IN THE SUPREME COURT OF THE STATE OF NEVADA

RICHARD KLUTMAN AND NEREIDA KLUTMAN, HUSBAND AND WIFE,
Appellants,
vs.
STEWART TITLE OF NEVADA, A NEVADA CORPORATION,
Respondent.

No. 45146

RICHARD KLUTMAN AND NEREIDA KLUTMAN, HUSBAND AND WIFE,
Appellants,
vs.
STEWART TITLE OF NEVADA, A NEVADA CORPORATION,
Respondent.

No. 45487

FILED

MAR 27 2007

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

ORDER OF AFFIRMANCE

These are consolidated appeals from a district court summary judgment, certified as final under NRCP 54(b), in a real property dispute, and a subsequent order awarding attorney fees and costs. Eighth Judicial District Court, Clark County; Valorie Vega, Judge. For the reasons stated below, we affirm the district court's rulings.

Appellants Richard and Nereida Klutman entered into a purchase agreement with real estate developer Rhodes Ranch Limited Partnership for the purchase of real property and a newly constructed residence commonly known as 275 Blackstone River Avenue, Las Vegas, Nevada, for the price of $178,525. The parties designated respondent Stewart Title of Nevada, Inc., as the escrow agent for the transaction.

The Klutmans and Rhodes Homes jointly executed escrow instructions directing Stewart Title "to deliver Seller's instrument of

07-06925

conveyance to the Buyer upon payment of the escrow agent, the Seller's account, of the full consideration."

As of the closing date, the Klutmans and Rhodes Homes had unresolved issues concerning repair items, which were noted in an August 18, 2000, Walk Through & Acceptance form. Despite these unresolved issues, on September 5, 2000, the Klutmans signed closing documents at Stewart Title's office and deposited $52,500 into escrow, which represented only a portion of the $178,525 purchase price. Stewart Title never received the full purchase price from the Klutmans or their lender.

Escrow did not close as anticipated; and in the ensuing weeks, Mr. Klutman wrote several letters to Stewart Title indicating that Rhodes Homes refused to close escrow because the Klutmans would not sign a provision on the Walk Through & Acceptance form indicating that the repairs were made. On September 22, 2000, Rhodes Homes formally instructed Stewart Title to cancel the escrow account.

After the escrow did not close, the Klutmans wrote several letters inquiring as to the "status" of the Klutmans' partial payment. However, the Klutmans did not make a written demand for a refund of their partial payment until May of 2001. Upon receipt of this written request, Stewart Title issued the Klutmans a check in the sum of $52,500.

The Klutmans subsequently sued Rhodes Homes and Stewart Title, alleging that Rhodes Homes failed to deliver the home on the close of the escrow date and that Stewart Title improperly failed to close escrow, and improperly withheld the Klutmans' $52,500.

Eventually, Stewart Title filed a motion for summary judgment, which the district court granted on the following claims: breach of contract, breach of the covenant of good faith and fair dealing, breach of

fiduciary duty, negligence and negligent misrepresentation, and punitive damages. In this, the district court found that Stewart Title fully complied with all of its escrow instructions and never was in a position to close the escrow because Stewart Title never was in possession of (1) the full purchase price from the Klutmans, (2) the conveyance documents from Rhodes Homes, and (3) mutual instructions from the Klutmans and Rhodes Homes to close escrow. In a subsequent order, the district court granted Stewart Title's motion for attorney fees in the amount of $55,573.75 and costs in the amount of $3,497.37 and denied the Klutmans' motion for reconsideration. These consolidated appeals followed.

The Klutmans contend the district court erred when it granted summary judgment to Stewart Title, asserting, among other things, that Stewart Title breached its duties by retaining the Klutmans' partial payment until May of 2001; failing to inform Rhodes Homes that the Klutmans signed the closing documents on September 5, 2000; failing to disclose to the Klutmans that Rhodes Homes had instructed Stewart Title on September 7, 2000, to cancel escrow; failing to respond to the Klutmans' written inquiries; and submitting altered documents to the district court.

We review a district court's order granting summary judgment de novo, without deference to the findings of the lower court.[1] Summary judgment is appropriate under NRCP 56 when the pleadings, depositions, and affidavits properly before the court demonstrate that no genuine issue of material fact exists, and that the moving party is entitled to judgment

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

as a matter of law.[2] "A factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party."[3]

Upon our review of the record, we conclude that Stewart Title was entitled, as a matter of law, to summary judgment as to all causes of action alleged by the Klutmans because Stewart Title did not breach its duties under the escrow instructions or otherwise act negligently.[4] Here, Stewart Title was never in possession of the full purchase price and the conveyance documents, and as a result, Stewart Title was not in a position to close escrow and cannot be held liable for its failure to do so. Stewart Title, moreover, never received mutual instructions from the parties directing it to close escrow. Going further, Stewart Title did not wrongfully retain the Klutmans' partial payment. In this, we note that the escrow instructions did not provide for an immediate return of the partial payment upon cancellation of the escrow. Rather, the escrow instructions provide that, in the event that no objection to the cancellation is filed, Stewart Title "is authorized and directed to comply with such cancellation notice." In this case, the Klutmans did not file an objection

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[2]Wood, 121 Nev. at 731, 121 P.3d at 1031.

[3]Id.

[4]Mark Properties v. National Title Co., 117 Nev. 941, 34 P.3d 587 (2001) (holding that beyond disclosing known fraud, an escrow agent is not required to do anything more for the parties to the escrow than what is specifically required under the escrow instructions); Broussard v. Hill, 100 Nev. 325, 329, 682 P.2d 1376, 1378 (1984) ("In managing monies deposited in escrow, the escrow agent is required to conduct his affairs with scrupulous honesty, skill and diligent.").

and Rhodes Homes' cancellation notice did not direct Stewart Title to release the funds to the Klutmans. Although the Klutmans wrote several letters inquiring as to the "status" of the partial payment, these inquiries did not amount to a written demand for the return of the partial payment. When the Klutmans finally provided a written request for the return of the funds, Stewart Title promptly issued the Klutmans a check.

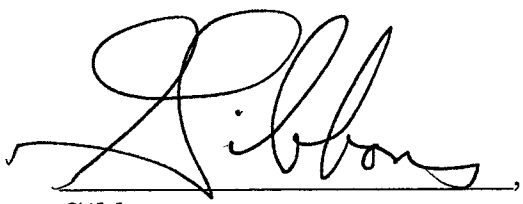
The Klutmans also assert that Stewart Title should be held liable for its failure to inform (1) Rhodes Homes that the Klutmans signed the closing documents and (2) the Klutmans that Rhodes Homes instructed Stewart Title not to close escrow as of September 7, 2000. We disagree. The Klutmans' only evidence that Rhodes Homes was unaware that the Klutmans signed the closing documents came from the deposition of Rhodes Homes' legal counsel, Ron Gillette who indicated that he did not become involved in the closing dispute until the middle of September. The Klutmans fail to cite to any evidence indicating that Rhodes Homes' closing coordinator was also unaware that the Klutmans had deposited the $52,500 in escrow and had signed closing documents. With respect to the Klutmans' second assertion, Mr. Klutman's own letters indicate that he was aware that Rhodes Homes was refusing to close as of September 7, 2000. Thus, based on the record evidence, the Klutmans failed to raise any genuine issue of material fact. Finally, any failure to communicate on the part of Stewart Title does not amount to a breach of its duty.

With respect to the district court's attorney fees and costs award, the Klutmans argue that the district court abused its discretion by awarding attorney fees and costs to Stewart Title. Attorney fees are only

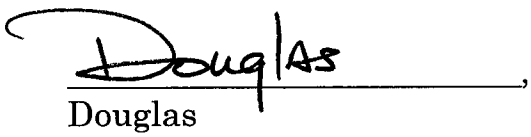
available when authorized by rule, statute, or contract.[5] Here, the escrow instructions entered into by the parties provide for an award of attorney fees to Stewart Title if it prevails. Since Stewart Title clearly prevailed, the district court did not abuse its discretion in awarding attorney fees and costs to it.

We have considered the Klutmans' other arguments in both of their appeals and conclude that they lack merit. Even if we construe the evidence in a light most favorable to the Klutmans, the record fails to disclose a breach of any duty imposed on Stewart Title. Accordingly, we affirm the district court's summary judgment and order awarding costs and attorney fees.

It is so ORDERED.



_____, J.
Gibbons



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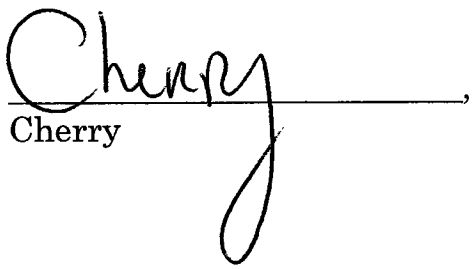
Douglas



_____, J.
Cherry

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[5]Flamingo Realty v. Midwest Development, 110 Nev. 984, 991, 879 P.2d 69, 73 (1994).

cc: Hon. Valorie Vega, District Judge
Lester H. Berkson, Settlement Judge
Doris Elie Nehme
Gerrard Cox & Larsen
Eighth District Court Clerk