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Appearing in Proper Person

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALEXANDER M. FALCONI, an individual;

Appellant,

vs.

CORAZON REAL ESTATE, a domestic corporation; and DOES I-X, inclusive;

Respondent.

Case #: 62296

APPELLANT'S OPENING BRIEF

COMES NOW, Appellant, Alexander M. Falconi, appearing in proper person, and hereby files an appellant's opening brief. This brief is based upon the following memorandum of points and authorities and Appellant's Appendix of Exhibits on file herein.

I. NRAP 26.1 Disclosure

Appellant is a natural person and therefore no such parent corporation exists.

DATED THIS 1st day of JANUARY, 2013.

Alexander M. Falconi
Pro Se

13-00894

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IV. Jurisdictional Statement

The Second Judicial District Court entered an Order Granting Motion to Dismiss; the order is not interlocutory and disposes of the case in its entirety. Pursuant to NRAP 3A(b)(1)[1], this is an appealable order. See also Lee v. GNLV Corp., 116 Nev. 424, *427, 996 P.2d 416 (2000)[2].

Appellant is aggrieved by the order as it disposes of his claims with prejudice. NRAP 3A(a). "In Kenney v. Hickey, 60 Nev. 187, 105 P.2d 192 (1940), this court held that an aggrieved party is one whose personal right is injuriously affected by the adjudication..." Bates v. Nevada Sav. & Loan Association, 85 Nev. 441, 456 P.2d 450 (1969).

Original jurisdiction is established in the Second Judicial District Court of the State of Nevada, Department 9, under CV12-02385. The dispositive order was rendered November 27, 2012, and the Notice of Appeal was timely filed December 10, 2012. NRAP 4(a)(1). An Application to Proceed in Forma Pauperis on Appeal has been filed in the district court and is pending. NRAP 24(a)(1).

Therefore this Court has appellate jurisdiction.

V. Statement of the Issues

1. Whether the District Court erred in applying the wrong standard of review for a motion to dismiss by failing to construe Appellant's allegations as true, drawing all inferences in his favor, and analyzing the stated claims of the Complaint; and
2. Whether the District Court abused its discretion by refusing to deny Respondent's Motion to Dismiss for failure to comply with DCR 13(2)[10]; and

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[1] NRAP 3A(b)(1): "An appeal may be taken from the following judgments and orders of a district court in a civil action: A final judgment entered in an action or proceeding commenced in the court in which the judgment is rendered."

[2] Lee v. GNLV Corp., 116 Nev. 424, *427, 996 P.2d 416 (2000): "Thus, whether the district court's decision is entitled a "judgment" or an "order" is not dispositive in determining whether it may be appealed; what is dispositive is whether the decision is final."

3. Whether the District Court erred in dismissing Appellant's Complaint for lack of evidence before discovery has been conducted; and
4. Whether the District Court committed legal error by allowing Respondent, a domestic corporation, to appear in proper person[3].

VI. Statement of the Case

Parties once shared a landlord-tenant relationship. Throughout this relationship, Respondent, the landlord, of a small, one-bedroom apartment, demanded costs for maintenance and repair of the air conditioner and stove[4] from Appellant, the tenant. Appellant consistently noticed Respondent that it was statutory obligated to maintain them. Respondent notified Appellant that he would be evicted for failure to obey and prosecuted an eviction near to lockout, at which point Appellant paid the costs demanded so as to avoid himself and his minor child being locked out of their home. Respondent does not allege any such deliberate or negligent conduct, but rather, that the contractual agreement between parties obligated Appellant to maintain the air conditioner. Appellant also has secondary claims, such as conversion[5] of a security deposit, retaliatory eviction, and failure to maintain the toilet. Appellant seeks punitive damages for violation of statutory torts.

VII. Factual Background

The dwelling unit, henceforth 'THE UNIT', was located at 2142 Roundhouse Rd., Sparks, NV 89431. Exhibit 1.

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[3] Appellant has stated in the district court and will state now that he is not personally opposed to Respondent appearing in proper person, however, he is compelled to oppose Respondent's appearance in proper person because of concerns that it may cause complications on the validity of any judgment obtained due to this Court's consistent requirement that corporations must be represented by attorneys.

[4] The issue with the stove is better described as the Respondent shifting a $25 fee upon Appellant.

[5] The Court did not rule on a motion to amend the complaint to include this claim, therefore it is not within the scope of this appeal.

Appellant has resided at the THE UNIT as tenant from October 2010 through October 17, 2012 with his minor child of age six (6), Armando Falconi. Exhibit 1, page 1.

Respondent was Appellant's landlord when he resided at THE UNIT. Exhibit 1, page 7.

Sometime in November or December of 2011, Appellant sent a request to Respondent to repair the stove top because two (2) of the four (4) burners didn't activate. Respondent made this repair shortly thereafter.

On January 20, 2012, Respondent sent a letter to Appellant demanding $25.00 for an alleged "no show" on the stove repair. Exhibit 2.

On July 5, 2012, Appellant requested Respondent repair the air conditioner because it was sporadically operating.

On July 6, 2012, Respondent made repairs to the air conditioner, alleging a filter was clogged. This did not fix the issue.

On July 18, 2012, Respondent sent a letter to Appellant demanding the aforementioned $25.00 for an alleged "no show" and also $100.50 for repairing the air conditioner (which still did not work) and threatened eviction and fines if Appellant did not pay. Exhibit 3.

On July 24, 2012, Appellant had Respondent personally served a written notice demanding repair of the toilet. Exhibit 4.

On or around August 22, 2012, Appellant reminded Respondent by telephone that the air conditioner still did not work.

On or around August 24, 2012, Respondent successfully repaired the air conditioner by changing the thermostat.

On September 1, 2012, Respondent made its first attempt to repair the toilet, and was successful in repairing it. Exhibit 5.

Appellant subsequently requested a rent credit due to the fact that he had to live with a barely functioning toilet for so long. Respondent threatened eviction if it did not receive rent in full.

On September 7, 2012, Respondent cashed Appellant's rent check (Exhibit 6), and served Appellant by posting upon the door of THE UNIT a Notice of Unlawful Detainer threatening eviction for non-payment of the rent (even though it had just cashed the check) and for the air conditioner and stove repair/maintenance costs. Exhibit 7.

On September 12, 2012, at the summary eviction proceeding, Appellant and Respondent agreed the rent was paid but disagreed that the maintenance costs were Appellant's responsibility. The Court held that a summary eviction proceeding was not a proper proceeding in which to determine the merits of a legal defense[6], merely acknowledge whether a legal defense exists or not. Respondent persisted in its demands and the Court ordered that Appellant pay half of the demanded amounts for the air conditioner and stove and iron out the details in a separate civil action at a later date.

On September 19, 2012, Respondent accepted a check for $105.00 in exchange for not evicting FALCONI.

VIII. Procedural Background

On September 20, 2012, Appellant filed Complaint. Exhibit 8.

On October 12, 2012, Respondent filed Answer and Counterclaim, through and by its non-attorney President, Mr. Chinnici.

On October 15, 2012, Appellant filed Motion to Require Corazon Real Estate to Obtain Counsel. Exhibit 9.

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[6] Though the summary eviction judge did not specifically cite any authority, he presumably was referring to NRS 40.253(6).

On October 17, 2012, Respondent filed Opposition to Motion to Require Corazon Real Estate to Obtain Counsel and Motion to Dismiss. Exhibit 10.

On October 29, 2012, Appellant filed Opposition to Motion to Dismiss. Exhibit 11.

On November 1, 2012, Respondent filed Reply to Opposition to Motion to Dismiss. Exhibit 12.

On December 5, 2012, the District Court granted Respondent's Motion to Dismiss. Exhibit 13.

IX. Summary of Argument on Motion to Dismiss

Respondent argues that Appellant's claims for punitive damages are a sham to establish jurisdiction in the district courts, and that Appellant should have filed suit in justice court as a small-claims action. Appellant argues that Respondent has committed statutory tort and that through its oppressive and malicious conduct an award of punitive damages is appropriate to punish and deter future conduct. Appellant argues that he can prove a set of facts that, if true, warrant an award of punitive damages.

X. Summary of Underlying Argument

Respondent has maintained[7] that Appellant should be bound by the contract assigning maintenance of the air conditioner. Appellant argues that the contract is adhesive; and that the provisions requiring him to maintain the air conditioner are ambiguous and should be construed against the drafter, contrary to public policy and therefore void, and explicitly declared void per NRS 118A.220(2)[8].

Appellant argues that punitive damages are appropriate in order to punish a wrongdoer for an intentional tort so as to discourage such further conduct, and that by leveraging its power

[7] Respondent does not allege in any way that Appellant has intentionally destroyed any equipment.
[8] NRS 118A.220(2): "Any provision prohibited by subsection 1 is void as contrary to public policy and the tenant may recover any actual damages incurred through the inclusion of the prohibited provision."

of eviction[9] against Appellant to coerce a payment, Respondent is guilty of oppressive and malicious conduct warranting supporting a punitive award. Appellant further argues that Respondent lacks incentive to modify his conduct because generally, few tenants sue to recover monies and when they do sue, it is more often than not in as a small-claims action for compensatory damages; thus, Respondent is only obligated to return the monies wrongfully withheld and the unlawful conduct remains profitable. Appellant also cites substantive authority explicitly stating that a tortfeasor may not rely on its own ambiguous contract to avoid punitive damages.

XI. Argument and Legal Analysis

Respondent's Motion to Dismiss alleged Appellant sought punitive damages in order to "get his case filed in District Court, rather than Small Claims Court where it belongs". Exhibit 10, page 2, lines 5-8. Respondent concluded that the claims should be dismissed and "remand[ed] to Small Claims Court, the appropriate venue to hear this matter." Exhibit 10, page 2, lines 27-28.

Appellant filed Opposition to Respondent's Motion to Dismiss per DCR 13(2)[10], per Respondent's failure to obtain counsel or at the very least permission from the District Court to proceed in proper person[11], and per Aftercare of Clark County v. Justice Ct. of Las Vegas Tp. Ex rel. 120 Nev., 1, *3, 82 P.3d 931 (2004)[12]. Appellant then construed Respondent's Motion to

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[9] Had Respondent merely held the repair costs in abeyance and deducted them from Appellant's security deposit upon his eventual move-out, it is unlikely this matter would have ever reached the district court (though an argument of punitive damages would still bear arguable merit).

[10] DCR 13(2): "A party filing a motion shall also serve and file with it a memorandum of points and authorities in support of each ground thereof. The absence of such memorandum may be construed as an admission that the motion is not meritorious and cause for its denial or as a waiver of all grounds not so supported."

[11] Respondent is a domestic corporation.

[12] Aftercare of Clark County v. Justice Ct. of Las Vegas Tp. Ex rel. 120 Nev., 1, *3, 82 P.3d 931 (2004): "In these consolidated appeals, we consider whether justices of the peace may deny jury trials to litigants who have filed a civil action in justice's court, rather than a small claims action, and seek less than $5,000. The Las Vegas Township Justice's Court has implemented a policy denying jury trials to litigants unless $5,000 or more is at stake. The district court declined to issue extraordinary relief compelling justice's court jury trials for the (continued ...)

Dismiss as one filed in accordance with NRCP 12(b)(1)[13] and further argued in opposition of dismissal accordingly. Exhibit 11.

Respondent then filed a Reply to Opposition to Motion to Dismiss reiterating that the case should be filed as a small-claims action. Exhibit 12, page 2, lines 22-26.

1. The District Court Erred in Dismissing with Prejudice for Lack of Evidence

The District Court granted dismissal on the grounds that:

> Plaintiff's claims are for a residence of which he no longer resides; as well Plaintiff has provided the Court no evidence or record of any of the alleged maintenance issues. Thus, there is no evidence to support Plaintiff's claim(s). The Court has reviewed the entire record and Plaintiff has provided no evidence of the alleged damages. Therefore, for the several reasons described above; Defendant's Motion to Dismiss with prejudice is granted.

Exhibit 13, page 2, lines 14-19. The District Court erred in coming to this conclusion because the district court's subject-matter jurisdiction was under attack via "motion to dismiss". Pursuant to Vacation Village Inc. v. Hitachi America Ltd., 110 Nev. 481, *484, 874 P.2d 744, **746 (1994):

> The standard of review for a dismissal under NRCP 12(b)(5) is rigorous as this court "`must construe the pleading liberally and draw every fair intendment in favor of the [non-moving party].'" Squires v. Sierra Nev. Educational Found., 107 Nev. 902, 905, 823 P.2d 256, 257 (1991) (quoting Merluzzi v. Larson, 96 Nev. 409, 411, 610 P.2d 739, 741 (1980)).

In discussing the standard of review on a motion to dismiss, this Court held in Edgar v. Wagner, 699 P. 2d 110 (1985) at page 111:

> On review of a motion to dismiss, our task is to determine whether or not the challenged pleading sets forth allegations sufficient to make out the elements of a right to relief. Crucil v. Carson City, 95 Nev. 583, 600 P.2d

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appellants, who are the defendants in two justice's court civil actions, both involving less than $5,000...(*9) Because the Las Vegas Township Justice's Court's policy violates the Nevada constitutional guaranty of trial by jury, we reverse the district court orders that denied appellants' petitions for writ relief, and we remand these cases to the district court for the issuance of writs of mandamus, compelling justice's court jury trials in these cases."

[13] NRCP 12(b)(1): "Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: lack of jurisdiction over the subject matter..."

> 216 (1979); cf. Stump v. Sparkman, 435 U.S. 349, 354, 98 S.Ct. 1099, 1103, 55 L.Ed.2d 331 (1978). In making this determination, the allegations in the complaint must be taken at "face value," California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 515, 92 S.Ct. 609, 614, 30 L.Ed.2d 642 (1972), and must be construed favorably in the plaintiff's behalf. The complaint cannot be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff could prove no set of facts which, if accepted by the trier of fact, would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957).

Exhibit 11, page 4, lines 2-11. And more specifically in Vacation Village Inc. v. Hitachi America Ltd., 110 Nev. 481, *484, 874 P.2d 744, **746 (1994):

> **All factual allegations of the complaint *must* be accepted as true.** Capital Mortgage Holding v. Hahn, 101 Nev. 314, 315, 705 P.2d 126 (1985). A complaint will not be dismissed for failure to state a claim "unless it appears beyond a doubt that the plaintiff could prove no set of facts which, if accepted by the trier of fact, would entitle him [or her] to relief." Edgar v. Wagner, 101 Nev. 226, 228, 699 P.2d 110, 112 (1985) (citing Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957)). (emphasis added)

Exhibit 11, page 4, lines 12-21. Under this precedent, the District Court exceeded its authority under the "motion to dismiss" test in demanding evidence of Appellant to substantiate his claims. Vacation Village Inc. v. Hitachi America Ltd., 110 Nev. 481, *484, 874 P.2d 744, **746 (1994) elaborates further:

> On appeal from an order granting an NRCP 12(b)(5) motion to dismiss, "[t]he sole issue presented ... is whether a complaint states a claim for relief." Merluzzi v. Larson, 96 Nev. 409, 411, 610 P.2d 739, 741 (1980), overruled on other grounds bySmith v. Clough, 106 Nev. 568, 796 P.2d 592 (1990). This court's "task is to determine whether... the challenged pleading sets forth allegations sufficient to make out the elements of a right to relief." Edgar, 101 Nev. at 227, 699 P.2d at 111. The test for determining whether the allegations of a complaint are sufficient to assert a claim for relief is whether the allegations give fair notice of the nature and basis of a legally sufficient claim and the relief requested. Ravera v. City of Reno,100 Nev. 68, 70, 675 P.2d 407, 408 (1984); see also Breliant v. Preferred Equities Corp., 109 Nev. 842, 858 P.2d 1258 (1993); Western States Constr. v. Michoff, 108 Nev. 931, 840 P.2d 1220 (1992).

The District Court should have reviewed the Complaint, accepted the allegations as true, and determined whether or not a cause of action could potentially be proven under the specified claims.

2. The District Court Erred in Refusing to Deny the Motion to Dismiss Per DCR 13(2)

Respondent's failed to cite any substantive authority in support of his motion to dismiss, and therefore the motion should have been denied per DCR 13(2)[10]. The application of DCR 13(2) is at the Court's discretion, therefore, we seek an abuse of discretion.

The District Court prejudiced Appellant by expecting him to guess by what vehicle and what authority Respondent was moving for dismissal. Pursuant to Anastassatos v. Anastassatos, 112 Nev. 317, *320, 913 P.2d 652, **653 (1996):

> Although Nevada is a notice pleading jurisdiction, a party must be given reasonable advance notice of an issue to be raised and an opportunity to respond. Schwartz v. Schwartz, 95 Nev. 202, 206, 591 P.2d 1137, 1140 (1979).

The District Court abused its discretion when it required evidence on a "motion to dismiss", in contravention to this Court's established standard of review, and without giving Appellant a reasonable opportunity to respond or provide the evidence. Pursuant to Hotel Last Frontier Corp. v. Frontier Properties, Inc., 79 Nev. 150, *153, 380 P.2d 293, **294 (1963):

> In Goodman v. Goodman, 68 Nev. 484, 489, 236 P.2d 305, 307, it is stated: "Yet even within the area of discretion where the court's discernment is not to be bound by hard and fast rules, its exercise of discretion in the process of discernment may be guided by such applicable legal principles as may have become recognized as proper in determining the course of justice. A clear ignoring by the court of such established guides, without apparent justification, may constitute abuse of discretion.

3. The District Court Committed Plain Error in Requiring Evidence Before Discovery

Pursuant to Green v. State, 119 Nev. 542, 80 P.3d (2003):

> In conducting plain error review, we must examine whether there was "error," whether the error was "plain" or clear, and whether the error affected the defendant's substantial rights.

Requiring evidence before the discovery phase in the process of civil procedure has even begun is erroneous on its face, and dismissing a case spontaneously without allowing the adverse party the opportunity to object results in a miscarriage of justice.

If Respondent had instead filed a motion for summary judgment, a different standard of review would have applied. "A court may grant summary judgment if the evidence does not create a genuine issue of material fact". Powell v. Liberty Mutual Fire Ins. Co., 127 Nev. ___, ___, 252 P.3d 668, 672 (2011). Still, it would have been far too early in the proceedings; the arbitration commissioner had yet to pick up the case so NAR 11 (a creature of NRCP 16.1) disclosures or any discovery whatsoever for that matter had yet to be conducted. Pursuant to Wiltsie v. Baby Grand Corp., 105 Nev. 291, *293, 774 P.2d 432, **434 (1989):

> This court has held that it is an abuse of discretion for a district court to grant summary judgment where a request for discovery is made early in the proceedings. See Halimi v. Blacketor, 105 Nev. ___, 770 P.2d 531 (1989); Harrison v. Falcon Products, 103 Nev. 558, 746 P.2d 642 (1987).

4. The District Court Erred in Allowing a Corporation to Appear in Proper Person

It is not factually in dispute that Respondent is a domestic corporation. Whether a corporation can appear in proper person is a question of law. "This court reviews de novo pure questions of law." Holiday Retirement Corp. v. State, DIR, 128 Nev. Adv. Op. No. 13, 274 P.3d 759, *761 (2012).

Pursuant to WDCR 23.5, "A corporation may not appear in proper person." Exhibit 9, page 2, line 7.

In re Discipline of schaefer, 117 Nev. 496, *509, 25 P.3d 191, **200 (2001), this Court held:

> We have consistently held that **a legal entity such as a corporation cannot appear except through counsel**, and we have prohibited non-lawyer principals from representing these types of entities. (emphasis added)

Exhibit 9, page 2, lines 8-12. See also: Sunde v. Contel of California 113 Nev. 1655, 970, P.2d 1136 (1997) and Salman v. Newell, 110 Nev. 1233, 885 P.2d 607 (1994). Exhibit 9, page 2, lines 13-28.

Therefore, the District Court erred in allowing Respondent to appear in proper person.

XII. Conclusion

The District Court should be instructed to reanalyze the motion to dismiss, assume each allegation of Appellant's Complaint to be true, and determine, based on that analysis, whether or not Appellant could prove a set of facts which support an award of punitive damages.

THEREFORE, Appellant hereby requests that:

1. The Court REVERSE and REMAND with instructions to requiring Respondent to obtain counsel; and
2. The Court REVERSE and REMAND with instructions to VACATE the Order Granting Dismissal with Prejudice; and
3. For such further relief as the Court deems necessary and just[14].

AFFIRMATION[15]: This document does not contain a social security number of any person.

DATED THIS 1st day of JANUARY, 2013.

Alexander M. Falconi
Pro Se

[14] In the event this Court deems the District Court reached the right conclusion, albeit for the wrong reasons, and concludes no set of facts could be proven to support an award of punitive damages, Appellant would request reversal with instructions to the district court to amend its order dismissing with prejudice to an order changing venue to the justice courts or in the alternative an order dismissing without prejudice.

[15] This affirmation is in accordance with NRS 239B.030.

DECLARATION OF ALEXANDER M. FALCONI

I, Alexander M. Falconi, state that I have read this Brief and that the contents are true and correct of my own personal knowledge, except for those matters I have stated that are not of my own personal knowledge, but that I only believe them to be true, and as for those matters, I do believe they are true.

I declare[16] under penalty of perjury that the foregoing is true and correct.

EXECUTED this 7 day of JANUARY, 2013.

Alexander M. Falconi

CERTIFICATE OF NRCP 5 SERVICE

I, Alexander M. Falconi, do hereby solemnly swear under penalty of perjury that I am over the age of 18 and a party to this action and that I **personally** served a true and correct copy of this Brief upon the following:

Corazon Real Estate
Attn: Charles Chinnici
254 Vassar Street
Reno, Nevada 89502

SERVED THIS 7 day of JANUARY, 2013.

Alexander M. Falconi

[16] NRS 53.045: "Any matter whose existence or truth may be established by an affidavit or other sworn declaration may be established with the same effect by an unsworn declaration of its existence or truth signed by the declarant under penalty of perjury, and dated, in substantially the following form: If executed in this State: "I declare under penalty of perjury that the foregoing is true and correct."