IN THE SUPREME COURT OF THE STATE OF NEVADA

JOEL SCHWARTZ,
Appellant/Cross-Respondent,
vs.
ROCIO GARCIA,
Respondent/Cross-Appellant.

No. 46960

FILED

MAR 13 2007

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

ORDER OF REVERSAL AND REMAND

This is an appeal and cross-appeal from a district court judgment granting specific performance of a real estate purchase contract and awarding attorney fees and costs. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Appellant/cross-respondent Joel Schwartz was the buyer under an agreement to purchase the Las Vegas home of respondent/cross-appellant Rocio Garcia for $195,000. The purchase agreement called for close of escrow by March 19, 2004, contained a "time is of the essence" clause, and required a written extension signed by both parties in order to allow escrow to close after the deadline. The parties did not agree on a written extension of time, and escrow did not close on March 19.

After Garcia, the seller, refused to close escrow, Schwartz, the buyer, sued for specific performance and/or damages for breach of contract and unjust enrichment, and filed a notice of lis pendens. Following a bench trial, the district court entered a judgment in March 2006, ordering Garcia to specifically perform by conveying the disputed home to Schwartz for the contract price of $195,000. The district court also awarded a total of $22,594.68 for attorney fees and costs to ~~Garcia,~~ Schwartz plus post-judgment interest from February 27, 2006, under NRS 17.130.

(Changed name per order filed 9-28-07 SY)

07-05915

Both Schwartz and Garcia have appealed from the judgment; Garcia also appeals from the attorney fee order. Schwartz challenges the judgment to the extent that he was not awarded damages for the increase in the interest rate to finance the purchase. Garcia challenges the judgment as improper, given the "time is of the essence" clause.

Although this court has consistently provided that the district court's findings of fact will not be disturbed on appeal if they are supported by substantial evidence, the court's conclusions of law and the construction of contractual terms are questions of law subject to this court's de novo review.[1]

It is undisputed that the purchase agreement contained a "time is of the essence" provision, close of escrow did not occur by the March 19, 2004 deadline, and no extension of time was signed by both parties. Further, no evidence suggests that Garcia breached the agreement by failing to perform a condition precedent to closing.[2] Schwartz simply did not tender payment of the purchase price by the closing date, and he failed to obtain an extension of time. Therefore, this

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[1]Bedore v. Familian, 122 Nev. 5, 9-10, 125 P.3d 1168, 1171 (2006) (quoting Clark County v. Sun State Properties, 119 Nev. 329, 334, 72 P.3d 954, 957 (2003)); NGA #2 Ltd. Liab. Co. v. Rains, 113 Nev. 1151, 1158, 946 P.2d 163, 167 (1997).

[2]Consequently, this case is distinguishable from Goldston v. AMI Investments, Inc., 98 Nev. 567, 655 P.2d 521 (1982) (concluding that the buyer's delay in depositing funds into escrow was caused by the seller's failure to remove a fence), and from Carcione v. Clark, 96 Nev. 808, 618 P.2d 346 (1980) (concluding that the seller's refusal to clear a lis pendens by posting a bond did not excuse her from conveying clear title to the buyers who had tendered performance).

court will not rewrite the parties' contract and will require strict compliance with the "time is of the essence" provision.[3]

Unlike NGA #2 Limited Liability Co. v. Rains, the facts in this case do not support a conclusion that the seller had waived strict compliance with the contract's "time is of the essence" provision, or that the seller should be estopped from enforcing the provision.[4] Here, Garcia evidenced her intent to abide by the contract by offering to extend it for one day in exchange for additional consideration. Although Schwartz asserts that he did not receive this offer until it had expired, no evidence shows that Garcia was under a duty to offer such an extension, nor is there evidence that Schwartz himself sought an extension.

Even though Schwartz had the house painted before the close of escrow, this fact did not estop Garcia from insisting upon strict compliance with the contract; nor did it constitute a substantial forfeiture by Schwartz. The evidence is undisputed that Garcia objected to the painting and ordered the painters off the property on the two occasions that she found them there. Even though Garcia gave Schwartz the house key before closing, Garcia provided evidence that the key was to be used only after the close of escrow and considered Schwartz's painters to have trespassed upon the property when they painted the house beforehand.

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[3]Holmby, Inc. v. Dino, 98 Nev. 358, 647 P.2d 392 (1982) (rejecting the buyer's contention that it was entitled to a reasonable time to tender payment when escrow instructions made time of the essence and required performance at a stated and unquestionable time); R & S Investments v. Howard, 95 Nev. 279, 593 P.2d 53 (1979) (holding that time was of the essence under the parties' contract and that the buyer failed to timely tender performance when the check he deposited into escrow was not honored).

[4]113 Nev. 1151, 946 P.2d 163 (1997).

Schwartz had not yet obtained title and was not lawfully in possession of the home when he had the house painted over Garcia's objections. Consequently, this case is distinguished from NGA[5] and Slobe v. Kirby Stone, Inc.,[6] and we conclude that no basis exists to award Schwartz any equitable relief from his purported forfeiture of the painting costs.[7]

We conclude, therefore, that the district court erred in awarding specific performance and attorney fees and costs to Schwartz.[8] Accordingly, we reverse the district court's judgment and remand for proceedings consistent with this order.

It is so ORDERED.

_____, J.
Hardesty

_____, J. _____, J.
Parraguirre Douglas

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[5]Id. (concluding that the seller may have been equitably estopped from asserting that the buyer had breached the contract due to the seller's silence after a deadline for filing a parcel map and the seller's failure to assist in filing the map).

[6]84 Nev. 700, 447 P.2d 491 (1968) (allowing equitable relief from forfeiture by giving the buyer a reasonable time to cure its $8,310.28 default in light of the buyer's $90,000 investment into the motel in dispute).

[7]See McCann v. Paul, 90 Nev. 102, 520 P.2d 610 (1974) (affirming the district court's denial of equitable relief in the absence of evidence showing that a substantial forfeiture had occurred).

[8]We further note that the district court's failure to state the basis for its award of attorney fees and costs is an abuse of discretion. Integrity Ins. Co. v. Martin, 105 Nev. 16, 19, 769 P.2d 69, 70 (1989).

cc: Hon. Michelle Leavitt, District Judge
Robert F. Saint-Aubin, Settlement Judge
Mushkin, Hafer, Rasmussen & Singer
Joseph J. Huggins
Eighth District Court Clerk