IN THE SUPREME COURT OF THE STATE OF NEVADA

TROPICANA PIZZA, INC.,
Appellant,
vs.
ADVO, INC.,
Respondent.

No. 48739

FILED

SEP 09 2008

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

ORDER OF AFFIRMANCE

Appeal from a district court judgment entered after bench trial in a contract action and from post-judgment orders denying a new trial and awarding attorney fees and costs. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge.

For nearly fifteen years prior to this action, appellant Tropicana Pizza, Inc., a Las Vegas franchisor, utilized the services of respondent Advo, Inc., to mail bulk advertising for Tropicana Pizza franchises. Periodically, a sales representative for Advo would meet with Azzam Mansour, the president of Tropicana Pizza, to renew a contractual "group rate" for advertising for all Tropicana Pizza franchises.

Each contract entered by Tropicana Pizza and Advo required Tropicana Pizza to make a "volume commitment" to order a specified number of mailings. In the event that Tropicana Pizza did not reach its set volume commitment, each contract also contained a "short rate clause," which provided that Advo would charge Tropicana Pizza an additional per piece fee for all mailed advertising during the contract period, calculated using Advo's "rate card." During the length of its relationship with Advo, Tropicana Pizza never met its contractual volume commitment. Even so, prior to this dispute, Advo never charged Tropicana Pizza a short rate.

In August and September of 2003, Advo and Tropicana Pizza negotiated the terms of a new contract, agreeing to a rate of $23.73 per thousand pieces, and a total volume commitment of 8 million pieces. Advo's sales representative input the agreed terms into Advo's computer system to generate a standard form contract, which included a short rate clause. Due to Tropicana Pizza's consistent failure to meet its volume commitment, Advo also attached a "short rate addendum," which listed the short rate that would be charged at varying levels if Tropicana Pizza reached a volume between 5 and 8 million pieces. This rate was substantially less than the short rate calculated using the standard short rate provision of the agreement. Mansour signed the contract on October 22, 2003.

Shortly after Tropicana Pizza and Advo executed the October contract, Mansour contacted Advo, claiming that he had not realized the October contract contained the short rate addendum, that he did not want to pay a short rate, and that he wanted the addendum removed from the contract. Advo and Tropicana Pizza eventually entered a new contract with a slightly higher price, but without the short rate addendum, on December 5, 2003. However, this contract still contained Advo's standard short rate provision.

During the 2003-2004 contract term, Tropicana Pizza fell far short of its volume commitment, achieving a volume of only 3,724,989 pieces. Pursuant to the standard short rate clause in the December agreement, Advo assessed a short rate charge of $63,958.06. Tropicana Pizza refused to pay.

Advo eventually filed suit for breach of contract, seeking enforcement of the short rate provision. Following a bench trial, the

district court concluded that Tropicana Pizza made a unilateral mistake when it executed the December contract based on the belief that the contract no longer contained a short rate pricing provision. Finding that Advo knew or should have known of this mistake, the district court rescinded the December contract.

After rescinding the December contract, the district court determined that the October contract was still in effect, and governed the parties' relationship. Concluding that the short rate addendum pricing only applied to total volumes over 5 million, the district court applied the standard short rate provision of the agreement, and determined that Tropicana Pizza owed Advo a short rate charge of $63,958.06.

Tropicana Pizza appeals, contending that (1) the district court should have reformed the December contract, rather than rescind it, and (2) the district court improperly interpreted the short rate clause of the October contract. For the reasons stated below, we affirm the decision of the district court.

Standard of review

Contract interpretation is subject to a de novo standard of review.[1] However, with respect to questions of fact, this court will defer to the district court's findings unless they are clearly erroneous or not based on substantial evidence.[2]

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[1]Grand Hotel Gift Shop v. Granite St. Ins., 108 Nev. 811, 815, 839 P.2d 599, 602 (1992).

[2]James Hardie Gypsum, Inc. v. Inquipco, 112 Nev. 1397, 1401, 929 P.2d 903, 906 (1996) overruled on other grounds by Sandy Valley Assocs. v. Sky Ranch Estates, 117 Nev. 948, 955 n.6, 35 P.3d 964, 969 n.6 (2001).

Decision to rescind, rather than reform, the December contract

Tropicana Pizza first argues that instead of rescinding the December contract and enforcing the short rate provision of the October contract, the district court should have reformed the December contract to exclude any short rate provision. We disagree.

In Home Savers, Inc. v. United Security Co.,[3] this court adopted the unilateral mistake rule set forth in § 153 of the Restatement (Second) of Contracts. Section 153 provides that

> Where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of mistake under the rule stated in § 154, and
>
> (a) the effect of the mistake is such that enforcement of the contract would be unconscionable, or
>
> (b) the other party had reason to know of the mistake or his fault caused the mistake.[4]

Thus, applying § 153, the court in Home Savers rescinded a contract between two parties after determining that a party based his assent to the contract upon a mistaken belief of which the other party knew or should have known.[5]

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[3]103 Nev. 357, 741 P.2d 1355 (1987).

[4]Restatement (Second) of Contracts § 153 (1981).

[5]103 Nev. at 358-59, 741 P.2d at 1356-57.

More recently, in NOLM, LLC v. County of Clark,[6] this court also adopted § 166 of the Restatement (Second) of Contracts. Section 166 states that

> If a party's manifestation of assent is induced by the other party's fraudulent misrepresentation as to the contents or effect of a writing evidencing or embodying in whole or in part an agreement, the court at the request of the recipient may reform the writing to express the terms of the agreement as asserted,
>
> (a) if the recipient was justified in relying on the misrepresentation.[7]

While the express language of § 166 applies only to cases of fraudulent misrepresentation, the drafter comments to the provision indicate that "[t]he rule stated in this Section also applies to the case where only one party is mistaken and the other, although aware of the mistake, says nothing to correct it."[8] Relying on the language of this comment, this court in NOLM determined that "where one party makes a unilateral mistake and the other party knew about it but failed to bring it to the mistaken party's attention," a court may reform a contract to reflect the belief of the mistaken party.[9] Accordingly, this court concluded that the district court did not err in reforming a contract for the sale of land between the buyer and Clark County when the buyer knew that the

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[6]120 Nev. 736, 100 P.3d 658 (2004).

[7]Restatement (Second) of Contracts § 166 (1981).

[8]Restatement (Second) of Contracts § 166 cmt. a (1981).

[9]120 Nev. at 740-42, 100 P.3d 662-63 (2004).

contract erroneously described the land purchased, but said nothing to the County.[10]

Tropicana Pizza argues that based on the decision in NOLM, the district court erred in rescinding, rather than reforming, the December contract between Tropicana Pizza and Advo. Tropicana Pizza also terms this decision to rescind the contract a "conclusion of law," and urges this court to "exercise its de Novo [sic] review," and overturn the decision of the district court.

As a preliminary matter, we reject Tropicana Pizza's contention that this court should evaluate the district court's decision to rescind the contract using the de novo standard. Tropicana Pizza fails to recognize that the comment to § 166, which allows for reformation of the contract, specifically provides that

> This Section . . . only states the circumstances in which a court "may" grant reformation, and, since the remedy is equitable, a court has the discretion to withhold it, even if it would otherwise be appropriate, on grounds traditionally considered by courts of equity in exercising their discretion.[11]

This court has also indicated that the decision to fashion and grant equitable remedies lies within the discretion of the district court.[12]

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[10]Id.

[11]Restatement (Second) of Contracts § 166 cmt. a (1981).

[12]See Bedore v. Familian, 122 Nev. 5, ___ n.21 125 P.3d 1168, 1174 n.21 (2006) (stating that "the trial court has full discretion to fashion equitable remedies that are complete and fair to all parties involved") (quoting Hammes v. Frank, 579 N.E.2d 1348, 1355 (Ind. Ct. App. 1991)); Canepa v. Durham, 62 Nev. 417, 426, 153 P.2d 899, 903 (1944) (stating

continued on next page . . .

Accordingly, the appropriate standard of review of the district court's decision to rescind, rather than reform, the contract is abuse of discretion.

Using this standard, we conclude that the district court did not abuse its discretion in rescinding, rather than reforming, the December contract. In NOLM, the primary case cited by Tropicana Pizza in support of reformation, this court reformed the contract between the buyer and the County only after finding that the buyer knew that the legal description of land provided the County was incorrect, but did not inform the County, intending to use this mistake as a "bargaining chip" in his application for an adult use permit.[13] In this case, Advo's senior sales representative indicated that he would have never considered authorizing a contract at the discounted rate provided to Tropicana Pizza without also including a short rate provision. Although the sales representative admitted that he did not tell Mansour that the terms provided in the short rate addendum of the October contract were actually more favorable than those contained in the standard short rate provision of the December contract, he testified that no Advo representative ever told Mansour that Tropicana Pizza would not be liable for a short rate under the new contract. Thus, while the district court concluded that Advo knew or should have known of Tropicana Pizza's mistaken belief that the December contract did not contain a short rate provision, it does not

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. . . continued

that "the question of whether or not a rescission shall be granted rests largely in the sound discretion of the court").

[13]120 Nev. at 739-40, 100 P.3d at 660-61.

appear that Advo's conduct rose to the level of the blatant failure to disclose that took place in NOLM. Accordingly, given the lesser level of Advo's conduct, we conclude that the district court did not abuse its discretion in rescinding, rather than reforming, the December contract.

Interpretation of the October contract

Tropicana Pizza alternately argues that the inclusion of both the standard short rate provision and the short rate addendum in the October contract rendered the contract ambiguous, indicating that the district court should have assessed the short rate under the more favorable provisions of the short rate addendum.[14]

As indicated above, the October contract contained two short rate provisions. The first provision, quoted above, provided that any short rate would be assessed using Advo's "rate card," and was paragraph 7.1 of the body of the contract. Using Advo's rate card, the short rate assessed against Tropicana Pizza was approximately $17 per thousand pieces. Attached to the end of the contract was a short rate "addendum," which stated that

Addendums

The short rate grid is as follows

Annual Volume	Short Rate
5,000,000-6,099,999 pieces	$1.16 per thousand pieces

[14]We note that Tropicana Pizza does not argue that the district court erred in reviving the October contract after it rescinded the December contract. Rather, at trial, it appears that Tropicana Pizza indicated that it would prefer the court to reform the December contract, but would also accept the remedy of recission, with revival of the October contract, as an alternative.

6,100,000-7,099,999 pieces	$.93 per thousand pieces
7,100,000-7,999,999 pieces	$.46 per thousand pieces

The short rate amount will be the actual volume achieved times the applicable short-rate indicated above. For example: If 5.7 million pieces are achieved, then the short-rate amount due to ADVO will be 5.7 million pieces times $1.16 per thousand which equals $6,612.

The short rate will be assessed annually at the end of each contract year.

These short rates were significantly lower in each amount category than if the rate had been calculated using Advo's standard rate card. In this case, Tropicana Pizza only reached a total volume of 3,724,989, which was lower than any volume amount provided on the short rate addendum. Accordingly, the district court calculated the short rate using Advo's rate card, as provided in paragraph 7.1 of the contract.

Tropicana Pizza asserts that this was error, because the inclusion of the short rate provision and the short rate addendum made the short rate clause ambiguous, and that this ambiguity should be interpreted against Advo. In this, Tropicana Pizza cites § 206 of the Restatement (Second) of Contracts, which provides that

> In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds.[15]

Based on this section, Tropicana Pizza argues that the ambiguity between the short rate provision in the body of the contract and the short rate addendum indicates that the district court should have charged Tropicana

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[15]Restatement (Second) of Contracts § 206 (1981).

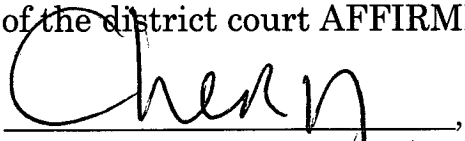
Pizza the more favorable $1.16 per thousand short rate contained in the short rate addendum.

Despite Tropicana Pizza's contentions, we conclude that the district court did not err in determining that for volumes of less than 5 million, the standard short rate provision of the contract applied. In this, we note that the "short rate addendum" does not appear to be a stand alone short rate clause. The short rate addendum does not contain language establishing when a party would be liable for a short rate, nor does it state that a short rate will be charged if Tropicana Pizza does not meet its contractual volume commitment. Rather, the addendum only provided a list of "substitute" short rates at various volume levels above 5 million. Therefore, we conclude that the short rate addendum was clearly intended to be read in conjunction with the standard short rate provision contained in paragraph 7.1 of the agreement. As testimony by Advo representatives established that Tropicana Pizza consistently fell far short of its volume commitment, it also appears reasonable that Advo would wish to provide Tropicana Pizza with an incentive, in the form of a reduced short rate, in the event Tropicana Pizza made a good faith effort to reach its volume commitment, but fell slightly short. Thus, even though the short rate addendum does not list a short rate charge for rate charges for volumes under 5 million, the contract clearly provided that a short rate would be charged, and would be assessed using Advo's rate card. Accordingly, we conclude that the district court did not err in using Advo's

rate card to assess a short rate under the standard short rate provision of the October contract.[16]

Therefore, for the reasons stated above, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
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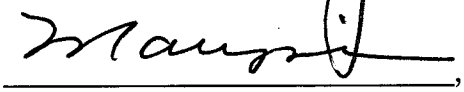

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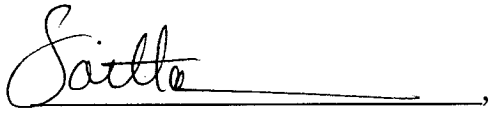

_____, J.
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cc: Hon. Elizabeth Goff Gonzalez, District Judge
William F. Buchanan, Settlement Judge
Vannah & Vannah
Jones Vargas/Las Vegas
Eighth District Court Clerk

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[16]We have also reviewed Tropicana Pizza's argument that pursuant to Restatement (Second) of Contracts § 211, Advo's standard short rate provision and rate card should have been excluded from the contract, and conclude that it lacks merit. Section 211 of the Restatement applies to standardized agreements, and provides that a contractual term will be excluded from an agreement if a party is unaware of a term, or it is hidden from view, and the party would not have signed the contract had he been aware of the term. In this case, Mansour's own testimony at trial indicated that he was aware that the October contract likely contained short rate provision. However, because Advo had never previously enforced the provision, it appears that Mansour did not care to know the specific details of the provision. Accordingly, because Mansour was aware of the short rate provision, we conclude that § 211 does not apply.