings and, by affidavit or other admissible evidence, introduce specific facts that show a genuine [dispute] of material fact." *Id.* at 603, 172 P.3d at 134. Evidence introduced in support of, or opposition to, a motion for summary

judgment must be admissible evidence. NRCp 56(c); *Henry Prods. v. Tarmu*, 114 Nev. 1017, 1019, 967 P.2d 444, 445 (1998). Because authentication is a condition precedent to admissibility, all evidence presented in connection with a summary judgment proceeding must be authenticated. NRS 52.015. "When affidavits are offered in support of a motion for summary judgment, they . . . must not only be made on the personal knowledge of the affiant, but must show that the affiant possesses the knowledge asserted." *Daugherty v. Wabash Life Ins. Co.*, 87 Nev. 32, 38, 482 P.2d 814, 818 (1971); *see also* NRS 53.045 (explaining a properly executed unsworn declaration may be utilized in place of an affidavit).

Our de novo review of the district court's grant of summary judgment demonstrates that Walker is not entitled to relief. Phazzer contended that it was entitled to judgment as a matter of law because Walker was not a party to the relevant contract and he was therefore not entitled to any benefit under the circumstances at issue in this matter. In support of the motion, Phazzer submitted a contract and authenticating declaration showing that there was a contract only between it and Walker Development & Trading Group Inc., a Delaware corporation (Walker Development). The contract specified that the work was to be performed by Walker Development and any payments from Phazzer pursuant to the contract were to be made to Walker Development. Moreover, in the authenticating declaration, Phazzer's counsel stated that he had personal knowledge of the contract and that the attached document was a true and correct copy of the contract.

The authenticating declaration provided sufficient information to authenticate the contract, and thus, the district court properly reviewed the contract when it considered Phazzer's motion for summary judgment. See NRCP 56(c). And the contract provided evidence to support Phazzer's contention that Walker was unable to demonstrate liability based upon a breach of contract. See *Iliescu v. Reg'l Transp. Comm'n of Washoe Cty.*, 138 Nev., Adv. Op. 72, 522 P.3d 453, 458 (Ct. App. 2022) ("To prevail on a claim for breach of contract, the plaintiff must establish (1) the existence of a valid contract, (2) that the plaintiff performed, (3) that the defendant breached, and (4) that the breach caused the plaintiff damages.").

Moreover, because the evidence demonstrated that any work was to be performed by Walker Development and any payments were to be made only to Walker Development, the evidence established that Phazzer did not "retain[] a benefit which in equity and good conscience belongs" to Walker. See *Unionamerica Mortg. & Equity Tr. v. McDonald*, 97 Nev. 210, 212, 626 P.2d 1272, 1273 (1981). Therefore, the evidence supported Phazzer's contention that Walker was unable to demonstrate liability based upon unjust enrichment.

Because Phazzer produced evidence in support of its argument that there was no genuine dispute of material fact, to defeat summary judgment Walker "had the burden of presenting evidence showing a material [dispute] of fact." *Cuzze*, 123 Nev. at 603, 172 P.3d at 134. Below, Walker made general arguments concerning Phazzer's motion for summary judgment, but he did not submit evidence in support of his underlying claims. Walker thus failed to meet his burden to produce evidence in

opposition to Phazzer's motion for summary judgment, *see id.* at 602-03, 172 P.3d at 134, and his general allegations and conclusory statements were insufficient to create genuine disputes of material fact, *see Wood*, 121 Nev. at 731, 121 P.3d at 1030-31. In light of the previously mentioned circumstances, we conclude that the district court did not err by granting summary judgment in favor of Phazzer. Therefore, Walker is not entitled to relief based on this claim.

Continuance

Second, Walker argues that the district court abused its discretion by denying his request for a continuance for further discovery under NRCP 56(d). Walker contends that he should have been given the opportunity to investigate the accuracy of the declaration submitted with the motion for summary judgment to authenticate the relevant contract. Walker also appears to assert that he wished to obtain information as to whether the Phazzer executive that signed the contract actually had authority to do so.

"[A] motion for a continuance under [NRCP 56(d)] is appropriate only when the movant expresses how further discovery will lead to the creation of a genuine [dispute] of material fact." *Aviation Ventures, Inc. v. Joan Morris, Inc.*, 121 Nev. 113, 118, 110 P.3d 59, 62 (2005). "A district court's decision to refuse such a continuance is reviewed for abuse of discretion." *Id.*

Here, Walker's appellate contentions do not demonstrate how this specific additional discovery would have led to the creation of a genuine dispute of material fact given Walker's failure to produce any evidence to

support his claims in opposing summary judgment. *See Iliescu*, 138 Nev., Adv. Op. 72, 522 P.3d at 458; *Unionamerica Mortg.*, 97 Nev. at 212, 626 P.2d at 1273. Therefore, Walker is not entitled to relief based on this claim.

Default Judgment

Third, Walker argues that the district court abused its discretion by denying his motion for entry of a default judgment. We review a district court's decision to grant or deny a motion to set aside an entry of default for an abuse of discretion. *Cicerchia v. Cicerchia*, 77 Nev. 158, 161, 360 P.2d 839, 841 (1961), *superseded by rule on other grounds as stated in Vargas v. J Morales Inc.*, 138 Nev., Adv. Op. 38, 510 P.3d 777, 779-80 (2022). If a defendant desires to set aside the default, it must demonstrate good cause. *See* NRCP 55(c).

Here, the district court found that Phazzer filed an answer and promptly moved to set aside the default one day later, that it was clear that Phazzer had no intent to delay the proceedings, that Walker had given Phazzer reason to believe that it could delay filing an answer based on the nature of his court filings, and that Phazzer moved to set aside the default in good faith. The district court also noted the strong public policy in favor of resolving cases on the merits. For those reasons, the district court granted Phazzer's request to set aside the default. Based on the record before this court, we discern no abuse of discretion in this decision. *See Leavitt v. Siems*, 130 Nev. 503, 509, 330 P.3d 1, 5 (2014) ("An abuse of discretion occurs when no reasonable judge could reach a similar conclusion under the same circumstances."). Therefore, Walker is not entitled to relief based on this claim.

Anti-SLAPP special motion to dismiss

Fourth, Walker argues that the district court erred by denying his special motion to dismiss Phazzer's defenses pursuant to NRS 41.660, Nevada's anti-SLAPP law. We review a district court's decision concerning an anti-SLAPP motion to dismiss de novo. *Coker v. Sassone*, 135 Nev. 8, 10, 432 P.3d 746, 748-49 (2019). A special motion to dismiss pursuant to Nevada's anti-SLAPP law may be filed by the party "against whom the action is brought" in order to seek dismissal of an action based on that party's good-faith communications made in furtherance of the right to petition or free speech in direct connection with an issue of public concern. NRS 41.660(1)(a). In this case, Walker was the party that brought the action against Phazzer, and thus, he was not entitled to pursue a special motion to dismiss pursuant to NRS 41.660(1)(a). Accordingly, we conclude that the district court did not err by denying Walker's special motion to dismiss. Therefore, Walker is not entitled to relief based on this claim.

Attorney fees

Finally, Walker challenges the district court's postjudgment order awarding Phazzer attorney fees. An order granting attorney fees and costs is independently appealable as a special order after final judgment. See NRAP 3A(b)(8) (providing for appeals from special orders entered after a final judgment); *Smith v. Crown Fin. Servs. of Am.*, 111 Nev. 277, 280 n.2, 890 P.2d 769, 771 n.2 (1995). The record indicates that the court's order concerning attorney fees was entered after Walker initiated this appeal. Thus, Walker's challenge to the district court's postjudgment attorney fees

order are not properly before this court as part of this appeal, and we do not consider them in resolving this matter.

Accordingly, for the reasons set forth above, we

ORDER the judgment of the district court AFFIRMED.¹


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

cc: Hon. Egan K. Walker, District Judge
Terrance Walker
Jeffrey A. Dickerson
Washoe District Court Clerk

¹Insofar as Walker raises arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.