IN THE SUPREME COURT OF THE STATE OF NEVADA

MECHELLE DERICHME,
Appellant,
vs.
ROY SWEARINGEN, INDIVIDUALLY; AFSAN HADADROSHAN, INDIVIDUALLY; AND PLATINUM PROPERTIES GMAC REAL ESTATE, A NEVADA CORPORATION,
Respondents.

No. 46708

FILED

FEB 14 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court post-judgment order denying specific performance of a lease-option agreement for the purchase of real property and a post-judgment order vacating an attorney fees award to appellant and awarding attorney fees and costs to respondents. Eighth Judicial District Court, Clark County; Timothy C. Williams, Judge; Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

Appellant Mechelle DeRichme argues that the district court improperly denied her specific performance of a lease-option contract to purchase a Las Vegas condominium from respondents Roy Swearingen, Afsan Hadadroshan, and Platinum Properties/GMAC Real Estate (collectively, Swearingen).[1] While the district court initially granted DeRichme specific performance of the option, it denied DeRichme this

[1]Although DeRichme also purports to challenge a host of other interlocutory rulings, the resolution of this issue necessarily disposes of DeRichme's subsidiary challenges, including her attorney fees challenge and challenge to the denial of her motion for reconsideration.

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equitable remedy after determining that she was unable to secure appropriate financing and close escrow by the court-appointed November 23, 2005, deadline. For the following reasons, we conclude that the district court did not abuse its discretion in denying Derichme specific performance under the circumstances. The parties are familiar with the facts and we do not recount them here except as necessary to our disposition.

This court reviews the denial of specific performance for an abuse of discretion, and will not disturb a district court's factual findings if they are supported by substantial evidence.[2] On appeal, this court is restrained from reweighing conflicting evidence and must draw all favorable inferences towards the prevailing party.[3]

Changing the form of financing altered the agreement

DeRichme argues on appeal that the district court abused its discretion in denying her specific performance because (1) she could not obtain purchase-type financing unless Swearingen first deeded her the property and (2) the district court improperly considered the negative tax consequences of proceeding as a refinance transaction.

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[2]Goodrich &. Pennington v. J.R. Woolard, 120 Nev. 777, 782, 101 P.3d 792, 795 (2004); Serpa v. Darling, 107 Nev. 299, 304, 810 P.2d 778, 782 (1991). Substantial evidence is "that which 'a reasonable mind might accept as adequate to support a conclusion.'" State, Emp. Security v. Hilton Hotels, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986) (quoting Richardson v. Perales, 402 U.S. 389, 401 (1971)).

[3]Yamaha Motor Co. v. Arnoult, 114 Nev. 233, 238, 955 P.2d 661, 664 (1998).

In this case, the lease-option contract required DeRichme to tender the balance of the purchase price ($99,000) at the close of escrow under a future purchase agreement. DeRichme initially obtained preliminary loan approval for the purchase price after enlisting a third-party co-signor. After obtaining specific performance at trial, however, Derichme abandoned her initial loan to qualify for financing on her own.

After several unsuccessful attempts to individually qualify for conventional purchase-type financing, DeRichme proposed to fund the purchase as a refinance transaction and was allegedly prepared to tender refinancing monies for the balance of the purchase price by the November 23 deadline. The district court, however, revoked its initial order and denied specific performance, concluding that a refinance-type loan such as the one DeRichme obtained altered the parties' original agreement.

"Specific performance is available only when: (1) the terms of the contract are definite and certain; (2) the remedy at law is inadequate; (3) the appellant has tendered performance; and (4) the court is willing to order it."[4] To obtain this remedy, a purchaser who has not already tendered the purchase price "must demonstrate that she is ready, willing, and able to perform."[5] Thus, specific performance is not available where the tender is defective or the purchaser is unable to perform.

DeRichme argues that she could not initially obtain purchase-type financing because Swearingen refused to convey title to her, which would have enabled her to qualify for the loan. The terms of the lease-

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[4]Serpa, 107 Nev. at 305, 810 P.2d at 782.

[5]Id. at 304, 810 at 782.

option contract, however, clearly suggest an opposite sequence for performance and counter-performance in this case. As such, the district court properly required DeRichme to tender the purchase price as a condition precedent to Swearingen's obligation to convey title.

Whether a provision amounts to a condition precedent generally depends on the parties' intent as evident from the contract itself.[6] Under the contract, Swearingen was required to execute a "grant, bargain sale deed" conveying title to DeRichme after DeRichme tendered the balance of the purchase price under a future purchase agreement. Even though the parties did not ultimately execute a separate purchase agreement, the contract itself indicates that the parties contemplated a conventional purchase transaction which required DeRichme to obtain purchase-type financing before Swearingen had a duty to convey title.[7] As the district court concluded, "it was very clear to all Parties that [DeRichme] intended to purchase this property," "wanted to be something other than a renter," and "intended to pursue an FHA loan." Because the

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[6]Mecham v. Nelson, 451 P.2d 529, 533 (Idaho 1969).

[7]Because Swearingen had no duty under the contract to convey title without proof that DeRichme could first secure purchase-type financing, Swearingen had the right to refuse to execute a purchase agreement. Even though the parties never agreed on the ultimate terms of such an agreement, the court concluded that "there was [still] enough specificity presented at Trial showing that [DeRichme's] Option can be enforceable," subject only to the ability of DeRichme to "produce the funds." Thus, because proof of purchase-type financing logically preceded the execution of a separate purchase agreement, it is irrelevant that Swearingen refused to execute the purchase agreement that Derichme submitted with her December 19, 2005, motion for reconsideration.

contract nowhere indicates that the parties had a contrary intent, we conclude that the contract required DeRichme to obtain purchase-type financing to complete the transaction.

Furthermore, the district court found that proceeding as a refinance would preclude Swearingen from deferring capital gains in a "1031 exchange". As such, this would "change[ ] what was contemplated in the Lease/Option Agreement and would be to the detriment of Defendants." Here, the contract clearly contemplated a purchase transaction; thus, Swearingen could not have anticipated the potential tax of proceeding as a refinance. Because this potential consequence departed from the parties' original intent as adduced from the contract itself, we conclude that the district court properly factored it into its decision to deny specific performance.

Because DeRichme's tender of refinancing monies altered the terms of the original agreement and otherwise demonstrated that DeRichme was not ready, willing, and able to perform by the court-appointed deadline, we conclude that the district court was within its discretion to deny specific performance under the circumstances.

Substantial evidence supports the district court's finding that DeRichme could not secure purchase-type financing

Nevertheless, DeRichme contends that substantial evidence did not support the district court's factual finding that she could not independently qualify for purchase-type financing by the November 23 deadline. While DeRichme's lender indicated in an affidavit that it could convert her refinance into an FHA purchase loan by allowing the district court's judgment to substitute as a purchase agreement, Gina Thomas of First American Title and Michelle Driver each testified that even with a

purchase agreement DeRichme could not qualify for a purchase-type financing because DeRichme's debt-to-income ratio was too high.

According to DeRichme, the district court was not at liberty to believe the testimony of Thomas and Driver over her lender's affidavit. We have repeatedly recognized, however, that "[t]he credibility of witnesses and the weight to be given their testimony is within the sole province of the trier of fact."[8] Correspondingly, where witnesses offer conflicting testimony, the district court may accept one version and reject the other.[9] As such, the district court was free in this case to conclude that DeRichme could not independently qualify for purchase-type financing despite her lender's suggestions to the contrary.[10]

Conclusion

We conclude that DeRichme's decision to change the form of financing from a purchase to a refinance altered the terms of the lease-option contract. We further conclude that substantial evidence supports the district court's finding that DeRichme could not individually qualify

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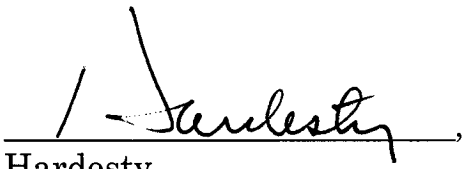
[8]Quintero v. McDonald, 116 Nev. 1181, 1184, 14 P.3d 522, 524 (2000).

[9]B & C Enterprises v. Utter, 88 Nev. 433, 435, 498 P.2d 1327, 1329 (1972).

[10]Notably, DeRichme did not offer any documentary evidence supporting her lender's bare assertion that she was FHA eligible. In fact, after reviewing the Sahara Mortgage file, Michele Driver noted that Sahara Mortgage had qualified DeRichme for a conventional refinance and that the file "contain[ed] none of the requirements for an FHA transaction." Driver ultimately concluded that the Sahara Mortgage file completely contradicted DeRichme's assertion that she was ever—or could ever become—qualified for an FHA purchase loan.

for purchase-type financing before the court-appointed deadline for closing. Accordingly, we conclude that the district court did not abuse its discretion in denying DeRichme specific performance.[11] Accordingly, we

ORDER the judgment of the district court AFFIRMED.



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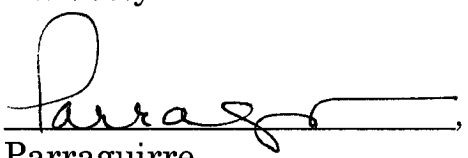
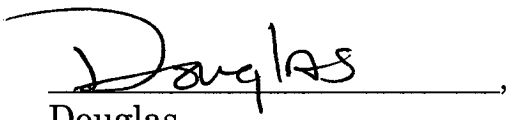


_____, J.
Parraguirre



_____, J.
Douglas

cc: Hon. Timothy C. Williams, District Judge
Hon. Valerie Adair, District Judge
William C. Turner, Settlement Judge
Kirk-Hughes & Associates
Reade & Associates
Eighth District Court Clerk

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[11]In accordance with our dispositional order today, we vacate our previous March 28, 2006, order staying the district court's post-judgment order denying specific performance.