IN THE SUPREME COURT OF THE STATE OF NEVADA

JACK LEHTINEN; CAROLYN L. LEHTINEN; CARLA NAVARRO; AND ARBY EL CAMINO PROPERTIES, LLC,
Appellants,
vs.
JOSEPH A. KENNEDY, AS TRUSTEE OF THE JOKEN TRUST U/A/D 6/1/99,
Respondent.

No. 46710

FILED

DEC 04 2006

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

ORDER OF AFFIRMANCE

This is an appeal from a district court judgment in a land sale dispute.[1] Eighth Judicial District Court, Clark County; Valerie Adair, Judge. On appeal, appellants Jack Lehtinen, Carolyn L. Lehtinen, Carla Navarro, and Arby El Camino Properties, LLC, challenge the district court's interlocutory order granting summary judgment to respondent Joseph A. Kennedy on his request for specific performance.[2]

The land sale transaction underlying this matter consists of at least three documents. First, under an offer and acceptance agreement, appellants contracted with Stab Holdings, LLC, to sell it approximately five acres of land in exchange for approximately $1.5 million. Second, the

[1]We have determined that this appeal should be submitted for a decision on the briefs without oral argument. See NRAP 34(f)(1).

[2]See Consolidated Generator v. Cummins Engine, 114 Nev. 1304, 971 P.2d 1251 (1998) (providing that this court on appeal from the final judgment may properly consider interlocutory orders).

related escrow instructions provided that (a) Stab Holding's deposit into escrow had to be in the form of a certified check, cashier's check, or wire transfer, (b) with respect to the close of escrow, time was of the essence, and (c) escrow would close when the documents necessary to consummate the land sale, including the deed, were recorded, and the proper form of payment was made. Third, an amendment to the escrow instructions essentially extended the date on which escrow was to close to forty-four days after a zoning change was approved. In light of the amendment to the escrow instructions, according to appellants, escrow was to close on March 19, 2004.[3]

Stab Holdings assigned its interest in the land sale transaction to respondent, who on that same date, March 19, 2004, deposited into escrow a personal check, which cleared a few days later.[4] But, because appellants failed to execute the deed necessary to close escrow, respondent instituted the underlying action, seeking specific performance of the land sale contract.

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[3]Respondent disputes appellants' calculation of the closing date but also maintains that, even if appellants' interpretation of the amendment to the escrow instructions is accurate, their arguments are unavailing.

[4]In their opening brief, appellants' assert, apparently for the first time, that respondent failed to deliver the personal check by March 19, 2004. But substantial evidence in the record supports the conclusion that the check was delivered on that date, see Mainor v. Nault, 120 Nev. 750, 101 P.3d 308 (2004), and regardless, as appellants raise this argument for the first time on appeal—indeed, it contradicts their district court pleadings—we need not consider it, see Dermody v. City of Reno, 113 Nev. 207, 931 P.2d 1354 (1997).

Thereafter, respondent moved for summary judgment on his request for specific performance, arguing that, although he failed to deposit a form of payment called for under the escrow instructions, escrow would have closed, had appellants executed the necessary deed. The district court granted summary judgment, concluding that, because appellants had breached their obligation under the land sale contract to execute the deed necessary to close escrow, respondent was entitled to specific performance of the contract. After a final judgment was issued, this appeal followed, in which appellants challenge the district court's order granting summary judgment and directing specific performance.

This court reviews the order granting summary judgment to respondent de novo.[5] Summary judgment is appropriate if the pleadings and other evidence on file, viewed in a light most favorable to appellants, demonstrate that no genuine issue of material fact remains in dispute and that respondent is entitled to judgment as a matter of law.[6] And specific performance may be an appropriate remedy when the contract terms are clear, the legal remedy is inadequate, the party seeking specific performance has fulfilled his contractual obligations, and the district court is willing to order and supervise the agreement's performance.[7]

Appellants primarily contend that respondent was not, as a matter of law, entitled to specific performance because respondent's

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[5]See Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

[6]Id. at 731, 121 P.3d at 1031.

[7]See Carcione v. Clark, 96 Nev. 808, 618 P.2d 346 (1980).

obligation to timely deposit into the escrow account the proper form of payment was a condition concurrent to appellants' obligation to execute the deed. As a result, appellants contend, any failure by them to execute the deed did not excuse respondent's performance required under the escrow instructions.[8] And, since the escrow instructions made time of the essence, to the extent that both parties failed to timely execute their concurrent obligations under the contract, appellants maintain, the parties' duties were discharged.[9] These arguments are unpersuasive.

Specifically, with respect to appellants' argument that respondent's payment in the form of a personal check constituted a breach of the escrow instructions, we note, as an initial matter, that appellant failed to object to respondent's use of a personal check when the payment was made.[10] And any breach of the escrow instructions by respondent's

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[8]See Goldston v. AMI Investments, Inc., 98 Nev. 567, 569, 655 P.2d 521, 523 (1982) (noting that "a seller of land . . . is justified in cancelling the contract if the purchaser has failed to perform a material part of the contract which is a condition concurrent or precedent to the seller's obligations to perform").

[9]See id. (noting that, when both parties to a land sale contract making time of the essence fail to tender performance by the date set for closure, the parties' duties are discharged); but see Restatement (Second) of Contracts § 242 cmt. d (1981) (recognizing that a contract clause making time of the essence must be "considered along with other circumstances in determining the effect of delay"); Foundation Dev. Corp. v. Loehmann's, 788 P.2d 1189, 1200 (Ariz. 1990) (same).

[10]See R & S Investments v. Howard, 95 Nev. 279, 284, 593 P.2d 53, 56 (1979) (indicating that an objection to a party's tendered contractual performance should normally be made when the facts underlying any objection arise).

payment in the form of a personal check was merely technical and promptly cured when the check cleared a few days later.[11] Appellants' reliance on respondent's use of a personal check to negate any failure by them to timely execute the necessary deed thus appears misplaced.

Relatedly, with respect to appellant's argument that respondent's payment into the escrow account was untimely—because the check did not clear until after March 19, 2004—we note that once a check clears and the funds are present in the account "the time of payment relates back to the time the check was delivered."[12] Here, then, as respondent made the requisite payment into the escrow account on March 19, 2004, and the check cleared with the funds arriving in the account a few days later, respondent's payment was timely, even under appellants' interpretation of the escrow instructions' amendment. Thus, respondent did not breach any obligation to deposit the funds necessary for closing escrow by March 19, 2004.

Because respondent timely tendered performance, the contract is clear, the subject matter is real property, and the district court was willing to supervise performance of the agreement, the district court properly ordered the parties to specifically perform the contract, and

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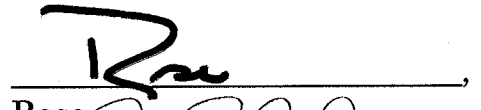
[11]See American Fence, Inc. v. Wham, 95 Nev. 788, 792, 603 P.2d 274, 277 (1979) (recognizing the inequity of terminating an agreement based on technical or remedial breaches); Restatement (Second) of Contracts § 241 (1981) (listing the circumstances significant in determining the materiality of a party's contractual breach including "the likelihood that the party failing to perform . . . will cure his failure").

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

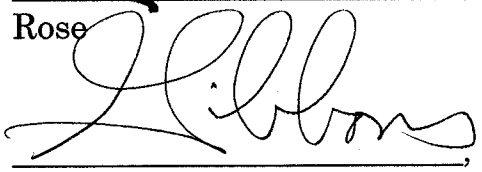
respondent was entitled to judgment as a matter of law.[13] Thus, the district court did not err in granting summary judgment.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, C.J.
Rose



_____, J.
Gibbons

_____, J.
Hardesty

cc: Hon. Valerie Adair, District Judge
Howard Roitman, Settlement Judge
Ryan, Mercaldo, & Worthington, LLP
Harrison Kemp & Jones, LLP
Clark County Clerk

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[13]See Carcione, 96 Nev. 808, 618 P.2d 346.