

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARC RADOW,
Appellant,
vs.
SPIGOT RESOURCES, INC., A
NEVADA CORPORATION,
Respondent.

No. 50257

FILED

APR 30 2009

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

ORDER OF AFFIRMANCE

This is an appeal from a district court judgment in a real property contract action for breach of contract and damages. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge.

Marc Radow contracted with Spigot Resources, Inc., to buy an area of land and its water in Southwest Reno. Thereafter, Radow altered e-mails and made several misrepresentations in bad faith to induce Spigot to lower the purchase price. When the contract was not performed, Radow instituted an action against Spigot for breach of contract and for specific performance. Spigot filed a counterclaim asserting that Radow breached various contract terms. After a three-day bench trial, the district court concluded that Radow breached several terms of the contract and awarded damages based on the breach.

Radow now appeals, alleging the district court erred in finding he breached the contract and further erred in awarding damages and interest based on those findings.¹ Specifically, Radow claims that the

¹Radow also argues that the district court erred in awarding prejudgment interest to Spigot. We conclude that this claim lacks merit because the district court accorded its award with NRS 99.040.

district court erred when it (1) determined that he breached the covenant of good faith and fair dealing and by awarding damages and interest on that claim; (2) determined that he breached the contract by failing to release Spigot's earnest money deposit and awarding Spigot the amount of the deposit as damages; and (3) awarded interest on the sales proceeds for the breach of contract action, relying on a measure for equitable relief rather than the legal claim on which Spigot prevailed. We disagree and conclude that the district court did not err in awarding damages for breach of contract, including a breach of the covenant of good faith and fair dealing, and awarding interest on the damages.

The parties are familiar with the remaining facts and procedures of this case and we do not discuss them except as necessary for our disposition.

DISCUSSION

Standard of Review

Whether a party breaches a contract term is a question of fact, which we review for substantial evidence. *May v. Anderson*, 121 Nev. 668, 672-73, 119 P.3d 1254, 1257 (2005). Substantial evidence is evidence "which 'a reasonable [person] might accept as adequate to support a conclusion.'" *State, Emp. Security v. Hilton Hotels*, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1970)). We review a district court's award of damages for an abuse of discretion. *Flamingo Realty v. Midwest Development*, 110 Nev. 984, 987, 879 P.2d 69, 71 (1994).

Ambiguity of a contract term is a question of law that we review de novo. *Anvui, LLC v. G.L. Dragon, LLC*, 123 Nev. 25 ___, 163 P.3d 405, 407 (2007).

Covenant of good faith and fair dealing

First, Radow argues that the district court erred in finding he breached the covenant of good faith and fair dealing and awarding damages based on that finding. We disagree.

The district court concluded that Radow breached the covenant of good faith and fair dealing with Spigot because it found that Radow intentionally altered e-mails to induce Spigot to lower the sales price. Specifically, the district court found that Radow intentionally altered e-mails to make misrepresentations to Spigot and Spigot relied on those false representations in negotiating a reduced sales price. Moreover, the district court found that Radow intentionally failed to disclose to Spigot that he had closed on the water rights, knowing that an addendum to the contract required him to release his \$50,000 earnest money deposit within seven days of closing on water rights. Finally, the district court found that Radow knowingly drafted the Supplemental Escrow Instruction so that it would not adhere to the addendum that required release of the earnest money deposit.

The covenant of good faith and fair dealing is implied in every contract. A.C. Shaw Construction, 105 Nev. 913, 914, 784 P.2d 9, 10 (1989). It is well established that all contracts impose upon the parties an implied covenant of good faith and fair dealing, which prohibits arbitrary or unfair acts by one party that work to the disadvantage of the other. University & Cmty. Coll. Sys. v. Sutton, 120 Nev. 972, 989, 103 P.3d 8, 19 (2004). “Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving “bad faith” because they violate

community standards of decency, fairness or reasonableness.” Restatement (Second) of Contracts § 205 (1981).

We conclude that all of the district court’s findings were supported by substantial evidence. Specifically, at trial, the district court admitted Radow’s altered e-mails and heard testimony supporting its conclusion that Radow was not acting in good faith and fair dealing throughout the course of the contract. Spigot testified that Radow altered the purchase price and the closing date on the water rights transaction between Radow and Gerald Smith, the owner of the water rights to the property, before forwarding the e-mails to Spigot. Spigot further testified that he relied on these material alterations in his dealings with Radow. This evidence demonstrates that Radow did not act in good faith when he altered the e-mails to misrepresent what he would pay for the water rights, inducing Spigot to lower the sales prices of the property. The evidence also demonstrates that Radow specifically made these misrepresentations to Spigot’s disadvantage. Accordingly, we further conclude that the district court did not abuse its discretion in awarding damages and interest based on its conclusion that Radow breached the covenant of good faith and fair dealing.

Earnest money deposit

Second, Radow argues that the district court erred in concluding that he breached the contract by failing to release his earnest money deposit, and awarding Spigot the earnest money deposit. In particular, Radow contends that the term requiring him to release his earnest money deposit to Spigot within seven days of closing on water rights is ambiguous. We disagree.

The district court found that Radow closed on water rights on October 6, 2005. The district court also found that Radow, in bad faith,

knowingly failed to reveal to Spigot or agents for either party that he had closed on water rights on October 6. The district court concluded that Addendum #3 to the contract required the release of Radow's earnest money deposit within seven days of closing on water rights and Radow did not release his earnest money deposit on October 13, 2005. Consequently, the district court concluded that Radow breached the term of the contract requiring a release of the earnest money deposit within seven days of closing on water rights.

"A contract is ambiguous when it is subject to more than one reasonable interpretation." Anvui, LLC v. G.L. Dragon, LLC, 123 Nev. 25 ___, 163 P.3d 405, 407 (2007). When a contract is clear on its face from the written language, it should be enforced as written. Canfora v. Coast Hotels & Casinos, Inc., 121 Nev. 771, 776, 121 P.3d 599, 603 (2005). "The Court has no authority to alter the terms of an unambiguous contract." Id.

On October 6, 2006, Smith assigned 60-acre feet of water right to Radow for \$2,280,000. Radow thus closed on his purchase of the water rights on October, 6, 2005, but did not tell Spigot. Radow did not release his earnest money deposit on October 13, 2005, as required by Addendum #3. At trial, Radow testified that he was confused about when he had to release the deposit. As late as October 25, 2005, Radow represented to his real estate agent that he was not ready to release the earnest money deposit.

We conclude that the term of the contract requiring Radow to release the earnest money deposit within seven days of closing on water rights is unambiguous. The plain language of Addendum #3 reads "Buyer shall release earnest money deposit of \$50,000 within 7 days after closing on additional water rights." Because this contract term is unambiguous,

we conclude that Radow's claim lacks merit. That is, under the contract, Radow was required to release his earnest money deposit by October 13, 2005, seven days from the date on which he acquired the water rights. Radow did not release the earnest money deposit.

As such, we conclude that substantial evidence supports the district court's conclusion that Radow closed on water rights and then failed to release his earnest money deposit according to the contract terms. Therefore, we conclude that the district court did not err in finding that Radow breached the term of the contract requiring a release of the earnest money deposit within seven days of closing on water rights. Accordingly, we conclude that the district court did not abuse its discretion in awarding damages and interest based on this finding.

Award of damages

Lastly, Radow argues that the district court improperly awarded interest on the sales proceeds for the breach of contract action because it relied on a measure for equitable relief rather than the legal claim on which Spigot prevailed. That is, Radow argues that the district court abused its discretion in awarding damages here because Spigot made no attempt to quantify the benefits that it would have received if Radow had renegotiated in good faith. We disagree and conclude that the district court did not abuse its discretion in awarding consequential damages as the damages calculation was not speculative because the district court awarded damages for the breach of the covenant of good faith and fair dealing based on Radow's conduct throughout the entire transaction between the parties

The district court found that Radow did not act in good faith or fair dealing with Spigot after entering into the contract with Spigot for the purchase of the property. Accordingly, the district court concluded that

Radow breached the covenant of good faith and fair dealing with Spigot. Based on this breach, the district court awarded Spigot damages for loss of use of its money from January 11, 2006, to the date of judgment in the amount of \$485,961.

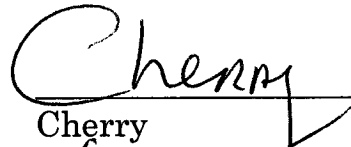
In calculating damages for breach of contract to negotiate in good faith, other courts have held that such damages “must be predicated on the outcome that would have been reached had the defendant been negotiating in good faith.” Auberbach v. Great Western Bank, 88 Cal. Rptr. 2d 718, 732 (Ct. App. 1999). Further, courts have found that damages for failure to negotiate in good faith based on future profits to the prospective land purchaser were too speculative. Vestar Development II, v. General Dynamics Corp., 249 F.3d 958, 962 (9th Cir. 2001).

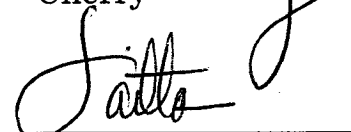
We conclude that the district court did not abuse its discretion in its award of damages for loss of use because the damages were compensatory as Radow would have been bound to purchase the property for \$6.5 million had he not altered e-mails to induce Spigot to lower the purchase price. Accordingly, we conclude that the district court did not abuse its discretion in awarding Spigot loss of use damages because Radow breached the covenant of good faith and fair dealing throughout his


course of conduct with Spigot. As such, Spigot was entitled to loss of use damages for that time period when he contracted with Radow without knowledge of Radow's repeated misrepresentations.

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Hon. Steven P. Elliott, District Judge
Nathan M. Jenkins, Settlement Judge
Law Office of James Shields Beasley
Galow & Smith
Law Offices of Mark Wray
Washoe District Court Clerk