

Aviation Ventures, Inc. v. Joan Morris, Inc.,
121 Nev. Adv. Op. 13, 110 P.3d 59 (April 28, 2005)¹

**CIVIL PROCEDURE – NRCP 56(f) MOTION FOR A CONTINUANCE &
THE DEFENSE OF SETOFF**

Summary

Joint venturers' relationship turned litigious when defendant failed to pay plaintiff on an overdue promissory note for \$150,000. The district court denied defendant's request for an NRCP 56(f) continuance and granted plaintiff's motion for summary judgment approximately seven months after plaintiff had filed its complaint and before the initiation of discovery. Defendant appealed and the Nevada Supreme Court reversed holding that summary judgment was improper because discovery had not begun and it was unclear whether genuine issues of material fact existed. The Court also held that defendant is entitled to assert setoff as a defense overruling the portion of Campbell v. Lake Terrace, Inc. that requires insolvency for the claim to apply.²

Disposition/Outcome

The Court reversed the district court's order granting summary judgment and remanded to the district court for further proceedings.

Factual and Procedural History

In 1996, Aviation Ventures, Inc., d/b/a Vision Air (hereinafter "Vision"), and the Las Vegas Tourist Bureau (hereinafter "LVTB") allegedly formed a joint venture agreement to set up a wholesale tour company. This joint venture continued to expand and two new companies were created. The parties agreed to share the profits equally. As a new company, Vision needed start-up capital and as a result, Mr. Morris, acting on behalf of LVTB, agreed to lend Vision \$150,000. A promissory note was executed and delivered to LVTB in the amount of \$150,000 on December 4, 1998. The note was re-executed six times. The final note gave Vision until December 31, 2000 to make payment. In May 2000, vision still had not paid anything on the loan.

Vision contends that Mr. Morris agreed that LVTB would be paid with Vision's share of the profits. On July 24, 2001 approximately six months after the maturity date of the promissory note, LVTB filed a lawsuit against Vision. In response, on September 18, 2001, Vision filed an answer and alleged various defenses including the defense of setoff.

In December 2001, before the parties had held the early case conference required under NRCP 16.1, LVTB moved for summary judgment. Discovery had not yet begun and Vision requested a continuance under NRCP 56(f) to allow it to engage in discovery in order to marshal facts to oppose the motion. Vision presented affidavits to support its opposition and maintained that further discovery was necessary and would demonstrate a genuine issue of material fact.

¹ Summarized by Bryce Loveland

² 111 Nev. 1329, 905 P.2d 163 (1995).

The district court denied Vision's request for an NRCP 56(f) continuance and granted LVTB's motion for summary judgment. Vision appeals the district court's order.

Discussion

A. NRCP 56(f) Motion for Continuance

In ruling on the NRCP 56(f) Motion for a continuance, the Court first defined NRCP 56(f) as allowing the district courts to grant a continuance when a party opposing a motion for summary judgment is unable to marshal facts in support of its opposition. The standard of review for such a motion is abuse of discretion. Furthermore, a motion for continuance is only appropriate when the movant expresses how further discovery will lead to the creation of a genuine issue of material fact.

The Court cited examples of prior cases where summary judgment was improperly granted and a NRCP 56(f) motion improperly denied. One such case was where the complaint had only been filed a year before summary judgment was granted.³ Accordingly, the Court ruled in favor of Vision, finding that Vision had clearly enunciated how discovery would allow it to develop the record in order to properly oppose LVTB's motion. The Court also noted that less than eight months had passed between the complaint and the granting of summary judgment.

B. The Defense of Setoff

The Court defined the defense of setoff using Nevada and Texas case law, which resembled Black's Law's definition of setoff.⁴ The Court then explained that under Campbell, it had set forth two requirements that must be met to successfully assert the defense of setoff: (1) each party must have a valid and enforceable debt against the other party; and (2) one of the parties must be insolvent. However, the Court determined that Campbell did not discuss the insolvency requirement because the parties were not mutually insolvent in that case. Therefore, the Court found that the insolvency requirement could be interpreted as dicta and need not be followed.

In addition, the Court cited an Oregon Supreme Court case and Williston on Contracts as authority that insolvency should not be a requirement to obtain a setoff between two mutually indebted parties.⁵ The Court based this conclusion on the rationale that it coheres with the purpose behind the doctrine of setoff, and serves the interests of efficiency.

Conclusion

The Court held that a continuance should have been granted to allow development of the record through discovery. The Court also concluded that it is not necessary for a party to demonstrate the insolvency of one of the parties to appropriately assert a claim of setoff and overruled Campbell to the extent that it required one of the parties to be insolvent to achieve setoff. Consequently, the district court's order granting summary judgment was reversed and the case was remanded.

³ Halimi v. Blacketor, 105 Nev. 105, 106, 770 P.2d 531, 531-32 (1989).

⁴ Campbell, 111 Nev. at 1332-33, 905 P.2d at 165; Trueheart v. Braselton, 875 S.W.2d 412, 415-16 (Tex.App. 1994); BLACK'S LAW DICTIONARY, Setoff (8th ed. 2004).

⁵ Paul B. Emerick Co. v. Wm. Bohenkamp & Assocs., 242 Or. 253, 409 P.2d 332 (1965) (quoting 6 WILLISTON ON CONTRACTS § 1998 at 5602 (rev. ed. 1938)).