IN THE SUPREME COURT OF THE STATE OF NEVADA

STAGECOACH HOMES, LLC, A NEVADA LIMITED LIABILITY COMPANY,
Appellant,
vs.
EMIL FREI, III, AN INDIVIDUAL; ADORIA FREI, AN INDIVIDUAL; STEPHEN BROCK, AN INDIVIDUAL; AND KATHRYN BROCK, AN INDIVIDUAL,
Respondents.

No. 51759

FILED

FEB 26 2010

TRACIE K. LINDEMAN
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BY S. Young
DEPUTY CLERK

ORDER OF REVERSAL

This is an appeal from a district court judgment awarding damages and costs in a contract action involving a real estate purchase contract. Eighth Judicial District Court, Clark County; Honorable Kenneth C. Cory presiding.

I.

This appeal arises out of a written purchase and sale agreement between appellant Stagecoach Homes, LLC, as seller, and respondents Stephen and Kathryn Brock, as buyers, of a to-be-constructed home. After a bench trial, the district court entered judgment in favor of the Brocks and their relatives, respondents Emil and Adoria Frei, for $150,000 plus costs. The award represents the profit Stagecoach made reselling the home when the Brocks failed to tender the purchase price and close escrow within the time set by the agreement for doing so.

The district court erred in not honoring the contract as written. The Freis neither signed nor had rights under the purchase and sale agreement, and the Brocks breached the contract by not tendering the

purchase price on time, even after Stagecoach extended the closing date at their request. As strangers to the contract, the Freis were not entitled to recover damages. Further, under Holmby, Inc. v. Dino, 98 Nev. 358, 647 P.2d 392 (1982), Stagecoach was the non-breaching party and did not owe the Brocks damages. Accordingly, we reverse.

II.

In a bench trial, "the court shall find the facts specially and state separately its conclusions of law thereon." NRCP 52(a). "Findings of fact shall not be set aside unless clearly erroneous." Id.; Bedore v. Familian, 122 Nev. 5, 9-10, 125 P.3d 1168, 1171 (2006). The interpretation of an unambiguous written contract presents a question of law. Sheehan & Sheehan v. Nelson Malley Co., 121 Nev. 481, 486, 487-88, 117 P.3d 219, 223-24 (2005). Conclusions of law are reviewed de novo. Id.

A.

The district court's implicit finding that the Freis were parties to the purchase agreement, deserving of damages along with the Brocks, was clearly erroneous. The Freis did not sign and were not party to the purchase and sale agreement. The statute of frauds applies to contracts for the sale of real property. NRS 111.210 (providing that contracts for sale of land are void unless in writing). Here, there is no writing by which Stagecoach undertook to sell, and the Freis to purchase, the real property that is the subject of this suit.

Stephen Brock's testimony that a Stagecoach representative falsely told the Brocks and the Freis that it had a policy against entering into purchase and sale agreements with multiple buyers does not alter this conclusion. If anything, this testimony establishes that the Brocks knowingly entered the agreement as the only parties on the buyers' side of

the transaction. Even if Stagecoach had acted capriciously in refusing to contract with four parties (the Freis and the Brocks) instead of two (the Brocks), and even if its representative misrepresented its policy, Stagecoach still was within its rights as a contracting party, absent some independent legal duty, to choose how many people and with whom it would contract on any single home sale contract. McCall v. Carlson, 63 Nev. 390, 424, 172 P.2d 171, 187 (1946).

B.

The district court also erred in finding that Stagecoach breached the contract by canceling the contract after the Brocks failed to tender payment within the agreed-upon escrow period.

When a land sale agreement contains a "time is of the essence" clause and specifies the time by which payment must be tendered, the seller is entitled to cancel the contract if the buyer does not tender payment in accordance with the contract as written, absent equitable considerations that permit a court to not enforce the express terms of the parties' agreement. NGA #2 Ltd. Liab. Co. v. Rains, 113 Nev. 1151, 1159, 946 P.2d 163, 168 (1997). Those equitable considerations include whether the seller is estopped from canceling or has waived its contractual right to cancel the contract of sale if the buyer has not tendered payment by the close of escrow. Id. Where the buyer has partly performed, taken possession, or made improvements to the property, reliance interests may make a forfeiture analysis appropriate. See, e.g., Benetti v. Kishner, 93 Nev. 1, 3, 558 P.2d 537, 538-39 (1977); Slobe v. Kirby Stone, Inc., 84 Nev. 700, 701-02, 447 P.2d 491, 492 (1968); 15 Richard A. Lord, Williston on Contracts §46.11 (4th ed. 2000).

Here, the Brocks acknowledge they did not tender payment on their own behalf in order to close escrow by the extended close date of

March 15, 2006. However, the Brocks argue that they deserved a reasonable time after the expiration of the escrow period to tender payment despite the "time is of the essence" clause or, alternatively, that the Freis' attempt to tender in the Freis' name should have counted as substantial compliance.

The Brock's argument is foreclosed by Holmby, 98 Nev. at 360, 647 P.2d at 393. In Holmby, the parties entered an agreement for the sale and purchase of two adjacent parcels of land. Holmby (the buyer) failed to either tender payment to extend escrow, or payment in full by the close of escrow, though he tendered full payment shortly thereafter. Id. Holmby argued that despite his breach of the express terms of the contract, he had substantially performed his obligations under the contract, and thus deserved specific performance. Id.

This court held that the "time is of the essence" provision in the escrow agreement precluded Holmby from arguing that he was entitled to a reasonable time to tender performance after the end of the escrow period. Id. at 361, 647 P.2d at 393-94 (citing R & S Investments v. Howard, 95 Nev. 279, 593 P.2d 53 (1979)). The court also held that Holmby had no other basis for avoiding enforcement of the forfeiture provision as "[the seller] made no false or misleading representations to Holmby which would give rise to estoppel; nor did his alleged conduct constitute waiver." Id. at 362, 647 P.2d at 394.

Both their contract as written and Holmby defeat the Brocks' claim that they had a built-in grace period within which to tender payment after the close of escrow. The contract included a "time is of the essence" clause. Thus, the Brocks were obligated to show that their failure to tender payment within the escrow period was excused because

either Stagecoach was estopped from enforcing the "time is of the essence" clause, or otherwise waived that right. This they failed to do.

To demonstrate estoppel, the Brocks had to show that Stagecoach made false or misleading representations to the Brocks, upon which they reasonably relied to their detriment. Topaz Mutual Co. v. Marsh, 108 Nev. 845, 853-54, 839 P.2d 606, 611 (1992). The only potentially offending conduct that the Brocks could point to at the time of the close of escrow was Stagecoach's failure to respond to the Brocks' request during the escrow period that they be permitted to assign their contractual rights to the Freis. The Brocks offered no argument, though, to turn Stagecoach's failure to agree to assignment into a false or misleading representation that Stagecoach made to the Brocks on which the Brocks reasonably relied to their detriment. Nor did the Brocks establish waiver, which requires "an intentional relinquishment of a known right." Holmby, 98 Nev. at 362, 647 P.2d at 394 (internal quotation marks and citation omitted).

Thus, under Holmby, the district court's finding that the Brocks performed under the contract, or were excused from performing, is clearly erroneous. There is no legally sufficient basis for either finding.

The Brocks acknowledge Holmby, but seek to distinguish it by arguing that their failure to tender payment within the escrow period is excusable. As support, they cite the line of cases where this court has held that a defaulting purchaser can at times tender untimely payment and equitably avoid a forfeiture, especially Benetti, 93 Nev. at 3, 558 P.2d at 538-39, and Slobe, 84 Nev. at 701-02, 447 P.2d at 492.

Holmby, rather than Benetti and Slobe, is controlling here, because Holmby, like the instant case, involved an purely executory

contract for purchase and sale without substantial reliance interests and forfeiture such as those which might arise when the buyer has taken possession, made part performance, or invested in improvements. Benetti, by contrast, involved a landlord-tenant dispute over renewal of a lease, and also contained factual allegations that might lead to estoppel or waiver which this court deemed unsuitable for summary judgment in favor of the landlord. 93 Nev. at 3, 558 P.2d at 538. And Slobe is distinguishable as well, because there the buyer had taken possession of the hotel property, and had paid a considerable portion of the purchase price between the down payment and payments on principal, while also expending considerable sums on improvements. 84 Nev. at 701, 447 P.2d at 491.

C.

Stagecoach contends, and we agree, that the district court erred in finding that Stagecoach breached the implied covenant of good faith and fair dealing. Even "[w]here the terms of a contract are literally complied with but one party to the contract deliberately countervenes the intentions and spirit of the contract, that party can incur liability for breach of the implied covenant of good faith and fair dealing." Hilton Hotels v. Butch Lewis Productions, 107 Nev. 226, 232, 808 P.2d 919, 922-23 (1991). Central to the Hilton Hotels holding was that the offending party deliberately took action interfering with the other party's ability to receive the expected benefits from the contract. Here, though, there was no such action. There was no understood, implicit assumption that the Brocks could freely assign their rights to the Freis. Indeed, the contract as written said the opposite—that assignment was not permitted, absent express consent. Such clauses are normally upheld. 29 Richard A. Lord, Williston on Contracts §74:22 (4th ed. 2003) ("Contract provisions

prohibiting the assignment of rights under the contract will ordinarily be upheld, depending on the particular facts and circumstances.").

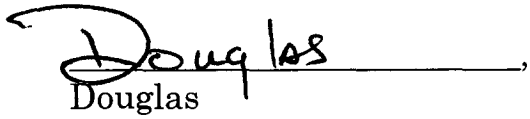
Stagecoach's knowledge that the Brocks intended to involve the Freis is equally unpersuasive as a source of obligation on its part to assent to an assignment to the Freis. In a normal commercial contract setting, one party's knowledge of the other party's independent plans does not extend a termination clause in a contract or make its enforcement a breach of the implied covenant of good faith and fair dealing. See Aluevich v. Harrah's, 99 Nev. 215, 218, 660 P.2d 986, 987 (1983). While the Brocks argue there was sharp dealing by Stagecoach in failing to respond during the escrow period to the Brocks' request that it permit them to assign their contractual rights to the Freis, Stagecoach had no contract or other legal duty to agree to the Brocks' request, or to tell the Brocks that it would not agree to their proposal, even if doing so might have been an act of "fair dealing" in colloquial terms. Id. The implied covenant of good faith and fair dealing may not be used to imply a term that is contradicted by an express term of the contract. Kucharczyk v. Regents of University of California, 946 F. Supp. 1419, 1432 (N.D. Cal. 1996). Here, there was an express "no assignment" clause and hence no implied duty to assent to a request for waiver of the clause.

Therefore, as there was no deliberate act on Stagecoach's part to interfere with the benefits the Brocks expected out of the contract, the district court's finding that Stagecoach breached the implied covenant of good faith and fair dealing was clearly erroneous under Hilton Hotels. And as to the Freis, the fact they were not parties to the contract defeats

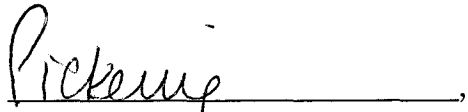
any implied covenant claim. United Fire Ins. Co. v. McClelland, 105 Nev. 504, 511, 780 P.2d 193, 197 (1989).

We therefore REVERSE.

_____, C.J.
Parraguirre



_____, J.
Douglas



_____, J.
Pickering

cc: Hon. Kenneth C. Cory, District Judge
Janet Trost, Settlement Judge
Pengilly Robbins Slater
Snell & Wilmer, LLP/Las Vegas
Eighth District Court Clerk