

IN THE SUPREME COURT OF THE STATE OF NEVADA

LEE SPENCER, AN INDIVIDUAL  
A/K/A LELAND SPENCER,  
Appellant,  
vs.  
NEVADA FIRST BUSINESS BROKERS,  
INC.,  
Respondent.

No. 51784

**FILED**

**DEC 04 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 contract action. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge.

BACKGROUND

Appellant Lee Spencer sought to purchase a business, Nevada Pay Phone, that was being represented by respondent Nevada First Business Brokers (Nevada First). Despite Spencer and the owner of Nevada Pay Phone signing an asset purchase agreement, Spencer ultimately did not purchase Nevada Pay Phone. Less than a year later, Nevada Pay Phone, again with Nevada First acting as broker, was sold to another buyer. Thereafter, Nevada First filed this instant action against Spencer in district court seeking damages from the failed sale of Nevada Pay Phone to Spencer. On May 2, 2008, the district court entered a judgment for \$170,000. plus costs and interest in favor of Nevada First and Spencer filed his timely notice of appeal of that judgment on May 30, 2008. Subsequently, on June 18, 2008, the district court entered an order awarding Nevada First attorney fees and costs.

On appeal, Spencer argues that the district court misinterpreted the underlying asset purchase agreement by failing to recognize that he had an absolute right to terminate the agreement within 45 days of receiving financial records from the seller and that Nevada First had not earned its commission, because the fact that amendments three through five of the asset purchase contract were never executed, demonstrated that negotiations were ongoing, and thus, the sale had not been completed. Spencer also asserts that even if Nevada First had earned its commission, such a commission should be reduced by the amount Nevada First received as its commission from the subsequent sale of Nevada Pay Phone to a different buyer under a mitigation of damages theory and that the district court erred in determining that Nevada First had established its intentional interference with a contractual relationship and intentional interference with a prospective business advantage cause of action.<sup>1</sup>

### DISCUSSION

When the facts are not in dispute, the interpretation of a contract is a question of law that this court reviews de novo. Lorenz v.

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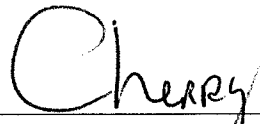
<sup>1</sup>In his briefs, Spencer additionally challenges the district court's post-judgment award of attorney fees and costs to Nevada First. As a post-judgment award of attorney fees is independently appealable, see NRAP 3A(b)(2) (setting forth that special orders after final judgment are independently appealable); Smith v. Crown Financial Services, 111 Nev. 277, 280 n.2, 890 P.2d 769, 771 n.2 (1995) (noting that a post-judgment award of attorney fees and costs is a special order after final judgment), and because Spencer did not independently appeal the attorney fees and costs award or even attempt to amend his notice of appeal from the final judgment, we do not consider his challenge to the attorney fees and costs award.

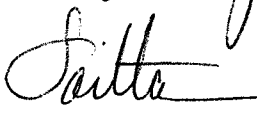
Beltio, Ltd., 114 Nev. 795, 803, 963 P.2d 488, 494 (1998). A district court's factual determinations, however, will not be set aside on appeal unless they are clearly erroneous and not based on substantial evidence. Id. Substantial evidence is that which a reasonable mind could accept as adequate to support a conclusion. Id.

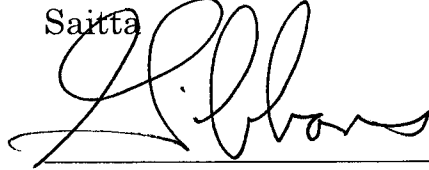
First, regarding Spencer's 45-day argument, we conclude, after reviewing the issue de novo that the district court properly determined that Spencer waived, in writing, his right to terminate the agreement within 45 days of receiving Nevada Pay Phone's financial documents. Additionally, the district court's conclusion that a valid contract was entered into by Spencer and the owner of Nevada Pay Phone is supported by substantial evidence and not clearly erroneous. See May v. Anderson, 121 Nev. 668, 672-72, 119 P.3d 1254, 1257 (2005) (explaining that the question of whether a contract exists is one of fact). Next, regarding Spencer's mitigation of damages argument, the district court properly enforced a liquidated damages provision, Mason v. Fakhimi, 109 Nev. 1153, 1156-57, 865 P.2d 333, 335 (1993) (noting that liquidated damages provisions are prima facie valid and will only be held unenforceable when the provision is established to be a penalty), and mitigation of damages is irrelevant in the enforcement of liquidated damages clauses. See Barrie School v. Patch, 933 A.2d 382, 391-94 (Md. 2007); NPS, LLC v. Minihane, 886 N.E.2d 670, 675-76 (Mass. 2008). Finally, regarding Spencer's assertions of district court error concerning the intentional interference causes of action, as the district court based its judgment on a breach of the liquidated damages provision, any error regarding the alternative intentional interference cause of action would be, at best, harmless error. See Cook v. Sunrise Hospital & Medical

Center, 124 Nev. \_\_\_, \_\_\_ n. 25, 194 P.3d 1214, 1219 n.25 (2008) (defining “harmless error” as “that which does not affect a party’s substantial rights”). Accordingly, as substantial evidence supports the district court’s judgment, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Cherry

  
\_\_\_\_\_, J.  
Saitta

  
\_\_\_\_\_, J.  
Gibbons

cc: Hon. Elizabeth Goff Gonzalez, District Judge  
John F. Mendoza, Settlement Judge  
Law Office of William A. Kennedy, Esq.  
Adams Law Group  
Eighth District Court Clerk