2014 WL 3753090 (Nev.Dist.Ct.) (Trial Motion, Memorandum and Affidavit)
District Court of Nevada.
Clark County

LEERAD, LP, a Nevada limited partnership; Virginia Belt, an individual, Plaintiffs,
v.
IMPERIAL CREDIT CORPORATION dba A.I. Credit Corporation, a New Hampshire corporation; Thomas Vail, an individual; Does I through X, inclusive; Roe Corporations I through X, inclusive, Defendants,
And Related Actions.

No. 10A631490.
February 18, 2014.

Opposition to Plaintiffs' Motion for Partial Summary Judgment

OPPM, Tisha Black Chernine, Esquire, Nevada Bar No. 5876, Andras F. Babero, Esquire, Nevada Bar No. 1658, Black & Lobello, 10777 West Twain Avenue, Third Floor, Las Vegas, Nevada 89135, Phone (702) 869-8801, Fax (702) 869-2669, tblack@blacklobellolaw.com, ababero@blacklobellolaw.com, for defendant, A.I. Credit Corporation.

DEPT. NO.: X

COME NOW Defendant/Counterclaimant, A.I. Credit Corporation by and through its counsel Andras F. Babero, Esquire, of the law firm of Black & LoBello, and hereby submits the following Opposition to Motion for Partial Summary Judgment (hereinafter referred to as the “Motion”). This Opposition is based on the memorandum of points and authorities, the pleadings on file herein, and any oral argument the Court may wish to hear at the time of hearing.

Dated 18th day of February 2014.

BLACK & LOBELLO

/s/ Andras F. Babero

ANDRAS F. BABERO, ESQUIRE

Nevada Bar No. 1658

Attorneys for AI. Credit Corporation

Memorandum of Points and Authorities

I

Statement of Facts

The Court is well acquainted with the facts of the instant case. Co-plaintiff, Virginia Belt (hereinafter referred to as “Dr. Belt”) is a retired professor of finance, with advanced degrees in economics and finance. On or about October 28, 2006, Plaintiffs, Dr. Belt and her operating entity, Leerad Family Limited Partnership, a Texas family limited partnership, purchased a life insurance policy (hereinafter referred to as the "Pioneer Policy") through Pioneer Mutual Life Insurance Company (hereinafter referred to as "Pioneer").

Co-defendant Thomas Vail (hereinafter referred to as "Vail") and Dr. Belt's daughter, Third Party Defendant Patricia McGill (hereinafter referred to as "McGill"), on information and belief, had been involved in a long-term romantic relationship at the time Leerad acquired the Pioneer Policy. Vail and McGill convinced Leerad to acquire the Pioneer Policy.

Dr. Belt and Leerad Family Limited Partnership (Plaintiffs and the Texas entity Leerad Family Limited Partnership, are hereinafter collectively referred to as "Leerad." [1]) hired McGill's then-lover, Vail, a licensed insurance broker [2] , and cloaked him with the apparent authority as their agent to acquire the Pioneer Policy, with Dr. Belt as the insured. Leerad sought and obtained premium financing from AICC to purchase the Pioneer Policy.

The Pioneer Policy had an initial face value of $1,320,000.00 (the maximum net death benefit at maturity was $1,959,596.00). Leerad Family Limited Partnership was named as the Pioneer Policy's sole owner and beneficiary. The Pioneer Policy is designed for persons whose estate may be facing certain adverse tax consequences upon the demise of the insured. On information and belief, Leerad, Vail, and McGill believed that Dr. Belt's estate was facing certain adverse tax consequences, and the Pioneer Policy was precisely what would mitigate such adverse tax consequences.

The Pioneer Policy was originally intended to be a type of life insurance in which a lump sum of money is paid into the policy in return for a death benefit that is guaranteed to remain paid-up until the insured dies. These types of policies are commonly referred to as a single-premium policy. However, Leerad subsequently changed the premium to an annual one.

Leerad alleged in the documents submitted to A.I. Credit Corporation (hereinafter referred to as "AICC") that it had a net worth of approximately $7 Million at the time it purchased the Pioneer Policy. However, Leerad claims in its pleadings, moving, and responding papers that it was illiquid. Leerad directed Vail to obtain a loan in order to acquire the Pioneer Policy.

Leerad directed its agent, Vail, to contact AICC to obtain premium financing to aid in acquiring the Pioneer Policy. AICC is an insurance financier, not an insurance company or broker. Life insurance premium financing for the acquisition of insurance policies was part of AICC's line of business at that time.

Leerad alleges its agent, Vail, through misrepresentation and fraud, convinced Dr. Belt to purchase the Pioneer Policy, knowing that she could not afford it. Leerad further alleges that Vail failed or inadequately explained how the Pioneer Policy worked or how it was intended to be financed.

Leerad executed a promissory note, loan agreement, an Assignment of Life Insurance Policy as Collateral in favor of AICC, as well as other loan documents as part of a loan in the principal sum of $215,865.00 (hereinafter referred to as the "Loan").

AICC also received additional security for the Loan in the form of an assignment of an insurance policy with Midland National Life Insurance Company issued upon McGill's life (hereinafter referred to as the "Midland Policy").

Leerad alleges that it withdrew a certificate of deposit in the sum of $285,000.00 and assigned it as collateral for the Loan. However, the certificate of deposit remained at Citibank at all times, and AICC only blocked the funds in the account to secure its interest. At no time did AICC liquidate or take possession of the certificate of deposit.

On information and belief, Dr. Belt filed a formal complaint against Pioneer and Vail with the Nevada Insurance Commission (hereinafter referred to as the "Insurance Commission"). The Insurance Commission directed that the insurance contract be rescinded. AICC was not a party to the Insurance Commission complaint.

Leerad ceased making payments on the Loan. However, AICC had advanced more than $430,000.00 on behalf of Leerad to purchase and maintain the Pioneer Policy. On or about October 9, 2008, Leerad executed documents requesting an additional loan in the sum of $215,865.00, to finance the annual premium due for the Pioneer Policy for that year.

Leerad filed the initial Complaint on December 15, 2010, and has filed an Amended Complaint, Second Amended Complaint, and Third Amended Complaint (hereinafter referred to the "Complaint").

II

Legal Argument and Analysis

A. *Standard for Summary Judgment*

Summary judgment is appropriate under Nevada Rule of Civil Procedure, Rule 56 only when the pleading, depositions, answers to interrogatories, admissions, and affidavits, if any, that are properly before the court demonstrate that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law.

Evidence presented in support of a motion for summary judgment must be construed in the light most favorable to the nonmoving party, and facts demonstrating the existence of a genuine issue will preclude a disfavorable summary judgment. A factual dispute is genuine when the evidence is such that a rational jury could return a verdict in the nonmoving party's favor. Sustainable Growth Initiative Committee v. Jumpers. LLC, 22 Nev. 53, 61, 128 P.3d 452, 458 (2006). As the Nevada Supreme Court stated in Wood v. Safeway, Inc., 121 Nev. 724, 732, 121 P.3d 1026, 1031, 1032 (2005), "A factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party." *See also* Posadas v. City of Reno, 109 Nev. 448, 851 P.2d 438 (1993).

When ruling on a summary judgment motion, "[a]ll of the nonmovant's statements must be accepted as true, and a district court may not pass on the credibility of affidavits." Jones v. First Mortgage Company of Nevada, 112 Nev. 531, 534, 915 P.2d 883, 885 (1996). *See also*, Harrington v. Syufy Enterprises, 113 Nev. 246, 248, 931 P.2d 1378, 1379-80 (1997). "A court should exercise great care in granting summary judgment; a litigant has a right to trial where there is the slightest doubt as to the facts." Nehls v. Leonard, 97 Nev. 325, 328, 630 P.2d 258, 260 (1981), Stone v. Mission Bay Mtg. Co., 99 Nev. 802, 672 P.2d 629 (1983); Shepard v. Harrison, 100 Nev. 178, 180, 678 P.2d 670, 672 (1984); *Pacific Pools Constr. Co. v. McClain's* Concrete, Inc., 101 Nev. 557, 559, 706 P.2d 849, 851 (1985).

Evidence introduced in support of or opposition to a motion for summary judgment must be admissible evidence; although the party opposing a motion for summary judgment is entitled to all favorable inferences from the pleadings and documentary evidence, the opposing party is not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture. *Collins v. Union Fed. Sav.& Loan Ass'n,* 99 Nev. 284, 302, 662 P.2d 610, 622 (1983); Henry Prods., Inc. v. Tarmu, 114 Nev. 1017, 1019, 967 P.2d 444, 445 (1998).

III.

ANALYSIS

A. Plaintiffs have not proven a civil conspiracy.

Leerad has alleged that they are entitled to a finding regarding civil conspiracy. An actionable civil conspiracy is a combination of two or more persons who, by some concerted action, intending to accomplish some unlawful objective for the purpose of harming another which results in damage. Collins v. Union Fed. Sav. & Loan Ass'n, 99 Nev. 284, 303, 662 P.2d 610, 622 (1983) (*citing* Wise v. S. Pac. Co., 223 Cal. App. 2d 50, 35 Cal. Rptr. 652 (1963); Bliss v. S. Pac. Co., 212 Or. 634, 321 P.2d 324 (1958)).

Further, with respect to concerted action, our Supreme Court opined as follows in GES, Inc. v. Corbitt, 117 Nev. 265, 270-71, 21 P.3d 11, 15 (2001):

> Both [concert of action and civil conspiracy] causes of action require an agreement. To prevail in a civil conspiracy action, a plaintiff must prove an agreement between the tortfeasors, whether explicit or tacit. Similarly, when [Restatement of Torts] section 876 [concert of action] refers to acting in concert with another tortfeasor or pursuant to a common design, it refers to this concept of 17 agreement. Proof of an agreement alone is not sufficient, however, because it is essential that the conduct of each tortfeasor be in itself tortious. (Emphasis added.)

Leerad has failed to prove, as opposed to merely alleging, that AICC had 1) an agreement with any third party; 2) to commit any unlawful act; 3) and such act was tortious. Leerad, in its attempt to prove a civil conspiracy, instead, turns to acts committed by solely by Vail. They offer not a scintilla of evidence, but only conjecture and failed argument regarding AICC.

Leerad's case turns on a finding that the wrongful acts committed by Vail are somehow attributable to AICC. This argument must fail because there is no evidence of civil conspiracy, under Corbitt.

Leerad contends that AICC, "... demonstrated that it acted in concert for the purpose of harming PLAINTIFFS when [AICC] testified that it had no knowledge that brokers might seek premium financing to ensure large insurance products could be purchased to increase the broker's commission." [3] (Emphasis in original.)

This is an absurdity. Firstly, a broker seeking to increase his or her commission is not, in itself, unlawful. Secondly, the fact that AICC's witness has no knowledge of an insurance broker's commission structure is a red herring. AICC is a financier; it is not an insurance company or insurance broker. Thus, its knowledge of an insurance broker's commission structure is irrelevant.

Further, Leerad has not proven that AICC "acted in concert" with Vail. Leerad had a personal relationship with Vail and "acted in concert" with him for their mutual investment scheme. It was only after the investment soured that Leerad sought to recoup its investment by blaming AICC. It should be noted that Leerad did not just obtain the Pioneer policy and then disavow it. Instead, Leerad repeatedly renewed the promissory note. Clearly, the renewals are demonstrable proof that Leerad intended to continuously work in concert with Vail.

AICC never had prior dealings with Vail. It did not solicit Vail; and it did not seek to do business with Leerad. To the contrary, Leerad has a lengthy relationship with Vail. Leerad put Vail in the position to solicit business with AICC. Further, Leerad continued to do business using Vail as its intermediary.

It is not AICC position to have to defend Vail and his actions. However, merely because AICC's representative did not know why a broker would seek to sell a particular product is not proof of a nefarious intent. AICC as a financier is not required to probe the rationale for a particular purchase. The financier responsibility is to provide financing for the purchase of the policy.

It is also absurd for Leerad to contend that AICC is responsible for any of its damages because AICC "admitted" that Leerad paid for the premiums. [4] Leerad paid for the insurance premiums by contracting with AICC to finance them. It then repeatedly renewed the promissory note. These were lawful acts conducted through lawful contracts. Thus, Leerad fails to prove that it sustained the requisite damages resulting from an unlawful act by AICC.

It is abundantly clear that Leerad cannot sustain the Motion. The evidence present must be construed in the light most favorable to the nonmoving party, i.e., AICC. *See,* Sustainable Growth Initiative Committee, *supra.* The facts demonstrating the existence of a genuine issue must preclude a disfavorable summary judgment.

B. Vail was acting as Leerad's agent at all times.

It is AICC's position that Vail, at all times, acted with apparent authority and the overt permission of Leerad. Restatement (Second) of Agency § 1 (1958), defines agency as "... the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act."

The Comments on Subsection 1 of the Restatement, Id., elaborates on this concept by the following:
a. The relation of agency is created as the result of conduct by two parties manifesting that one of them is willing for the other to act for him subject to his control, and that the other consents so to act. The principal must in some manner indicate that the agent is to act for him, and the agent must act or agree to act on the principal's behalf and subject to his control. Either of the parties to the relation may be a natural person, groups of natural persons acting for this purpose as a unit such as a partnership, joint undertakers, or a legal person, such as a corporation.

b. Agency a legal concept. Agency is a legal concept which depends upon the existence of required factual elements: the manifestation by the principal that the agent shall act for him, the agent's acceptance of the undertaking and the understanding of the parties that the principal is to be in control of the undertaking. (Emphasis added.)

In Dixon v. Thatcher, 103 Nev. 414, 742 P.2d 1029 (1987), the Nevada Supreme Court went further in explaining the relationship of agent and principal by stating the following:
To bind a principal, an agent must have actual authority, express or implied, or apparent authority. *See* Myers v. Jones, 99 Nev. 91, 93, 657 P.2d 1163, 1164 (1983). Apparent authority is "that authority which a principal holds his agent out as possessing or permits him to exercise or to represent himself as possessing, under such circumstances as to estop the principal from denying its existence." *Id.* (Emphasis added.)

The concept of "apparent authority" was explained in Nevada *Nat'l Bank v. Gold Star* Meat Co., 89 Nev. 427, 429, 514 P.2d 651, 653 (1973), when the Nevada Supreme Court stated that, " 'apparent authority' arises when a principal holds his agent out as possessing certain authority or permits him to exercise or to represent himself as possessing such authority under circumstances that would estop the principal from denying its existence."

"A principal is bound by acts of its agent while acting in the course of his employment." Prell Hotel Corp. v. Antonacci, 86 Nev. 390, 392, 469 P.2d 399, 400 (1970), and a principal is liable for those acts within the scope of the agent's authority. *See*, Yellow Jacket Silver Mining Company v. Stevenson, 5 Nev. 224 (1869); Ellis v. The Central Pacific Railroad Company of California, 5 Nev. 255, 256 (1869); Lonkey v. Succor M & M Co., 10 Nev. 17, 19 (1874); Wright v. Carson Water Co., 23 Nev. 39, 42, 42 P. 196, 197 (1895).

In the case at instant, Leerad cloaked Vail with the apparent authority to act on its behalf in its dealings with AICC. Leerad and Vail had an extensive business and personal, almost familial relationship with Dr. Belt and her daughter. He was Leerad's trusted advisor, and he had been McGill's lover for a lengthy period.

Vail had advised Leerad on the insurance issues that are the gravamen of this litigation, and he worked with Dr. Belt to structure the insurance premium financing. Further, Leerad ratified Vail's alleged wrongful actions by entering into the contract with AICC, repeatedly renewing the loan, and ratifying Vail's actions, instead of not immediately disavowing any action Vail took which Leerad perceived was wrongful. It was under these circumstances that Vail sought AICC and presented Leerad to AICC for the insurance premium financing.

Leerad alleges the following in the Complaint:

20. VAIL told DR. BELT that LEERAD would have to pledge collateral to get the loan.

21. On November 13, 2006, DR. BELT assigned LEERAD's only asset - Citibank Certificate of Deposit No. XXXXXXXXX for $285,000.00(the "CD") - to A.I. CREDIT as "collateral to secure the obligations" for the loan from A.I. CREDIT to LEERAD in the amount of $215,865.00. by signing an Agreement for Security of Financial Obligations of [sic] to AI. Credit Corp." ...

22. In 2006, DR.BELT authorized VAIL to use the $285,000.00 CD to purchase an annuity, Policy No. 150270618-5, from non-party Midland National Life Insurance Company... for the benefit of LEERAD. [5] (Emphasis added.)

The Complaint clearly demonstrates that Dr. Belt imbued Vail with the authority to negotiate with AICC. AICC, in contrast, never instill Vail with any authority. It never held Vail out as representing AICC, and never exercised any control over him. Additionally, AICC had never had dealings with Vail prior to his soliciting AICC for premium financing on behalf of his principal.

Lastly, it has long been held by our Supreme Court that the trial court may determine the existence of the agency relationship. *See,* Adams v. Smith, 19 Nev. 259, 9 P. 337 (1886), where the Court found that, it is not error for the trial court to take from the consideration of a jury a fact which is clearly proved and not materially disputed.

AICC could not have acted in concert with AICC, as Vail acted solely upon Leerad's apparent authority and direction. Thus, the Court cannot find that Leerad is entitled to summary judgment.

C. AICC does not owe Leerad a fiduciary obligation.

Leerad alleges that AICC owes it a fiduciary obligation. [6] Under Nevada law, "[a] fiduciary relationship is deemed to exist when one party is bound to act for the benefit of the other party. Such a relationship imposes a duty of utmost good faith." Hoopes v. Hammargren, 102 Nev. 425, 725 P.2d 238, 242 (1986) (holding that doctors have fiduciary relationship to patients). "The essence of a fiduciary or confidential relationship is that the parties do not deal on equal terms, since the person in whom trust and confidence is reposed and who accepts that trust and confidence is in a superior position to exert unique influence over the dependent party." Id. (internal quotation marks and citation omitted).

It is well settled that lenders do not owe borrowers a duty of fiduciary care. In Wensley v. First Nat. Bank of Nevada, 874 F. Supp. 2d 957, 967 (D. Nev. 2012), it was found that a claim fails on its face because it is well-settled that lenders and servicers owe no fiduciary duties to mortgage borrowers.); *see also,* Weingartner v. Chase Home Fin., LLC, 702 F. Supp. 2d 1276, 1288 (D. Nev. 2010) (a fiduciary duty exists in Nevada between doctor and patient, between attorney and client, but not between lender and debtor. Indeed, such parties are adversaries, not fiduciaries.); Larson v. Homecomings Fin., LLC, 680 F. Supp. 2d 1230, 1234 (D. Nev. 2009) (courts have repeatedly held that a lender owes no fiduciary duties to a borrower absent exceptional circumstances, such as when a special relationship exists between the two parties).

In Yerington Ford, Inc. v. General Motors Acceptance Corp., 359 F. Supp. 2d 1075, 1089 (D. Nev. 2004), aff'd in relevant part by Giles v. Gen. Motors Acceptance Corp., 494 F.3d 865 (9th Cir. 2007), the court stated the following:
Under Nevada law, "[a] fiduciary relationship exists when one has the right to expect trust and confidence in the integrity and fidelity of another." Powers v. United Services Auto. Ass'n, 115 Nev. 38, 979 P.2d 1286, 1288 (1999) (approving jury instruction defining fiduciary duty in the context of an insurance bad faith claim). Nevada courts also recognize the existence of a "confidential relationship," which may arise by reason of kinship or professional, business, or social relationships between the parties. Such a relationship exists when one party gains the confidence of the other and purports to act or advise with the other's interests in mind; it may exist although there is no fiduciary relationship; it is particularly likely to exist when there is a family relationship or one of friendship. Perry v. Jordan, 111 Nev. 943, 900 P.2d 335, 337-38 (1995) (internal quotations and

citations omitted); See also Randono v. Turk, 86 Nev. 123, 466 P.2d 218, 222 (1970) ("A confidential relation exists between two persons, whether their relations be such as are technically fiduciary or merely informal, whenever one trusts in and relies on the other. The question in such case is always whether or not trust is reposed."). Both types of relationships give rise to a duty on the part of "the person in whom the special trust is placed ... to act in good faith and with due regard to the interests of the other party." Perry, 900 P.2d at 338. Whether such a relationship exists appears to be a question of fact. Mackintosh v. Cal. Fed. Sav. & Loan Ass'n, 113 Nev. 393, 935 P.2d 1154, 1160 (1997) ("[T]he existence of a special relationship is a factual question[;] ... all of the facts must be considered in order to determine if the relationship was created."). However, the question for the Court is whether, under the circumstances of this case, a reasonable jury could conclude that a reasonable person would impart special confidence in the other party and whether that other party would reasonably know of this confidence. See id. at 1160.

The aforementioned Giles case (applying Nevada law, which provides that no duty exist absent a special relationship), specifically found that, "... the Nevada Supreme Court has yet to recognize the existence of a fiduciary relationship arising from the relationship between a lender and a debtor, or between a lender and a guarantor...many jurisdictions hold that a lender does not ordinarily owe a fiduciary duty to a borrower. (Emphasis added.)

In the case at instant, there could not have been a fiduciary relationship under the Yerington and Giles factors, as Nevada does not recognize such relationships under the lender/borrower scenario. Thus, we address whether there was a "confidential relationship" between the parties.

The Giles court stated the following:

... Nevada courts also recognize the existence of a "confidential relationship," which may arise by reason of kinship or professional, business, or social relationships between the parties. Such a relationship exists when one party gains the confidence of the other and purports to act or advise with the other's interests in mind; it may exist although there is no fiduciary relationship; it is particularly likely to exist when there is a family relationship or one of friendship. Perry v. Jordan, 111 Nev. 943, 900 P.2d 335, 337-38 (1995) (internal quotations and citations omitted); See also Randono v. Turk, 86 Nev. 123, 466 P.2d 218, 222 (1970) ("A confidential relation exists between two persons, whether their relations be such as are technically fiduciary or merely informal, whenever one trusts in and relies on the other. The question in such case is always whether or not trust is reposed."). Both types of relationships give rise to a duty on the part of "the person in whom the special trust is placed ... to act in good faith and with due regard to the interests of the other party." Perry, 900 P.2d at 338. Whether such a relationship exists appears to be a question of fact. Mackintosh v. Cal. Fed. Sav. & Loan Ass'n, 113 Nev. 393, 935 P.2d 1154, 1160 (1997) ("[T]he existence of a special relationship is a factual question [;] ... all of the facts must be considered in order to determine if the relationship was created."). However, the question for the Court is whether, under the circumstances of this case, a reasonable jury could conclude that a reasonable person would impart special confidence in the other party and whether that other party would reasonably know of this confidence. See id. at 1160.

It is interesting to note that relationships cited in Giles and Yerington is familial. Giles specifically speaks of fiancés and their shared confidential, fiduciary relationship. This is important in this instance because on information and belief, Vail and McGill were fiancés. This lends even more credence to the position that Vail was Leerad's agent and imbued with apparent authority to act on its behalf, and any fiduciary or confidential relationship was solely between Leerad and Vail.

In the case at instant, the relationship between Leerad and AICC commenced upon the execution the loan documents. Dr. Belt claims she was unaware that AICC was the lender.[7] Assuming, arguendo, Dr. Belt did not know AICC was to be the lender, then the question becomes, "How could she have imbued AICC with 'special trust,' as required by Giles?" Moreover, as Dr. Belt stated in her Affidavit in support of Leerad's Opposition to AICC's Motion for Summary Judgment:

12. Neither I nor Leerad directed VAIL to contact A.I. Credit to obtain premium financing to aid in the acquiring of the Pioneer policy.

13. Neither I nor Leerad knew VAIL was causing us to enter into a contract with A.I. Credit.

14. A.I. Credit's parent company is AIG, and I would never have agreed to do business personally or through LEERAD with any company affiliated with AIG ... and I knew to steer clear of AIG... I considered AIG to be a despicable corporation that could not be trusted. [8] (Emphasis in the original.)

First, Leerad claims it did not know AICC was going to be the lender. It necessarily follows that there could not be a confidential relationship with a party who is not known to exist. Leerad must admit it knew AICC was the lender when it signed the loan documents, as well as when it renewed the loan.

Again, it is nonsensical for Leerad to allege a special relationship with AICC entitled to trust while also stating that, "I considered AIG to be a despicable corporation that could not be trusted." It is a non sequitur.

In the case at instant, even Leerad does not allege a relationship between AICC that falls within the parameters set forth by the Giles and Yerington decisions. Clearly, there was no fiduciary relationship between AICC and Leerad. Moreover, there was not even a confidential relationship. Thus, this allegation must fail.

D. AICC was not negligent in its actions toward Leerad.

The standard for finding negligence is well founded in Nevada law. In Scialabba v. Brandise Const. Co., Inc. 112 Nev. 965, 921 P.2d 928 (1996), the Court stated the following:

To prevail on a negligence theory, a plaintiff must generally show that: (1) the defendant owed a duty of care to the plaintiff; (2) the defendant breached that duty; (3) the breach was the legal cause of the plaintiffs injury; and (4) the plaintiff suffered damages. Perez v. Las Vegas Medical Center, 107 Nev. 1, 4, 805 P.2d 589, 590 (1991). In a negligence action, summary judgment should be considered with caution. *See* Sims v. General Telephone & Electric, 107 Nev. 516, 521, 815 P.2d 151, 154 (1991). In order to establish entitlement to judgment as a matter of law, a moving defendant must show that one of the elements of the plaintiffs prima facie case is "clearly lacking as a matter of law." *Id.* at 521, 815 P.2d at 154.

As set forth at length above, lenders owe no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money. *See* Nymark v. Heart Fed. Sav. & Loan Assn., 231 Cal. App. 3d 1089, 1096, 283 Cal. Rptr. 53, 56 (Ct. App. 1991). In Nymark, the lender's conduct was limited to performing an appraisal of the collateral in the usual course and scope of its loan processing procedures to protect its interest that the collateral provided adequate security. *Id.* at 54-55. There was no indication that this act of appraisal was intended to induce the plaintiff to enter into the loan transaction. *Id.* As such, lender was acting well within its conventional role as a lender of money to ascertain the sufficiency of the collateral as security, and cannot be said to have engaged in "active participation of the financed enterprise. *Id.* at 57. The court, thus, affirmed the lower court's dismissal of plaintiff's negligence claim. *Id.; see also* Jolley v. Chase Home Fin., LLC, 213 Cal. App. 4th 872, 885, 153 Cal. Rptr. 3d 546, 557 (2013) (the undisputed evidence shows that Chase and Plaintiff engaged in the typical lender/borrower relationship. Plaintiff has not presented evidence of special circumstances on which to impose a general duty of due care.); Das v. Bank of Am., N.A., 186 Cal. App. 4th 727, 741, 112 Cal. Rptr. 3d 439, 451 (2010) (although respondent's loan was suspicious, nothing in the complaints suggests that respondent acted outside the scope of its conventional role as a mere lender of money, that respondent improperly persuaded Kaustubh to borrow the funds, or that the loan contained unfair or disadvantageous terms.); Hughes v. Holt, 140 Vt. 38, 435 A.2d 687, 688 (1981) (the court reasoned that this was not a case where a bank goes beyond its role as mortgagee and gets involved in a capacity beyond that of a mere lending agency so that a duty relationship analogous to that of a seller or broker may come into being....).

Not only are the operative facts of Nymark substantially similar to the case at bar so as to warrant the same conclusion, it would be absurd to concoct a duty on the part of the lender based on conduct for the lender's own benefit.

In the case at instant, there was no fiduciary relationship, as alleged by Leerad. Moreover, there was no duty of care owing Leerad by AICC, other than to finance the insurance premium, which AICC did as contracted. Raising negligence as an issue is a red herring, because it fails to demonstrate how an alleged failure to send collateral proposals to the legal department for review was negligent, or would have affected the financing of the insurance contract. Moreover, Leerad fails to demonstrate how the alleged "breach" was the legal cause of the its injury.

E. AICC did not commit elder abuse.

Leerad makes the assertion that merely by entering into a legal contract with AICC, AICC is liable for **elder abuse**. This is not the law or the case. Admittedly, Leerad makes a case against Vail on this allegation. However, it does not extend to AICC. In the case at instant, Leerad purchase the Pioneer policy as an investment. [9]

To establish a cause of action for **elder** exploitation under NRS 41.1395, plaintiff must show an older person ... suffers a loss of money or property caused by exploitation. *See* NRS 41.1395(1). The statute itself, NRS 41.1395(4)(b), particularly defines "exploitation" as:

> [A]ny act taken by a person who has the trust and confidence of an older person ... or any use of the power of attorney or guardianship of an older person ... to: (1) Obtain control, through deception, intimidation or undue influence, over the money, assets or property of the older person or vulnerable person with the intention of permanently depriving the older person or vulnerable person of the ownership, use, benefit or possession of his money, assets or property; *or* (2) Convert money, assets or property of the older person with the intention of permanently depriving the older person or vulnerable person of the ownership, use, benefit or possession of his money, assets or property. As used in this paragraph, "undue influence" does not include the normal influence that one member of a family has over another. (internal citations omitted).

The plain language of the statute requires more than mere showing of a contractual relationship between the parties. Rugamas v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark, 129 Nev. Adv. Op. 46, 305 P.3d 887, 894 (2013), reh'g denied (Sept. 26, 2013) ("When a statute is facially clear, this court will give effect to the statute's plain meaning and not go beyond the plain language to determine the Legislature's intent.") (*citing* Sonia F. v. Eighth Judicial Dist. Court, 125 Nev. 495, 497, 215 P.3d 705, 706 (2009)).

Indeed, in a recent insurance decision from the Federal District of Nevada, the DeRuise court held that the insurer's failure to distribute proceeds under the policy did not constitute a separate tort of exploitation under NRS 41.1395. *See* DeRuise v. Progressive Cas. Ins. Co. Inc., 2011 WL 3651297 (D. Nev. Aug. 17, 2011). There, the dispute revolved around payments due under an insurance policy. *Id.* Specifically, plaintiff alleged that the insurer's delaying tactics and withholding of benefit payments amounted to **elder** exploitation prohibited by NRS 41.1395. See *Id.* Notwithstanding, the DeRuise court found that mere allegations as to the policy and delay or withholding of benefits does not conform with the statutory definition of **elder** exploitation. *Id.* As such, the DeRuise court granted defendant's request for dismissal.

Leerad understood the risk it was taking by purchasing the insurance product. Dr. Belt is an extraordinarily astute person regarding financial issues. [10] She was uniquely qualified to understand the risks associated with any investment.

AICC, as a financier, does not factor information regarding a borrower's age or any possible infirmities when underwriting its loans. Even Leerad does not believe that there is a requirement to maintain such information. Thus, the reference to the Deceptive Trade Consumer Protection Act is itself deceptive. There is nothing illegal or wrongful in requiring a borrower to waive rights under the Deceptive Trade Consumer Protection Act. Thus, Leerad's references to it are illusory.

AICC entered into a lawful contract, and it performed pursuant to the terms of that contract. The fact that Dr. Belt is of a certain age is not a sword to be used when she fully understood the contract into which she was entering.

IV.

CONCLUSION

It is respectfully submitted to this Honorable Court that when construed in the light most favorable to AICC, the nonmoving party, the facts clearly demonstrate the existence of a genuine issues that must preclude a summary judgment. Therefore, it is respectfully requested that the instant Motion be denied.

Respectfully submitted, this _____ day of February, 2014.

BLACK & LOBELLO

/s/ Andras F. Babero

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Footnotes

1 Dr. Belt and the Texas non-party, Leerad Family Limited Partnership, purchased the Pioneer Policy and Midland Policy. The Complaint and its predecessors named the Nevada entity Leerad, LP as a Co-plaintiff, although it had no contractual rights or relationship to AICC or the contracts in question. The Court allowed Leerad, LP to remain as a Co-plaintiff.

2 Vail had been licensed by the Nevada Division of Insurance (hereinafter referred to as the "Division") as an insurance producer until the Division revoked his license following Vail's felony conviction in the Eighth Judicial District Court on October 23, 2009.

3 See, Motion, 4: 10-13.

4 See, Motion 5:3-17.

5 See, Complaint, p.5: ¶¶20-22.

6 See, Motion 9:6.

7 See, Third Amended Complaint, 4: ¶18

8 See, Dr. Belt's Affidavit in support of Leerad's Opposition to AICC's Motion for Summary Judgment 32: ¶12-14.

9 See, Paul Burkett's deposition. 51:9-19.

The second part about it is because it was a high limit, a million, three, and the premium dollars at her age that was requested by PML to buy that item, forcing her to go in and look at a different financial mechanism to pay that premium over time, in other words, get a loan, and then also at the same time being told that, "By the way, you can sell this again to the secondary market," and the initial pitch was that it was $16,000 or $17,000 of premium and, boy, you'll be able to turn it around in less than a year and you can get $75,000.

10 See, Dr. Belt's Deposition 99:10; 100:11-12; 100-101: 23-25, 1-11; 102:4-11.

Generally I was a professor in a university. It was in southern Illinois, and I was -- I'm sorry -- southern California, and I was there for 25 years. While I was there I also made a lot of speeches for people, and different people heard me and hired me to do other things. That's what happened when the American Bankers Association -- they had heard me speak at a board of meeting of the bank in the Union Bank in California.

...

I served on the board of Union Bank...

And I traveled all over the world as the spokesman for the American Bankers Association.

...

Q You also served as a consultant?

A For many different companies, yes.

Q Could you give us the type of -- your background in terms of serving as a consultant?

A Usually just straight business finance, how to make the company work, how to -- how to help -- how they could help themselves, you know. In other words, I'd try to find ideas that would help the company to increase their productivity.

Q And what type of companies did you advise?

A Well, all of them, from -- let's see. The big medical, I guess that was the biggest one for the -- one of the big medical companies. And I worked with them for quite some time, and this was a private organization.

...

A For my master's it was -- let's see. I think I got the master's there in economics. Yes.

Q All right. And your Ph.D?

A I got that in finance.

Q So as part of economics were you in -- was it - your 9 discipline, was it macroeconomics? Econometrics?

Microeconomics? All three?

A All three, right.