

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

HARRY V. MOHNEY,
Appellant,
vs.
PETER ELIADES, INDIVIDUALLY,
Respondent.

No. 71677 ✓

PETER ELIADES, INDIVIDUALLY,
Appellant,
vs.
HARRY V. MOHNEY,
Respondent.

No. 71686

FILED

OCT 13 2017

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

ORDER OF REVERSAL AND REMAND

These are consolidated appeals from district court orders in a breach of contract action. Harry Mohney appeals from a district court order granting a motion for judgment as a matter of law pursuant to NRCP 50(a), and Peter Eliades appeals from a district court order denying a motion for summary judgment and a motion for attorney fees. Eighth Judicial District Court, Clark County; Douglas Smith, Judge.

In 2009, Mohney and Eliades contemplated the joint purchase and ownership of a limo business, which would require each party to obtain a Nevada Transportation Authority license.¹ To expedite matters, Mohney elected not to seek his license until a later date. Eliades formed Royalty Limos, LLC (Royalty), and purchased the limo company without Mohney. The parties drafted an operating agreement for joint operation and ownership of Royalty, but a signed copy was not produced at trial. Eliades personally purchased six limos for the business and sent invoices to Mohney for half of the cost of the limos, approximately \$158,000. Mohney wrote one

¹We do not recount the facts except as necessary to our disposition.

check to Eliades for \$116,000, and one check to Royalty for \$41,568. Both were deposited in Eliades' personal account, totaling approximately \$158,000. After a dispute, Mohney decided not to go forward with joint ownership of Royalty.

Mohney subsequently filed a complaint for breach of oral contract against Eliades seeking the \$158,000, which he alleged he loaned to Eliades personally to purchase the limos for Royalty. Mohney claimed the money was to be repaid if he was unable to obtain an NTA license or if the parties' business agreement otherwise failed. Eliades filed a motion for summary judgment alleging that the \$158,000 was an investment in Royalty rather than a loan. The court denied the motion for summary judgment. During the jury trial, Mohney testified that he did not know about the limo purchase until after Eliades purchased the limos, and that he did not sign the operating agreement or manage the company. On cross-examination, Eliades' counsel appeared to impeach Mohney with other sworn declarations contradicting his testimony. On cross-examination, Mohney offered explanations for each inconsistency.

Around this time, Eliades filed a NRCP 50 motion for judgment as a matter of law, alleging that Mohney failed to show the \$158,000 was for a loan rather than an investment, and orally arguing that Mohney's inconsistent testimony amounted to fraud on the court. The district court agreed and struck Mohney's testimony in its entirety. With Mohney's testimony struck, the district court found that all the remaining evidence failed to prove the \$158,000 paid to Eliades was a loan rather than an investment and granted Eliades' NRCP 50 motion. The court further concluded as a matter of law that the statute of frauds barred Mohney's claim, that there was no valid contract because material terms were lacking, and that Eliades, as a manager of Royalty, could not be held individually

liable for its debts. Thereafter, the district court denied Eliades' motion for attorney fees, finding that Eliades' offer of judgment was unreasonable, Mohney's rejection of the offer was reasonable, and Mohney's claims were not frivolous.

Mohney now appeals, asserting that the district court erred on two points of law. First, Mohney argues the court erred by concluding that he committed fraud on the court and striking his entire jury testimony. Second, he argues the court further erred by granting the motion for directed verdict and concluding as a matter of law that (a) the statute of frauds barred any breach of oral contract claim, (b) that there was insufficient evidence to prove existence of an oral contract, and (c) that Eliades could not be held personally liable under the contract. Eliades also appeals, raising two additional issues for our consideration. Eliades asserts that the district court erred by failing to grant his motion for summary judgment and by denying his motion for attorney's fees.

Under NRCP 50(a)(1), a district court must view the evidence and all inferences most favorably to the nonmoving party and should not consider "the credibility of the witnesses nor the weight of the evidence." *Broussard v. Hill*, 100 Nev. 325, 327, 682 P.2d 1376, 1377 (1984). "If there is conflicting evidence on a material issue, or if reasonable persons could draw different inferences from the facts, the question is one of fact for the jury and not one of law for the court." *Id.* We agree with Mohney that the district court erred by striking his testimony and granting judgment as a matter of law.

The district court's decision to grant a judgment as a matter of law was driven by its earlier decision to strike Mohney's testimony. We conclude the district court erred in two respects by finding that Mohney's testimony amounted to fraud on the court. First, fraud upon the court is

generally a basis for setting aside a final judgment under NRCP 60(b)(3). *NC-DSH, Inc. v. Garner*, 125 Nev. 647, 654, 218 P.3d 853, 858 (2009). Second, fraud on the court “embrace[s] only that species of fraud which does, or attempts to, subvert the integrity of the court itself.” *Id.* (alteration in the original) (internal quotation marks omitted). “[T]rue fraud on the court is rare and requires egregious misconduct,” *id.* at 650, 218 P.3d at 856 (internal quotation marks omitted), and inconsistent testimony, even under oath, generally does not reach that level of fraud, *see Appling v. State Farm Mut. Auto. Ins. Co.*, 340 F.3d 769, 780 (9th Cir. 2003) (holding that “[n]on-disclosure, or perjury by a party or witness, does not, by itself, amount to fraud on the court”).

Here, the district court struck a witness’ entire trial testimony because it was inconsistent with other sworn testimony. Unlike true fraud on the court, here there was no evidence that Mohney knowingly made false statements, *see Mosley v. Figliuzzi*, 113 Nev. 51, 55 n.2, 930 P.2d 1110, 1112 n.2 (1997), *overruled in part on other grounds by Castle v. Simmons*, 120 Nev. 98, 105 n.20, 86 P.3d 1042, 1047 n.20 (2004), or that the basis of a claim was unmistakably contradicted by the record, *see Estate of Adams v. Fallini*, 132 Nev. ___, ___, 386 P.3d 621, 626 (2016). Therefore, our review of the record reveals that Mohney’s testimony did not amount to fraud on the court and the district court erred by striking his testimony.

Because the court improperly struck Mohney’s testimony, we conclude the district court erred by thereafter granting Eliades’ NRCP 50(a) motion for judgment as a matter of law on the basis that Mohney did not prove his claim. Rather, Mohney’s testimony presented conflicting evidence on a material issue, creating questions of fact for the jury. *See Broussard*, 100 Nev. at 327, 682 P.2d at 1377.

We further conclude that the district court erred by determining the statute of frauds required judgment as a matter of law. NRS 111.220(1) bars enforcement of any oral agreement that *cannot* be performed within a year by the agreement's very terms. *Stone v. Mission Bay Mortg. Co.*, 99 Nev. 802, 805, 672 P.2d 629, 630-31 (1983) (finding an oral employment contract enforceable where it could have been terminated within one year under the alleged probationary period); *see also Atwell v. Sw. Sec.*, 107 Nev. 820, 824-25, 820 P.2d 766, 769 (1991) (concluding that an oral contract of potentially infinite duration was not precluded by the statute of frauds where nothing indicated it could not possibly be completed within one year). Here, however, Mohney testified that Eliades' agreement to repay him was conditioned upon either Mohney being denied a license or the agreement to enter into business failed to go forward. It was possible at the time the oral agreement was entered into that the parties would decide not to move forward with the business within one year. In addition, although Mohney testified that his NTA license application would likely take 18 months to process, there was nothing to indicate this time-frame was certain, or that it was impossible for the application to process within one year. Therefore, the oral contract was not barred by the statute of frauds.

Because Mohney supported his arguments with evidence creating a question of fact for the jury, and because the contract was not barred by the statute of frauds, the district court erred by granting the motion for judgment as a matter of law.² Accordingly, we

²In light of the foregoing, it follows that Eliades' appeal regarding the district court's denial of his motion for summary judgment is unavailing. Further, because we reverse the district court, Eliades' appeal regarding attorney fees is moot.

ORDER the judgments of the district court REVERSED AND
REMAND this matter to the district court for proceedings consistent with
this order.

Silver, C.J.
Silver

Tao, J.
Tao

Gibbons, J.
Gibbons

cc: Hon. Douglas Smith, District Judge
Michael H. Singer, Settlement Judge
Law Office of Andrew M. Leavitt, Esq.
Neil J. Beller, Ltd.
Eighth District Court Clerk