

IN THE SUPREME COURT OF THE STATE OF NEVADA

TARINA M. LEAVITT, INDIVIDUALLY,
AND AS TRUSTEE FOR THE TERRY
LEAVITT & TARINA M. LEAVITT FAMILY
TRUST,

Appellant,

vs.

SCOTT HIGGINSON AND CYNTHIA
HIGGINSON,

Respondents.

No. 35095

FILED

MAY 21 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Bloom*
CHIEF DEPUTY CLERK

ORDER REVERSING AND REMANDING

This is an appeal from a judgment in favor of respondents, an order awarding attorney fees to respondents and an order granting in part respondents' motion to amend the findings of fact and conclusions of law.

This appeal involves contract interpretation. On January 11, 1991, appellant Tarina M. Leavitt and respondents Scott and Cynthia Higginson entered into an agreement regarding the sale and purchase of Leavitt's residence. Each party has interpreted the agreement differently. Leavitt asserts that the agreement evidences that she, as trustee for the Terry Leavitt and Tarina M. Leavitt Family Trust, sold her residence to the Higginsons for \$350,000.00. In contrast, the Higginsons contend that the agreement merely gave them an "option" to purchase the home for \$350,000.00, and if they decided not to exercise their option to purchase the home within five years, Leavitt could order the sale of the property to liquidate her asset.

The district court ruled that the terms of the parties' agreement were unambiguous. Accordingly, the

district court did not consider extrinsic evidence in interpreting the parties' agreement.¹

Additionally, in interpreting the parties' agreement, the district court stated that the agreement was "a 'win' 'win' circumstance for both parties." Specifically, the district court found that "the Defendants Higginsons benefited from living in the home . . . for in excess of five (5) years, and that the Plaintiff Tarina Leavitt benefited from having her preexisting first mortgage paid in full." Thus, the district court concluded that the Higginsons did not purchase Leavitt's residence for \$350,000.00. Rather, the district court found that the parties' agreement merely gave the Higginsons an "option to purchase" Leavitt's home.

While we agree with the district court's ruling that the parties' agreement is clear and unambiguous on its face, we disagree with the district court's interpretation of the parties' agreement. Because this appeal concerns interpretation of the parties' agreement, we are not bound by the district court's interpretation.² Instead, this court conducts a de novo review.³ Accordingly, we conclude that the parties' agreement evidences the sale of Leavitt's home to the Higginsons. Although the sales price was \$350,000.00, the agreement provided that the Higginsons were not required to pay the entire amount until either one of two options took

¹See *Margrave v. Dermody Properties*, 110 Nev. 824, 829, 878 P.2d 291, 294 (1994) ("Under the parole evidence rule, extrinsic evidence cannot be introduced to aid the court in interpreting a contract unless the contract contains ambiguities.").

²See *Bazelin Trust v. McCandless Int'l Trucks*, 108 Nev. 341, 343, 830 P.2d 1332, 1334 (1992) ("When a trial court interprets a contract by looking solely to the written terms, this court may apply a plenary review of the contract.").

³See *Caldwell v. Consolidated Realty*, 99 Nev. 635, 638, 668 P.2d 284, 286 (1983).

place. First, the Higginsons had the option of reselling the home at any time after the execution of the agreement. Alternatively, the second option provided that Leavitt could force the sale of the property after five years to liquidate her asset and collect the remaining balance from the Higginsons. We conclude that the Higginsons did not exercise their option to resell the property; instead, Leavitt elected to force the sale of the property in order to collect the balance of the sales price from the Higginsons.

As to the sale and purchase of the home, recital C of the agreement states that the Higginsons "desire[] to purchase" Leavitt's residence by satisfying three conditions. First, the Higginsons were required to pay off Leavitt's first deed of trust. Second, the Higginsons were required to make a cash payment to Leavitt at closing. Last, the Higginsons were required to execute a note, a second deed of trust and a personal guaranty all in favor of Leavitt.

It is apparent from the record that the Higginsons satisfied the foregoing three conditions. On or about January 11, 1991, the Higginsons refinanced Leavitt's first deed of trust in the amount of \$141,620.00. Moreover, the Higginsons made a cash payment to Leavitt at the time of closing in the approximate amount of \$930.00.⁴ Finally, on or about January 11, 1991, the Higginsons executed a promissory note, second deed of trust and personal guaranty in favor of Leavitt in the amount of \$207,448.67. Accordingly, we conclude that the Higginsons purchased Leavitt's residence by satisfying the foregoing conditions.

⁴The cash payment consisted of a portion of the closing costs, attorney fees and accountant's fees in accordance with paragraphs 1 and 8 of the agreement.

Next, we must examine the provisions of the agreement to determine how the sale was to be consummated. Paragraph 1 states that "[t]he full sales price of the Property is \$350,000.00." According to the plain language of paragraph 1, the \$350,000.00 sales price included the amount of Leavitt's first deed of trust that was refinanced by the Higginsons (\$141,620.00), the amount of the cash payment made to Leavitt at closing (approximately \$930.00) and the amount of the second deed of trust executed by the Higginsons (\$207,448.67). Moreover, pursuant to the terms of paragraph 2, the Higginsons executed a \$207,448.67 note in favor of Leavitt to secure the payment of the second deed of trust.

As to the applicable interest rate on the note, paragraph 2 provides that "[i]n the event of refinancing the indebtedness to [Leavitt] evidenced by this Agreement and the Loan Documents, but not a Resale or sale to a third party, the ten percent (10%) interest rate stated in the Note will control." In this case, the Higginsons did not refinance their indebtedness. Nor did the Higginsons elect to resell the property pursuant to paragraph 4. Instead, Leavitt exercised her right to liquidate the property after five years pursuant to paragraph 5. Therefore, because a sale to a third party took place, we conclude that the ten-percent interest rate stated in the note does not control. Rather, the applicable interest rate on the note is five percent per annum as set forth in paragraph 4(c), which is discussed below.

With respect to Leavitt's liquidation option, paragraph 5 states that "[f]ive years from the execution of this Agreement, [Leavitt] has the option to liquidate the indebtedness owed hereunder and under the Loan Document by demanding the sale of the Property." The mechanics of exercising the five-year liquidation option required that

Leavitt provide the Higginsons with at least thirty days notice of her intent to liquidate. Further, in order to sell the house under the provisions of paragraph 5, Leavitt and the Higginsons had to agree on a sales price. In the event the parties were unable to agree on a sales price, paragraph 5 directed the parties to hire a "mutually acceptable M.A.I. appraiser." If, however, the parties were unable to agree on a "mutually acceptable M.A.I. appraiser," paragraph 5 states that "each party shall choose one M.A.I. appraiser, and those two appraisers shall choose a third M.A.I. appraiser. The Property shall then be sold at a price representing the average of the three appraisals."

In this case, Leavitt timely exercised her five-year option to liquidate by sending notice to the Higginsons on October 25, 1995. Further, Leavitt's representations to the Higginsons that they "could sell at any price" eliminated the need to enlist an appraiser to establish the sales price because Leavitt was willing to agree to any price the Higginsons set. Thus, we conclude that the district court erred when it found that Leavitt "frustrated" the provisions of paragraph 5 by advising the Higginsons that they could sell the property at any price. The plain language of this provision clearly anticipates and authorizes that the parties would agree upon a sales price. Because Leavitt represented that she was willing to agree to any price for which the Higginsons sold the house, the enlistment of an appraiser was not necessary.

The record reveals that the liquidation sale resulted in gross sales proceeds of approximately \$260,000.00. From this amount, roughly \$21,000.00 in real estate fees was deducted. Thus, the net liquidation sales proceeds amounted to approximately \$239,000.00. The last sentence of paragraph

5 states that "[t]he proceeds of any sale pursuant to this Paragraph 5 shall be divided in accordance with Paragraph 4, above." Therefore, in order to determine whether the district court properly divided the net liquidation sales proceeds, the language contained in sections (a) through (d) of paragraph 4 must be examined.

First, paragraph 4(a) dictates that the first deed of trust must be "paid off in its entirety." We conclude that the district court correctly deducted the remaining balance on the first mortgage (approximately \$138,000.00) from the net liquidation sales proceeds. After the first deed of trust was paid off in its entirety, approximately \$101,000.00 of the net liquidation sales proceeds remained.

Second, paragraph 4(b) states that "[t]he remaining principal amount of the indebtedness on the Note secured by the Second Deed shall be paid to [Leavitt] in its entirety." As set forth above, the Higginsons executed a \$207,448.67 note in favor of Leavitt to secure the payment of the second deed of trust. Because the district court failed to address payment of the second deed of trust, we remand this case for further proceedings regarding this issue.

Third, paragraph 4(c) provides that "[a]ny and all accumulated interest on the principal amount of the Note, compounded monthly at five percent (5%) per annum, shall be paid to [Leavitt] by [the Higginsons]." Thus, Leavitt is entitled to interest on the note in the amount of five percent per annum. According to the record, the amount of interest due Leavitt from January 11, 1991, to January 11, 1996, totaled nearly \$60,000.00. However, because the note has not been paid in its entirety, interest due under the note continues to accrue. Therefore, this case is remanded to the

district court for calculation of interest owed to Leavitt since January 11, 1996.


Finally, paragraph 4(d) states as follows:

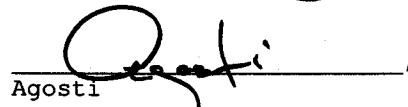
After the payments specified in (a)-(c) have been made, any remaining profit from the Resale [or sale pursuant to paragraph 5] shall be divided between [the Higginsons] and [Leavitt] with 45% of said profit going to [the Higginsons] and 55% to [Leavitt], up to a maximum return ("Cap") to [Leavitt] equivalent to thirteen percent (13%). After the Cap has been reached, any additional profits shall go to [the Higginsons].

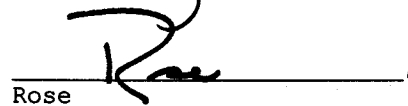
According to the plain language of this provision, if the liquidation sale of the property resulted in excess of \$350,000.00, the Higginsons would have been entitled to a portion of the sales proceeds. However, because the liquidation sale garnered less than \$350,000.00, and because the second deed of trust was not satisfied, the Higginsons are not entitled to any of the sales proceeds. Therefore, we conclude that the district court erred in ordering Leavitt to pay the Higginsons \$18,560.18.

As to the attorney fees awarded to the Higginsons, paragraph 15 of the agreement states that "[r]easonable attorney fees, costs and expenses incurred in relation to the enforcement of this agreement and the related documents shall be paid to the prevailing party in the event of litigation or enforcement of remedies." We conclude that because the district court erred in its interpretation of the parties' agreement, the award of attorney fees to the Higginsons must be reversed. In interpreting the plain language of the parties' agreement, it is apparent that Leavitt is the "prevailing party" because the agreement constituted a sale rather than an option to purchase. Thus, we remand this case to the district court for determination of the amount of attorney fees to be awarded to Leavitt.

Accordingly, because we disagree with the district court's interpretation of the parties' agreement, we reverse the district court's judgment in favor of the Higginsons in the amount of \$18,560.18. Further, consistent with our conclusion that the parties' agreement evidences the sale of Leavitt's home to the Higginsons, we reverse the district court's order granting in part the Higginsons' motion to amend the findings of fact and conclusions of law. Finally, we reverse the district court's order awarding attorney fees to the Higginsons, and we remand this matter to the district court for proceedings consistent with this order.


Shearing J.


Agosti J.


Rose J.

cc: Hon. Valorie J. Vega, District Judge
Kravitz Schnitzer & Sloane, Chtd.
Callister & Reynolds
Clark County Clerk