IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBIN BRUGESS,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE VALORIE J. VEGA, DISTRICT JUDGE,
Respondents,
and
DANIEL DOHRN AND ANN DOHRN,
Real Parties in Interest.

No. 44280

FILED

JAN 0 6 2005

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

ORDER GRANTING PETITION FOR WRIT OF MANDAMUS

This original petition for a writ of mandamus challenges district court orders that enforce a partial summary judgment by establishing an escrow closing date, allowing the real parties in interest to inspect petitioner's home, and requiring petitioner to relinquish possession of her home.[1] On December 17, 2004, the real parties in interest filed an answer. After reviewing the petition and answer, we conclude that our intervention by way of extraordinary relief is warranted.

Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to a

[1]Petitioner concurrently moved for a stay. On November 23, 2004, we temporarily stayed the district court's orders. Because our review of the partial summary judgment order is necessary to determine the propriety of the enforcement orders, we construe the writ petition as also seeking relief from the partial summary judgment order.

judgment as a matter of law.[2] All of the evidence submitted in support of and in opposition to summary judgment must be viewed in the light most favorable to the party against whom summary judgment is sought.[3] In a mandamus proceeding, we review a summary judgment order and subsequent enforcement orders to control a manifest abuse of discretion when there is no plain, speedy and adequate remedy in the ordinary course of the law.[4]

On February 20, 2004, petitioner Robin Brugess and real parties in interest Daniel and Ann Dohrn executed an agreement for the sale of Brugess' home to the Dohrns. The agreement established March 31, 2004, as the escrow closing date and provided that time is of the essence. On March 10, 2004, Brugess attempted to cancel escrow because of a $6,900 broker's fee in the escrow contract and because Daniel Dohrn allegedly "underrepresented the market value" of the home. On March 24, the Dohrns' attorney wrote Brugess, stating that the $6,900 fee was a mistake and would not be charged and encouraging Brugess to "go[ ] through with the contract." Three days later, on March 27, Brugess agreed to proceed with the sale. According to Brugess' declaration, she requested a one-month extension of the closing date to secure moving services. The Dohrns allegedly refused, but instead agreed to rent the property to Brugess for the month of April 2004. By March 31, the parties had signed all of the closing documents. But when the Dohrns failed to

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[2]NRCP 56(c).

[3]Quirrion v. Sherman, 109 Nev. 62, 65, 846 P.2d 1051, 1052 (1993).

[4]See NRS 34.170; Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 637 P.2d 534 (1981).

fully fund escrow by the end of the day on March 31, Brugess canceled escrow.

The Dohrns sued Brugess. Based on this court's decision in Goldston v. AMI Investments, Inc.,[5] the district court granted the Dohrns summary judgment on their claims for breach of contract and specific performance and later entered the challenged enforcement orders. We conclude that the district court manifestly abused its discretion.

In Goldston, we held that a seller of land could not rely on a time-is-of-the-essence clause to avoid a real estate contract when the seller was responsible for the buyer's failure to timely fund escrow. Here, an issue of fact remains as to whether Brugess was responsible for the Dohrns' failure to close on March 31. When Brugess and the Dohrns reaffirmed the sales contract after Brugess attempted to cancel escrow, the Dohrns allegedly insisted on maintaining the March 31 closing date. Thus, in light of the evidence submitted, it appears that Brugess retracted her repudiation, which, together with the Dohrns' refusal to extend the closing date, revived the contract's time-is-of-the-essence clause.[6] Consequently, the Dohrns' failure to fully fund escrow on March 31 may

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[5]98 Nev. 567, 655 P.2d 521 (1982).

[6]See 4 Arthur L. Corbin, Corbin on Contracts § 980, at 933 (1951) (observing that retraction of an anticipatory repudiation of a land sales contract can revive a time-is-of-the-essence clause); id. at 939 (stating that "the repudiator has a power of retraction as long as there has been no substantial change of position by the injured party; and the latter's continuing to urge performance may be properly held to keep this power of retraction alive"); cf. Kirkpatrick v. Petreikis, 358 N.E.2d 679, 680-81 (Ill. App. Ct. 1976) (stating that a time-is-of-the-essence clause that has been waived may be revived when the buyer receives notice that strict contractual compliance is expected).

have entitled Brugess to lawfully cancel the contract.[7] Summary judgment against Brugess was, therefore, unavailable.

Accordingly, we direct the clerk of this court to issue a writ of mandamus directing the district court to vacate its August 27, 2004 partial summary judgment order and the enforcement orders entered on October 28, 2004, and November 19, 2004.[8]

It is so ORDERED.

_____, J.
Maupin

_____, J.
Douglas

_____, J.
Parraguirre

cc: Hon. Valorie Vega, District Judge
McCrea Martin Allison, Ltd.
Ashworth & Benedict
Clark County Clerk

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[7]Goldston, 98 Nev. at 569, 655 P.2d at 523 ("A seller of land pursuant to a contract of sale is justified in canceling the contract if the purchaser has failed to perform a material part of the contract which is a condition concurrent or precedent to the seller's obligations to perform.").

[8]In light of this order, we vacate our temporary stay entered on November 23, 2004.