

IN THE SUPREME COURT OF THE STATE OF NEVADA

RICK IHASZ AND OLGA IHASZ,
Appellants,
vs.
GENE SIMONE; SHUISAN MUI; AND
M. JEANNE HERMAN,
INDIVIDUALLY AND D/B/A
LANDFINDER COUNTRY
PROPERTIES,
Respondents.

No. 45227

FILED

SEP 29 2006

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

ORDER OF AFFIRMANCE

This is an appeal from a district court order granting specific performance in a breach of contract action. Second Judicial District Court, Washoe County; Robert H. Perry, Judge.

Appellants Rick and Olga Ihasz (Sellers) contend that the district court erred in determining that they entered into a valid contract to sell a parcel of real property to respondents Gene Simone and Shuisan Mui (Buyers). Sellers also contend that the district court erred in denying them relief on claims of fraud and rescission against their real estate broker, respondent M. Jeanne Herman. The parties are familiar with the facts, and we do not recount them except as necessary to our discussion.

Existence of contract

The question whether a contract exists is an issue of fact and is thus subject to an abuse of discretion standard.¹ This court will defer to

¹May v. Anderson, 121 Nev. ___, ___, 119 P.3d 1254, 1257 (2005).

the district court's findings unless they are clearly erroneous or not based upon substantial evidence.²

An enforceable contract requires an offer and acceptance, meeting of the minds, and consideration.³ Sellers claim that the district court erred in determining that a valid contract existed because they never accepted Buyers' counteroffer. We disagree. There is substantial evidence showing that Sellers objectively manifested to Buyers a willingness to contract and thus Sellers entered into a valid contract to sell the real estate at issue.⁴

Buyers contacted Herman, Sellers' real estate agent, on February 9, 2003, and made an offer on the property. Sellers rejected the offer and faxed a counteroffer to Buyers that expired by its own terms on February 12. Buyers then attempted to accept the counteroffer on February 15. Although Buyers' attempt to accept the offer after it had expired was ineffectual to create a contract, we consider this attempt a counteroffer that the Sellers were then free to accept or reject.⁵

²James Hardie Gypsum, Inc. v. Inquipco, 112 Nev. 1397, 1401, 929 P.2d 903, 906 (1996), overruled on other grounds by Sandy Valley Assocs. v. Sky Ranch Estates, 117 Nev. 948, 955, 35 P.3d 964, 969 (1991); First Interstate Bank v. Jafbros Auto Body, 106 Nev. 54, 56, 787 P.2d 765, 767 (1990) (providing that substantial evidence is evidence a reasonable mind might accept as sufficient to support a conclusion).

³May, 121 Nev. at __, 119 P.3d at 1257.

⁴James Hardie Gypsum, 112 Nev. at 1402, 929 P.2d at 906.

⁵Morrison v. Rayen Investments, Inc., 97 Nev. 58, 60, 624 P.2d 11, 12 (1981).

In late February, the Sellers approached the Buyers requesting an extension of escrow in order to avoid substantial tax liabilities. The parties executed an Addendum on March 28, extending the escrow period and explicitly stating that the Addendum was meant to be part of the contract.

We note, at the outset, that it is not uncommon in real estate transactions for a prospective buyer and seller to exchange a series of offers and counteroffers, eventually producing a mutual agreement. In analyzing such negotiations, we consider the parties' objective manifestations of intent to enter a contract, not their self-serving statements regarding their subjective understandings.⁶

We conclude that Sellers objectively manifested a willingness to sell the property at issue to Buyers. First, Mr. Ihasz entered into these negotiations to extend escrow, an act clearly evidencing an intent to sell the property. Second, Mr. Ihasz contacted Buyers in April 2003 and invited them to spend several days on the property in apparent anticipation of the impending sale. Third, Mrs. Ihasz executed escrow documents mailed to her by the escrow agent on March 18, 2003. Fourth, and most significantly, Sellers allowed this process to continue for four months without ever voicing a concern to Buyers regarding the validity of the real estate sale contract.

Sellers' only remaining argument on this issue is that they entered escrow negotiations and acted in a manner consistent with an intent to sell because they were under the mistaken belief that a binding contract existed as a result of the attempted February 15 acceptance.

⁶James Hardie Gypsum, 112 Nev. at 1402, 929 P.2d at 906.

However, for reasons discussed below, the evidence indicates that Sellers were at least constructively aware of potential defects in the contract and moved forward with the sale anyway.

As a result, we conclude that substantial evidence supports the district court's conclusion that a valid land sale contract was formed between Buyers and Sellers.

Sellers' claims against Herman

Sellers further contend that the district court erred in refusing to award them damages against Herman based upon Herman erroneously telling Sellers that Buyers' attempted February 15 acceptance was valid. Sellers argue that they relied on this misrepresentation and are thus entitled to damages for fraud and the rescission of the contract due to Herman's wrongful conduct. We conclude that these arguments lack merit.

An essential element of the tort of fraud is justifiable reliance.⁷ Therefore, Sellers must show that they relied upon a misrepresentation to their detriment and that such reliance was justifiable under the circumstances.⁸ As a result of his conversations with a family friend in the real estate business, Mr. Ihasz was at least constructively aware that the validity of the contract was in doubt, and therefore could not justifiably rely upon Herman's representations regarding the contract.

Sellers further argue that the district court failed to consider the possibility that Herman committed constructive fraud based upon her

⁷Epperson v. Roloff, 102 Nev. 206, 210, 719 P.2d 799, 802 (1986).

⁸Id.

silence concerning the issue of Buyers' late acceptance. There are three elements to the tort of constructive fraud: (1) the defendant owed a legal or equitable duty to the plaintiff arising out of a fiduciary or confidential relationship; (2) the defendant breached that duty by misrepresenting or concealing a material fact; and (3) the plaintiff sustained damages due to defendant's breach.⁹ These elements must be proven by clear and convincing evidence.

We conclude that Sellers failed to prove by clear and convincing evidence that they were proximately damaged by Herman's silence. As noted above, Sellers were constructively aware of possible defects in the real estate contract prior to Herman's statements. Despite lingering doubts about the validity of the contract, Sellers did not seek legal representation and continued to manifest a willingness to contract. As a result, we conclude that substantial evidence supports the district court's rejection of Sellers' claim for constructive fraud.¹⁰

Finally, Sellers claim that the district court should have granted their request for rescission. Rescission is an equitable remedy cancelling a contract where one party enters the contract in reliance upon the misrepresentation of another.¹¹ If the misrepresentation was made

⁹Executive Mgmt. v. Tigor Title Ins. Co., 114 Nev. 823, 841, 963 P.2d 465, 477 (1998).

¹⁰We note that the district court erred in denying relief based upon contributory negligence, which is not a defense to fraud. However, where the district court reaches the right decision, even if based upon the wrong standard, this court will affirm. Sengel v. IGT, 116 Nev. 565, 570, 2 P.3d 258, 261 (2000).

¹¹Pacific Maxon, Inc. v. Wilson, 96 Nev. 867, 870, 619 P.2d 816, 818 (1980).

knowingly, even negligent, unreasonable reliance by the misled party does not preclude rescission.¹² The misrepresentation must have been made knowingly and with the intention that it be relied upon.¹³ Sellers allege that the district court should have cancelled the contract as a result of Herman's misrepresentations.

Again, we conclude this claim lacks merit because Sellers cannot prove they relied at all upon Herman's statements. The record indicates that Sellers had actual or constructive knowledge that the agreement was unenforceable prior to the execution of the Addendum. Despite this knowledge, Sellers signed the Addendum and escrow documents and manifested an objective willingness to contract. As a result, the district court properly rejected Sellers' claim for rescission.¹⁴

Conclusion

Substantial evidence supports the district court's conclusions that a valid contract existed between Buyers and Sellers and that Sellers' fraud and rescission claims against Herman were unavailing.

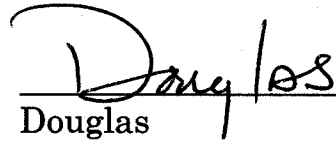
¹²Id., 619 P.2d at 817.


¹³Id.


¹⁴Sellers also claimed they were a prevailing party on their third-party complaint against Herman and, thus, entitled to attorney fees because the district court ruled in their favor on two of their eight counterclaims against Herman. However, Sellers were awarded no damages for these breaches, lost on the vast majority of their counterclaims, and ultimately lost the suit on the merits. As a result, we conclude that the district court did not abuse its discretion when it refused to award attorney fees. See Glenbrook Homeowners v. Glenbrook Co., 111 Nev. 909, 922, 901 P.2d 132, 141 (1995) (holding that where each party prevails on some issues and loses on others, court need not award attorney fees).

Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 _____, J.
Douglas

 _____, J.
Becker

 _____, J.
Parraguirre

cc: Hon. Robert H. Perry, District Judge
Lester H. Berkson, Settlement Judge
Frank W. Daykin
Kelly L. Turner
Cope & Guerra
Michael Davis Merchant
Washoe District Court Clerk