

IN THE SUPREME COURT OF THE STATE OF NEVADA

EXQUISITE INVESTMENTS, INC.,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK, AND THE HONORABLE
MARK R. DENTON, DISTRICT JUDGE,
Respondents,
and
AIR LIQUIDE AMERICA LP, AND
WRIGHT ENGINEERS,
Real Parties in Interest.

No. 46456

FILED

MAY 05 2006

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

ORDER GRANTING IN PART PETITION FOR WRIT OF MANDAMUS

This original petition for a writ of prohibition or mandamus challenges a district court order that expunged petitioner's lis pendens in a real estate contract dispute.

Writ relief is an extraordinary remedy within the sound discretion of this court.¹ A writ of prohibition is available to arrest the proceedings of any tribunal when such proceedings are without or in excess of such tribunal's jurisdiction.² A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting

¹See Smith v. Dist. Ct., 113 Nev. 1343, 950 P.2d 280 (1997).

²Beazer Homes Nevada, Inc. v. Dist. Ct., 120 Nev. 575, 579, 97 P.3d 1132, 1135 (2004).

from an office, trust, or station, or to control an arbitrary or capricious exercise of discretion.³

In this case, the parties do not dispute that their agreement required EII, as a condition precedent, to record a commercial map dividing the subject property so that one parcel could be conveyed to EII while the other parcel could be retained by real party in interest, Air Liquide (“AIR”). Both EII and AIR, as well as EII’s engineering firm that prepared the map, mistakenly believed that filing the commercial map with the City of Henderson was all that was necessary to have the subject property divided into two separate parcels. In fact, the City of Henderson also required a drainage study and improvement plan before it would approve the map for recordation.

AIR apparently continued to work toward closing the transaction by (1) orally extending the deadline until January 15, 2005; (2) continuing extension negotiations from January 15 to March 22, 2005; (3) offering to extend the contract until December 2005; (4) requesting that EII obtain a second opinion from another engineering firm as to how long it would take to meet the City’s additional requirements; (5) and never seeking to enforce the contract’s “time is of the essence” provision until after terminating the contract. During the negotiations for an extension of time, AIR was aware of EII’s substantial expenditure of time and money in attempting to divide the property.

In expunging EII’s notice of lis pendens, the district court found that EII should have known about the requirements for the drainage study and improvement plan, as they were a matter of public

³See NRS 34.160; Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 637 P.2d 534 (1981).

knowledge, and EII could have been working on them from the beginning in order to comply with the requirements for recording the map by the contract deadline. The district court also found that the parties had not reached an extension agreement beyond mid-January, 2005, and “[t]he fact that the parties continued thereafter to try to work toward a common goal does not mean that [AIR] gave up its right to finally call a halt by terminating a contract which it had allowed to continue in place when it became evident that the reason that it was keeping a holding pattern, *i.e.*, further negotiations leading up to a new closing with extension terms, fell through.” Consequently, the district court concluded that EII “cannot perform conditions precedent, such as recordation of the map that was supposed to have taken place long ago,” that EII was not likely to prevail, and that any injury to EII would not be sufficiently serious to outweigh the injury to AIR if the notice of lis pendens were allowed to remain in place.

NRS 14.015(2)(c), however, does not require a party to have already performed conditions precedent, or to immediately perform them, but instead, to establish that “he will be able to perform any conditions precedent to the relief sought.” In this case, the district court erred in implicitly concluding that EII cannot perform the conditions precedent because it had not already recorded the commercial map, and thus failing to examine EII’s prospective ability to perform the conditions precedent under NRS 14.015(2)(c).

Additionally, the district court failed to analyze the effects of waiver and/or equitable estoppel upon the parties’ actions, given that AIR continued to negotiate beyond the extended deadline and allowed EII to continue to work toward closing the transaction for some time without


enforcing the deadline.⁴ Consequently, it is unclear whether the district court properly concluded that EII was not likely to prevail or had no fair chance of success on the merits under NRS 14.015(3).

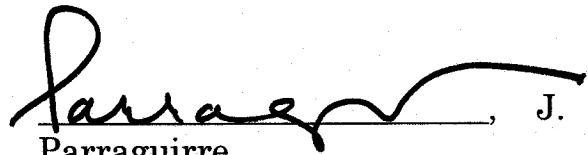
Finally, as “real property and its attributes are considered unique and loss of real property rights generally results in irreparable harm,”⁵ the district court should have considered whether, under NRS 14.015(3)(b), the injury to EII with the loss of the property would be less than the injury to AIR in the form of monetary damages.

Accordingly, we grant this petition in part. The court clerk shall issue a writ of mandamus directing the district court to vacate its order expunging the lis pendens and to reconsider whether expungement is warranted, in light of the discussion of NRS 14.015 in this order.

It is so ORDERED.⁶

 _____, J.
Douglas

 _____, J.
Becker

 _____, J.
Parraguirre

⁴NGA #2 Ltd. Liab. Co. v. Rains, 113 Nev. 1151, 946 P.2d 163 (1997); see also A.C. Shaw Construction v. Washoe County, 105 Nev. 913, 784 P.2d 9 (1989) (determining that all contracts contain an implied covenant of good faith and fair dealing).

⁵Dixon v. Thatcher, 103 Nev. 414, 416, 742 P.2d 1029, 1030 (1987).

⁶In light of this order, we vacate this court’s temporary stay entered on December 22, 2005.

cc: Hon. Mark R. Denton, District Judge
Marquis & Aurbach
Guild Russell Gallagher & Fuller
Clark County Clerk