

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL WADE, AN INDIVIDUAL;
AND KAREY GOTTSCHALL, AN
INDIVIDUAL,
Appellants,
vs.
STRATOSPHERE HOTEL & CASINO, A
NEVADA CORPORATION,
Respondent.

No. 50760

FILED

MAY 21 2009

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

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court summary judgment in a breach of contract and tort action. Eighth Judicial District Court, Clark County; Timothy C. Williams, Judge.

Respondent Stratosphere Hotel & Casino hired appellants Michael Wade and Karey Gottschall as models for a Stratosphere photo shoot. Appellants each received a nominal fee and signed a contract containing a boiler plate Model's Release (Release) with their modeling agency, Classic Models. Appellants alleged that Classic Models and the photographer, Peter Harasty, told them that Stratosphere would only use their photos for in-house fliers and the hotel's website. Later, however, appellants learned that Stratosphere was using their photos in a nationwide advertising campaign. As a result, appellants filed a complaint for damages against Stratosphere, Classic Models, and Harasty.

Eventually, Stratosphere moved for summary judgment, arguing that appellants signed a valid release of all rights to their photographs. The district court found that the release was unambiguous and binding, and therefore it granted Stratosphere's summary judgment motion.

Appellants now appeal, arguing that the Release was ambiguous, and therefore, the district court erred when it granted Stratosphere's summary judgment motion. We conclude that the district court erred in granting Stratosphere's summary judgment motion because the contract at issue is ambiguous.

The parties are familiar with the facts and we do not recount them here except as necessary to our disposition.

Discussion

"This court reviews a district court's grant of summary judgment de novo, without deference to the findings of the lower court." Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is appropriate when the pleadings and evidence reveal no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Id. "[A]ny reasonable inferences drawn from [the evidence], must be viewed in a light most favorable to the nonmoving party." Id.

Summary judgment regarding contract interpretation is appropriate only "when a contract is clear and unambiguous, meaning that the contract is not reasonably susceptible to more than one interpretation." University of Nevada, Reno v. Stacey, 116 Nev. 428, 431, 997 P.2d 812, 814 (2000). If a contract is ambiguous, then this court construes it against the drafter and extrinsic evidence is admissible to discern the parties' intent. Dickenson v. State, Dep't of Wildlife, 110 Nev. 934, 937, 877 P.2d 1059, 1061 (1994). If a contract is ambiguous, this court prefers an interpretation that is fair, reasonable, and avoids harsh results. Id.

Appellants argue that the Release is ambiguous because the document refers to a specified purpose and duration, but the spaces

provided for specifying the purpose and duration are blank. We agree because the contract is missing essential terms, namely, Stratosphere's scope of use and the duration of use regarding the photographs.

The district court made the following findings of fact and conclusions of law: (1) appellants executed an express written contract, (2) appellants understood the meaning of the contract; (3) the contract was unambiguous and contained the essential terms; and (4) appellants are therefore bound by the express contract.

The contract at issue is a half-page document that contains the model's contact information and a Model's Release section. The Release states: "The following release is for the specific purpose stated above and this release is granted for that purpose only." However, most of the information above the Release is blank with handwritten arrows through the "send invoice to" section and the "use/client" section. The contract contained these arrows when appellants signed it. Nevertheless, the release does contain Harasty's name and it has "Stratosphere" handwritten over a portion of the client space. The release goes on to discuss the use and duration of the photographs:

In consideration of the sum stated hereon, I hereby sell, assign and grant to the above or those for whom they are acting as indicated above, the right and permission to copyright and/or use and/or publish photographic portraits or pictures of me in which I may be included in whole or in part or composite or reproduction thereof in color or otherwise made through any media at the studios or elsewhere for art, advertising, trade or any other similar lawful purpose whatsoever but only for the specific purpose stated above, for a period terminating ____ months from date of this booking. I hereby waive my right to inspect and/or

approve the finished product or the advertising copy that may be used in connection therewith.

This Release is the basis of Stratosphere's summary judgment motion.

Here, aside from Classic Model's letterhead, the contract contained only the model's name, social security number, address, and the date and time of the photo shoot. The contract did not contain the models' pay rate or the agency fee, Harasty's invoice information, or the location of the photo shoot. More importantly, it did not contain any information in the "use" section of the contract regarding the purpose of the photo shoot. Because the Release specifically refers to the "use" section and the purpose "stated" therein, it is an essential term of the contract. Further, the duration portion of the release is blank.

Because appellants did not draft the contract, we do not construe it against them. Additionally, we resolve any reasonable inferences in their favor because they are the nonmoving party. As a result, we reject Stratosphere's argument that the blank "use" section and "duration" clause should be interpreted to mean appellants intended unlimited use and scope of their photographs. Because the scope of use and duration are unclear from the face of the contract, the contract is ambiguous. This ambiguity creates a genuine issue of material fact as to the parties' intent. Thus, we conclude that the district court erred in granting Stratosphere's motion for summary judgment.

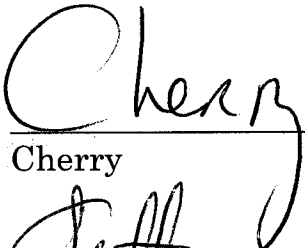
The contract's ambiguity triggers the parol evidence rule, which allows the district court to admit extrinsic evidence "to determine the true intent of the parties." Trans Western Leasing v. Corrao Constr. Co., 98 Nev. 445, 447, 652 P.2d 1181, 1183 (1982). On remand, the district court "may look to the circumstances surrounding the execution of the contract and the subsequent acts or declarations of the parties to interpret


unclear contract provisions.” Id. The district court should determine not whether appellants and Stratosphere meant the same thing, but whether both parties said the same thing. Hotel Riviera, Inc. v. Torres, 97 Nev. 399, 401, 632 P.2d 1155, 1157 (1981). If the parties’ external words and actions were different, then there was no meeting of the minds, and therefore, no express contract. Id.


However, there may still be an implied contract as manifested by the parties’ conduct and other surrounding circumstances. Warrington v. Empey, 95 Nev. 136, 138, 590 P.2d 1162, 1163 (1979). If so, the district court may use industry custom and usage to determine the terms of the implied contract. Id. at 139, 590 P.2d at 1163-64.

Finally, if the district court determines there is no express or implied contract, it must determine if appellants’ claim for unjust enrichment is valid. LeasePartners Corp. v. Brooks Trust, 113 Nev. 747, 756, 942 P.2d 182, 187 (1997). Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Hon. Timothy C. Williams, District Judge
Janet Trost, Settlement Judge
Blut & Campain, APC
Aldrich Law Firm, Ltd.
Eighth District Court Clerk