IN THE SUPREME COURT OF THE STATE OF NEVADA

FLORINE BOND,
Appellant,
vs.
BAYANI GONZALES AND REMEDIOS GONZALES,
Respondents.

No. 51273

FILED

MAY 29 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF REVERSAL

This is an appeal from a district court summary judgment in a real property action. Eighth Judicial District Court, Clark County; Valorie Vega, Judge.

In 2000, respondents Bayani and Remedios Gonzales purchased a residential condominium and detached residential garage unit from Mission Ridge LLC. In 2003, appellant Florine Bond entered into a residential purchase agreement (the Agreement) with respondents. The parties dispute whether the Agreement was for the sale of both the condominium and garage units. Both parties moved for summary judgment, and the district court granted respondents' motion, concluding that the Agreement did not include the garage unit as a matter of law. Specifically, the district court found that the Agreement constituted the entire agreement between the parties and did not refer to the garage unit in any way.

We conclude that the applicability of the merger by deed doctrine is a factual issue in this case. Having also determined that the Agreement is ambiguous on its face and that extrinsic evidence proves a genuine factual issue of the parties' intent, we reverse the summary judgment ruling in respondents' favor and remand to the district court.

09-13491

We review an appeal from an order granting a motion for summary judgment de novo. Sustainable Growth v. Jumpers, LLC, 122 Nev. 53, 61, 128 P.3d 452, 458 (2006). In deciding a summary judgment motion, "the evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party." Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). However, "the nonmoving party may not rest upon general allegations and conclusions, but must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine factual issue." Id. at 731, 1030-31 (internal quotations omitted).

Additionally, when a written instrument is ambiguous, extrinsic evidence is admissible to ascertain the true intentions and agreement of the parties. M.C. Multi-Family Dev. v. Crestdale Assocs, 124 Nev. __, __, 193 P.3d 536, 545 (2008).

Under the doctrine of merger by deed, "once a deed has been executed and delivered, the contract becomes merged into the deed, because it has accomplished the purpose for which it was created." Hanneman v. Downer, 110 Nev. 167, 177, 871 P.2d 279, 285 (1994). "Stated differently, when the terms of the deed cover the same subject as the earlier contract and the two are at variance, the deed controls." Id. However, the applicability of the doctrine depends on the intent of the parties, a question of fact. Id.

Here, the deed conveys all the real property described in Exhibit A. In turn, under Exhibit A, Parcel III conveys, "[t]he exclusive right of use, possession, and occupancy of those portions the project designated as those 'limited common elements.'" Limited Common Elements are then defined in the Mission Ridge CC&Rs. Section 2.21.1

states, "[e]ach garage shall be a part of the Common Element as a Limited Common Element."

Thus, based on the deed, it appears that the Gonzaleses included the garage unit in the conveyance. However, if the Agreement does not include the garage unit, the deed and the agreement are not consistent. Under merger by deed, the terms of the deed would then control. Whether or not merger by deed applies is a question of fact depending on the parties' intent as "determined by the examination of the instruments and from the facts and circumstances surrounding their execution." Id. Accordingly, this issue cannot be decided as a matter of law.

Moreover, despite the district court's ruling, the Agreement refers to garage door openers and controls in at least two places.[1] It is unclear why the Agreement would contain these references if the garage was not included in the purchase. Viewed in the light most favorable to appellant, the references to garage door openers again raise a factual issue of whether the parties intended to include the garage in the sale. Adding to the ambiguity, the Agreement does not specifically exclude the garage even though the deed by which the respondents originally took title conveyed both the garage and the condominium unit together. We

---

[1]Page six, item 27 of the Agreement states, "[p]hysical possession of the property with all keys, alarm codes and garage door opener/controls, shall be delivered to Buyer upon COE." Page 9, item 6 states, "[e]xcept as crossed out herein, all items permanently attached to the property as of this date are to be included in the price of the home." The list that follows this statement includes "electric garage door openers with controls." None of the items on the list are crossed out.

therefore conclude that the Agreement is ambiguous on its face and that extrinsic evidence is admissible to determine the parties' intentions.

The extrinsic evidence in this case does not resolve the factual issues the writings raise. In particular, the parties dispute whether they intended to incorporate by reference the CC&Rs, which provide that a residential unit cannot be sold without a garage unit. There is also evidence that the condominium and garage were listed under the same parcel number in the original transaction between Mission Ridge LLC and respondents. According to appellant, the garage unit was given a separate parcel number after the transaction with respondents. Additionally, under the real estate sales listing for the property, the garage was included with the condominium. Appellant claims to have relied on this listing when entering into the transaction. The parties further dispute whether appellant took possession of the garage immediately after the sale. While appellant claims to have had possession since the time the sale was completed, respondents maintain that they kept the garage unit locked and under their control until they attempted to sell appellant the garage unit in 2005.

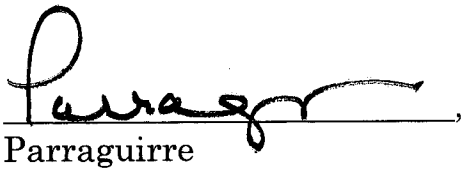
In light of the foregoing, we conclude there is a genuine issue of fact as to whether the parties intended the garage to be included in the conveyance, making summary judgment in favor of respondents improper on this record.[2] Accordingly, we

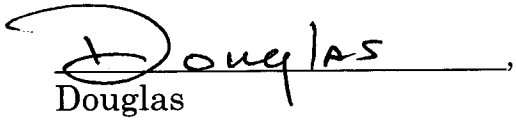
---

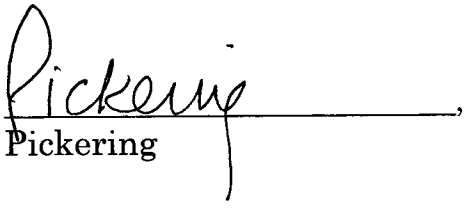
[2]Reading the deed and Agreement together without looking to extrinsic evidence, we conclude that an ambiguity remains as to whether the garage unit was included with the condo sale. Notably, neither the deed nor the Agreement specifically refer to the garage unit. While the deed conveys the "limited common elements," the garage unit is not found

continued on next page . . .

REVERSE and REMAND to the district court for proceedings consistent with this order.


Parraguirre, J.


Douglas, J.


Pickering, J.

cc: Hon. Valorie Vega, District Judge
William F. Buchanan, Settlement Judge
Florine Bond
Mont E. Tanner
Eighth District Court Clerk

. . . *continued*

on the non-exhaustive list of "limited common elements" in the deed. Due to this ambiguity, we cannot grant summary judgment in appellant's favor.