IN THE SUPREME COURT OF THE STATE OF NEVADA

VILLAGE POINTE, LLC, A CALIFORNIA LIMITED LIABILITY COMPANY; LOUIS TORIO, AN INDIVIDUAL; TIMOTHY JOHN HOFFMAN, AN INDIVIDUAL; TIMOTHY STEVEN FINCH, AN INDIVIDUAL; KATHRYN ANN ARSENAULT, AN INDIVIDUAL; AND MICHAEL CHARLES MARTIN, AN INDIVIDUAL,
Appellants,
vs.
RESORT FUNDING, LLC,
Respondent.

No. 56026

FILED

NOV 18 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY H. Ingersoll
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order granting summary judgment and a judgment of deficiency. Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.

I.

Appellant Village Pointe, LLC,[1] needed funding to complete an acquisition of Las Vegas apartment property and to convert the apartments into timeshare condominiums. In July 2005, it signed a Term Sheet, which outlined the general features of two loans respondent Resort Funding, LLC, would make to Village Pointe.

[1]Appellants include Village Pointe, LLC, Louis Torio, Timothy Hoffman, Timothy Finch, Kathryn Arsenault, and Michael Martin. This order refers to appellants, collectively, as Village Pointe.

The parties entered into the two line-of-credit loan agreements ten months apart. In September 2005, they executed a $25,000,000 Acquisition, Development and Construction (AD & C) loan agreement. Resort Funding advanced $18,625,586.67 under the AD & C loan for the purchase of the property. Village Pointe was required to meet several conditions and make formal applications when it requested additional advances. Furthermore, Village Pointe was required to request any advances within 12 months of the effective date of the AD & C loan, repayment of which was to commence in October 2006. At the same time the parties executed the AD & C loan, they signed a Letter Agreement outlining the terms of the second loan contemplated under the Term Sheet—a $30,000,000 hypothecation loan for conversion of the properties into timeshare condominiums.

This Letter Agreement contained several contingencies to final execution of the hypothecation loan and it was not until July 2006 that all conditions were satisfied and the parties completed the paperwork formalizing that loan. Like the AD & C loan, the hypothecation loan required Village Pointe to make a formal application for funds and present documentation showing that several conditions had been met. When the hypothecation loan was complete, the AD & C loan was amended so the two loans were cross-collateralized. They were secured by, among other things, a deed of trust naming Resort Funding as the beneficiary and giving Resort Funding the right to foreclose if Village Pointe defaulted under either loan.

Also in July 2006, Village Pointe requested its first advance under the AD & C loan agreement. Pursuant to this request, Resort Funding provided Village Pointe with an advance of $169,612.05 and,

after another request in September 2006, Resort Funding provided an additional $120,343.24 under the AD & C loan agreement. Village Pointe never requested funds under the hypothecation loan.

When interest payments on the AD & C loan came due, Village Pointe made only partial payments for October, November, and December 2006, then stopped making payments entirely. Resort Funding provided notice of default under the AD & C loan and the parties tried to find a buyer for the property but were unable to. Thereafter, Resort Funding filed a complaint for appointment of a receiver and the court appointed a receiver. Resort Funding foreclosed on the property in 2008.

The property was sold at a foreclosure sale to Desert LV, a wholly-owned subsidiary of Resort Funding to whom Resort Funding had transferred its beneficial interest under the deed of trust, for $22,000,000. Because this amount was less than Village Pointe's indebtedness under the AD & C loan, Desert LV initiated a deficiency proceeding. Village Pointe raised several counterclaims: breach of contract, breach of the covenant of good faith and fair dealing, and unjust enrichment. It also alleged wrongful foreclosure—asserting that foreclosure was improper because it had not breached the AD & C loan agreement. Village Pointe filed a third-party complaint against Resort Funding, raising all of the same claims it made against Desert LV. It also amended its counterclaim against Desert LV to assert an "alter ego" claim against Resort Funding, after which the parties stipulated to substitute Resort Funding for Desert LV.

Resort Funding moved for summary judgment on Village Pointe's counterclaims and moved to strike Village Pointe's third-party complaint and amended counterclaim. Village Pointe opposed the motions

and the district court held a hearing, ultimately granting Resort Funding's summary judgment motion and its motion to strike the third-party complaint and the amended counterclaim. After a deficiency hearing, the district court granted Resort Funding a deficiency judgment of $2,611,776.63.

Village Pointe appeals the district court's order granting summary judgment and the deficiency judgment.[2]

II.

We review a district court's grant of summary judgment de novo. Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper when the pleadings and other evidence demonstrate that no genuine issue of material fact remains and the moving party is entitled to judgment as a matter of law. Id.

Village Pointe bore the burden of proof on its counterclaims, obligating it to produce evidence demonstrating the existence of genuine issues of material fact to defeat summary judgment. Anderson v. Liberty

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[2]Village Pointe also argues that the district court abused its discretion in striking its amended counterclaim and third-party complaint. Third-party complaints under NRCP 14 are reserved for indemnity and contribution claims, not ordinary claims against non-parties as was the case here. See NRCP 13(h); Lund v. Dist. Ct., 127 Nev. ___, ___, 255 P.3d 280, 283-84 (2011). Furthermore, the district court correctly struck Village Pointe's amended counterclaim alleging that Desert LV was the alter ego of Resort Funding because the substitution of Resort Funding by stipulation rendered moot any benefit that Village Pointe would have gained through application of its alter ego assertion. Thus, we find no merit to Village Pointe's arguments that the district court abused its discretion in striking the amended counterclaim and third-party complaint.

Lobby, Inc., 477 U.S. 242, 256 (1986) ("[A] party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial."). But Resort Funding did not stand on the burden of proof; it also supported its motion with affirmative proof that, if left uncontradicted, entitled it to judgment as a matter of law on all of Village Pointe's counterclaims. Cuzze v. Univ. & Cmty. Coll. Sys. of Nev., 123 Nev. 598, 602-03, 172 P.3d 131, 134 (2007) (When "the nonmoving party will bear the burden of persuasion at trial, the party moving for summary judgment may satisfy the burden of production by either (1) submitting evidence that negates an essential element of the nonmoving party's claim, or (2) 'pointing out . . . that there is an absence of evidence to support the nonmoving party's case.'" (footnote omitted) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986))). As to Village Pointe's breach of contract claim, Resort Funding argued that no evidence existed to prove that Resort Funding breached the AD & C loan agreement and buttressed its assertion with evidence showing it had affirmatively met all its contractual obligations under the AD & C loan agreement. Thus, Resort Funding supplied documentary and testimonial evidence—from both its President, Lisa Henson, and appellant Louis Torio—that it advanced over $18 million for the purchase of the building under the AD & C loan and provided advances both times Village Pointe submitted properly documented requests for draws.

Village Pointe's breach of contract claim as to the hypothecation loan was also properly adjudicated on summary judgment. The undisputed evidence showed that Village Pointe never requested funds under the hypothecation loan. Indeed, Resort Funding provided

evidence that Village Pointe was never in a position to do so. Among the preconditions to Village Pointe's ability to request advances under that loan was its ability to assign notes securing sold timeshare units. But Village Pointe never sold a timeshare unit—it could not because it delayed in obtaining the approval needed from the Nevada Real Estate Division to do so, a regulatory failure for which Village Pointe, not Resort Funding, was responsible. Thus, Village Pointe's argument that Resort Funding committed breach of contract by not providing advances under the hypothecation agreement is a non-starter.

Resort Funding also argued in its summary judgment motion that Village Pointe could adduce no evidence to show that it had breached the implied covenant of good faith and fair dealing. Nor, Resort Funding argued, could Village Pointe produce evidence to show that it had provided a benefit to Resort Funding to support its unjust enrichment claim. Cuzze, 123 Nev. at 603, 172 P.3d at 134 (When the party who does not bear the burden of persuasion at trial "point[s] to the absence of evidence to support [the nonmoving party's] cause of action . . . [the nonmoving party] ha[s] the burden of presenting evidence showing a material issue of fact.").

Finally, to combat Village Pointe's claim of wrongful foreclosure, Resort Funding produced an affidavit from Lisa Henson and deposition testimony from appellant Louis Torio that Village Pointe failed to make full payments as they came do in October 2006. It pointed to § 5.1 of the AD & C loan agreement, which listed failure to pay as a default. Thus, Resort Funding maintained in its motion for summary judgment that Village Pointe was clearly in default prior to Resort Funding's April 2008 election to foreclose on the property.

Once Resort Funding filed a properly supported summary judgment motion, Village Pointe was required to "set forth specific facts showing that there is a genuine issue for trial." NRCP 56(e); see Schuck v. Signature Flight Support, 126 Nev. ___, ___, 245 P.3d 542, 545 (2010). This, Village Pointe failed to do.

It did not identify a provision of the AD & C agreement or the hypothecation agreement that was breached. Instead, Village Pointe viewed the hypothecation loan and AD & C loan as two loans embodied in one contract. As such, its breach of contract argument appears to rely on the Term Sheet, which outlined the features of both loans before either was executed. The Term Sheet lists general terms for the two loans side by side and mentions one "closing of th[e] transaction" rather than two separate closings on two separate loans. At the district court level and on appeal, Village Pointe argues that the Term Sheet bound the parties to execute the hypothecation loan at the same time as the AD & C loan. Failure to do so, it alleges, created a ten-month gap in which it did not have access to the necessary funds under the hypothecation loan. Because of its understanding that the loans would be available at the same time, it believed it had to wait until the hypothecation loan was finished before it could request funds under the AD & C loan. It argues the lag time killed the project.

And Village Pointe blames the lag time on Resort Funding. It surmises that Resort Funding was "unable to perform according to its obligations under the [AD & C] Loan Agreement," and, to avoid making an advance, "made repeated and ongoing representations . . . that there was no point in commencing construction because the hypothecation loan which was needed to fund the Development and Construction Advances

was not complete." Assertedly relying on these representations, Village Pointe did not seek advances under the AD & C loan agreement (apart from the $18,625,586.67 needed to fund the property's purchase) until after executing the hypothecation loan, by which time the project was already in trouble. Obviously, if the parties contractually agreed that the loans were paired and one could not be performed without the other—and this was supported by evidence—material facts would exist to support Village Pointe's breach of contract and breach of the covenant of good faith and fair dealing claims. See Richardson v. Jones, 1 Nev. 405, 408 (1865) (To win on a breach of contract claim, the plaintiff must show that a valid contract exists, that the defendant breached the contract, and that the defendant's breach resulted in damages to the plaintiff.).

But there are two problems with this theory. First, the Term Sheet is not a contract and there is no evidence that the two loans were consolidated into a single contract. The Term Sheet was merely a preliminary outline of future loan agreements, conditioned on "due diligence, final credit committee approval, satisfactory review and execution of documentation, and such other terms and conditions as may be required by Lender." As such the Term Sheet cannot by itself serve as the basis for a breach of contract claim. Mark Andrew of Palm Beaches v. GMAC Comm. Mortg., 265 F. Supp. 2d 366, 378-79 (S.D. N.Y. 2003) (term sheet was not a contract and cannot be the basis of breach of contract action without a commitment to lend); see also 3 Robert J. Ingato & Maury B. Poscover, Successful Partnering Between Inside and Outside Counsel § 53:18 (Robert L. Haig ed. 2000) (term sheets and letter agreements are non-binding outlines of proposed financing).

Village Pointe's reliance on the Term Sheet is also misplaced because, as the district court noted, the AD & C loan agreement was an integrated agreement which "embod[ied] the entire agreement" and "supercede[d] all prior agreements and understandings between the parties." Brunzell v. Woodbury, 85 Nev. 29, 33, 449 P.2d 158, 160 (1969) ("When the parties have deliberately put their agreement in writing, in such language as imports a legal consideration, it is conclusively presumed that the whole engagement and the extent and manner of their undertaking is there expressed."). Thus, the integration clause forecloses any reliance Village Pointe places on the Term Sheet as evidence to show that the AD & C loan agreement and the hypothecation loan were tied together as one contract, see 11 Richard A. Lord, Williston on Contracts § 33:14 (4th ed. 1999) (extrinsic evidence may not be admitted to contradict the terms of an integrated contract). Village Pointe provided no evidence that the ten-month gap in executing the instruments effected a breach.[3]

Village Pointe's second problem is that it failed to direct the district court to evidence that Resort Funding made representations that performance on the AD & C loan had to wait for execution of the hypothecation loan. Indeed, it was not until Village Pointe's reply brief on appeal that it unearthed record evidence supporting its theory. In the reply brief, Village Pointe cited declarations filed in connection with an earlier lis pendens skirmish in the case by co-appellants Timothy John

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[3]Nor is there any evidence that Resort Funding was responsible for the delay. In fact, it appears that execution of the hypothecation loan was delayed by Village Pointe's lethargy in obtaining approval for the timeshare project from the Nevada Real Estate Division, a condition to final completion of the hypothecation agreement.

Hoffman and Louis Torio, in which they attested that Lisa Henson, President of Resort Funding, allegedly told them not to request advances of AD & C funds until the hypothecation loan was complete. But, assuming this testimony would have been admissible, Village Pointe did not offer it or even mention it in its opposition to Resort Funding's properly supported summary judgment motion. It "is not the district court's job" to comb the record searching for material facts to preclude summary judgment. Schuck, 126 Nev. at ___, 245 P.3d at 545 ("'[R]equiring the district court to search the entire record, even though the adverse party's response does not set out the specific facts or disclose where in the record the evidence for them can be found, is unfair.'" (quoting Carmen v. San Francisco Unified Sch. Dist., 237 F.3d 1026, 1031 (9th Cir. 2001))). What's more, crediting this argument on appeal—when it could have been addressed in opposition to Resort Funding's summary judgment motion—would be unfair to Resort Funding. Schuck, 126 Nev. at ___, 245 P.3d at 544. Because Village Pointe did not provide evidence or argument sufficient to demonstrate the existence of a genuine issue of material fact as to the breach of contract and breach of the implied covenant of good faith and fair dealing claims, the district court properly granted summary judgment.

Village Pointe's opposition to summary judgment on its claims of unjust enrichment, and wrongful foreclosure also fell short. Its unjust enrichment argument relies on a known faulty premise; it acknowledges that its "action based on a theory of unjust enrichment is not available [because] there is an express, written contract, [and] no agreement can be implied when there is an express agreement." See LasePartners Corp. v. Brooks Trust, 113 Nev. 747, 755-56, 942 P.2d 182, 187 (1997) ("'The

doctrine of unjust enrichment or recovery in quasi contract applies to situations where there is no legal contract but where the person sought to be charged is in possession of money or property which in good conscience and justice he should not retain but should deliver to another [or should pay for].'" (alteration in original) (quoting 66 Am. Jur. 2d Restitution § 11 (1973))); Lipshie v. Tracy Investment Co., 93 Nev. 370, 379, 566 P.2d 819, 824 (1977) ("To permit recovery by [unjust enrichment] where a written agreement exists would constitute a subversion of contractual principles.").

As to its wrongful foreclosure claim, Village Pointe readily admitted to failing to make payments as they became due,[4] which was a default under the AD & C agreement. Thus, Village Pointe lacks an essential element to its claim of wrongful foreclosure and summary judgment was appropriate as to this claim. Collins v. Union Fed. Savings & Loan, 99 Nev. 284, 304, 662 P.2d 610, 623 (1983) ("An action for the tort of wrongful foreclosure will lie if the trustor or mortgagor can establish that at the time the power of sale was exercised or the foreclosure occurred, no breach of condition or failure of performance existed on the mortgagor's or trustor's part which would have authorized the foreclosure or exercise of the power of sale."). [5]

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[4]It argues this breach was excused because Resort Funding breached first by not disbursing the loans. As discussed above, this argument lacks merit.

[5]We are also unconvinced by Village Pointe's argument that summary judgment was improper because Resort Funding produced 236 pages of discovery documents three days after Village Pointe's opposition to summary judgment was due. Village Pointe did not move for post-

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Finally, we disagree with Village Pointe's contention that the district court lacked substantial evidence for its deficiency judgment. Lee v. Verex Assurance, Inc., 103 Nev. 515, 517, 746 P.2d 140, 141-42 (1987) (district court's deficiency judgment will be upheld so long as it is supported by substantial evidence). Village Pointe's argument hinges on Resort Funding's inconsistent reports of the deficiency and the fact that the district court made one determination before summary judgment, another at a deficiency hearing after summary judgment, and a different, final, determination in its written judgment of deficiency. These discrepancies do not undo the judgment. After the district court's final deficiency hearing following summary judgment, it reported that "[c]ounsel advised they reached agreement regarding calculations."[6] Immediately following that hearing, the district court set the deficiency at $2,677,276.57 but, in the written order produced by Resort Funding, the final deficiency judgment was $2,611,776.63 after subtracting funds taken by the receiver. Because parties had apparently agreed on the initial calculations and the district court's post-hearing alteration worked in Village Pointe's favor, we conclude that the district court had substantial

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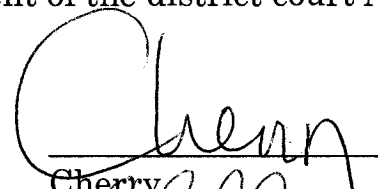
judgment relief under NRCP 60, nor, after having had time to review these documents, does it identify on appeal how those documents would have helped it defeat summary judgment.

[6]The transcript of that deficiency hearing is not part of the record on appeal. While Village Pointe bemoans its absence, as the party seeking reversal on appeal it was obligated to submit the transcript of that hearing. NRAP 10(c).

evidence on which to base its deficiency judgment. Accordingly, we ORDER the judgment of the district court AFFIRMED.



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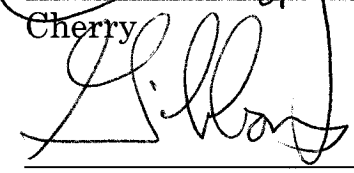

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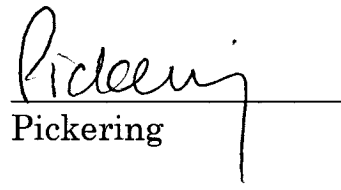

_____, J.
Pickering

cc: Hon. Kathleen E. Delaney, District Judge
Robert F. Saint-Aubin, Settlement Judge
Tiffany & Bosco, P. A.
Holland & Hart LLP/Las Vegas
Eighth District Court Clerk