

IN THE UTAH COURT OF APPEALS

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A Good Brick Mason, Inc., a Utah corporation,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff and Appellee,)	Case No. 20090521-CA
)	
v.)	F I L E D
)	(June 4, 2010)
Spectrum Development Corporation, a Utah corporation; Palmo Rancho, LLC, a California limited liability company; and John Does 1 through 10,)	2010 UT App 145
)	
Defendants and Appellants.)	

Fourth District, Heber City Department, 070500248
The Honorable Samuel D. McVey

Attorneys: John Walsh, Salt Lake City, for Appellants
Robert L. Jeffs and Liisa A. Hancock, Provo, for
Appellee

Before Judges Davis, Thorne, and Voros.

THORNE, Judge:

Spectrum Development Corporation and the other defendants in this matter (collectively, Spectrum) appeal from the district court's entry of summary judgment in favor of appellant A Good Brick Mason, Inc. (AGBM) on a breach of contract claim arising from AGBM's performance of masonry work on a residential property in Park City, Utah (the Property). We affirm.

Spectrum argues that the district court erred in denying Spectrum's motion to strike the affidavit of AGBM owner Ron Nielsen on grounds of Nielsen's lack of personal knowledge and incompetence as a witness and in granting summary judgment to AGBM based on Nielsen's affidavit. The district court is granted broad discretion to decide motions to strike summary judgment affidavits. See Murdock v. Springville Mun. Corp. (In re Gen. Determination of the Rights to the Use of All the Water), 1999 UT 39, ¶¶ 25-26, 982 P.2d 65. However, we review a district court's

ultimate grant or denial of summary judgment for correctness, viewing the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party. See Posner v. Equity Title Ins. Agency, Inc., 2009 UT App 347, ¶ 8, 222 P.3d 775.

We first determine whether the district court exceeded its broad discretion by refusing to strike Nielsen's affidavit. Affidavits filed in support of or in opposition to summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Utah R. Civ. P. 56(e). In his affidavit, Nielsen stated, "The information contained in this [a]ffidavit is of my own personal knowledge." There is nothing in Nielsen's affidavit that is obviously outside his personal knowledge as the owner of AGBM, and the district court acted within its range of discretion in accepting Nielsen's assertion of personal knowledge at face value. Cf. Butterfield v. Okubo, 790 P.2d 94, 97 (Utah Ct. App. 1990) ("[O]ur role is not to cross-examine the affidavit by conjecture; rather, we take it at face value" (footnote omitted)), rev'd on other grounds, 831 P.2d 97 (Utah 1992); see generally Mountain States Tel. & Tel. Co. v. Atkin, Wright & Miles, 681 P.2d 1258, 1261 (Utah 1984) ("[When considering a motion for summary judgment, a] trial court must not weigh evidence or assess credibility."). Similarly, there is nothing on the face of Nielsen's affidavit to suggest that any of the facts asserted therein constitute inadmissible evidence such as hearsay or privileged information. Finally, Nielsen's competence to testify is presumed under Utah law, subject only to the provisions of the Utah Rules of Evidence. See Utah Code Ann. § 78B-1-127 (2008) ("Every person is competent to be a witness except as otherwise provided in the Utah Rules of Evidence."). Nielsen's affidavit spoke largely to factual matters purportedly within his personal knowledge as AGBM's owner,¹ and the district court acted within the bounds of

¹The one arguable exception to this observation is Nielsen's assertion that AGBM's work "enhanced the value of the Property by \$26,538.50." Spectrum argues that Nielsen's affidavit does not qualify him as an expert in the field of property valuation, particularly in the Park City market. See generally Utah R. Evid. 702 (establishing requirements for expert witness testimony). However, evidence of the increased value of the Property was relevant only to AGBM's unjust enrichment claim, and the district court denied summary judgment to AGBM as to that claim. Accordingly, we need not decide whether Nielsen's affidavit properly spoke to the increase in the value of the

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its discretion in concluding that Nielsen was competent to testify as to the information contained in the affidavit.

Having determined that the district court properly considered Nielsen's affidavit, we turn to the question of whether AGBM was entitled to summary judgment on its breach of contract claim against Spectrum. AGBM's motion for summary judgment asserted as undisputed facts that AGBM had performed masonry work on the Property for Spectrum pursuant to an oral agreement, that the work performed was as represented on a January 2007 invoice, and that AGBM charged its normal rates for the work performed except for some additional amount charged for travel expenses. These facts were supported by Nielsen's affidavit and the attached invoice.

The district court determined that Spectrum's memorandum and affidavit opposing summary judgment created a genuine question of material fact only as to the square footage of masonry work actually performed by AGBM. Accordingly, the district court entered summary judgment on AGBM's breach of contract claim and awarded damages based on the square footage of work claimed by Spectrum, calculated at the invoice rate. To the extent that Spectrum claimed that its opposition affidavit had raised other factual questions precluding summary judgment, the district court ruled that Spectrum's affidavit was in conflict with earlier deposition testimony and would not be considered. See generally Webster v. Sill, 675 P.2d 1170, 1172-73 (Utah 1983) ("[W]hen a party takes a clear position in a deposition, that is not modified on cross-examination, he may not thereafter raise an issue of fact by his own affidavit which contradicts his deposition, unless he can provide an explanation of the discrepancy.").

On appeal, Spectrum argues that the district court should not have entered summary judgment because there were disputed material facts as to the square footage of work performed, the rate of billing for the use of a lathe, the rate of billing for columns and arches, and the overall amount charged. As stated above, the district court resolved the square footage issue in Spectrum's favor and entered summary judgment accordingly. As to the other issues, Spectrum's appellate briefing fails to acknowledge or address the district court's conclusion that Spectrum's affidavit was in conflict with prior deposition testimony. Thus, these issues are inadequately briefed and we do not consider them. See generally Utah R. App. P. 24(a)(9) (setting requirements for arguments contained in appellate

¹(...continued)
Property.

briefs); Smith v. Smith, 1999 UT App 370, ¶ 8, 995 P.2d 14 ("An issue is inadequately briefed when the overall analysis of the issue is so lacking as to shift the burden of research and argument to the reviewing court." (internal quotation marks omitted)).

Spectrum has failed to demonstrate that the district court exceeded its discretion in considering Nielsen's affidavit in support of AGBM's motion for summary judgment or that it committed legal error when it entered summary judgment on AGBM's breach of contract claim. Accordingly, we affirm the district court's judgment.

William A. Thorne Jr., Judge

WE CONCUR:

James Z. Davis,
Presiding Judge

J. Frederic Voros Jr., Judge