

Electronically Filed
Sep 01 2015 10:42 a.m.
Tracie K. Lindeman
A-13-686303-C
Clerk of Supreme Court

Case No.: 66823

District Court Case No.
Dept. No.: XXVII

SIG ROGICH aka SIGMUND ROGICH as Trustee of The Rogich Family Irrevocable Trust; ELDORADO HILLS, LLC, a Nevada limited liability company; DOES I-X; and/or ROE CORPORATIONS I-X, inclusive,

Respondents.

From the Eighth Judicial District Court

The Honorable Nancy L. Allf, District Judge

APPELLANT’S REPLY BRIEF

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I.

Supplemental Legal Argument

A. Respondents Have Failed to Identify How the Lower Court Made the Correct Factual and Legal Analysis.

Respondents fail to address the actual issues before this Court on appeal. Respondents fail to make any mention that the lower court adopted any of their arguments. Respondents also fail to apply any of the lower court's findings to the correct standard of review. The lower court did not determine that the Nanyah did not have "a shred of evidence" to base its claims. The lower court did not determine that even though Eldorado Hills, LLC is referred to repeatedly in multiple agreements that it was not a party to these same agreements. The lower court did not determine that Nanyah did not pay the \$1.5 million to Eldorado, and Mr. Huerta's receipt of \$1.25 million subsequent, was a deduction of Nanyah's investment, when Mr. Huerta undisputedly had been carrying the debt obligation of Eldorado Hills. The lower court did not find that Mr. Rogich's payment to multiple investors did not make Eldorado Hills a non-party to the agreements. The lower court did not determine that Nanyah being mentioned specifically in these agreements and that it would be repaid, did not make it an intended third-party beneficiary. Lastly the lower court did not base the running on the statute of limitations any of the case law cited by either party, or its own determination of the applicable case law. Because these findings were not made by the lower court, Respondents' arguments fail to address the relevant issues on appeal. Also importantly, Respondents fail to support how the lower court could have dismissed Nanyah's claims when these findings were not made.

The crux of the dismissal by the lower court relate to its conclusion that the statute of limitations began the moment that Nanyah's funds were received. In making its findings articulating this point the lower court stated:

1 So the countermotion will be denied without prejudice to start but I am going to
2 grant the motion for partial summary judgment for the following reasons: first of
3 all both the complaint and the amended complaint in paragraph 45 state Nanyah's
4 grounds for relief as against Eldorado as being based upon a capital investment
5 but the evidence is that there was no investment by Nanyah directly into
6 Eldorado. A lack of contractual privity precludes any relief under the unjust
7 enrichment cause of action but additionally the statute of limitations would
8 preclude the cause of action by this Plaintiff as against this Defendant -- this
9 particular cause of action and the fourth cause of action simply because it's the --
10 I don't need to determine any questions of fact to determine the statute of
11 limitations. The cause of action if any would have risen at the time of the
12 investment and there's no analysis needed to determine when the cause of action
13 arose in this case simply because there's no contractual privity.

14 App Vol. 2, 343:16-344:4. [Emphasis added].

15 The lower court made these findings despite Eldorado being mentioned in numerous places in
16 the agreements and the fact that Mr. Rogich was obligating himself to repay monies which
17 Eldorado had admittedly received in these same agreements. For example in the Purchase
18 Agreement of October 30, 2008 the parties state:

19 A. Seller owns a Membership Interest ("Membership Interest") in Eldorado Hills, LLC
20 (the "Company") equal to or greater than thirtdy-five percent (35%) and which may be
21 as high as forty-nine and forty-four one hundredths (49.44%) of the total ownership
22 interest in the Company. ...

23 2. Consideration ... (c) Furthermore as acknowledgement of the fact that Carlos will no
24 longer be a manager of
25 the Company after the Closing, Buyer shall also defend and indemnify Carlos from and
26 against post-Closing company activities.

27 Each Seller furthermore does hereby presently resign (or confirms resignation)
28 form any and all positions in the Company as an officer, manager, employee and/or
consultant. Additionally, Seller does hereby release the company and its members,
managers and officers from any and all liability to each Seller of whatever kind or
nature, including without limitation any claims for debt or equity payment ...

... the decision to sell the Membership Interest on the terms and conditions of this
Agreement were negotiated by the parties upon consideration of the concurrent
transactions to be entered into among Buyer, Company and two new investors
(referenced below in this Section 4)...

5. Further Assurances and Covenants. ... (b) Go Global and Carlos shall deliver

1 all books and records (including checks and any other material of Company) to Buyer
2 promptly under Closing.

3 App Vol. 1, pp. 12-21.

4 In these sections, among others, Eldorado's membership interest was being transferred,
5 Eldorado was receiving a release from liability, Mr. Huerta a member of the "Company" was
6 resigning along with other possible members and Mr. Huerta and Go Global were providing the
7 books and records of Eldorado to Mr. Rogich. *See Id.* Eldorado Hills, LLC, or the "Company"
8 was as much an intended party to this agreement as was Nanyah, if not more so.

9 The Membership Interest Purchase Agreement dated October 24, 2008 similarly
10 references Eldorado in multiple clauses and further binds Eldorado through the agreements
11 reached by its members. App. Vol. 1, 177-199. For example the Membership Interest Purchase
12 Agreement contains the following language:

13
14 RECITALS: A. Eldorado Hills, LLC, a Nevada limited-liability company ("Company")
15 is indebted in the approximate amount of twenty-one million one hundred seventy
thousand two hundred seventy eight dollars and 08/100, ...

16 D. Seller desires to sell all interest in Company which after issuance, will equal an
17 aggregate one-sixth (1/6th) membership interest ("Membership Interest") to Buyer, and
18 Buyer desires to acquire the Membership Interest in Company from Seller, on the terms
hereinafter set forth....

19 H. From the proceeds of the consideration (defined below), Seller at closing shall make
20 a capital contribution to the Company of an amount necessary to pay (a) one-half of
21 certain expenses of the Company, inclusive of attorneys' fees and closing costs relative
to the closing of the New Loan (the "Eldorado Expenses")...

22 I. Concurrently with the closing of the purchase of the membership Interest by Buyer
23 from Seller, the Company and its members shall adopt that Amended and Restated
24 Operating Agreement (the "Amended and Restated Operating Agreement") as attached
hereto as Exhibit "I".

25 4. Representations of Seller. ... e. The Company is duly organized and validly
26 existing under and by virtue of, and is in good standing under, the laws of the State of
Nevada....

1 8. Further Agreement Among Certain of the Parties. ...c. Seller shall defend,
2 indemnify and hold Buyer harmless from any and all the claims of Eddy line
3 Investments, LLC, Ray Family Trust, Nanyah Vegas, LLC and Antonio Nevada, LLC
 each of whom invested or otherwise advanced the funds, plus certain possible-claimed
 accrued interest....

4 g. Go Global and Carlos hereby resign from any and all managerial or
5 offices positions in the Company, effective immediately upon Closing of the
6 transactions contemplated by this Agreement...

7 EXHIBIT "D"
8 QUALIFICATION OF REPRESENTATIONS OF SELLER

9 Seller confirms that certain amounts have been advanced to or on
10 behalf of the Company by certain third parties, as referenced in Section 8 of
11 the Agreement, Seller shall endeavor to convert the amounts advanced into
12 non-interest bearing promissory notes for which Seller shall be responsible.
13 Regardless of whether the amounts are so converted, Seller shall defend,
 indemnify and hold harmless the Company and its members for any claims
 by the parties listed below, and any other party claiming interest in the
 Company as a result of transactions prior to the date of this Agreement
 against the Company or its Members.

14 1.	Eddyline Investments, LLC (potential investor or debtor)	\$50,000.00
15 2.	Ray Family Trust (potential investor or debtor)	\$283,561.60
16 3.	Nanyah Vegas, LLC (through Canamex Nevada, LLC)	\$1,500,000.00
4.	Antonio Nevada, LLC/Jacob Feingold	\$3,360,000.00

17 APP, Vol. I at pp. 177-199.

18 In these clauses, Eldorado's business affairs were discussed at great length. Membership interests
19 were being conferred, Mr. Huerta and Go Global were resigning from Eldorado, the parties
20 memorialized that Nanyah had invested \$1.5 million dollars into Eldorado, etc. *See Id.* The claim
21 of Respondents and the lower court, asserting that Eldorado was not a party to these agreements,
22 when its business affairs were being reorganized within these agreements, does not stand against
23 the plain language of the agreements.

24 1. Even If Eldorado Was Not in Contractual Privity to Nanyah, Unjust Enrich Is an
25 Equity Based Claim That Does Not Require Contractual Privity.

26 The lower court erroneously determined that contractual privity was required to have
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1 an unjust enrichment claim. (Judge Allf “A lack of contractual privity precludes any relief
2 under the unjust enrichment cause of action...” App Vol. 2, 343:16-344:4.) As Appellants
3 mentioned previously, under Nevada law, unjust enrichment is an implied contract which
4 “occurs whenever a person has and retains a benefit which in equity and good conscience
5 belongs to another.” *In re Amerco Derivative Litig.*, 252 P.3d 681, 703 (Nev.2011) (quotation
6 omitted); *Leasepartners Corp. v. Robert L. Brooks Trust Dated Nov. 12, 1975*, 113 Nev. 747,
7 942 P.2d 182, 187 (1997). On this point alone, the lower court misapplied the law. A written
8 contract is not required to have an implied contract or quasi contract claim, such as unjust
9 enrichment. Viewing this misapplication of law in the most favorable light to Nanyah, the
10 lower erred in dismissing its claim. *See Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d
11 1026, 1029 (2005). The lower courts error and Respondents’ reciting of this error in legal
12 analysis should not be affirmed by this Court.

14 **B. Respondents’ Entire Argument Claiming that Eldorado Did Not Receive the \$1.5**
15 **Million Is Undermined By the Fact that the Agreements Acknowledging Receipt**
16 **Were Subsequent to the Time Mr. Huerta Took Any Proceeds as Repayment.**

17 Respondents’ not only ignore the provisions of the agreements that affirm that Nanyah
18 invested the \$1.5 million dollars, they also ignore that Mr. Rogich affirmed that this sum was
19 provided even after the time of investment in 2007. App. Vol. 1, at pp. 331:11-13. The
20 agreements of October 2008 both followed the time that the funds were received. There is no
21 evidence to suggest that Mr. Rogich objected to Nanyah having provided Eldorado with \$1.5
22 million dollars from 2007 to October 2008. Mr. Rogich did the opposite, he executed to
23 agreements which both memorialized that Nanyah had done exactly what it claimed in its
24 complaint, *i.e.* given Eldorado \$1.5 million dollars. Any argument to the contrary by
25 Respondents, is belied by Mr. Rogich’s own action in affirming that Nanyah had provided the
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1 funds as expressed in these agreements.

2 **C. The Lower Court Did Not Undertake a Determination of When the Statute of**
3 **Limitations Started Because It Erroneously Determined that the Statute of**
4 **Limitations Started Immediately After Nanyah Had Provided the Funds to**
5 **Eldorado Hills.**

6 There is no case law that either the lower court or Respondents have cited that says that
7 the statute of limitations for unjust enrichment starts immediately after the consideration is
8 placed. A statute of limitations commences when a party knew or should have reasonably
9 known of facts giving rise to cause of action. *Nevada State Bank v. Jemison Family*
10 *Partnership*, 106 Nev. 792, 800, 801 P.2d 1377, 1382 (1990). A third-party beneficiary, such as
11 Nanyah, takes subject to any defense arising from the contract that is assertible against the
12 promisee, including the statute of limitations. *Gibbs v. Giles*, 96 Nev. 243, 246-47, 607 P.2d
13 118, 120 (1980).

14 The lower court did not undertake any analysis of when the statute of limitations began
15 to accrue. The lower court simply stated “I don't need to determine any questions of fact to
16 determine the statute of limitations.” App. Vol. 2, pp. 343:25-344:1. The lower court did not
17 assess when Nanyah “knew or should have knew” it was not going to be repaid. It said that the
18 statute of limitations began to accrue the moment Nanyah invested the funds and therefore the
19 time to file began as early as 2007. App. Vol. 1; *see also* Transcript at pp. 332 and 344.
20 Whether Nanyah “knew or should have known” or its future damages was not even considered
21 by the Court in making its decision. Because in its legal conclusion, it decided that the statute
22 of limitations started once the money was received – not at the point of having a reasonable
23 belief that they would not be repaid. The determination of when a statute begins to run is a
24 question of fact that must be considered by the lower court. *See Golden Nugget, Inc. v. Ham*,
25 95 Nev. 45, 589 P.2d 173 (1979). Not identifying the pertinent facts, the interplay of the
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1 agreements, and the representations of Mr. Rogich, were all clear error, and facts, if viewed in a
2 light most favorable to Nanyah, should have barred a dismissal of their claim.

3 **II.**

4 **Conclusion**

5 Wherefore based on foregoing, the District Court erred in dismissing the claim of Nanyah
6 Vegas, and the order of October 1, 2014 should be stricken and this case remanded for further
7 discovery and a trial on the actual merits.

8 Dated this 22nd day of August, 2015.

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Certification Pursuant to Nev. R. App. P. 28.2

1
2 1. I hereby certify that this brief complies with the formatting requirements of NRAP
3 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP
4 32(a)(6) because:

5 [X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word
6 version 14 in Times New Roman with a font size of 12; or

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8 *word-processing program]* with *[state number of characters per inch and name of type style]*.
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10 2. I further certify that this brief complies with the page- or type-volume limitations
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13 [] Proportionately spaced, has a typeface of 14 points or more, and contains _____ words;
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18 [X] Does not exceed 30 pages.

19 3. Finally, I hereby certify that I have read this appellate brief, and to the best of my
20 knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I
21 further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure,
22 in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the
23 record to be supported by a reference to the page and volume number, if any, of the transcript or
24 appendix where the matter relied on is to be found. I understand that I may be subject to sanctions
25
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1 in the event that the accompanying brief is not in conformity with the requirements of the Nevada
2 Rules of Appellate Procedure.

3 Dated this 22nd day of August, 2015.

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Certificate of Service

Pursuant to NRAP 25(c)(1), I hereby certify that on this 22nd day of August, 2015, service of the foregoing **APPELLANT’S REPLY BRIEF** was made by submission to the electronic filing service for the Nevada Supreme Court upon the following registered users to the email addresses on file:

Samuel Lionel
Brandon McDonald

/s/ Brandon B. McDonald
An employee of McDonald Law Offices, PLLC