

IN THE UTAH COURT OF APPEALS

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MAR/REG Investments,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff and Appellant,)	
)	Case No. 20080173-CA
v.)	
)	
El Paso E&P Company, L.P.,)	F I L E D
successor by merger to El Paso)	(June 5, 2008)
Production Company, a Delaware)	
limited partnership,)	2008 UT App 217
)	
Defendant and Appellee.)	

Third District, Salt Lake Department, 020910944
The Honorable Kate A. Toomey

Attorneys: Terry R. Spencer, Sandy, for Appellant
Derek Langton and Richard E. Mrazik, Salt Lake City,
for Appellee

Before Judges Billings, Davis, and McHugh.

PER CURIAM:

This matter is before the court on El Paso E&P Company, LP's motion for summary disposition. El Paso claims that the issues presented by MAR/REG Investments are so insubstantial as to not merit further proceedings.

Summary judgment is appropriate when it is determined that "there is no genuine issue of material fact" and "the moving party is entitled to judgment as a matter of law." Utah R. Civ. P. 56(c). Further, after a moving party, who does not bear the burden of proof at trial, presents evidence in support of its motion demonstrating that there is no genuine issue of material fact, "the burden then shifts to the nonmoving party, who 'may not rest upon the mere allegations or denials of the pleadings,' but 'must set forth specific facts showing that there is a genuine issue for trial.'" Orvis v. Johnson, 2008 UT 2, ¶ 18, 177 P.3d 600 (quoting Utah R. Civ. P. 56(e)) (emphasis in original). MAR/REG failed to satisfy this burden.

El Paso's motion for summary judgment contained thirty-two statements of undisputed facts. MAR/REG did not dispute any of these facts; accordingly, unless the facts were effectively rebutted in the remainder of MAR/REG's memorandum in opposition to the motion for summary judgment, the facts were properly deemed to be admitted. See Bluffdale City v. Smith, 2007 UT App 25, ¶ 12, 156 P.3d 175. Among the facts admitted was that El Paso had not removed any equipment from the wells at issue in the case. MAR/REG argues that while it did not specifically dispute this fact in a separate section of its memorandum, it disputed the fact within the context of its argument. However, MAR/REG attempted to dispute this fact in the body of its argument with nothing other than the allegations it set forth in its complaint. Such reliance on allegations and mere supposition was insufficient to satisfy its burden under rule 56. See Orvis, 2008 UT 2, ¶ 18. Accordingly, because MAR/REG's breach of contract claim was premised entirely upon its allegation that El Paso had wrongfully removed certain equipment and because the undisputed facts established that El Paso did not remove the equipment, El Paso was entitled to summary judgment on the breach of contract claim.

MAR/REG also argued to the district court that it should not grant El Paso's motion for summary judgment because El Paso's conduct constituted a breach of El Paso's fiduciary duty to MAR/REG. However, MAR/REG's complaint did not contain a cause of action for breach of fiduciary duty. Further, MAR/REG never filed a motion to amend its complaint to include such a cause of action. Thus, MAR/REG could not rely on a claim of breach of fiduciary duty to defeat El Paso's motion for summary judgment.

Finally, El Paso's request for costs and attorney fees pursuant to rule 33 of the Utah Rules of Appellate Procedure is denied because this court does not hold that the appeal was frivolous or filed for the purpose of delay.

Affirmed.

Judith M. Billings, Judge

James Z. Davis, Judge

Carolyn B. McHugh, Judge