

IN THE SUPREME COURT OF THE STATE OF NEVADA

GELT MANAGEMENT CONTROL,
INC., A NEVADA CORPORATION; AND
SHLOMY WEINGARTEN,

Appellants,

vs.

YOUNG ELECTRIC SIGN COMPANY,
A UTAH CORPORATION,

Respondent.

No. 35420

FILED

NOV 09 2001

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

ORDER OF AFFIRMANCE

This is an appeal from a final judgment in an action for breach of contract and related claims.

Appellant Gelt Management Control, Inc. (Gelt), contends that the district court correctly determined that the Young Electric Sign Company (YESCO) breached its contract by failing to provide the water feature, but that it was error as a matter of law for the district court to simultaneously hold that YESCO substantially performed on the contract. We disagree.

"A breach of contract may be said to be a material failure of performance of a duty arising under or imposed by agreement."¹ However, Nevada law does not mandate that a construction contract be fully performed for the builder to recover a judgment for the contract price. To the contrary, this court has held that "with respect to building contracts[,] the law implies a substantial rather than a literal or exact performance of the terms of the contract."² Thus, so long as the purpose of the contract is fulfilled through the builder's substantial performance - and the contract does not include a standard of strict compliance - a builder is entitled to

¹Calloway v. City of Reno, 116 Nev. 250, 256, 993 P.2d 1259, 1263 (2000) (citations omitted).

²Sharp v. Twin Lakes Corp., 71 Nev. 162, 166, 283 P.2d 611, 613 (1955).

recover the full contract price, less any damages caused because of the breach.³

Substantial performance is defined as "performance of the essential elements of a contract, provided that the defects in performance do not prevent the parties from accomplishing the purpose of the contract."⁴ The question of substantial performance is considered a factual determination.⁵ Since this matter was tried without a jury, the district court resolved the issue of substantial performance while sitting as a trier of fact. The district court's findings of fact will be upheld if they are supported by substantial evidence, and will not be set aside unless clearly erroneous.⁶

We note that there is no simple rule for determining whether a party has substantially performed on its contract.⁷ In this instance, however, we conclude that there is substantial evidence in the record indicating that YESCO did substantially perform.

Specifically, YESCO performed on all aspects of the contract except for providing a water feature that Gelt found suitable. Gelt's president, Shlomy Weingarten, testified that he was pleased with the 375-square foot car wash sign, other than the water feature component of the sign. Further, Weingarten's testimony was clear that the water feature was merely a component of a large and intricate sign package. And in fact, the water feature made up just fourteen percent of the total price of the project.

Moreover, Gelt presented no evidence that it was harmed without the presence of the water feature. When YESCO installed the

³See Thompson v. Herrmann, 91 Nev. 63, 68, 530 P.2d 1183, 1186 (1975) (citing Little Thompson Water Ass'n v. Strawn, 466 P.2d 915, 917 (Colo. 1970)).

⁴Measday v. Kwik-Kopy Corp., 713 F.2d 118, 124 (5th Cir. 1983) (citation omitted).

⁵See Thompson, 91 Nev. at 68, 530 P.2d at 1186.

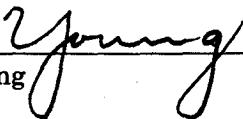
⁶Jordan v. Bailey, 113 Nev. 1038, 1044, 944 P.2d 828, 832 (1997); NRCP 52(a).

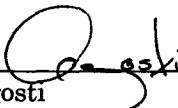
⁷See Plante v. Jacobs, 103 N.W.2d 296, 298 (Wis. 1960) (holding that "[n]o mathematical rule relating to the percentage of the price, of cost of completion, or of completeness can be laid down to determine substantial performance of a building contract").


“eye catchers” after Gelt was dissatisfied with the flow of water in the sign, Gelt’s car wash business continued to grow. Likewise, the “eye catchers” also provide evidence of YESCO’s attempts to remedy its breach. YESCO not only attempted to satisfy Gelt’s desires to create a cascading water feature, but it proposed a reduction in lease payments and a substantial credit when the water feature could not be created as Gelt desired.

Having considered appellants’ arguments, we conclude that the district court’s ruling that YESCO substantially performed on its contract with Gelt is supported by substantial evidence. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Young


_____, J.
Agosti


_____, J.
Leavitt

cc: Hon. Nancy M. Saitta, District Judge
Foley & Foley
Ellis & Gordon
Clark County Clerk