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Order

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0411414

BK0497PG4317

1 Case No. 95-CV-0141

FILED

2 Dept. No. II

NO. _____

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4

BARBARA J. ...
CLERK

5

BY: _____

6

IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

7

IN AND FOR THE COUNTY OF DOUGLAS

8

ELDON J. NICHOLSON, aka
E.J. NICHOLSON,

9

Plaintiff,

10

vs.

ORDER

11

L.J.C. CORPORATION, a Nevada
corporation, et al.,

12

Defendants.

13

14

L.J.C. CORPORATION, a Nevada
corporation,

15

Counterclaimant,

16

vs.

17

ELDON J. NICHOLSON, aka E.J.
NICHOLSON,

18

19

Counterdefendant.

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This matter comes before the Court upon Plaintiff

22

Nicholson's Motion for Summary Judgment which was filed on

23

January 15, 1997. Defendant L.J.C. Corporation (LJC) filed an

24

opposition on February 20, 1997, and Plaintiff filed a reply on

25

March 20, 1997.¹

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The parties failed to timely notify the court

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that they had stipulated to extend the time for
filing an opposition and a reply. By the time the
court was notified of this stipulation it had
already prepared and signed an order, although

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1 On March 26, 1997, LJC filed a Motion to Continue Trial.
2 Nicholson filed an opposition on April 4, 1997, and LJC filed a
3 reply on April 8, 1997. This motion will also be addressed in
4 this order.

5 Upon consideration of the papers and pleadings on file,
6 and good cause appearing,

7 IT IS HEREBY ORDERED that Nicholson's Motion for Summary
8 Judgment is GRANTED in part.

9 Summary judgment is appropriate only when the moving party
10 is entitled to judgment as a matter of law, and no genuine
11 issue remains for trial. NRCP 56(c); Shepard v. Harrison, 100
12 Nev. 178 (1984). Based on the undisputed facts as supported by
13 the evidence presented in support of and opposition to
14 Nicholson's motion, the Court concludes that Nicholson is
15 entitled to partial summary judgment as a matter of law.

16 The undisputed admissible evidence presented establishes
17 that no partnership exists between Nicholson and LJC regarding
18 the Topaz property at issue in this case.

19 On or about September 15, 1988, Nicholson entered into an
20 agreement with LJC's predecessor-in-interest Eagle Valley
21 Mobile Home Estates (Eagle Valley) regarding the property to
22 which Nicholson seeks to quiet title. This agreement is
23 clearly a purchase agreement, not a partnership agreement.

24 On or about February 2, 1989, Eagle Valley assigned its
25

26
27 that order had not yet been filed. For future
28 reference, the parties are instructed to review
NJDCR 6, and in particular NJDCR 6(d)(the Judicial
Assistant shall submit motions upon the expiration
of the time for filing a reply).

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1 interest under the September 15, 1988 agreement to LJC.
2 Nicholson acknowledged this assignment in a separate agreement
3 dated February 2, 1989. Nicholson's acknowledgment cannot be
4 construed as an affirmation of a partnership agreement or as
5 anything more than an acknowledgment and agreement that LJC was
6 thereafter entitled to "one-third of the net profits from the
7 sale of [the Topaz property as its been referred to in this
8 order]."

9 Mr. Bjerke's affidavit, the only evidence presented by
10 LJC, does not create a genuine issue of material fact with
11 respect to the issue of the existence of a partnership. NRC
12 56(e) requires that opposing affidavits be made on personal
13 knowledge and shall set forth such facts as would be admissible
14 in evidence. Although Mr. Bjerke' state's that he has personal
15 knowledge regarding the terms of the September 15, 1988
16 agreement, and purports to describe the terms of that agreement
17 in his affidavit, Mr. Bjerke clearly does not have personal
18 knowledge regarding that agreement; he was not a party to that
19 agreement, and at the time of signing his affidavit, he did not
20 even have possession of a copy of the agreement. (See Reply to
21 Opposition to Motion for Continuance).

22 Further, the terms of the September 15, 1988 agreement are
23 clear on the face of the agreement, and Mr. Bjerke's
24 description of his interpretation of the agreement, which
25 varies considerably from the actual terms of the agreement,
26 does not create a genuine issue of material fact. Similarly,
27 the terms of Nicholson's acknowledgment of the assignment by
28 Eagle Valley of its interest under the September 15, 1988

1 agreement to LJC are clear on the face of the February 2, 1989
2 agreement, and, again, cannot be varied by Mr. Bjerke's self-
3 serving statement that "[a]t the time when Eagle Valley
4 assigned its interest in the partnership to LJC Corporation,
5 Nicholson reaffirmed his agreement to all of the terms of his
6 partnership agreement with Eagle Valley."

7 As LJC has failed to produce any admissible evidence
8 supporting its claim that a partnership exists between it and
9 Nicholson, this claim cannot be used to support LJC's position
10 that it is entitled to cloud title to the Topaz property with
11 the "Memorandum of Constructive Notice" it has recorded against
12 the property.

13 Finally, even if a partnership existed between the
14 parties, no evidence has been presented or legal authority
15 cited supporting LJC's position that it is entitled to cloud
16 Nicholson's property with a so-called "Memorandum of
17 Constructive Notice."

18 In view of the above, the court hereby grants Nicholson
19 summary judgment against LJC on LJC's claim to have a
20 partnership agreement with Nicholson and on LJC's claim that it
21 was entitled to file the Memorandum of Constructive Notice
22 based on its alleged partnership agreement. Accordingly, the
23 Memorandum of Constructive Notice is a fugitive document which
24 shall be expunged from the record immediately.

25 Genuine issues of material fact still remain, however,
26 with respect to whether LJC has an interest in the Topaz
27

28 _____
LJC may be entitled, however, to record a lis pendens. See NRS 14.010.

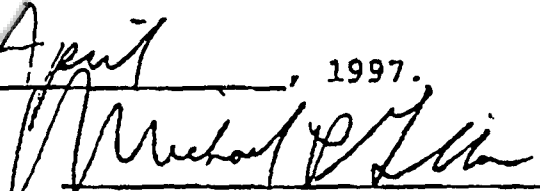
1 property pursuant to the September 15, 1988 agreement. LJC has
2 filed a motion to amend its complaint to add a cause of action
3 for a vendor's lien. While that motion is not ripe as of this
4 date, the court believes it would be premature to grant
5 complete summary judgment on Nicholson's quiet title action.
6 Such an order would decree that Nicholson is the owner of the
7 Topaz property free and clear of LJC's claims, when a question
8 exists at this point regarding a vendor's lien.

9 Summary judgment is also not appropriate on Defendant LJC
10 counterclaims for breach of contract and equitable mortgage as
11 genuine issues of material fact still exist with respect to
12 those claims. See NRCP 56(c).

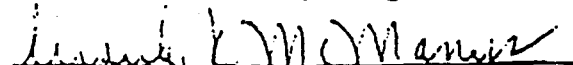
13 LJC's Motion to Continue Trial is GRANTED. Nicholson's
14 belated production of the September 15, 1988 agreement is good
15 cause to continue the trial, and any prejudice to Nicholson can
16 be minimized by postponing the trial date until after peak
17 business season. The parties are directed to be prepared to
18 set the new trial date at the pre-trial conference on April 14,
19 1997.

20 IT IS SO ORDERED.

21 Dated this 10 day of April, 1997.

22
23 
MICHAEL P. GIBBONS
District Judge

24
25 Copies served by mail this 10th day of April, 1997, to:
26 Mark H. Gunderson, Esq., 6121 Lakeside Drive, Suite 230, Reno,
Nevada, 89511; Alex Flangas, Esq., Robert C. Vohl, Esq., P.O.
Box 3237, Reno, Nevada 89505

27 
Ursula K. McManus

28 0411414

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CERTIFIED COPY

The document to which this certificate is attached is a full, true and correct copy of the original on file and of record in my office.

SEAL

DATE: 4/25/97
Clerk of the Judicial District Court
of the State of Nevada, In and for the County of Douglas,

By [Signature] Deputy

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REQUESTED BY
Mark Gunderson Ltd
IN OFFICIAL RECORDS OF
DOUGLAS CO., NEVADA

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LINDA SLATER
RECORDER
\$13⁰⁰ PAID to DEPUTY