

IN THE SUPREME COURT OF THE STATE OF NEVADA

RAVI GREWAL, A/K/A RAVINDER
GREWAL; AND NEVADA FIRST
BUSINESS BROKERS, INC.,

Appellants,

vs.

REGENCY AUTO SPA, INC., A
CORPORATION,

Respondent.

No. 46783

FILED

MAR 15 2007

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

ORDER OF AFFIRMANCE

This is an appeal from a district court order granting summary judgment in a contract dispute.¹ Eighth Judicial District Court, Clark County; Kathy A. Hardcastle, Judge.

Appellants Ravi Grewal (“buyer”) and Nevada First Business Brokers, Inc. (“broker”) filed complaints against respondent Regency Auto Spa, Inc. (“seller”), after the seller refused to perform an asset purchase agreement to sell its car wash business to the buyer. The listing agreement between the broker and the seller originally required the broker to sell the business for \$1,800,000 in an all-cash sale. The broker found the buyer, who offered to pay substantially less. After several counteroffers, the seller accepted the buyer’s offer to purchase the business for \$1,450,000, with \$650,000 of that amount due in cash at the

¹Pursuant to NRAP 34(f)(1), we have determined that oral argument is not warranted in this appeal.

close of escrow and the remainder payable in installments over eighteen months. The seller's acceptance, however, was made "subject to the seller[']s and lender[']s approval of Buyers['] financial statements."

When the seller's lender failed to approve the buyer's financial statements, the seller likewise disapproved the statements and refused to sell the business to the buyer. Because the sale was not completed, the seller also refused to pay a \$100,000 commission to the broker. The broker sued to collect its commission, and the buyer sued for specific performance or damages. The complaints were consolidated in the district court.

Less than five months after the first complaint was filed, the district court granted the seller summary judgment on all claims. Among other things, the court found that the buyer's proposed initial cash payment was insufficient to pay both the broker's commission and the seller's outstanding loan amount, so that it was reasonable to require the lender's approval to continue the loan while the buyer operated the car wash, until the buyer could make his final installment payment to the seller. The court concluded that there was no issue of fact regarding the reasonableness of the seller's and the lender's rejections of the buyer's financial statements. Since the seller and the lender did not approve the buyer's financial statements, the court found that a condition precedent to making the agreement binding on the parties was not performed and concluded that the purchase agreement could not be enforced. Because the broker failed to produce a buyer on terms acceptable to the seller, the district court further concluded that the broker was not entitled to a commission from the seller. The buyer and the broker appeal.

On appeal, the buyer and the broker contend that the seller's and the lender's approvals were subject to a good faith and/or

reasonableness standard. They assert that the buyer was financially qualified to complete the transaction and that there were factual issues to be determined by a jury as to the reasonableness and/or good faith of the seller and lender in rejecting the buyer's financial statements.

The broker also argues that summary judgment was improper under NRCP 56(f), because no discovery had yet been conducted and no joint case conference report had been filed. As examples of allegedly vital and relevant areas of inquiry requiring discovery, the broker points to the reasonableness and good faith of the seller and lender in rejecting the buyer's financial statements and whether the lender actually had a secured interest in any of the seller's car wash assets.

Summary judgment standard

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law.² Once the movant has properly supported the summary judgment motion, the non-moving party may not rest upon general allegations and conclusions and must instead set forth, by affidavit or otherwise, specific facts demonstrating the existence of a genuine issue of material fact for trial to avoid summary judgment.³ This court reviews an order granting summary judgment de novo.⁴

²Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

³Id. at 731, 121 P.3d at 1030-31; NRCP 56(e).

⁴Wood, 121 Nev. at 729, 121 P.3d at 1029.

Condition precedent in sales agreement

Whether a contractual term constitutes a condition precedent is a question of law subject to our de novo review.⁵ A condition precedent may be a condition that must be performed before the parties' agreement becomes a binding contract or it may be a condition that must be fulfilled before the duty to perform an existing contract arises.⁶ 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."⁷

In the present case, we conclude from the language and circumstances surrounding the parties' purchase agreement that the seller's and the lender's approvals of the buyer's financial statements were conditions precedent that were required to be performed before the agreement became binding and enforceable. The seller's counteroffer to the purchase agreement, which the buyer agreed to, clearly stated that its acceptance of the buyer's offer was subject to the seller's and the lender's approval of the buyer's financial statements.⁸

⁵NGA #2 Ltd. Liab. Co. v. Rains, 113 Nev. 1151, 1158, 946 P.2d 163, 168 (1997).

⁶See id. at 1158-59; 946 P.2d at 163; 17A C.J.S. Contracts § 356 (2006).

⁷NGA, 113 Nev. at 1158, 946 P.2d at 167 (quoting Davis v. Nevada National Bank, 103, Nev. 220, 223, 737 P.2d 503, 505 (1987)).

⁸Edward Webb, the seller's president, averred that this provision was particularly significant to him because of his prior litigation in an unrelated transaction, and further asserted that his lender's approval was
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The circumstances surrounding the transaction show that, in agreeing to sell at a lower price than listed, the seller required, for its own benefit, its and its lender's approvals of the buyer's financial statements.⁹ These approvals were necessary for the lender to continue the loan, release its security interest in the business, and not demand the loan's payment in full upon closing when the business assets were transferred to the buyer. It is undisputed that the seller and lender failed to approve the buyer's statements. Thus, the condition precedent to the creation of a binding contract failed to occur.

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necessary because the transaction was not an all-cash sale. After the initial \$650,000 in cash due at closing, the buyer was to pay the balance of \$800,000 in three equal installments over the course of the following eighteen months. Webb averred that, after paying the broker's \$100,000 commission upon closing from the initial cash payment as required by the purchase and listing agreements, the remaining \$550,000 would have been insufficient to pay off the seller's debts that were secured by the business assets. Richard Miller, the lender's member-manager, verified in his affidavit that the lender had loaned the seller approximately \$630,000; a copy of the note stating that it was secured by a deed of trust was attached to Webb's affidavit.

⁹See Sala & Ruthe Realty, Inc. v. Campbell, 89 Nev. 483, 486, 515 P.2d 394, 396 (1973) (recognizing that a prospective buyer's approval of an inventory and accounting was a condition precedent to the existence of a contract for the sale of a motel, and concluding that, when the buyer failed to complete or approve the inventory and accounting within the time specified in his conditional offer, no binding contract existed between the parties, so that the broker was not entitled to a commission, as he had not produced a ready, willing, and able buyer as contemplated in the listing agreement).

Reasonableness and Good Faith

The buyer and broker, however, contend that the buyer was fully qualified to purchase and operate the car wash, and that summary judgment should not have been entered because there were questions of fact as to the seller's and lender's reasonableness and good faith in rejecting the buyer's financial statements. The broker points out that the covenant of good faith and fair dealing is implied in every contract.¹⁰ And citing a California case, the buyer asserts the counteroffer provision requiring the seller's and lender's approval was a "satisfaction clause," meaning that the seller's and the lender's approvals or "satisfaction" regarding the financial statements was subject to either of two tests: 1) the seller's and lender's subjective judgment, controlled by the element of good faith, or 2) judicially determined objective "reasonableness."¹¹ The buyer argues that the seller's rejection cannot withstand either test and that, in any event, the seller's good faith or reasonableness in rejecting the buyer's financial statements was a question of fact to be decided at trial.¹²

¹⁰A.C. Shaw Construction v. Washoe County, 105 Nev. 913, 914, 784 P.2d 9, 9, (1989) (citing Restatement (Second) of Contracts §205 and Ainsworth v. Combined Ins. Co., 104 Nev. 587, 592 n.1, 763 P.2d 673, 676 n.1 (1988)); see also Consolidated Generator v. Cummins Engine, 114 Nev. 1304, 1311-12, 971 P.2d 1251, 1256 (1998).

¹¹Kadner v. Shields, 97 Cal. Rptr. 742, 748 (1971) (citing Samuel Williston, 5 Williston on Contracts, §§ 675A and 675B, pp. 189-218 (3d ed. 1961)).

¹²Id. at 758.

Regardless of the seller's good faith and reasonableness, or lack thereof, the record clearly shows that the lender, who was not a party to the purchase or listing agreements, did not approve the buyer's financial statements.¹³ As the lender was not party to the contract, it was not subject to the implied covenant of good faith and fair dealing, and thus it was free to reject the buyer's statements for any reason.¹⁴ Accordingly, since the lender rejected the buyer's financial statements, the condition precedent was not met and the buyer cannot enforce the contract.

Further, as the broker failed to produce a buyer for the full cash price, or for a lesser price on terms that were satisfactory to the seller, the broker is not entitled to any commission under its listing agreement with the seller.¹⁵

¹³Webb averred that he was not comfortable with the buyer's financial statements, and that, in any event, the lender refused to approve any transaction with the buyer that was not an all-cash transaction. Miller averred that he would not, then or now, approve any transaction between the buyer and seller that was not an all-cash transaction.

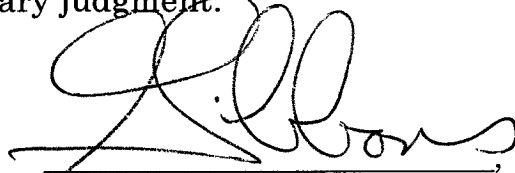
¹⁴See generally Johnson v. Yousoofian, 930 P.2d 921, 925 (Wash. Ct. App. 1996) (holding that a landlord, who was not a contracting party to a sublease, was under no duty to act reasonably in withholding his consent to his lessees' assignment of a lease to a potential buyer of the lessees' business).

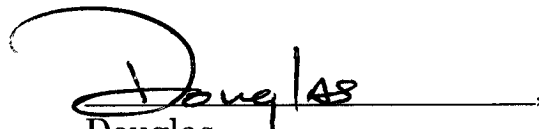
¹⁵See Fleshman v. Hendricks, 93 Nev. 103, 560 P.2d 1350 (1977) (concluding that a real estate broker had failed to produce an able buyer and was not entitled to his commission when the third-party lessor refused to approve assignment of the lease to the buyer); Ferrara v. Firsching, 91 Nev. 254, 533 P.2d 1351 (1975) (recognizing that if the contract is not consummated because of the buyer's lack of financial ability to perform, then broker has no right to commission); Nolan v. State Dep't of Commerce, 86 Nev. 428, 470 P.2d 124 (1970) (concluding, in the context

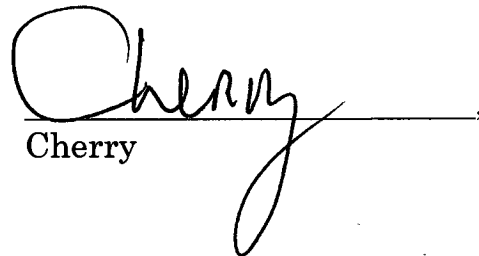
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The district court properly granted, as a matter of law, summary judgment to the seller, and in doing so, appropriately denied the broker's NRCP 56(f) request for additional discovery time. Thus, we affirm the district court's summary judgment.

It is so ORDERED.


_____, J.
Gibbons


_____, J.
Douglas


_____, J.
Cherry

cc: Hon. Kathy A. Hardcastle, District Judge
Thomas F. Christensen, Settlement Judge
Adams & Rocheleau, LLC
Berkley, Gordon & Goldstein, LLP
Law Offices of Michael F. Bohn, Ltd.
Eighth District Court Clerk

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of a review from a disciplinary proceeding suspending the brokers' license, that if the purchaser's offer was in accordance with the seller's listing agreement with the broker, then the broker would have been entitled to his commission); Sala, 89 Nev. 483, 515 P.2d 394 (recognizing that the broker was not entitled to a commission because the buyer was not ready, willing, and able to buy property); Engle v. Wilcox, 75 Nev. 323, 340 P.2d 93 (1959) (requiring a real estate broker to bring a ready, willing and able purchaser to earn his commission).