IN THE SUPREME COURT OF THE STATE OF NEVADA

OPHTHALMIC ASSOCIATES, LLP; KEVIN N. MILLER, M.D.; GRACE S. SHIN, M.D.; EMILY L. FANT, M.D.; AND TUSHINA A. REDDY, M.D.,
Appellants,
vs.
TRIPLE NET PROPERTIES, LLC, SUCCESSOR-IN-INTEREST TO WESTBAY, LLC,
Respondent.

No. 46560

FILED

MAY 30 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court's judgment entered after a bench trial in a lease action. Eighth Judicial District Court, Clark County; Jessie Elizabeth Walsh, Judge.

On May 1, 2002, appellants Ophthalmic Associates, LLP, Doctors Kevin Miller, Grace Shin, Emily Fant, and Tushina Reddy (collectively "Ophthalmic") entered into a lease agreement for medical office space in the Westbay Office Complex with respondent Westbay, LLC ("Westbay"). Westbay had initially purchased the land where the Westbay Office Complex is located, on the condition that the land would be rezoned for commercial development. Westbay was able to acquire commercial zoning in 1995, albeit amidst the concern and protest of many of the neighborhood residents. The City Council approved the zoning change contingent upon 31 restrictions, including one restriction that no vehicular or pedestrian travel would be granted access via Campbell Drive. Accordingly, the West Office Complex has driveway access solely through Charleston Boulevard.

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After the office building was completed in 1999, the Las Vegas Metropolitan Police Department (LVMPD) leased office space in the Westbay Office Complex. Soon after they moved in, Detective Gordon Martines noted that the complex was difficult to access and that it was "an accident waiting to happen." Martines contacted Finlayson and thereafter attempted to acquire a building permit to create an additional driveway for the complex. He successfully obtained this permit in March 2002. He was never told about the existing zoning prohibition against the driveway by either Finlayson or the Public Works Department.

On May 1, 2002, Ophthalmic entered into a ten year lease with Westbay to operate an ophthalmology clinic out of the Westbay Office Complex. The Ophthalmic doctors see many elderly and infirm patients with ocular pathology and expressed concern about the limited access provided solely at and onto Charleston Boulevard. Accordingly, Ophthalmic and Westbay negotiated, in a separate addendum to the lease, that Westbay[1] would construct an additional driveway by December 31, 2002, to provide for an additional driveway entrance from the Westbay Office Complex onto Campbell Drive. The addendum stated in pertinent part:

> Additional Property Access: Landlord has received approval and shall subsequently obtain building permits for an additional driveway

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[1]Triple Net acquired the Westbay Office Complex from Westbay, LLC sometime in 2004 and assumed Opthalmic's lease. Although the names of the corporate entities have changed, Ian Finlayson ("Finlayson") remains as a principal owner of the Westbay Office Complex. Therefore, for the purposes of this order, Westbay, LLC, Triple Net, and Finlayson represent one entity and will be collectively referred to as "Triple Net."

> entrance from the property onto Campbell Drive. Landlord can at Tenant's option be considered in default of this agreement if such driveway is not completed by December 31, [ ] 2002.

On June 28, 2002, the City of Las Vegas ("City") revoked the building permit that Martines had obtained and halted construction, stating that the driveway violated existing zoning regulations. Subsequently, Ophthalmic sued Triple Net for breach of contract and breach of good faith and fair dealing for its failure to construct the driveway.

Following a bench trial, the district court ruled in favor of Triple Net on the ground that the force majeure clause[2] of the lease agreement excused Triple Net's failure to construct the driveway and found that the City's revocation of the building permit for the driveway was an unforeseeable event. The court found that Triple Net had pursued their administrative and judicial remedies in good faith with the City of

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[2]The lease agreement contained a force majeure clause that stated:

> Any prevention, delay or stoppage of work to be performed by Landlord or Tenant which is due to strikes, labor disputes, inability to obtain labor, materials, equipment or reasonable substitutes therefore, acts of God, governmental restriction or regulations or controls, judicial orders, enemy or hostile government actions, civil commotion, fire or other casualty, or other cause beyond the reasonable control of the party obligated to perform hereunder, shall excuse performance of the work by that party for a period equal to the duration of that prevention, delay or stoppage. Nothing in this Article 34 shall excuse or delay Tenant's obligation to pay Rent or other charges under this lease.

Las Vegas Planning Commission, Las Vegas City Council, and the District Court of Clark County, Nevada,[3] but that the revocation of the permit and failure to complete construction of the driveway was beyond their reasonable control. The district court also found that, notwithstanding the inability and failure to construct an access to Campbell Drive, Ophthalmic was nevertheless obligated to perform all of the remaining terms and provisions of the lease. The district court also awarded to Triple Net attorney fees, costs, and prejudgment interest pursuant to paragraph 37(c) of the parties' lease agreement.[4] Ophthalmic timely appealed.

On appeal, Ophthalmic first argues that the "Additional Property Access" clause in the subsequently negotiated Addendum I to the lease agreement was an express condition precedent to the lease agreement. Secondly, Ophthalmic argues that the district court erred in finding that the City's revocation of the building permit triggered the force majeure defense, thereby excusing Triple Net from performance. Ophthalmic argues that in order to use the force majeure defense, the circumstance creating the impossibility must be unforeseeable at the time the parties entered into the contract. Ophthalmic also argues that, at the time the parties executed the lease agreement, Triple Net knew or should have known that the City would not allow the additional driveway to be built because the City had expressly prohibited the building of any new or

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[3]Westbay, LLC v. The City of Las Vegas, Case No. A474882.

[4]37(c) of the lease provides that "If any action or proceeding is brought by either party against the other pertaining to or arising out of this Lease, the finally prevailing party shall be entitled to recover all costs and expenses, including reasonably attorneys' fees, incurred on account of such action or proceeding."

additional driveway as a condition subsequent to approving a zoning change in 1995 on the subject property. We agree.

Construction of a contractual term is a question of law and this court "is obligated to make its own independent determination on this issue, and should not defer to the district court's determination."[5] In interpreting a contract, "the court shall effectuate the intent of the parties, which may be determined in light of the surrounding circumstances if not clear from the contract itself . . . ."[6]

Here, the intent of the parties was clear. The parties negotiated and agreed to a condition precedent in the lease which provided that an additional driveway entrance from the Westbay Complex onto Campbell Drive would be created by December 31, 2002. If the driveway was not completed, according to the terms of the contract, then at Ophthalmic's option, Triple Net could be considered in default. Ophthalmic contends it never would have agreed to the lease without the addendum for the Campbell driveway. "A condition precedent to an obligation to perform calls for the performance of some act after a contract is entered into, upon which the corresponding obligation to perform immediately is made to depend."[7] Here, pursuant to the lease agreement, Triple Net can be considered in default of the agreement, because Triple

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[5]NGA #2 Ltd. Liab. Co. v. Rains. 113 Nev. 1151, 1158, 946 P.2d 163, 167 (1997) (quoting Clark Co. Public Employees v. Pearson, 106 Nev. 587, 590, 798 P.2d 136, 137 (1990)).

[6]Id. (quoting Davis v. Nevada National Bank, 103 Nev. 220, 223, 737 P.2d 503, 505 (1987) (citations omitted)).

[7]Id. at 1158-59, 946 P.2d at 168.

Net failed to perform a material part of the contract which was a condition precedent to Ophthalmic's continued obligation to perform under the terms of the lease agreement.

In order to excuse Triple Net's failure to construct the driveway as required by Opthalmic in the lease, the district court relied upon the force majeure clause contained in the lease agreement. The Ninth Circuit, in an unpublished order, recently adopted California case law establishing that a "'[f]orce majeure is not necessarily limited to the equivalent of an act of God, but that the test is 'whether under the particular circumstances there was such an insuperable interference occurring without the parties' intervention as could not have been prevented by prudence, diligence and care.'"[8] The theory of force majeure is likened to the defense of impossibility of performance.[9] The party who relies on a force majeure clause or the impossibility of performance defense to excuse their performance bears the burden of proving that the event was beyond the party's control and without its fault or negligence.[10]

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[8]Rio Props. v. Armstrong Hirsch Jackoway Tyerman & Wertheimer, 94 Fed. Appx. 519, 521 (9th Cir. Cal. 2004) (quoting Horsemen's Ben. & Prot. Ass'n v. V.R.A., 6 Cal. Rptr. 2d 698, 713 (Ct. App. 5th Dist. 1992) (citing Pacific Vegetable Oil Corporation. v. C. S. T., 174 P.2d 441 (1946)). (See generally National Carbon Co. v. Bankers' Mortgage Co., 77 F.2d 614, 617 (10th Cir. Kan. 1935) (early authors treated force majeure as the equivalent to an act of God and later authority has broadened the meaning to any insuperable interference).

[9]Sun Operating Ltd. Partnership v. Holt, 984 S.W.2d 277, 282 (Tex. App. 1998).

[10]West Los Angeles Institute for Cancer Research v. Mayer, 366 F.2d 220, 225-26 (9th Cir. 1966) (noting that impossibility as defense in contract action is inapplicable where party has reason to know of facts

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In Nevada, "the defense of impossibility is available to a promisor where his performance is made impossible or highly impracticable by the occurrence of unforeseen contingencies."[11] However, a force majeure defense is not available if the difficulties that frustrate the purpose of the contract or make performance impossible could have been reasonably foreseen by the promisor when the parties entered into the contract.[12]

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The record reveals that the 1995 approval for a change in zoning (i.e., from rural density residential to commercial zoning), which enabled the Westbay Office Complex to be zoned "commercial," was initially conditioned upon the understanding that no vehicular or pedestrian travel would be permitted access to Campbell Drive in addition to imposing

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that might cause impossibility); see also Wal-Mart Stores, Inc. v. AIG Life Ins. Co., 872 A.2d 611, 621 (Del. Ch. 2005) (holding that the doctrine of commercial frustration does not apply if at the time of contracting the supervening event was reasonably foreseeable, and could, and should, have been anticipated by the parties and provided for in the contract).

[11]Nebaco, Inc. v. Riverview Realty Co., 87 Nev. 55, 57, 482 P.2d 305, 307 (1971) (emphasis added).

[12]Amoco Oil Co. v. Gomez, 125 F. Supp. 2d 492, 505 (S.D. Fla. 2000); see Watson Laboratories, Inc. v. Rhone-Poulenc Rorer, 178 F.Supp. 2d 1099, 1111 (C.D. Cal. 2001) (noting that an event claimed to be a force majeure must be unforeseeable under California law); see also Eastern Air Lines, Inc. v. McDonnell Douglas Corp., 532 F.2d 957, 990-91 (1976) (noting that exculpatory provisions which are phrased merely in general terms excuse only unforeseen events).

numerous other restrictions before approving the Westbay Office Complex.[13]

At trial, Finlayson, Triple Net's principal owner, testified that he knew of the city zoning restrictions, ~~and also that any additional access was expressly prohibited~~. Finlayson testified that he knew as early as 1998 that there was significant opposition from the neighborhood residents regarding any additional traffic on Campbell Drive. Finlayson knew of this zoning restriction prior to entering into the lease agreement with Ophthalmic and of the potential conflict when he negotiated and agreed to the addendum. In fact, Finlayson had actual knowledge that the building permit was revoked by the City on June 28, 2002, over one month before Ophthalmic moved into the complex. Given Finlayson's testimony, there is substantial evidence to show that Triple Net knew the addition of a driveway would be in violation of ~~the no-access~~ zoning restriction and could not be constructed unless the City Council removed or changed the zoning restriction.[14] Therefore, as a matter of law the force majeure clause

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[13]Including the requirement that a block wall and 25-foot landscape buffer be constructed around the entire complex.

[14] Although the City's building department mistakenly issued a building permit for the driveway, the permit appears to have been void ab initio, State ex rel. Russell Center v. City of Missoula, 533 P.2d 1087, 1090 (Mont. 1975), as it was issued in violation of the no-access restriction and NRS 278.610(2).

NRS 278.610(2) states in pertinent part:

> 2. The building official shall not issue any permits unless the plan of and for the proposed erection, construction, reconstruction, alteration or use fully:

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cannot be used to excuse Triple Net's nonperformance because the revocation of the permit was foreseeable at the time the parties entered into the contract.

The burden of obtaining a government permit is placed on the promisor.[15] "[O]ne who contracts to render a performance for which government approval is required has the duty of obtaining such approval" and bears the risk of its refusal.[16] Furthermore, when government approval is required for performance, the failure to obtain such approval by the party seeking it will not justify the party's failure to perform or breach of the agreement.[17] Moreover, when a party is relying upon a denial of a permit by the government to excuse its performance because the denial renders the performance illegal, a court may consider whether the illegality is caused by a change in law subsequent to the contract.[18] Here, the "illegality," that is, the creation of the driveway onto Campbell Drive, is not due to a recent change in the zoning. The applicable zoning regulation at the time the City revoked the building permit on June 28, 2002, was the same as it was when Triple Net first acquired the property

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> (a) Conform to all building code and zoning regulations then in effect.

[15]Colorado Environments v. Valley Grading, 105 Nev. 464, 468, 779 P.2d 80, 82 (1989).

[16]Id.

[17]Id.

[18]Id. at 469, 82. (citing Hawkins v. First Federal Savings And Loan Ass'n., 280 So. 2d 93, 96-97 (Ala. 1973)).

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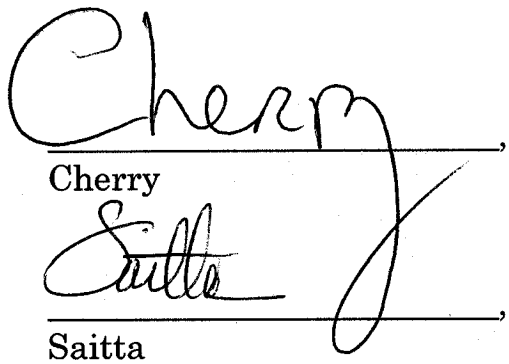
in 1995, and as it was on May 1, 2002, when the parties entered into the lease agreement. At all times relevant to this matter, zoning ~~restrictions~~ restricted and/or limited ~~prohibited any~~ vehicular and pedestrian access onto Campbell Drive from the Westbay Office Complex.

Therefore, we conclude that Triple Net knew of the zoning restriction, and assumed a duty to obtain the City's approval for the construction of the driveway, and to complete the driveway. Triple Net knew in advance, regardless of the building permit, that the City would have to change the existing zoning regulation and approve of the driveway. Nevertheless, Triple Net knowing that the zoning restriction would frustrate a significant provision in the lease, entered into an agreement where construction of the driveway was a condition precedent to the lease agreement; i.e., a term which would allow for default of the agreement. Even after the City revoked the building permit on June 28, 2002, and before Ophthalmic moved into the Complex in August, 2002, Triple Net made no effort to notify Ophthalmic that a negotiated term of their agreement would no longer be possible to effectuate.

Because Ophthalmic contracted for driveway access to Campbell Drive in the addendum, and Triple Net could not cure the zoning restriction and construct the driveway access, a material term of the agreement was breached. Given the longstanding restriction against ingress and egress to Campbell Drive, none of the above mentioned circumstances can be considered unforeseen events. Therefore, the district court erred in finding that the revocation of the building permit was an unforeseen event that would trigger a force majeure defense for non-performance, or that Ophthalmic was obliged to perform the contract. The court also erred by finding that political processes operated in such a

way as to be unforeseen, unreasonable, or beyond the control of the parties. Except for an oversight when the building permit was inadvertently issued on March 5, 2002, in violation of the pre-existing zoning restriction, the processes appear to have operated in exactly an anticipated manner. Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.



_____, J.
Cherry

_____, J.
Saitta

cc: Hon. Jessie Elizabeth Walsh, District Judge
Richard F. Scotti, Settlement Judge
Lemons Grundy & Eisenberg
Martin & Allison, Ltd.
J.R. Albregts, LLC
Eighth District Court Clerk

MAUPIN, J., dissenting:

While I agree that certain facts in this case suggest that Triple Net could have foreseen that city officials would revoke the building permit for the additional driveway, I would affirm the decision of the district court.

As noted by the majority, a force majeure clause is not enforceable if the condition which makes performance impossible is reasonably foreseeable to the contracting party.[1] In general, foreseeability is a question of fact.[2] On appeal, this court will not disturb a district court's findings of fact if they are supported by substantial evidence.[3] Substantial evidence is that evidence which a reasonable person would accept as adequate to support a conclusion.[4]

Here, the district court determined that the City's revocation of the building permit was not foreseeable, indicating that the force majeure clause of the lease relieved Triple Net of their obligation to construct the driveway. As the majority suggests, certain facts in this case, such as the preexisting zoning restrictions, would support a finding that revocation of the permit was foreseeable. However, substantial

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[1]See, e.g., Amoco Oil Co. v. Gomez, 125 F. Supp. 492, 505 (S.D. Fla. 2000).

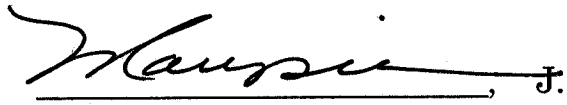
[2]Valladares v. DMJ, Inc., 110 Nev. 1291, 1294, 885 P.2d 580, 582 (1994).

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

[4]Quintero v. McDonald, 116 Nev. 1181, 1182, 14 P.3d 522, 523 (2000).

evidence supports the district court's conclusion that the City's decision to revoke the permit was not foreseeable. Specifically, it appears that Triple Net relied on the issuance of the building permit in agreeing to construct the driveway as a condition of the lease, and would not have signed the lease if it had any warning that the permit could be revoked. A city official who issued the permit further testified that he had no reason to suspect that the permit should not have issued. In addition, the access restrictions on Campbell Drive arguably applied only to the area directly to the north of the proposed driveway; indicating that Triple Net could have reasonably believed that any zoning restrictions would not have affected construction of the driveway itself. Thus, I conclude that this evidence is sufficient to support the district court's determination that revocation of the building permit was not foreseeable.

Because the district court's finding of foreseeablity was supported by substantial evidence, I would affirm the decision of the district court. Therefore, I dissent.



Maupin