

IN THE SUPREME COURT OF THE STATE OF NEVADA

SAMARNG GROMER,  
Appellant,  
vs.  
NADEEN HUGHES; AND BENEDICT  
PRASAD, D/B/A REALTY  
PROFESSIONALS OF LAS VEGAS, A  
NEVADA CORPORATION,  
Respondents.

No. 48230

**FILED**

MAY 07 2008

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court amended judgment entered after a bench trial in a contract action. Eighth Judicial District Court, Clark County; Jessie Elizabeth Walsh, Judge.

Appellant Samarng Gromer appeals from a district court judgment in favor of real estate agent Nadeen Hughes and Hughes's broker, Benedict Prasad, who sought to recover from Gromer their commission on a sale of real property. Gromer owned a five-acre parcel of undeveloped property in northwest Las Vegas. She contracted with Hughes to sell the property for a 10 percent commission. The district court awarded damages based on a theory of quantum meruit, finding that although Hughes did not consummate the final sale of the property, she was the procuring cause of the sale.

On appeal, Gromer argues that the district court erred in its enforcement of the contract (1) because the contract was unenforceable for failure to comply with the statute of frauds, NRS 645.320, (2) by improperly applying a procuring cause theory to award equitable damages for a breach of contract, and (3) by ignoring specific contract terms. Gromer also argues that, if procuring cause was an applicable legal

theory, the record does not contain substantial evidence to support a finding that Hughes was the procuring cause of the sale. Finally, Gromer argues that the district court erred by awarding attorney fees based on the contract when it awarded damages in quantum meruit. The parties are familiar with the facts, and we do not recount them here except as necessary for our disposition.

The exclusive brokerage agreement between Gromer and Hughes was valid

Gromer argues that the brokerage agreement was defective for failure to comply with the statute of frauds, NRS 645.320, because it was not signed by Prasad, the broker.<sup>1</sup> Hughes responds that Gromer waived this argument by failing to assert it as an affirmative defense at the district court and by raising it for the first time on appeal, and that the

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<sup>1</sup>NRS 645.320 provides:

Every brokerage agreement which includes a provision for an exclusive agency representation must:

1. Be in writing.
2. Have set forth in its terms a definite, specified and complete termination.
3. Contain no provision which requires the client who signs the brokerage agreement to notify the real estate broker of his intention to cancel the exclusive features of the brokerage agreement after the termination of the brokerage agreement.
4. Be signed by both the client or his authorized representative and the broker or his authorized representative in order to be enforceable.

contract was valid under the statute of frauds because Hughes signed as Prasad's authorized agent.

This court need not consider arguments that are raised for the first time on appeal.<sup>2</sup> Furthermore, under NRCP 8(c), the statute of frauds is an affirmative defense that must be pled in a responsive pleading. In this case, although Gromer raised an issue related to the statute of frauds at the trial court, she did not challenge the agreement's validity due to Prasad's failure to sign it. Gromer also failed to present any evidence supporting an affirmative defense that the contract violated the statute of frauds. In her answer to Hughes's complaint, Gromer asserted an affirmative defense of statute of frauds, but did so without alleging any facts establishing the defense. In addition, Prasad testified that Hughes was his sister and worked for him at the time the contract was signed, and Gromer failed to present any evidence to show that Hughes was not Prasad's agent, authorized to sign the contract. We therefore conclude that Gromer waived her statute of frauds argument on appeal by failing to adequately raise it at the trial court, and that the written brokerage agreement was a valid exclusive brokerage agreement under NRS 645.320.<sup>3</sup>

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<sup>2</sup>Dermody v. City of Reno, 113 Nev. 207, 210-11, 931 P.2d 1354, 1357 (1997).

<sup>3</sup>Because we conclude that the agreement was valid, we do not reach Gromer's argument that Hughes could not recover under quantum meruit if the exclusive bargaining agreement was invalid. See Bangle v. Holland Realty Inv. Co., 80 Nev. 331, 336, 393 P.2d 138, 141 (1964) (holding that an exclusive brokerage agreement is not enforceable in quantum meruit unless the agreement complies with NRS 645.320).

The district court properly awarded Hughes and Prasad their commission because Gromer acted in bad faith

Gromer argues that the district court erred in awarding damages under the written contract because it applied principles of unjust enrichment including the procuring cause theory and ignored the terms of the contract. Hughes responds that Gromer breached the contract by rejecting the final offer from Focus Commercial Group, Inc. in bad faith, intending to deprive Hughes of the commission, and that the contract did not prohibit recovery under a procuring cause theory or under quantum meruit.

In this case, the district court awarded damages for the wrong reason, as neither the procuring cause theory nor principles of quantum meruit apply. However, this court will affirm a district court judgment where it reaches the correct conclusion, even if it applied the wrong reason.<sup>4</sup>

Procuring cause is a legal theory that this court has applied to allow a broker who organized a sale of real property to recover a commission under quantum meruit to which he or she may not be entitled under the literal terms of the brokerage agreement.<sup>5</sup> To recover under the procuring cause theory, an agent or broker must prove that he or she had an employment agreement for the sale of real property and that was the procuring cause of the sale.<sup>6</sup> Where the terms of the brokerage agreement

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<sup>4</sup>Lioce v. Cohen, 124 Nev. \_\_\_\_, \_\_\_\_ n.42, 174 P.3d 970, 985 n.42 (2008).

<sup>5</sup>Carrigan v. Ryan, 109 Nev. 797, 799, 858 P.2d 29, 30 (1993).

<sup>6</sup>Id. at 798-99, 858 P.3d at 30.

require that an agent or broker be the procuring cause of the sale before the seller is obligated to pay a commission, this court has also required an agent to prove that he or she was the procuring cause of a sale.<sup>7</sup> However, when the terms of the contract do not require the agent to be the procuring cause or when a sale is prevented by the bad faith of the property owner, the procuring cause theory does not apply.<sup>8</sup>

In this case, the contract between Gromer and Hughes created an obligation to pay Hughes the commission if any person, including Gromer, sold the property at or above the contract price and according to terms acceptable to Gromer during the contract time period, or if any person sold the property during the 210-day grace period to a person with whom Hughes had negotiated. Therefore, Hughes was not required to prove that she was the procuring cause of the sale to recover under the contract. Furthermore, the district court found that Gromer acted in bad faith to prevent the sale to Focus. This finding also relieved Hughes from

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<sup>7</sup>See, e.g., *id.* at 800, 858 P.2d at 31.

<sup>8</sup>See *Ramezzano v. Avansino*, 44 Nev. 72, 87, 189 P. 681, 686 (1920) (holding that the court need not consider the claim for relief under quantum meruit because the jury properly decided on a breach of contract theory involving bad faith); *Nollner v. Thomas*, 91 Nev. 203, 207, 533 P.2d 478, 480-81 (1975) (considering a broker's ability to recover on a contract that did not require the broker to be the procuring cause of the sale, but rather only required that the broker consummate a sale on the terms of the agreement). Because we conclude that procuring cause was an inapplicable recovery theory, we decline to address Gromer's argument that Hughes presented insufficient evidence to prove that she was the procuring cause of the sale.

proving that she was the procuring cause of the sale to recover for breach of contract.

Although the district court awarded damages under quantum meruit, applying the procuring cause theory, we determine that the procuring cause theory does not apply to this case. The district court found that through her negotiations and marketing efforts, Hughes obtained Focus's invitation to counteroffer at \$1,300,000 and communicated that offer to Gromer. That communication took place before the expiration of the 210-day grace period in the written contract and before Gromer signed a contract with a new broker, which Gromer argues invalidated the 210-day grace period. The district court found that Gromer refused Focus's invitation to counteroffer with the intent to deprive Hughes of her commission. We conclude that Gromer's bad faith rejection was a breach of the implied covenant of good faith and fair dealing. Because Gromer breached the contract by refusing, in bad faith, to counteroffer, Hughes was entitled to receive damages under the contract.<sup>9</sup> We therefore affirm the district court's judgment awarding contract damages.<sup>10</sup>

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<sup>9</sup>See Hilton Hotels v. Butch Lewis Productions, 107 Nev. 226, 232-33, 808 P.2d 919, 922-23 (1991) (holding that contract damages are recoverable for breach of the implied covenant of good faith and fair dealing "[w]here the terms of a contract are literally complied with but one party to the contract deliberately countervenes the intention and spirit of the contract").

<sup>10</sup>We note that the district court awarded damages of a 5 percent commission on a sale of \$1,300,000. Although the written contract provided for a 10 percent commission, Hughes and Prasad only sought half of the contract commission traditionally paid to the seller's agent.

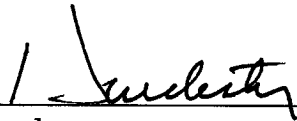
The district court properly awarded attorney fees under the written contract

In its order granting attorney fees, the district court stated that Hughes was entitled to attorney fees based on the contract and the offer of judgment, but did not specify on which basis it awarded the fees. The brokerage agreement allows the prevailing party to recover attorney fees in a suit brought to enforce the contract. Having determined that the contract was valid and that Gromer breached the contract, we affirm the district court's award of attorney fees based on the written contract.

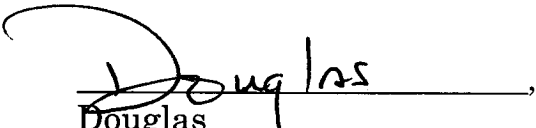
CONCLUSION

We conclude that the exclusive brokerage agreement between Gromer and Hughes was valid and that the district court's award of damages could have been properly based on Gromer's breach of that contract by refusing an invitation to counteroffer in violation of the implied covenant of good faith and fair dealing. We also conclude that the district court properly awarded attorney fees under the written contract. Accordingly, we,

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Hardesty

  
\_\_\_\_\_, J.  
Parraguirre

  
\_\_\_\_\_, J.  
Douglas

cc: Hon. Jessie Elizabeth Walsh, District Judge  
Stephen E. Haberfeld, Settlement Judge  
R. Clay Hendrix, P.C.  
McCullough, Perez & Associates, Ltd.  
Eighth District Court Clerk