

IN THE SUPREME COURT OF THE STATE OF NEVADA

PERRY CHAMANI,  
Appellant,

vs.

THOMAS MACKAY AND NORMA  
JEAN MACKAY, A MARRIED COUPLE;  
VIRGINIA JONES, AN INDIVIDUAL;  
LAS VEGAS FIRST REALTY, A  
NEVADA CORPORATION; THE  
MACKAY GROUP, INC., A NEVADA  
CORPORATION; AND EQUUS  
FINANCIAL CORPORATION, A  
NEVADA CORPORATION,

Respondents.

No. 47550

**FILED**

SEP 09 2008

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

PERRY CHAMANI,  
Appellant,

vs.

THOMAS MACKAY AND NORMA  
JEAN MACKAY, A MARRIED COUPLE;  
THE MACKAY GROUP, INC., A  
NEVADA CORPORATION; AND  
EQUUS FINANCIAL CORPORATION,  
A NEVADA CORPORATION,

Respondents.

No. 48020

ORDER OF AFFIRMANCE

These are consolidated appeals from a district court judgment entered in a real property purchase contract and tort action and from a post-judgment order awarding costs and attorney fees. Eighth Judicial District Court, Clark County; Kenneth C. Cory, Judge. As the parties are familiar with the facts, we do not recount them except as necessary for our disposition.

Summary judgment

Chamani argues that the district court improperly granted summary judgment on his claims for breach of contract, breach of

fiduciary duty, breach of the implied covenant of good faith and fair dealing, negligent misrepresentation, and intentional misrepresentation, because genuine issues of material fact existed, particularly regarding causation, breach of duties owed to him, and actual damages. We disagree.

“This court reviews the district court’s grant of summary judgment de novo . . . .<sup>1</sup> Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”<sup>2</sup> We view the evidence, and any reasonable inferences that may be drawn from it, in the “light most favorable to the nonmoving party.”<sup>3</sup> A genuine issue of fact exists if “the evidence is such that a rational trier of fact could return a verdict for the nonmoving party.”<sup>4</sup> If a defendant shows that the evidence does not support any element of the plaintiff’s prima facie case, summary judgment is proper.<sup>5</sup>

#### Breach of contract

To succeed on a claim for breach of contract, the plaintiff must show that a contractual relationship existed between it and the defendant,

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<sup>1</sup>Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

<sup>2</sup>NRCP 56(c).

<sup>3</sup>Wood, 121 Nev. at 729, 121 P.3d at 1029.

<sup>4</sup>Id. at 731, 121 P.3d at 1031.

<sup>5</sup>Bulbman, Inc. v. Nevada Bell, 108 Nev. 105, 111, 825 P.2d 588, 592 (1992).

and that the defendant materially breached a duty owed to the plaintiff under the contract.<sup>6</sup> Generally, when one party prevents performance of a contractual duty, the other party is excused from performing.<sup>7</sup> For example, in a purchase and sale agreement, a buyer must be “ready, willing, and able” to purchase the property.<sup>8</sup> Further, “[a]s a general rule, a party cannot recover damages for loss that he could have avoided by reasonable efforts.”<sup>9</sup>

Viewing the evidence in a light most favorable to Chamani, we conclude that, while respondent Norma Jean Mackay promised in the brokerage agreement to promote appellant Perry Chamani’s interest in seeking to purchase the property, and Virginia Jones was listed as a broker, the record reveals that neither of these parties promised to obtain a loan for Chamani regardless of his credit history. Additionally, the record does not reveal that respondent Thomas Mackay made such a promise either. We conclude that the loan qualifications in 2005 did not prove that Chamani could have qualified for similar loans in 2003, the time period relevant to this appeal. Thus, the record reveals that Chamani was not a ready, willing, and able buyer because he had a credit problem, and did not remedy this problem by obtaining proper documentation that the collections were disputed or had been resolved.

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<sup>6</sup>Bernard v. Rockhill Dev. Co., 103 Nev. 132, 135, 734 P.2d 1238, 1240 (1987).

<sup>7</sup>Cladianos v. Friedhoff, 69 Nev. 41, 45-46, 240 P.2d 208, 210 (1952).

<sup>8</sup>Lombardo v. Albu, 14 P.3d 288, 290 (Ariz. 2000); see also Cladianos, 69 Nev. at 45-46, 240 P.2d at 210.

<sup>9</sup>Conner v. Southern Nevada Paving, 103 Nev. 353, 355, 741 P.2d 800, 801 (1987).

Chamani is precluded from recovering for any damages because he could have prevented any damage through reasonable efforts to resolve his credit problems. Accordingly, the district court properly granted summary judgment on Chamani's claim for breach of contract.

Breach of fiduciary duties

NRS 645.252 outlines the duties of real estate licensees, none of which include obtaining a loan for a purchaser. NRS 645.257 provides that a person who suffers actual damages because the real estate licensee violates the standard duty of care may recover for damages actually suffered. The plaintiff has the burden to prove actual damages, the amount of which must not be speculative.<sup>10</sup>

Viewing the evidence in a light most favorable to Chamani, we conclude that none of the respondents breached their fiduciary duties to Chamani. The record reveals that Mr. Mackay did not sabotage the transaction because, as discussed above, Chamani did not resolve his credit problems and, therefore, was not ready, willing, and able to purchase the property. Moreover, as Chamani's assertion that he would have made "a substantial profit" is speculative, we further conclude that the record does not reveal that Chamani suffered actual damages. Accordingly, we conclude that the district court properly granted summary judgment on Chamani's claim for breach of fiduciary duties.

Breach of the implied covenant of good faith and fair dealing

"It is well established that all contracts impose upon the [contracting] parties an implied covenant of good faith and fair dealing,

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<sup>10</sup>Clark Cty. Sch. Dist. v. Richardson Constr., 123 Nev. \_\_\_, \_\_\_, 168 P.3d 87, 97 (2007).

which prohibits arbitrary or unfair acts by one party that work to the disadvantage of the other.”<sup>11</sup>

Viewing the evidence in a light most favorable to Chamani, we conclude that the record contains no evidence that the respondents acted arbitrarily or in bad faith. As discussed above, the record reveals that Chamani himself caused his inability to obtain a loan by failing to resolve his credit problems. Accordingly, we conclude that the district court properly granted summary judgment on Chamani’s claim for breach of the implied covenant of good faith and fair dealing.

Negligent or intentional misrepresentation

“Intentional misrepresentation is established by three factors: (1) a false representation that is made with either knowledge or belief that it is false or without a sufficient foundation, (2) an intent to induce another’s reliance, and (3) damages that result from this reliance.”<sup>12</sup> This court defines the tort of negligent misrepresentation as follows:

“One who, in the course of his business, profession or employment, or in any other action in which he [or she] has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he [or she] fails to exercise reasonable care or competence in obtaining or communicating the information.”<sup>13</sup>

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<sup>11</sup>Nelson v. Heer, 123 Nev. \_\_\_, \_\_\_, 163 P.3d 420, 427 (2007).

<sup>12</sup>Id. at \_\_\_, 163 P.3d at 426.

<sup>13</sup>Barmettler v. Reno Air, Inc., 114 Nev. 441, 449, 956 P.2d 1382, 1387 (1998) (quoting Restatement (Second) of Torts § 552(1) (1976)).

Viewing the evidence in a light most favorable to Chamani, we conclude that the record does not reveal that any of the respondents promised to obtain a loan for Chamani regardless of his credit history. Indeed, Chamani admitted that Jones and Las Vegas First Realty never had any direct communications with Chamani. As discussed above, Chamani failed to prove that he suffered actual damage, which is an element for both negligent and intentional misrepresentation. As such, we conclude that the district court properly granted summary judgment to the respondents on Chamani's claims for intentional and negligent misrepresentation.<sup>14</sup>

#### Costs and attorney fees

Chamani argues that even if this court concludes that summary judgment was proper, evidence supports his assertion that he brought his claims in good faith and, therefore, an award of attorney fees and costs was improper. We disagree.

We will not disturb a district court's award of attorney fees and costs unless the district court abused its discretion.<sup>15</sup> The district court may award attorney fees pursuant to NRS 18.010(2)(b) if the plaintiff did not have reasonable grounds to bring the complaint. This court has concluded that even if a complaint survives an NRCP 12(b)(5)

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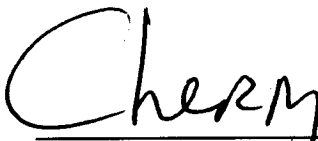
<sup>14</sup>See Bulbman, Inc. v. Nevada Bell, 108 Nev. 105, 111, 825 P.2d 588, 592 (1992) (concluding that summary judgment on a claim is proper where the defendant fails to present evidence to establish one of the elements of that claim). As we conclude that the district court properly granted summary judgment on all of Chamani's claims, we need not address whether Las Vegas First Realty and Equus Financial Corporation were vicariously liable for those claims.


<sup>15</sup>Parodi v. Budetti, 115 Nev. 236, 240, 984 P.2d 172, 174 (1999).


motion to dismiss for failure to state a claim, the district court may nonetheless award attorney fees under NRS 18.010(2)(b) according to "the actual circumstances of the case."<sup>16</sup> We conclude that the district court did not abuse its discretion when it determined that Chamani lacked reasonable grounds to file his complaint because, at the time he filed the complaint, he knew that he had collections on his credit report and that he had not resolved his credit problems. We further conclude that the record reveals that such award was reasonable. Therefore, we affirm the district court's award of attorney fees.

Accordingly, we affirm the orders granting summary judgment in Docket No. 47550 and affirm the order awarding attorney fees in Docket No. 48020.

It is so ORDERED.

  
\_\_\_\_\_, J.  
Cherry

  
\_\_\_\_\_, J.  
Maupin

  
\_\_\_\_\_, J.  
Saitta

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<sup>16</sup>See Bergmann v. Boyce, 109 Nev. 670, 675, 856 P.2d 560, 563 (1993) (concluding that whether the district court had granted an NRCP 12(b)(5) motion "was irrelevant to the trial court's inquiry as to whether the claims of the complaint were groundless").

cc: Hon. Kenneth C. Cory, District Judge  
William F. Buchanan, Settlement Judge  
Law Offices of Richard McKnight, P.C.  
Sterling Law, LLC  
Lewis Brisbois Bisgaard & Smith, LLP  
Olson, Cannon, Gormley & Desruisseaux  
Eighth District Court Clerk