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ORDER

**This page added to provide additional information required by NRS 111.312 Sections 1-2.  
(Additional recording fee applies)**

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2009-003  
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5 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
6 IN AND FOR THE COUNTY OF WASHOE

10 NEVADA STATE BANK, a Nevada  
11 Banking Corporation,  
12 Plaintiff,

13 vs.

Case No. CV04-01936

14 GENERAL BUILDERS, INCORPORATED,  
15 A Nevada Corporation, dba, AMERICAN  
16 GENERAL DEVELOPMENT, JOHN F.  
17 SIEBEN, JR., DOES 1-10,

Dept No. 1

18 Defendants.

19 ORDER

20 Plaintiff, NEVADA STATE BANK, (hereinafter "NSB"), by and through its attorney, Leo  
21 Bergin, Esq., filed a *Motion for Summary Judgment*. Defendants, GENERAL BUILDERS,  
22 INCORPORATED, a Nevada Corporation and JOHN F. SIEBEN, JR. (hereinafter "General  
23 Builders"), by and through its attorney, Stephen Harris, Esq., filed an *Opposition*, to which Plaintiff  
24 *Replied*. Defendants also filed a *Motion to Continue Motion for Summary Judgment to Permit*  
25 *Discovery to be Taken Pursuant to NRCP 56(f)*, which Plaintiff *Opposed*.

26 This case arises from the execution of two promissory notes. General Builders has allegedly  
27 failed to pay the promissory notes in favor of Nevada State Bank.  
28



1 On or about October 8, 1999, General Builders executed a Business Loan Agreement and  
2 Promissory Note in favor of Nevada State Bank and subsequently modified the 1999 Loan  
3 Documents on August 14, 2002. Pursuant to the terms of the modified documents General Builders  
4 promised to pay Nevada State Bank the principal amount of \$750,000 together with interest at the  
5 initial rate of prime plus 1.25%.

7 On or about November 15, 2000, Sieben executed a continuing, unlimited Commercial  
8 Guaranty in favor of Nevada State Bank pursuant to which Sieben absolutely and unconditionally  
9 guaranteed payment to Nevada State Bank of all General Builder's liabilities, obligations, debts, and  
10 indebtedness of the \$750,000 loan.

12 General Builders and Sieben have allegedly defaulted on the loan and promissory note.  
13 According to Nevada State Bank, as of March 31, 2005, the outstanding amount due and payable is  
14 \$452,559.67, plus attorney's fees and costs.

16 On or about November 15, 2000, General Builders executed an additional Business Loan  
17 Agreement. On or about January 25, 2001, General Builders executed a promissory note in favor of  
18 Nevada State Bank pursuant to which General Builders promised to pay Nevada State Bank the  
19 principal amount of \$125,000 together with interest at the initial rate of 9.75%. Sieben also  
20 guaranteed payment to Nevada State Bank of all General Builder's liabilities.

22 General Builders and Sieben have allegedly defaulted pursuant to the terms of the second  
23 loan and promissory note. According to Nevada State Bank, as of March 31, 2005, the outstanding  
24 amount due and payable under the loan is \$39,158.19, plus attorney's fees and costs.

26 Nevada State Bank claims General Builders and Sieben breached both of the loan  
27 agreements, and Nevada State Bank is therefore entitled to summary judgment.



1 General Builders claims one of its employees embezzled monies, which were to be applied  
2 and used to pay down the loans to Nevada State Bank. General Builders asserts Nevada State Bank  
3 failed to perform its duties and obligations when it chose to by honor the fraudulent checks, which  
4 ultimately depleted the accounts. According to General Builders, Nevada State Bank violated NRS  
5 104.4406 because it failed to compensate General Builders for the improperly withdrawn funds.  
6 General Builders claims but for Nevada State Bank's actions it would be able to pay back the loan  
7 amounts. General Builders argues if the Court grants Nevada State Bank's *Motion for Summary*  
8 *Judgment*, the Court would essentially allow Nevada State Bank to benefit from its own negligent  
9 and intentional actions. General Builders does not contest that they owe the monies due under the  
10 loans but contend they may be entitled to offset payments due to Nevada State Bank's negligent and  
11 intentional actions.  
12  
13

14 General Builders contends it needs additional time to fully develop its claims and defenses  
15 concerning the embezzled monies, and additional discovery must be conducted. General Builders  
16 asserts only eight months has passed since the filing of the *Complaint*, therefore, its been less than  
17 120 days for the parties to conduct discovery in this case.  
18

19 Nevada State Bank avers NRS 104.4406(6)<sup>1</sup> and 104.4406(4)<sup>2</sup> bar General Builders' forgery  
20 claims. According to Nevada State Bank, all of the alleged forged checks, which were presented to  
21  
22

23 <sup>1</sup> NRS 104.4406 (6) provides in pertinent part:

- 24 6. Without regard to care or lack of care of either the customer or the bank a customer who does not within 1 year  
25 after the statement or items are made available to him (subsection 1) discover and report his unauthorized  
26 signature or any alteration on the item, is precluded from asserting against the bank the unauthorized signature  
or the alteration. If there is a preclusion under this subsection, the payor bank may not recover for breach of  
warranty under NRS 104.4208 with respect to the unauthorized signature or alteration to which the preclusion  
applies.

27 <sup>2</sup> NRS 104.4406 (4) provides in pertinent part:

- 28 4. If the bank proves that the customer failed, with respect to an item, to comply with the duties imposed on him by  
subsection 3, he is precluded from asserting against the bank:  
(a) His unauthorized signature or any alteration on the item, if the bank also proves that it suffered a loss  
by reason of the failure; and



1 Nevada State Bank for payment occurred between November 6, 2001 and September 11, 2003.  
2 General Builders did not notify Nevada State Bank of the alleged forgeries until March 18, 2004,  
3 approximately six months after the last alleged forged check was presented to the Bank. Thus,  
4 Nevada State Bank asserts, as a matter of law, NRS 104.4406(6) bars any offset claims related to  
5 payments made before March 18, 2003. Furthermore, Nevada State Bank contends NRS  
6 104.4406(4) bars the remaining forgery offset claims because all of the alleged payments were made  
7 before any forgery was reported to Nevada State Bank in March 2004.  
8

9  
10 Summary judgment is appropriate if no genuine issue of material fact exists and the moving  
11 party is entitled to judgment as a matter of law. NRCPC 56(c). In determining whether issues of  
12 material fact exist, the trial court shall review the record in a light most favorable to the non-moving  
13 party. *Salas v. Allstate Rent-A-Car, Inc.*, 116 Nev. 1165, 1168 (2000). The Nevada Supreme Court  
14 has held that summary judgment is precluded where there is the slightest doubt as to the operative  
15 facts. *Washoe Medical Center v. Churchill County*, 108 Nev. 622, 625 (1992); *Posadas v. City of*  
16 *Reno*, 109 Nev. 448 (1983). A party opposing a summary judgment motion is not entitled to "build a  
17 case on the gossamer threads of whimsy, speculation and conjecture." *Posadas, supra*, citing  
18 *Collins v. Union Fed. Savings & Loan*, 99 Nev. 284, 302 (1983). A genuine issue of material fact is  
19 such that a reasonable jury could return a verdict for the nonmoving party. *Id.*  
20

21  
22 The Court has reviewed the record, pleadings and arguments of counsel. The Court finds  
23 General Builders and Sieben have failed to pay the promissory notes and loans owed to Nevada State  
24

25  
26 (b) His unauthorized signature or alteration by the same wrongdoer on any other item paid in good faith by  
27 the bank if the payment was made before the bank received notice from the customer of the  
28 unauthorized signature or alteration and after he had been afforded a reasonable period of time, not  
exceeding 30 days, in which to examine the item or statement of account and notify the bank.



1 Bank. The Court further finds there are no genuine issues of material fact, which preclude entry of  
2 Summary Judgment, as NRS 104.4406(6) and 104.4406(4) bar General Builders and Sieben's  
3 affirmative defenses against Nevada State Bank concerning the alleged forgery claims.  
4

5 Accordingly, and good cause appearing, Nevada State Bank's *Motion for Summary Judgment*  
6 is GRANTED.

7 DATED: This 3rd day of June, 2005.

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11 DISTRICT JUDGE

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CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this 3<sup>rd</sup> day of June, 2005, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true copy of the attached document addressed to:

Belding Harris & Petroni  
417 West Plumb Lane  
Reno, NV 89509

McDonald Carano Wilson  
100 West Liberty Street, 10<sup>th</sup> Floor  
P.O. Box 2670  
Reno, NV 89505-2670

  
Christine Kuhl

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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.

DATE: JUN 09 2005  
RONALD A. LONGTIN, JR., Clerk of the Second Judicial District Court, in and for the County of Washoe, State of Nevada.

By J. Davis Deputy



BK- 0605  
PG- 4842