IN THE SUPREME COURT OF THE STATE OF NEVADA

CROWN COMMERCIAL INVESTMENT, LLC, A NEVADA LIMITED LIABILITY COMPANY,
Appellant,
vs.
SAHARA MEADOWS PROPERTIES, INC., A NEVADA CORPORATION; AND AZTEC INN CASINO LIMITED PARTNERSHIP, A NEVADA LIMITED PARTNERSHIP,
Respondents.

No. 45941

FILED

AUG 0 8 2006

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

ORDER OF AFFIRMANCE

This is an appeal from a district court order granting summary judgment to respondents, expunging a notice of lis pendens, and awarding attorney fees and costs in a real property contract dispute. Eighth Judicial District Court, Clark County; Mark R. Denton, Judge.

Essentially, this case involves respondents' cancellation of a September 1, 2004 contract to sell the Aztec Inn Casino, based on appellant's failure to make an initial deposit of $200,000 by September 7, 2004. Appellant's check, which was delivered to respondents on September 2, 2004, but not presented for payment until September 8, 2004, did not clear because of insufficient funds in appellant's account. Appellant claims that it had the funds to cover the check, which its bank

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allegedly failed to transfer into its checking account from other accounts. Appellant further contends that it wired funds for deposit to the escrow company on September 10, 2004, even before respondents received actual notice of the "bounced" check. Thus, appellant argues that its payment was timely and should relate back to September 2, the date that it initially delivered a check for the deposit. Appellant argues that even if its deposit was late, it was not a material breach, and respondents suffered no harm. Thus, appellant seeks to vacate the district court's summary judgment order that denied its claims for equitable relief and specific performance of the contract and expunged its notice of lis pendens.

Respondents, however, point to the clear and unambiguous language of the contract, which states that "time is of the essence" and which required appellant to deliver $200,000 into escrow by September 7. Otherwise the agreement was to become "null and void ab initio, and have no further force or effect whatsoever." According to respondents, by September 10, when appellant wired the deposit to the escrow company, the agreement was already null and void and had terminated by its own terms. Respondents further argue that appellant's failure to timely make the initial deposit was a material breach. Respondents contend that appellant's non-performance was not excused, and that the district court properly refused appellant's request for specific performance and granted summary judgment in respondents' favor.

We review the district court's order granting summary judgment to respondents de novo.[1] Summary judgment is appropriate

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

when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law.[2] When reviewing a motion for summary judgment, the evidence, and any reasonable inferences from it, must be viewed in a light most favorable to the non-moving party.[3]

It is undisputed that appellant's first check did not clear, due to insufficient funds, when it was presented for payment on September 8. The clear and unambiguous provisions of the parties' contract stated that time is of the essence and required the initial deposit to be made by September 7, or the agreement would become void ab initio. As this court previously stated in R & S Investments v. Howard,[4] the time of payment relates back to the time the check was delivered, if the check is honored. But if the check is not honored, as in the present case, the payment is not deemed made until cash is actually received or a subsequent check is

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[2]Id.

[3]Id.

[4]95 Nev. 279, 284, 593 P.2d 53, 56 (1979) (citing Ruppert v. Edwards, 67 Nev. 200, 215-20, 216 P.2d 616, 623-26 (1950)).

honored.[5] Here, the funds were not transferred until September 10, too late to meet the September 7 deadline.[6]

Appellant argues, however, that it is entitled to equitable relief from forfeiture and strict enforcement of the contract's provisions.[7] As the district court found, the parties' agreement was wholly executory, and appellant did not make any substantial expenditures in reliance upon the contract. Appellant's purchase of adjoining property to develop in conjunction with the subject property did not occur until September 21, 2004, well after the purchase agreement was rendered void. Additionally, appellant's second deposit for $200,000, made on or about September 10,

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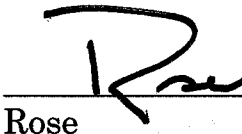
[5]Id.; see also Von Ehrensmann v. Lee, 98 Nev. 335, 647 P.2d 377 (1982) (holding that buyer was not entitled to specific performance when his deposit of funds into escrow was three weeks late and the contract contained a time is of the essence clause); Holmby, Inc. v. Dino, 98 Nev. 358, 647 P.2d 392 (1982) (rejecting buyer's contention that it had substantially complied with the parties' agreement and was entitled to a reasonable time to tender payment when escrow instructions provided that time is of the essence and required performance at a stated and unquestionable time).

[6]See R & S Investments, 95 Nev. at 284, 593 P.2d at 56.

[7]See McCann v. Paul, 90 Nev. 102, 520 P.2d 610 (1974) (stating that equitable relief has normally been granted where the buyer has paid a considerable portion of the purchase price, or has entered upon the property and enhanced its value by placing improvements thereon, or some other similar circumstance that would constitute a forfeiture of substance, and concluding that the trial court did not abuse its discretion in denying equitable relief to the buyer); Slobe v. Kirby Stone, Inc., 84 Nev. 700, 447 P.2d 491 (1968) (affirming the trial court's decision to grant equitable relief where the buyer had invested about $90,000 to purchase a motel for $129,000 and needed $8,310.28 to cure its default, and there was evidence that one of the sellers had encouraged the buyer to secure a third-party purchaser, who had committed herself to others for financing).

was returned to it. Consequently, the district court did not err in granting summary judgment to respondents on appellant's specific performance claim and expunging appellant's notice of lis pendens. Accordingly, we affirm the district court's order.[8]

It is so ordered.



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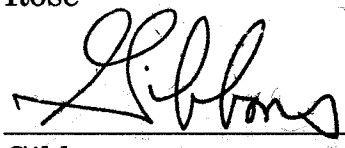
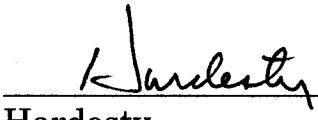
Rose



_____, J.
Gibbons



_____, J.
Hardesty

cc: Hon. Mark R. Denton, District Judge
Stephen E. Haberfeld, Settlement Judge
John Peter Lee Ltd.
Nitz Walton & Heaton, Ltd.
Clark County Clerk

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[8]As appellant has not asserted that the award of attorney fees and costs was, independent of the summary judgment, improper, we affirm that portion of the order as well. We note that the parties' contract provides for attorney fees and costs to the prevailing party.