

IN THE SUPREME COURT OF THE STATE OF NEVADA

ZUHIR YOUSIF,
Appellant,
vs.
JERRY HAMIKA,
Respondent.

No. 49530

FILED

FEB 05 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

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

In October 2002, appellant Zuhir Yousif and respondent Jerry Hamika entered into a written purchase and sale agreement for Yousif to purchase Hamika's convenience store, Topaz Market, for \$120,000. In relevant part, the contract's terms provided (1) for Yousif to acquire liquor and gaming licenses, (2) that an escrow account be opened, and (3) that the close of escrow would follow after Yousif obtained approvals for the liquor and/or gaming license. During this time, Yousif worked at Topaz Market.

Following the deterioration of the parties' business relationship, Yousif filed the underlying complaint against Hamika alleging breach of contract, breach of the implied covenant of good faith and fair dealing, and conversion. Specifically, with respect to his breach of contract claim, Yousif alleged that although he made "various payments" to Hamika to fulfill his contractual obligations to buy the store, Hamika refused to allow Yousif access to the store, and seized the store's contents and inventory. Yousif's breach of the implied covenant of good faith and

fair dealing claim centered around the same allegations as his breach of contract claim. With respect to his conversion claim, Yousif alleged that in August 2003, Hamika unlawfully took possession and control over Yousif's property, specifically the assets and inventory of the Topaz Market that rightfully belonged to Yousif.

Hamika filed his answer and counterclaim, alleging, in relevant part, conversion. Hamika claimed that Yousif wrongfully exercised possession of the goods and monies at Topaz Market for his own benefit by issuing money orders on checks Yousif knew to be invalid and by removing inventory from the business.

Following a bench trial, the district court entered an order ruling against Yousif on all of his claims for relief. The court ruled that although Yousif testified that he had paid Hamika over \$96,000 towards the purchase price of the store, Yousif failed to provide any credible documentation or receipts evidencing payment. The court also noted that Yousif failed to obtain any of the licensing required by the contract and that escrow was never opened. Additionally, the court determined that Yousif was not a credible witness (1) because he made misrepresentations of fact regarding his use of a W-2 tax form provided to him by Hamika, and (2) because of his mismanaged handling of checks and money orders while employed at Topaz Market. With respect to Yousif's conversion claim, the court concluded that there was no credible evidence to support that claim.

With regard to Hamika's counterclaims, the court found in favor of Hamika as to his conversion claim only. Specifically, the court determined that Yousif wrongfully exercised acts of dominion and control over Hamika's property by knowingly accepting bad checks from an

acquaintance of his, his wife, and “G&L maintenance,” and in return giving them either cash or money orders. The court determined that as a result of Yousif’s actions, Hamika lost \$42,000, which the court awarded to Hamika.

Yousif timely filed the instant appeal, challenging the district court’s findings regarding his claims for breach of contract and breach of the implied covenant of good faith and fair dealing. He contends that he paid Hamika \$96,000 towards the purchase price for Topaz Markets, as evidenced by Yousif’s daily ledger book, which was introduced at trial, documenting his payments, and Yousif’s testimony regarding such payments. Yousif also maintains that his payments are evidenced by the fact that he was named as a tenant, along with Hamika, on Topaz Market’s lease. Yousif asserts that Hamika refused “to provide any receipts and demanded all payments to be made in cash.” Yousif also challenges the district court’s favorable finding with regard to Hamika’s counterclaim for conversion, arguing that there was no evidence presented at trial that Yousif had direct knowledge that the checks he received were invalid or that there were insufficient funds to cover the checks. Finally, Yousif asserts that the district court committed judicial misconduct, which impeded Yousif’s right to a fair trial by “engag[ing] in repeated, adverse and, at times, sarcastic, conduct against Yousif” at trial.

In considering this appeal, we give deference to the court’s factual findings so long as they are not clearly wrong and are supported by substantial evidence, NOLM, LLC v. County of Clark, 120 Nev. 736, 739, 100 P.3d 658, 660-61 (2004); Gibellini v. Klindt, 110 Nev. 1201, 1204, 885 P.2d 540, 542 (1994), which has been defined as evidence that “a reasonable mind might accept as adequate to support a conclusion.” First

Interstate Bank v. Jafbros Auto Body, 106 Nev. 54, 56, 787 P.2d 765, 767 (1990) (internal quotation omitted), superseded by statute on other grounds as stated in Countrywide Home Loans v. Thitchener, 124 Nev. ___, 192 P.3d 243 (2008). Moreover, witness credibility determinations are within the district court's fact-finding purview, and we will not substitute our or appellant's view of witness testimony for that of the district court. Fox v. First Western Sav. & Loan, 86 Nev. 469, 470 P.2d 424 (1970).

In this case, the first question before us concerns whether Yousif paid \$96,000 towards the purchase of Topaz Market, and whether Hamika, after receiving that money, unilaterally terminated the contract. We conclude that there is substantial evidence to support the district court's findings that there was no breach of contract or breach of the implied covenant of good faith and fair dealing by Hamika because there is no credible documentation or receipts evidencing payment by Yousif to Hamika towards the purchase of Topaz Markets. Although Yousif presented a "daily ledger" he had kept to evidence alleged payments and testified that Hamika refused to provide any receipts and demanded that all payments be in cash, it was for the district court to determine the credibility of Yousif's testimony at trial and weigh his testimony appropriately. See Id. As a result, we conclude that the district court's rulings against Yousif on his claims are supported by substantial evidence. See First Interstate Bank, 106 Nev. at 56, 787 P.2d at 767.

Additionally, given the numerous bad checks that Yousif accepted in return for either cash or money orders during his time at Topaz Markets from the acquaintance, his wife, and company "G&L maintenance," we conclude that there was substantial evidence to support the district court's findings in favor of Hamika's claim for conversion. See

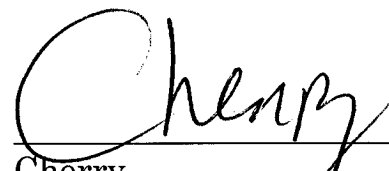
Wantz v. Redfield, 74 Nev. 196, 198, 326 P.2d 413, 414 (1958) (stating that a conversion is “a distinct act of dominion wrongfully exerted over another’s personal property in denial of, or inconsistent with his title or rights therein or in derogation, exclusion, or defiance of such . . . rights”).

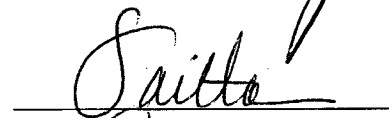
Finally, we reject Yousif’s contention that various comments by the district court constituted improper judicial commentary that, when viewed cumulatively, warrant reversal.


Generally, “[i]f remarks made by the judge in the progress of a trial are calculated to mislead the jury or prejudice either party, it would be grounds for reversal.” Ginnis v. Mapes Hotel Corp., 86 Nev. 408, 417, 470 P.2d 135, 140 (1970) (quoting Peterson v. Silver Peak, 37 Nev. 117, 122, 140 P. 519, 521 (1914)). Here, none of the alleged instances of improper conduct appeared to be calculated to prejudice either party. Therefore, even when viewed cumulatively, we conclude that any alleged error did not have a prejudicial impact on the district court’s verdict or otherwise affect the integrity of the proceedings.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Hon. Michelle Leavitt, District Judge
Janet Trost, Settlement Judge
Kirk T. Kennedy
Wright & Weiner
Eighth District Court Clerk