

IN THE SUPREME COURT OF THE STATE OF NEVADA

ONYX LAS VEGAS, LLC, A NEVADA
LIMITED LIABILITY COMPANY,
Appellant,

vs.

TROPICANA INN INVESTORS, LLC, A
NEVADA LIMITED LIABILITY
COMPANY; AND MARSHALL
INVESTMENTS CORPORATION,
Respondents.

No. 54994

FILED

DEC 09 2010

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

ORDER OF REVERSAL AND REMAND

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

Appellant filed a district court complaint against respondent Tropicana Inn Investors, LLC, seeking, among other things, damages for breach of contract and the covenant of good faith and fair dealing and specific performance of the parties' agreement to sell and purchase a condominium project in Las Vegas, Nevada. According to appellant, Tropicana refused to sell the property despite their agreement to do so in accordance with the agreement's terms. Tropicana answered the complaint and filed a summary judgment motion, asserting that appellant defaulted under the agreement by failing to timely close escrow, and that under the agreement, Tropicana was entitled to judgment as a matter of law and the \$350,000 escrow deposit. Since Tropicana had assigned its interest in the escrow account to respondent Marshall Investments Corporation, Marshall intervened in the action and filed a response to the summary judgment motion and a countermotion for summary judgment.

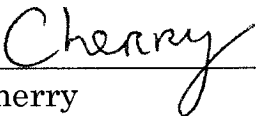
Appellant opposed summary judgment, providing a supporting affidavit from its manager and documentary evidence, and arguing that Tropicana had breached the agreement's terms by (1) not being able to provide clear title to the property, (2) assigning its rights under the contract and allowing the property to go into receivership without informing appellant, (3) allowing mechanics' liens and other encumbrances on the title, and (4) continuing to pursue other sales on the property.¹ On October 14, 2009, the district court granted respondents' summary judgment motions, finding that appellant breached the agreement by not timely closing on the property. This appeal followed.

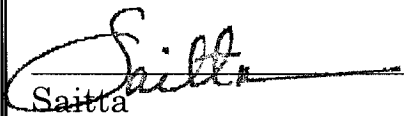
Having reviewed the appellate briefs and appendices, we conclude that the district court erred by granting summary judgment. Appellant provided sufficient evidence to establish material questions of fact as to its contract claims. Wood v. Safeway, Inc., 121 Nev. 724, 729-32, 121 P.3d 1026, 1029-31 (2005); Bernard v. Rockhill Dev. Co., 103 Nev. 132, 135, 734 P.2d 1238, 1240 (1987) (describing a breach of contract as a


¹Because Tropicana was involved in an involuntary bankruptcy proceeding and since the bankruptcy stay apparently was lifted the day before Tropicana sought summary judgment in the underlying case, the district court deferred ruling on the summary judgment motions until September 21, 2009, to allow appellant time to conduct discovery. Appellant supplemented its opposition on September 17, 2009, asking for additional time for discovery, asserting that the parties had just agreed upon a joint case conference report, and once it was filed, the parties could conduct discovery. It does not appear that the district court addressed appellant's request for additional time, although the discovery commissioner's scheduling order indicated that the joint case conference report was filed on September 18, 2009, and that the parties should complete discovery on or before July 7, 2010.

“material failure of performance of a duty arising under or imposed by agreement” (quoting Malone v. University of Kansas Medical Center, 552 P.2d 885, 888 (Kan. 1976)); FDIC. v. Air Florida System, Inc., 822 F.2d 833, 840 (9th Cir. 1987) (explaining that ordinarily whether a party has breached a contract and whether that breach is material are triable questions of fact). Thus, summary judgment was improper. Accordingly, 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: Chief Judge, The Eighth Judicial District Court
Hon. Joseph T. Bonaventure, Senior Judge
Kathleen M. Paustian, Settlement Judge
Lombino Law Studio
Michael R. Mushkin & Associates, P.C.
Santoro, Driggs, Walch, Kearney, Holley & Thompson
Eighth District Court Clerk