IN THE SUPREME COURT OF THE STATE OF NEVADA

FURTHER SOUTH, LLC, A NEVADA LIMITED LIABILITY COMPANY; AND JOSEPH GENOVESE, AN INDIVIDUAL,
Appellants,
vs.
ROYAL ESSEX, LLC, A NEVADA LIMITED LIABILITY COMPANY,
Respondent.

No. 84544

ORDER OF AFFIRMANCE

This is an appeal from district court orders granting motions for summary judgment and dismissing counterclaims in a business matter. Eighth Judicial District Court, Clark County; Nancy L. Allf, Judge.[1]

This case arises from the disbursement of funds in an LLC following bankruptcy. Essex Real Estate Partners, LLC (Essex) was formed in 2007 for the purpose of purchasing, developing, and reselling certain real property. Essex's operating agreement outlines three classes of membership: (1) Class A Common Units (CAC), (2) Class B Non-Voting Common Units, and (3) Series A Preferred Units (SAP). The SAP members provided the initial funding for Essex. There were originally four CAC members, two of which are relevant here: Landco Partners, LLC, which was owned or controlled by George Holman and comprised approximately 61% (Holman's CAC interest) of the total CAC; and Furthest South, LLC, comprised of 15%. Appellant Further South, LLC, is the successor entity to

[1]Pursuant to NRAP 34(f)(1), we have determined that oral argument is not warranted.

Furthest South. Appellant Joseph Genovese was the former managing member of Furthest South, and the current managing member of Further South.

Under the operating agreement, SAP members were entitled to a preferred return and the distribution of proceeds, which required that SAP members' return and initial contributions be paid in full. CAC members were entitled to a distribution after the SAP members were paid in full. Essex filed for Chapter 11 bankruptcy and its real property was sold for roughly $18.7 million pursuant to a reorganization plan. The bankruptcy court determined that the order of distribution would be dictated under state law and the terms of the operating agreement. The $18.7 million available under the reorganization plan is insufficient to cover the roughly $27 million owed to SAP members under the terms of the operating agreement.

Days before Essex filed for bankruptcy, respondent Royal Essex, LLC (Royal) purchased the Holman CAC interest, which made it the majority interest holder for the SAP members. Before the purchase, Holman, as manager of Essex, amended the operating agreement to allow for the sale of the interest without notice and a right of first refusal for the other members. A second amendment provided that SAP members would limit their recovery, and a third amendment created a new class of interest comprised solely of Royal, the Series B Preferred class, which would receive any proceeds leftover after the SAP members were paid in full.

Royal sought declaratory and injunctive relief as to its distribution priority rights and to enjoin Further South from sharing in any priority distributions. Further South filed an answer and counterclaim, alleging that Royal conspired with Holman to breach the contractual duty

of good faith and fair dealing by failing to provide Further South with notice of any proposed sale of the Class A membership interest, and thereby deprived Further South of its right of first refusal. Royal moved for summary judgment, arguing that the proceeds should be distributed to the SAP members, which the district court granted. The district court also granted Royal's motion to dismiss Further South's counterclaims. Further South appeals.

Further South argues that the district court erred by dismissing its counterclaim on the mistaken finding that Further South would not be entitled to damages even if the amendments to the operating agreement were declared invalid. We rigorously review an order granting an NRCP 12(b)(5) motion to dismiss for failure to state a claim upon which relief can be granted. *Blackjack Bonding v. City of Las Vegas Mun. Court.*, 116 Nev. 1213, 1217, 14 P.3d 1275, 1278 (2000). In doing so, we construe the pleadings liberally, accept all factual allegations in the complaint as true, and draw every fair inference in favor of the nonmoving party. *Simpson v. Mars Inc.*, 113 Nev. 188, 190, 929 P.2d 966, 967 (1997). A "complaint should be dismissed only if it appears beyond a doubt that [the nonmoving party] could prove no set of facts, which, if true, would entitle it to relief." *Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008).

Having reviewed the record, we conclude that Further South failed to demonstrate that it would have been entitled to a higher priority for purposes of the current bankruptcy distribution even if its allegations were true. Genovese declared below that Furthest South's charter was revoked in 2009, and Further South—its successor entity—acknowledged in its briefing that it was not reinstated until December 2020. Further

South failed to demonstrate that it would have had the ability and/or funding to purchase Holman's CAC interest before the bankruptcy. Regardless, Further South failed to demonstrate that it would be entitled to any funds if it had purchased all of Holman's CAC interest under the terms of the original operating agreement. This is because the SAP would retain a higher priority status for payment, and there are insufficient funds to cover the monies owed to the SAP members under the bankruptcy reorganization plan.

As there was no evidence that Further South was damaged even if all of the amendments to the operating agreement were deemed invalid and it retained its right of first refusal under the original operating agreement, we conclude that the district court did not err by dismissing Further South's counterclaims because "it could prove no set of facts, which, if true, would entitle it to relief." *See id.*; *Hilton Hotels Corp. v. Butch Lewis Prods., Inc.*, 107 Nev. 226, 232-33, 808 P.2d 919, 922-23 (1991) (explaining the damages requirement for breach of the implied covenant of good faith and fair dealing); *Collins v. Union Fed. Savings & Loan*, 99 Nev. 284, 303, 662 P.2d 610, 622 (1983) (explaining that an actionable conspiracy requires that "damage results from the act or acts"). And for this reason, we conclude that the district court also properly granted Royal's motion for summary judgment. *See Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (setting forth the standard of review for orders granting summary judgment and holding that summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law). Lastly, because the district court dismissed the counterclaims under NRCP 12(b)(5), and NRCP 56 applies in

the summary judgment context, we need not address Further South's arguments regarding NRCP 56(d). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Stiglich, C.J.

Stiglich

Lee, J.

Lee

Parraguirre, J.

Parraguirre

cc: Hon. Nancy L. Allf, District Judge
Janet Trost, Settlement Judge
Law Offices of Alan R. Smith
Law Offices of Byron Thomas
Eighth District Court Clerk