IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID R. MERKER, INDIVIDUALLY AND AS A TRUSTEE OF MERKER, INC., A REVOKED NEVADA CORPORATION,
Appellant,
vs.
BETTY ENGELSTAD, AS EXECUTRIX OF THE ESTATE OF RALPH LOUIS ENGELSTAD, DECEASED,
Respondent.

No. 45791

FILED

MAY 31 2007

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

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from a district court judgment entered after a bench trial in a contract action. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge.

The district court entered judgment in favor of respondent Betty Engelstad (Engelstad), as executrix of Ralph Engelstad's estate, and against appellant David Merker, in the total amount of $812,132.14 plus interest, for loans related to Merker's Las Vegas home, various additional loans, settlement costs associated with the Anytime, Ltd. property, and unreturned management fees. The district court also entered judgment in favor of Engelstad on Merker's counterclaim. Merker has appealed.

On appeal, Merker argues that the district court erred by (1) finding for Engelstad as to her claim for payment of three promissory notes totaling $250,000, because the claim was not supported by substantial evidence, (2) determining that Merker was indebted to Engelstad for the additional loans, because Engelstad's claim for the additional loans was barred by the statute of limitations, (3) finding for

Engelstad as to her claim for a share of the Anytime settlement, because the claim was contrary to the written agreement between Merker and Ralph Engelstad and was barred by the statute of limitations, (4) misinterpreting the written agreement by determining that the term "net profits" was ambiguous, implying a loss obligation into the agreement, and concluding that Merker had already received the accounting he requested in his counterclaim, and (5) awarding $120,000 in unreturned management fees to Engelstad, because Engelstad's claim for the management fees was contradicted by the pleadings and against the substantial weight of the evidence. The parties are familiar with the facts and we do not further recount them except as necessary for our disposition.

"On appeal, this court will not disturb a district court's findings of fact if they are supported by substantial evidence."[1] "Substantial evidence is evidence that 'a reasonable mind might accept as adequate to support a conclusion.'"[2]

In addition, this court has held that "'failure to object to asserted errors at trial will bar review of an issue on appeal.'"[3] However,

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[1]Keife v. Logan, 119 Nev. 372, 374, 75 P.3d 357, 359 (2003).

[2]First Interstate Bank v. Jafbros Auto Body, 106 Nev. 54, 56, 787 P.2d 765, 767 (1990) (quoting State, Emp. Security v. Hilton Hotels, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986)).

[3]Allum v. Valley Bank of Nevada, 114 Nev. 1313, 1324, 970 P.2d 1062, 1069 (1998) (quoting McCullough v. State, 99 Nev. 72, 74, 657 P.2d 1157, 1158 (1983)). See also Britz v. Consolidated Casinos Corp., 87 Nev. 441, 447, 488 P.2d 911, 915 (1971) ("A point not urged in the trial court,

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if the issue presents the possibility of plain error, "this court may consider [the issue] even in the absence of an objection below if it is so substantial as to result in a miscarriage of justice."[4]

The Las Vegas home loan

At trial, Merker suggested that Engelstad could only produce copies of the promissory notes, rather than the original documents that comprise the Las Vegas home loan. Merker claims that he repeatedly asked Engelstad to produce the original promissory notes, yet Engelstad only produced copies. Merker contends that under NRS 104.3309, if a party does not possess an instrument that they seek to enforce, they must account for their loss of possession. Merker argues that Nevada law thus requires this court to reverse the district court's judgment because Engelstad failed to produce the original promissory notes. However, Merker did not object when Engelstad introduced the copies of the notes during trial.

Merker further argued that Ralph Engelstad had destroyed or cancelled the original notes in forgiveness of Merker's debt. In its findings of fact, the district court determined that "neither [Ralph Engelstad] nor any of his corporation, successors or assigns" ever forgave all or any part of the $250,000 debt. The evidence in the record is such that a reasonable mind could adequately conclude that neither Ralph Engelstad nor his

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unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be consider on appeal.").

[4]Landmark Hotel v. Moore, 104 Nev. 297, 299, 757 P.2d 361, 362 (1988).

corporation, successors, or assigns ever forgave Merker's debt on the home loan. We therefore determine that Merker has failed to demonstrate that the district court's finding is not supported by substantial evidence.

Statute of limitations on the additional loans

Merker also argues that Engelstad's claims for certain additional loans were barred by the statute of limitations. Merker asserted a statute-of-limitations affirmative defense in his answer and counterclaim, but he did not raise the statute-of-limitations issue during trial or in post-trial motions or proceedings, until this appeal.

We determine that there is no plain error and that by failing to raise the statute of limitations in the trial court, Merker has waived the issue.

Anytime, Ltd. settlement

Merker argues that under the written agreement, Ralph Engelstad was to provide the money for their business ventures and Merker was to perform the work required to sell the properties. Merker further argues that Engelstad's claim for Merker's pro rata share of the Anytime, Ltd. settlement was contrary to the written agreement because Ralph Engelstad was responsible for the financial aspect of the business relationship.

In its findings of fact, the district court determined that Merker was responsible to Ralph Engelstad for his pro rata share of the Anytime settlement and that he had acknowledged this debt. There is evidence in the record by which a reasonable mind could adequately conclude that Merker was liable to Engelstad for his pro rata share under the written agreement with Ralph Engelstad and that Merker had acknowledged this debt. Accordingly, we determine that the district

court's finding as to Merker's pro rata share of the Anytime settlement is supported by substantial evidence.

Merker also argues that Engelstad's claim for the pro rata share was barred by the statute of limitations. However, while Merker asserted a statute-of-limitations defense in his pleadings, he did not raise the issue during trial or in post-trial motions or proceedings, until this appeal. We determine that there is no plain error and that by failing to raise the statute of limitations in the trial court, Merker has waived the issue.

The district court's interpretation of the written agreement

On appeal, Merker argues that the district court misinterpreted the written agreement in three respects: (1) the district court incorrectly determined that the term "net profits" in the contract was unclear and ambiguous; (2) the district court incorrectly implied the term "losses" into the contract; and (3) the district court incorrectly found that Merker had already received the accounting that he requested in his counterclaim.

"A contract is ambiguous if it is reasonably susceptible to more than one interpretation."[5] "When contract language is ambiguous . . . extrinsic evidence may be admitted to determine the parties' intent, explain ambiguities, and supply omissions."[6] "In determining the parties' intent, the trier of fact must construe the contract as a whole, including consideration of the contract's subject matter and objective, the

[5]Margrave v. Dermody Properties, 110 Nev. 824, 827, 878 P.2d 291, 293 (1994).

[6]Ringle v. Bruton, 120 Nev. 82, 93, 86 P.3d 1032, 1039 (2004).

circumstances of its drafting and execution, and the parties' subsequent conduct."[7] Moreover, "[i]n the determination of the meaning of an indefinite or ambiguous contract, the interpretation placed upon the contract by the parties themselves is to be considered by the court and is entitled to great, if not controlling, influence in ascertaining their understanding of its terms."[8]

Additionally, "[w]hen the parties do not dispute the facts, the interpretation of a contract is a question of law, which we review de novo."[9] But where factual determinations are concerned, "'[a] district court's findings will not be disturbed on appeal unless they are clearly erroneous and are not based on substantial evidence.'"[10]

Our review of the district court's findings of fact and conclusions of law reveals that the district court analyzed the contractual language, construed the contract as a whole in light of the contract's subject matter and the circumstances of drafting, examined the parties' subsequent conduct, and gave considerable weight to how the individual parties interpreted the contract. We conclude that based on the language and structure of the contract, as well as the parties' subsequent conduct, the district court did not err in (1) determining that the term "net profits"

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[7]Id.

[8]Agric. Aviation v. Clark Co. Bd. Comm'rs, 106 Nev. 396, 399, 794 P.2d 710, 712 (1990).

[9]Lorenz v. Beltio, Ltd., 114 Nev. 795, 803, 963 P.2d 488, 494 (1998).

[10]Id. (quoting Gibellini v. Klindt, 110 Nev. 1201, 1204, 885 P.2d 540, 542 (1994)).

as used in the contract is ambiguous and that the parties' subsequent conduct removed the ambiguity, (2) construing the term "losses" as it applies to the contract and how losses were to be shared between the parties, and (3) finding that Merker had already received an accounting and was not entitled to another one. We also conclude that Merker has failed to demonstrate that the district court's findings are not supported by substantial evidence or that its conclusions are erroneous. Accordingly, we reject Merker's arguments as to how the district court interpreted the contract in the aforementioned three instances.

Unreturned management fees

Engelstad's complaint sought the return of management fees issued to Merker between March 14, 1991, and May 18, 1994. Yet the district court determined that Merker owes $120,000 in management fees that he received after April 3, 1996.[11] Merker argues that Engelstad's claim for unreturned management fees was contradicted by the pleadings and against the substantial weight of the evidence. Engelstad does not dispute Merker's argument on this issue.

Engelstad never specifically sought recovery of the management fees issued after April 3, 1996. Based on our review of the record and the contract, we thus conclude that the district court erred in entering judgment against Merker for the $120,000 in management fees advanced to him after April 3, 1996. Therefore, we reverse the judgment

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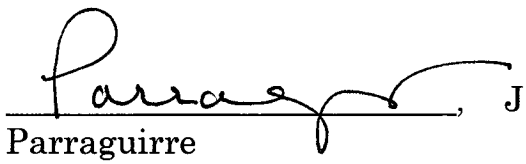
[11]The district court concluded that all management fees advanced to Merker before April 3, 1996, were settled at the closing of the Sherwood Atrium property.

as to this issue only and remand the matter so that the district court may correct the judgment.

Accordingly, we ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND WE REMAND this matter to the district court so that the court may correct the judgment as set forth in this order.



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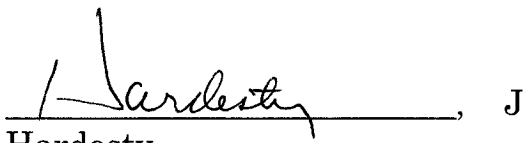

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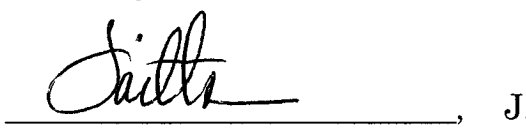

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cc: Hon. Stewart L. Bell, District Judge
Jerry J. Kaufman, Settlement Judge
Fitzgibbons & Anderson
Nitz Walton & Heaton, Ltd.
Olson, Cannon, Gormley & Desruisseaux
Eighth District Court Clerk