

IN THE SUPREME COURT OF THE STATE OF NEVADA

RESORT PROPERTIES OF AMERICA,
A NEVADA SOLE PROPRIETORSHIP,
Appellant,

vs.

CHERRY INVESTMENT AND
DEVELOPMENT COMPANY, A
GEORGIA CORPORATION; L.A.
PACIFIC CENTER OPERATING
COMPANY, LLC, A NEVADA LIMITED
LIABILITY COMPANY; RICHARD
ALTER, A CALIFORNIA RESIDENT;
AND FINANCIAL CAPITAL
INVESTMENT COMPANY, A NEVADA
CORPORATION,
Respondents.

No. 51098

FILED

JUN 30 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *Tracie K. Lindeman*
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court summary judgment in an action to recover a real estate broker's commission. Eighth Judicial District Court, Clark County; David B. Barker, Judge.

Appellant Resort Properties of America brought suit against respondents Cherry Investment and Development Company, L.A. Pacific Center Operating Company, Richard Alter, and Financial Capital Investment (collectively Cherry Investment), for allegedly stealing a commission owed to David Atwell, appellant's sole proprietor, from a transaction for the purchase of the Alexis Park Hotel property. The

parties are familiar with the facts, and we do not recount them here except as necessary to our disposition.¹

On appeal, Resort Properties argues that the district court erred in granting Cherry Investment's motion for summary judgment on two issues that revolve around the disclosure requirements of NRS 645.252. First, Resort Properties argues that the district court erred in finding that it was barred from recovery of a broker's fee due to a violation of the disclosure requirements under NRS 645.252. Second, Resort Properties argues that the district court erred in finding that it was barred from recovery on the issue of an alleged oral agreement due to a violation of the disclosure requirements under NRS 645.252. For the following reasons, we reverse the summary judgment and remand to the district court.

Standard of review

We review an order granting summary judgment de novo. Pegasus v. Reno Newspaper, Inc., 118 Nev. 706, 713, 57 P.3d 82, 87 (2002). Summary judgment is appropriate and shall be rendered forthwith when the pleadings and other evidence on file demonstrate that no genuine

¹Resort Properties also argues that the district court erred in granting Cherry Investment's motion for summary judgment because: 1) Atwell was the procuring cause of the sale of the Alexis Park Hotel property, 2) Cherry Investment was barred from using a public-policy defense, 3) Atwell had no duty to make the required disclosures under NRS 645.252, and 4) a finder's-fee-exception applied to Atwell such that he was entitled to recover. As we find that the district court erred in granting Cherry Investment's motion for summary judgment on the basis of Resort Properties being barred from bringing suit because Atwell failed to make the required disclosures under NRS 645.252, we do not reach these additional issues.

issue of material fact remains and that the moving party is entitled to judgment as a matter of law. Wood v. Safeway, Inc., 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005).

Recovery of the broker's fee

Resort Properties argues that the district court erred in granting Cherry Investment's motion for summary judgment by ruling that Resort Properties was barred from bringing suit against Cherry Investment to recover a broker's fee because David Atwell had failed to make the disclosures required by NRS 645.252. We agree.

NRS 645.252(1)(a)(b) states, in relevant part, that a person licensed as a real estate agent who acts in a real estate transaction shall disclose to the parties, as soon as is practicable, any material and relevant information that is known, or should have been known, that relates to the property subject to the transaction, and all sources from which the agent will receive compensation from the transaction. The remedy for violation of NRS 645.252 is a civil action for damages by the person who suffered damages as a proximate result of the licensed broker's failure to perform the required duties. NRS 645.257(1).

We have held that a statute that provides for sanctions other than a forfeiture of the right to sue on a contract does not preclude maintaining an action to recover on the contract. Nev. Equities v. Willard Pease Drilling, 84 Nev. 300, 302, 440 P.2d 122, 123 (1968). Further, in the context of a general contractor, we have held that "[t]he penalty provisions in regulatory laws are essentially expressions of legislative will" Robken v. May, 84 Nev. 433, 435, 442 P.2d 913, 914 (1968). In Robken, we held that a general contractor was not barred from suing based on the penalty provision of the relevant statute because the statute did not contain a prohibition against filing suit on the contract. Id. We concluded

that the Legislature would have specifically inserted such a prohibition had that been its intent. Id.

Here, we conclude that the district court erred in ruling that appellant was barred from bringing suit against Cherry Investment because the plain language of NRS 645.257(1) does not provide for this penalty. Had the Legislature intended a violation of NRS 645.252 to prohibit a licensed broker from filing suit on the contract, it would have expressly provided for this in NRS 645.257(1). See Robken, 84 Nev. at 435, 442 P.2d at 914. As such, appellant is not barred from bringing a suit to recover broker's fees from Cherry Investment and the district court erred in granting Cherry Investment's motion for summary judgment on this ground.

Oral contract

Resort Properties argues that the district court erred in granting Cherry Investment's motion for summary judgment on the ground that the enforcement of the alleged oral commission agreement between Atwell and Alter was banned because of Atwell's failure to comply with the disclosure requirements of NRS 645.252. We agree.

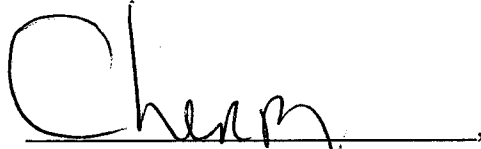
Before a real estate broker is entitled to a commission, an employment contract must be shown. Atwell v. Southwest Securities, 107 Nev. 820, 823, 820 P.2d 766, 768 (1991). An employment contract will be found if the circumstances surrounding the real estate transaction indicate that the broker and client entered into an employment relationship. Carrigan v. Ryan, 109 Nev. 797, 801 n.3, 858 P.2d 29, 32 n.3 (1993) (citing Morrow v. Barger, 103 Nev. 247, 253-54, 737 P.2d 1153, 1156 (1987)). Further, we have held that the requirement that an employment contract be found is easily met, and all that must be present for a broker to recover under a theory of quantum meruit is that there was

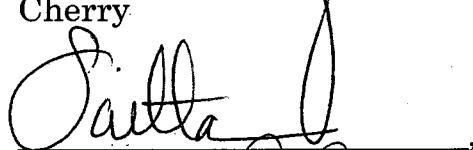
a promise, which can be implied, to pay the reasonable value of services. Atwell at 823, 737 P.2d at 768.

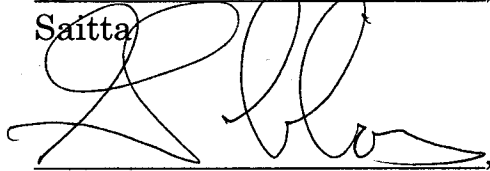
We conclude that the district court erred in finding that Resort Properties was barred from bringing a claim based on the alleged oral contract as a matter of public policy. Atwell's failure to make the requisite disclosures under NRS 645.252 cannot stand as a basis for barring recovery because the penalties set out for violation of that statute do not include loss of a claim. See NRS 645.257(1). As such, it was error for the district court to grant Cherry Investment's motion for summary judgment on the basis that Resort Properties was barred from recovery on a theory of breach of an oral contract, and we remand this issue back to the district court for further proceedings on this theory.²

²In addition to the breach-of-oral-contract theory, we instruct the district court to hold further proceedings on the claims of quantum meruit and unjust enrichment. We conclude that there may be genuine issues of material fact regarding these two alternative theories of equitable recovery. However, because the district court erred in granting Cherry Investment's motion for summary judgment before these issues could be explored, we remand this case with instructions to the district to allow the parties to explore these two alternative theories based on the alleged oral agreement between Atwell and Alter.

In light of the foregoing discussion, 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. David B. Barker, District Judge
Thomas J. Tanksley, Settlement Judge
Kemp, Jones & Coulthard, LLP
Law Offices of Steven Greenfeld
Morris Peterson/Las Vegas
Eighth District Court Clerk