IN THE SUPREME COURT OF THE STATE OF NEVADA

LOU MELTON,
Appellant/Cross-Respondent,
vs.
SCOTT MORGAN,
Respondent/Cross-Appellant.

No. 43715

FILED

FEB 16 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal and cross-appeal from a district court judgment in a real property action. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge.

In September 2000, Scott Morgan, respondent/cross-appellant, entered into a three-year lease with Lou Melton, appellant/cross-respondent, for a house Melton owned in Reno, Nevada. The lease agreement provided Morgan with an option to purchase the house from Melton beginning after the first year for $250,000. The parties dispute whether this figure would eventually escalate up if the house's fair market value increased. Morgan attempted to exercise the option to purchase at $250,000 in April 2003, but Melton refused to sell at that price.

Morgan filed an action for specific performance against Melton in September 2003. In light of the lease's imminent expiration, Morgan also applied for a preliminary injunction that would bar Melton from evicting him pending the action. The district court granted Morgan injunctive relief, but ordered him to procure a $10,000 cash bond and to pay Melton $1,250 per month, an amount equal to the rent under the lease. The district court also granted Morgan partial summary judgment on the option price issue, determining that it was a flat $250,000 with no escalation. Furthermore, the district court struck Melton's demand for

jury trial, reasoning that she was not entitled to a jury trial in an equitable action for specific performance.

Following a bench trial, the district court concluded that Morgan was financially able to perform and granted him specific performance. The court ordered the release of Morgan's $10,000 cash bond, but not the $1,250 monthly payments. The court granted Morgan attorney fees pursuant to the parties' lease agreement.

Melton now appeals, challenging among other things the $250,000 purchase price and the district court's grant of specific performance to Morgan. Morgan cross-appeals, claiming that the district court erred by allowing Melton to keep the $1,250 monthly payments. We conclude that the district court did not err in regard to the issues raised on appeal and cross-appeal.

Purchase price

Melton argues that the district court erred in granting partial summary judgment as to the purchase price set forth in the agreement. Specifically, Melton contends that there is a factual question as to whether a mark next to the "$250,000" figure was a plus sign, which could indicate an escalating purchase price. We disagree.

"[I]ssues of contractual construction, in the absence of ambiguity or other factual complexities, present questions of law for the courts and are suitable for determination by summary judgment."[1] We review an order of summary judgment de novo.[2] Here, the mark at issue

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[1]Ellison v. C.S.A.A., 106 Nev. 601, 603, 797 P.2d 975, 977 (1990).

[2]Whealon v. Sterling, 121 Nev. ___, ___, 119 P.3d 1241, 1244 (2005).

is clearly not a plus sign, but a somewhat jagged, horizontal dash that bisects the left parenthesis. It denotes zero cents after the "$250,000" figure and can be found throughout the agreement serving that same purpose. Thus, we conclude that the district court did not err in finding as a matter of law that the agreement provided for a purchase price of $250,000 only, and in granting partial summary judgment on this matter.

Specific performance

Melton argues that the district court erred in awarding specific performance of the option agreement to Morgan because (1) Morgan failed to demonstrate his ability to pay the purchase price, and (2) the option agreement had too many unspecified terms. A district court's decision to grant specific performance will not be disturbed on appeal unless an abuse of discretion is shown.[3]

Morgan's ability to pay

"Specific performance sought by a purchaser of real property may be denied if the purchase price is not tendered when due. If the purchaser has not tendered the purchase price, he must demonstrate that he is ready, willing and able to perform if the court should order specific performance."[4] The rationale for this rule is that a trial court should be certain that a purchaser is able to pay if the seller is ordered to perform.[5]

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[3]McCann v. Paul, 90 Nev. 102, 103-04, 520 P.2d 610, 611 (1974).

[4]Cohen v. Rasner, 97 Nev. 118, 120, 624 P.2d 1006, 1008 (1981) (citation omitted) (concluding that district court did not err in denying specific performance to appellants because appellants' loan application was never processed, so appellants had not completed necessary financial arrangements, nor demonstrated ability to perform).

[5]Id.

We conclude that substantial evidence supports the district court's finding that Morgan was ready, willing, and able to perform his purchase obligations under the agreement. At the bench trial,[6] Morgan's mortgage broker testified that Morgan had been approved for a loan of $300,000. After costs, fees, and IRS lien payoffs, the net loan proceeds amounted to approximately $215,900. The district court determined that the adjusted purchase price, inclusive of offsets and award of attorney fees to Morgan,[7] would be $221,569.85. After weighing the evidence, the district court concluded that Morgan had sufficient assets to cover the difference between the loan and the adjusted purchase price.

Melton's argument that Serpa v. Darling[8] precludes specific performance is unpersuasive because Serpa is factually distinguishable from this case. In addition to failing to tender the actual purchase price of the property, the appellant in Serpa also failed to tender consideration for the option itself.[9] This is not the case here. Thus, we conclude that the district court did not abuse its discretion in finding Morgan ready, willing, and able to perform.

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[6]In her appeal, Melton challenged the propriety of a bench trial over a jury trial. We have considered Melton's challenge, but conclude that it is without merit.

[7]We have considered Melton's challenge to the attorney fees, but conclude that it lacks merit.

[8]107 Nev. 299, 810 P.2d 778 (1991).

[9]See id. at 304-05, 810 P.2d at 782.

Terms of agreement

Melton argues that the agreement cannot be enforced because too many terms were left open, unspecified, or subject to decision in escrow. Specific performance is only available when the terms of the contract are definite and certain.[10] "The contract must be reasonably certain as to its subject matter, its stipulations, its purposes, its parties and the circumstances under which it was made."[11] We conclude that the terms of the agreement were definite and reasonably certain. For example, while Melton claims that escrow fees and closing costs are open terms, Paragraph 29 of the agreement specifies that they will be paid in accordance with local custom. At trial, an escrow officer testified on this matter. Melton had also claimed that the proration of taxes, inspection costs, and repairs was left open. However, Paragraph 31 of the agreement states that taxes and other expenses of the property would be prorated as of the date of the recordation of the deed. Because the terms of the agreement were definite and reasonably certain, we conclude that the district court did not abuse its discretion in ordering specific performance.

Morgan's monthly payments

On cross-appeal, Morgan argues that the district court erred by allowing Melton to keep the $1,250 monthly payments he had made to her, contending that they constituted refundable security for the

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[10]Id. at 305, 810 P.2d at 782; Carcione v. Clark, 96 Nev. 808, 811, 618 P.2d 346, 348 (1980) (citing Dodge Bros., Inc. v. Williams Estate Co., 52 Nev. 364, 287 P.2d 282 (1930)).

[11]Harmon v. Tanner Motor Tours, 79 Nev. 4, 17, 377 P.2d 622, 629 (1963).

injunction, not rent for Morgan's occupancy of the property pending litigation. We disagree.

At the preliminary injunction hearing, the district court stated that payment of rent would continue to be paid until the matter was finally adjudicated, and instructed Morgan's attorney to draft an appropriate order. However, the subsequent order recast the rent as "security." Subsequently, the district court again expressed that the monthly payments were rent, not security. Thus, we decline to give the written order preference.[12] Furthermore, no harm to Morgan was demonstrated because, even if the agreement had been performed, Morgan would still have had to make mortgage payments. Therefore, based on the above reasons, we conclude that the district court did not err in allowing Melton to keep the monthly payments of $1,250.

Having concluded that the district court did not err with respect to the issues raised on appeal and cross-appeal, we

ORDER the judgment of the district court AFFIRMED.

Douglas, J.
Douglas

Becker, J.
Becker

Parraguirre, J.
Parraguirre

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[12]See Rodriguez v. Oakley Valley Stone, Inc., 816 P.2d 326, 331-32 (Idaho 1991).

cc: Hon. Steven P. Elliott, District Judge
Walsh, Baker & Rosevear, P.C.
Molof & Vohl
Washoe District Court Clerk