

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH SALVATORE,
INDIVIDUALLY,
Appellant,
vs.
ROBINDALE VILLAS, LLC, A NEVADA
LIMITED LIABILITY COMPANY,
Respondent.

No. 48703

FILED

JUN 13 2008

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

ORDER OF AFFIRMANCE

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

The material facts are essentially undisputed. Appellant Joseph Salvatore ("buyer") contracted to buy a home under construction from respondent Robindale Villas, LLC. ("seller"). The home was completed within two years as required by the parties' contract, but only after numerous delays and several alleged reschedulings of the closing date, which required the buyer to resubmit his loan application several times. When the home was finally completed, the buyer was on a three-week vacation to Alaska and did not return in time to close within two business days of the seller's notice of completion, as also required by the contract.

The buyer filed a district court complaint for breach of contract and breach of the implied covenant of good faith and fair dealing. Following a bench trial, the district court concluded that the buyer had materially breached the contract and was not excused by the substantial

performance doctrine from abiding by the contractual deadline and the contract's express "time is of the essence" provision. Based on this conclusion, the district court found that the seller was legally entitled to cancel escrow and terminate the purchase agreement. The buyer has appealed.

This court will not disturb the district court's findings of fact if supported by substantial evidence in the record, but we will review de novo the district court's conclusions of law.¹ When a contract is clear and unambiguous, we will enforce it as written.²

The buyer agrees in its opening brief that the contract in this case "mandates that [he] close the purchase within two (2) days of notification that the unit was ready for occupancy" and that the contract contains a "time is of the essence" provision. He contends, however, that (1) the seller waived enforcement of that provision because the seller contributed to the delay in performance by continually changing the estimated closing date, (2) the two-day closing deadline was not reasonable or uniformly enforced and it was impossible to fund a loan within two days, (3) he substantially performed by placing the money into escrow by September 13, 2004, and (4) the seller did not act in good faith when it cancelled escrow, because it could have allowed him to pay a \$50 per day late fee instead of forfeiting the more than \$100,000 increase in the home's market value over the purchase price.

¹Bedore v. Familian, 122 Nev. 5, 9-10, 125 P.3d 1168, 1171 (2006).

²Renshaw v. Renshaw, 96 Nev. 541, 543, 611 P.2d 1070, 1071 (1980); see Musser v. Bank of America, 114 Nev. 945, 947, 964 P.2d 51, 52 (1998).

The seller disagrees, asserting that the buyer breached the agreement by failing to pay the purchase price in full by the closing deadline. The seller argues that (1) the “time is of the essence” provision should be strictly enforced, (2) the two-day notice provision is reasonable and was met by all other buyers, (3) the substantial performance theory is inapplicable to this case, and (4) while its reasons for terminating the contract are irrelevant, it had good faith reasons for doing so.

After reviewing the parties’ briefs, the appendix, and the transcript filed in this case, we conclude that the contract in this case is clear and unambiguous, and thus, it must be enforced as written.

We have strictly construed a “time is of the essence” provision in a number of cases.³ While we have sometimes declined to strictly enforce clear and unambiguous time is of the essence provisions, based on equitable considerations, we have done so only in vary narrow circumstances involving forfeiture or waiver.⁴ In particular, we have

³Holmby, Inc. v. Dino, 98 Nev. 358, 361, 647 P.2d 392, 394-94 (1982); Von Ehrensmann v. Lee, 98 Nev. 335, 647 P.2d 377 (1982); R & S Investments v. Howard, 95 Nev. 279, 593 P.2d 53 (1979).

⁴See Slobe v. Kirby Stone, Inc., 84 Nev. 700, 447 P.2d 491 (1968) (granting equitable relief from forfeiture and giving a motel purchaser, who had made substantial installment payments on the contract price, reasonable time to close escrow); Moore v. Prindle, 80 Nev. 369, 377-78, 394 P.2d 352, 357 (1964) (granting equitable relief from forfeiture to a purchaser who stood to lose her substantial equity in the property, which, based on the previous payments she made, amounted to 38% of the contract price); Mosso v. Lee Et Al., 53 Nev. 176, 295 P. 776 (1931) (granting equitable relief from forfeiture to a buyer who had been making monthly payments to purchase real property, lived on the property, had made improvements thereto, and tendered the final lump sum balance due and all taxes, penalties, and interest by the escrow closing date, even

continued on next page . . .

granted equitable relief from forfeiture when the buyers were in possession of the properties and had substantially performed by making significant installment payments toward the purchase prices. Further, we have recognized that if the buyer's delay in performance is caused by the seller, then the seller is seen to have waived its right to enforce the "time is of the essence" provision: the buyer can enforce the contract in spite of his delay, and the seller cannot use the buyer's failure to perform on time as a defense.⁵

Here, substantial evidence supports the district court's factual findings and its conclusion that the buyer materially breached the contract by failing to timely fund escrow. As there is no evidence

... continued

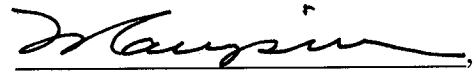
though he had previously failed to pay interim taxes and interest when due).

See also 8 Catherine M.A. McCauliff, Corbin on Contracts § 37.4 (Joseph M. Perillo, ed., rev. ed. 1999) (recognizing that delays are frequent in real estate transactions but it is customary to overlook them, even when time is stated to be of the essence, and also recognizing that if values are rapidly fluctuating and the purchaser has gained an advantage because of a delay, the purchaser's failure to pay on time may justify the seller's refusal to convey).

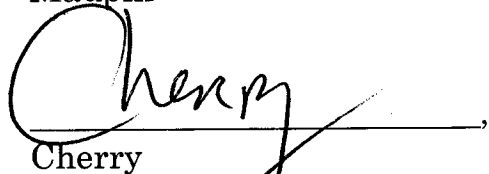
⁵Goldston v. AMI Investments, Inc., 98 Nev. 567, 569-70, 655 P.2d 521, 523-24 (1982); see also NGA #2 Ltd. Liab. Co. v. Rains, 113 Nev. 1151, 946 P.2d 163 (1997) (concluding, in a specific performance case, that summary judgment was improper because there were genuine issues of material fact as to whether the seller waived or should be equitably estopped from requiring strict enforcement of the time is of the essence provision and the closing deadline, when both parties continued to work on concluding the deal even after the extension period had expired and the seller may have been responsible for the buyer's delay).

supporting the buyer's arguments that the seller waived or should be equitably estopped from enforcing the contract's provisions, or that it acted in bad faith, the "time is of the essence" requirement controls in this case and the buyer's alleged substantial performance was untimely. Under the contract, the buyer accepted sole responsibility to obtain any funding that he needed and to pay the balance of the purchase price within two business days of receiving the completion notice. Because the buyer failed to provide the balance of the purchase price by the escrow closing deadline, he materially breached the contract, and the district court correctly concluded that the seller was entitled to cancel escrow and terminate the purchase agreement. Accordingly, we

ORDER the judgment of the district court AFFIRMED.⁶

 J.

Maupin

 J.

Cherry

 J.

Saitta

cc: Hon. Jessie Elizabeth Walsh, District Judge
William F. Buchanan, Settlement Judge
Michael R. Mushkin & Associates
Pengilly Robbins Slater
Eighth District Court Clerk

⁶We reject as meritless the buyer's other arguments.