

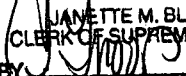
IN THE SUPREME COURT OF THE STATE OF NEVADA

NEVADA TRAILS-LAS VEGAS, INC.,
D/B/A NEVADA TRAILS, A NEVADA
CORPORATION,
Appellant,
vs.
STRATOSPHERE LEASING, LLC,
Respondent.

No. 44713

FILED

SEP 25 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court grant of summary judgment in an action for unlawful detainer in a commercial lease. Eighth Judicial District Court, Clark County; Mark R. Denton, Judge.

The parties are familiar with the facts, and we do not recount them here except as pertinent to our disposition.

This court reviews a grant of summary judgment de novo, without deference to the findings of the lower court.¹ Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.²

“[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.”³ Only a dispute of fact “that might affect the outcome of

¹Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

²Id.

³Id. at 730, 121 P.3d at 1030.

the suit under the governing law will properly preclude the entry of summary judgment,” and disputes over irrelevant facts should be ignored.⁴

In its motion for partial summary judgment, respondent Stratosphere Leasing, LLC contended that appellant Nevada Trails-Las Vegas, Inc., breached the use clause in the parties’ commercial lease agreement for retail space in the Tower Shops, located in the Stratosphere Hotel and Casino. The use clause allowed Nevada Trails to operate a retail store selling a full product line of Southwestern gifts and items bearing the Las Vegas logo, and it generally prohibited Nevada Trails from using the premises for any other business or purpose. Stratosphere alleged that Nevada Trails was selling items such as luggage, trinket jewelry, Disney knock-off shirts, shot glasses, water, soft drinks, ATM machine services, and Internet services in violation of the use clause. Stratosphere also alleged that Nevada Trails sold pornographic items on the premises, which Nevada Trails contended was mistakenly stocked by a supplier without its knowledge.

The district court granted Stratosphere’s motion for partial summary judgment, and it declared Nevada Trails to be in material breach of the lease. Further, the district court determined that Stratosphere was entitled to evict Nevada Trails and re-let the premises to a new tenant. The district court based its ruling on the following pertinent conclusions: (1) Stratosphere provided adequate notice of its intent to terminate the lease; (2) Nevada Trails’ individual violations of

⁴Id.

the lease constitute material breaches of the lease, or alternatively, its repeated violations cumulatively constituted a material breach; (3) the sworn statements of Haim Gabay, president of Nevada Trails, were not sufficient to create factual issues; and (4) there were no genuine issues of material fact, and Stratosphere was entitled to judgment as a matter of law. The district court additionally issued a writ of restitution, and it awarded \$27,300.50 in attorney fees and costs to Stratosphere.

On appeal, Nevada Trails contends that summary judgment was improper because there were factual issues as to whether it had materially breached the lease. Additionally, even though the lease required that all modifications or waivers be made in writing, Nevada Trails argues that the parties had modified the lease provisions through oral agreements and in its course of dealing. Apparently, previous Tower Shops managers permitted Nevada Trails to use the premises for purposes other than those allowed in the lease's use clause.

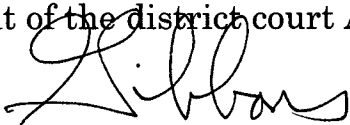
After reviewing the record and the parties' arguments on appeal, we conclude that: (1) the use clause was unambiguous, at least as to the material breaches⁵ alleged by Stratosphere;⁶ (2) in light of the

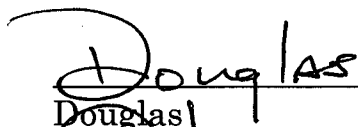
⁵The materiality of a breach is a question of fact. Stone Forest Industries, Inc. v. U.S., 973 F.2d 1548, 1550-51 (Fed. Cir. 1992). However, the materiality of a breach may be decided on summary judgment. See Pervis v. State Farm Fire and Cas. Co., 901 F.2d 944, 947-48 (11th Cir. 1990).

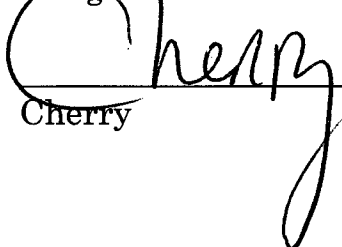
⁶Nevada Trails sold items and services on the leased premises that were outside of the scope of the permitted use or that were expressly or implicitly prohibited by the use clause. Such products and services included ATM and Internet services, as well as the sale and/or stocking of unauthorized sundries and pornography.

evidence presented below, there were no genuine issues of material fact as to whether the parties modified the use clause through oral agreements or their course of dealings,⁷ and (3) Stratosphere was entitled to judgment as a matter of law and Nevada Trails otherwise failed to show that there were genuine issues of material fact precluding summary judgment. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Gibbons


_____, J.
Douglas


_____, J.
Cherry

⁷The declaration of Haim Gabay was the only evidence provided by Nevada Trails that indicated that there were oral modifications to the use clause. Similar to the district court, we conclude that Gabay's declaration was not sufficient to create a genuine issue of material fact. The declaration states, in relevant part, that previous Tower Shops managers, namely George Schmidt and Randy Aguilar, allowed Nevada Trails to sell various items prohibited by the use clause, and allowed Nevada Trails to install an ATM machine and provide Internet services in exchange for \$150,000 in "improvements" to the leased premises. The remainder of the evidence, including letters from Schmidt and Aguilar, indicate that Stratosphere intended to enforce its use clause at all times except when stated otherwise in writing, and that Nevada Trails was never authorized to install an ATM machine or sell Internet services, or to stock or sell pornography.

cc: Hon. Mark R. Denton, District Judge
M. Nelson Segel, Settlement Judge
John R. Hawley
Lawrence J. Semenza
Beckley Singleton, Chtd./Las Vegas
Eighth District Court Clerk