

IN THE SUPREME COURT OF THE STATE OF NEVADA

SKY LAS VEGAS REALTY, INC., A
NEVADA CORPORATION AND SKY
LAS VEGAS CONDOMINIUMS, INC., A
NEVADA CORPORATION,
Appellants,
vs.
333-CA, LLC, A LIMITED LIABILITY
COMPANY,
Respondent.

No. 54759

FILED

JUL 27 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

SKY LAS VEGAS REALTY, INC., A
NEVADA CORPORATION; AND SKY
LAS VEGAS CONDOMINIUMS, INC., A
NEVADA CORPORATION,
Appellants,
vs.
333-CA, LLC, A LIMITED LIABILITY
COMPANY,
Respondent.

No. 57624

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

These are consolidated appeals from a district court order granting summary judgment in a real property contract action (Docket No. 54759) and from a post-judgment order awarding attorney fees and costs (Docket No. 57624). Eighth Judicial District Court, Clark County; Doug Smith, Judge.

In 2005, appellants Sky Las Vegas Condominiums, Inc., and Sky Las Vegas Realty, Inc., (collectively, Sky) entered into a contract (the Agreement) to sell a condominium to respondent 333-CA, LLC, for \$689,010. Pursuant to the Agreement, 333-CA deposited, in increments, a total of \$137,802 into escrow. Thereafter, Sky sent an amendment to 333-CA offering, in pertinent part, the option to terminate the Agreement and

receive full reimbursement of its deposits. When 333-CA thereafter attempted to accept this offer, Sky deemed the attempt ineffective, and therefore refused to return 333-CA's deposits.

333-CA brought suit against Sky for, among other things, breach of contract, and moved for summary judgment. The district court granted 333-CA summary judgment, concluding that 333-CA had accepted Sky's offer to terminate the Agreement. The court determined that Sky's offer had not specified a time for acceptance, and that 333-CA accepted the offer within a reasonable time. It further determined that under the express terms of the parties' new contract, Sky was required to return 333-CA's deposits. Therefore, the district court entered summary judgment in favor of 333-CA for \$137,802.

Sky filed an appeal, and 333-CA filed a motion to dismiss, asserting that the district court's order granting summary judgment was not appealable because it did not resolve all of the claims between the parties. This court denied 333-CA's motion, determining that the district court's order was a final and appealable judgment. Shortly thereafter, 333-CA filed a motion with the district court for attorney fees under the offer of judgment rule. Sky opposed this motion, contending that 333-CA's motion was untimely because it was not made within 20 days of the notice of entry of the district court's order granting 333-CA summary judgment, as required by NRCP 54. The district court entered an order granting 333-CA's motion for attorney fees.

Sky now appeals from the district court's order granting 333-CA summary judgment and the post-judgment order awarding 333-CA attorney fees. For the reasons set forth below, we affirm the district court's summary judgment. We reverse and remand, however, the district

court's post-judgment award of attorney fees. As the parties are familiar with the facts of this case, we do not recount them further except as necessary to our disposition.

The district court did not err in granting 333-CA summary judgment

Sky argues that the district court erred in granting 333-CA summary judgment because 333-CA's acceptance of Sky's offer to terminate the Agreement was ineffective. We disagree.

We review de novo whether the district court appropriately granted summary judgment. Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). We also review questions of contract interpretation de novo. Benchmark Insurance Company v. Sparks, 127 Nev. ___, ___, 254 P.3d 617, 620 (2011). When the language of a contract is plain, it will be enforced and construed as written. Canfora v. Coast Hotels & Casinos, Inc., 121 Nev. 771, 776, 121 P.3d 599, 603 (2005). “[I]ssues of contractual construction, in the absence of ambiguity or other factual complexities, present questions of law for the courts and are suitable for determination by summary judgment.” Ellison v. C.S.A.A., 106 Nev. 601, 603, 797 P.2d 975, 977 (1990).

Sky asserts that the manner of 333-CA's acceptance was defective because 333-CA did not sign and return Sky's offer. Sky argues that 333-CA was required to do so under the terms of the offer.

An offer may require an acceptance to be performed in a specific manner. See Shetakis v. Centel Communications, 104 Nev. 258, 261, 756 P.2d 1186, 1188 (1988). Here, Sky's offer provided that if 333-CA elected to terminate the Agreement outright, 333-CA “may do so by hand delivering notice thereof to [Sky] or by mailing notice thereof by United States prepaid postage to [Sky].” As required, 333-CA mailed written notice of its decision to terminate the Agreement. Contrary to Sky's

claims, 333-CA was not required to sign the offer in order to terminate the Agreement outright. Rather, pursuant to the plain language of the offer, 333-CA was only required to sign the offer in the event that it wished to proceed with the closing on the condominium. Thus, it is irrelevant that 333-CA did not sign and return the offer. See Pravorne v. McLeod, 79 Nev. 341, 347, 383 P.2d 855, 858 (1963) (whether an acceptance was effective does not necessarily depend on whether the offer was signed by the offeree; rather, the relevant inquiry is whether the offeree consented to be bound). Accordingly, 333-CA accepted Sky's offer in the manner required.

Next, Sky asserts that the passage of the time period for acceptance, specified by the terms of its offer, terminated 333-CA's power of acceptance. In particular, Sky asserts that 333-CA was required to accept its offer within five days, pursuant to the terms of its offer. Alternatively, Sky asserts that 333-CA was required to accept its offer within 10 days, pursuant to the cover letter of its offer. Sky also emphasizes that the Agreement provided that time was of the essence in the parties' dealings.

The power of an offeree to accept an offer may be terminated at a time specified in the offer. Morrison v. Rayen Investments, Inc., 97 Nev. 58, 60, 624 P.2d 11, 12 (1981). Sky's offer provided 333-CA with the option to terminate the Agreement by delivering or mailing notice to Sky. No time period for delivering or mailing this notice was specified in Sky's offer in the event that 333-CA opted to terminate the Agreement. Rather, the time period specified in the offer applied only if 333-CA proceeded with the purchase of the condominium and thereafter decided to terminate the Agreement. In that instance, 333-CA had the option to terminate the

Agreement within five days of signing the offer to proceed with the purchase. And, although the cover letter affixed to Sky's offer asked that 333-CA respond within 10 days and the Agreement noted that time was of the essence, these documents do not have any impact on the effectiveness of 333-CA's acceptance because Sky's offer expressly provided that its text formed the entirety of the parties' revised agreement. In sum, Sky's offer did not specify a time by which 333-CA was required to accept Sky's offer to terminate the Agreement. Therefore, the passage of a specified time did not terminate 333-CA's power of acceptance.

Finally, Sky contends that 333-CA's acceptance was not effective because it contained several terms that materially differed from those in Sky's offer. Specifically, Sky asserts that 333-CA's acceptance contained requests for several additional benefits, including a demand that Sky return any interest accrued on 333-CA's deposits.

In order to be effective, an acceptance must assent to the material terms of an offer. Pravorne, 79 Nev. at 346, 383 P.2d at 857. A request for an additional, immaterial benefit does not operate as a counteroffer or otherwise prevent the formation of a contract. See id. Thus, "[i]mmaterial variances between the offer and its acceptance will be disregarded" when determining whether an acceptance was effective. Id. at 346, 383 P.2d at 857 (quoting Kaw City Mill & E. Co. v. Purcell Mill & E. Co., 91 P. 1022, 1023 (Okla. 1907)).

Here, Sky's offer provided 333-CA with the option to cancel the Agreement and receive its deposits, in full, "without penalty." To the extent that it can be said that Sky's offer does not speak directly to the subject of interest, this benefit can be reasonably implied into its offer by industry custom. See Crook v. Mortenson-Neal, 727 P.2d 297, 301 (Alaska

1986) (parties may “be bound by reasonable additional terms governing standard conditions implicit in the[ir] relationship”); see also R.J. Daum Const. Co. v. Child, 247 P.2d 817, 821 (Utah 1952) (“To create a binding contract the acceptance must unconditionally agree to all the material provisions of the offer, and must not add any new material conditions, but all of the provisions of an offer need not be expressly stated therein—some may be implied from the surrounding circumstances.”). Thus, 333-CA’s request for the interest accrued on its deposits did not prevent the formation of a contract. Any other purported variations between the terms of Sky’s offer and 333-CA’s acceptance were immaterial. 333-CA’s acceptance of Sky’s offer to terminate the Agreement was therefore effective.¹ Accordingly, we conclude that the district court did not err in granting 333-CA summary judgment.²

¹Sky argues, for the first time on appeal, that (1) what constitutes a reasonable time for acceptance and whether the terms of its offer could be integrated into the Agreement, were disputed questions of fact that should not have been resolved by the district court on summary judgment, and (2) the district court should not have entered summary judgment against Sky Las Vegas Realty because only Sky Las Vegas Condominiums was a party to the Agreement. We decline to address these arguments. See Schuck v. Signature Flight Support, 126 Nev. ___, ___, 245 P.3d 542, 544 (2010) (an argument not raised below is considered waived and generally will not be addressed for the first time on appeal). We have considered Sky’s remaining arguments and conclude that they are without merit.

²Sky contends that even if the district court’s order granting 333-CA summary judgment is substantively sound, it must be reversed because it was entered in a procedurally defective manner. Sky has failed to demonstrate any prejudice flowing from any alleged procedural defect and, therefore, we conclude that this argument is meritless. See NRS 178.598 (“Any error, defect, irregularity or variance which does not affect

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The district court abused its discretion in awarding 333-CA attorney fees

Sky argues that the district court abused its discretion in awarding 333-CA attorney fees because 333-CA did not file its motion for fees within 20 days of entry of the district court's order granting summary judgment, as required by NRCP 54(d)(2)(B).

We review the district court's award of attorney fees for an abuse of discretion. Foster v. Dingwall, 126 Nev. ___, ___, 227 P.3d 1042, 1052 (2010). In evaluating the reasonableness of a request for attorney fees, we require the district court to consider the factors set forth by this court in Brunzell v. Golden Gate National Bank, 85 Nev. 345, 349-50, 455 P.2d 31, 33 (1969). See Shuette v. Beazer Homes Holdings Corp., 121 Nev. 837, 864-65, 124 P.3d 530, 549 (2005).

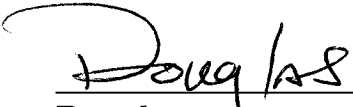
Our review of the record reveals that although the district court's post-judgment order awarding 333-CA attorney fees cited Brunzell in passing, it did not analyze or make findings relevant to the factors set forth therein. See Beattie v. Thomas, 99 Nev. 579, 589, 668 P.2d 268, 274 (1983) (it is an abuse of discretion to award attorney fees without making "findings based on evidence that the attorney's fees sought are reasonable and justified"). Moreover, the district court failed to address whether 333-CA's motion for attorney fees was timely. Accordingly, we conclude that the district court abused its discretion in awarding 333-CA attorney fees. We therefore reverse the district court's post-judgment order awarding

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substantial rights shall be disregarded."); NRCP 61 (an error only requires reversal if it affects a party's substantial rights).

attorney fees and remand the issue to the district court to consider the timeliness of 333-CA's motion for attorney fees and, if satisfied that the motion was timely, whether 333-CA's requested fees are reasonable under the Brunzell factors. For the foregoing reasons, we

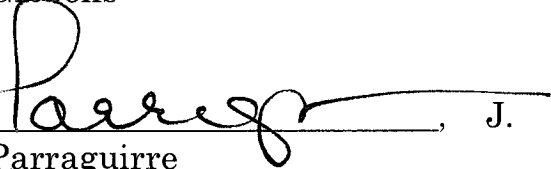
ORDER the summary judgment of the district court AFFIRMED and the post-judgment order of the district court REVERSED AND REMANDED for further proceedings consistent with this order.


_____, J.

Douglas


_____, J.

Gibbons


_____, J.

Parraguirre

cc: Hon. Doug Smith, District Judge
Kathleen J. England, Settlement Judge
Reade & Associates
Marquis Aurbach Coffing
Eighth District Court Clerk