

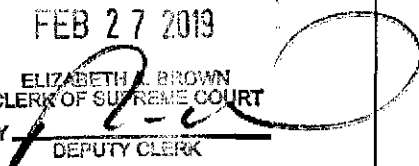
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KH REAL ESTATE INVESTMENT  
FUND, LLC, A NEVADA LIMITED  
LIABILITY COMPANY,  
Appellant,  
vs.  
LILY L.H. KONG TRUST DATED  
NOVEMBER 3, 2010, BY FIRST  
HAWAIIAN BANK, AS SUCCESSOR  
TRUSTEE,  
Respondent.

No. 72993-COA

**FILED**

FEB 27 2013

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY  DEPUTY CLERK

*ORDER OF AFFIRMANCE*

This is an appeal from a district court order quieting title to real property and an order awarding attorney fees. Eighth Judicial District Court, Clark County; Joseph Hardy, Jr., Judge.

On March 15, 2012, Cheung Chan, as managing member of appellant KH Real Estate Investment Fund, LLC (KH Real Estate), entered into a written agreement of sale with Lily L.H. Kong, as trustee of respondent Lily L.H. Kong Trust (Kong Trust). Pursuant to the agreement, Kong Trust agreed to sell KH Real Estate property located in downtown Las Vegas, consisting of two parcels. In exchange, KH Real Estate agreed to pay Kong Trust \$1,800,000. KH Real Estate further agreed to pay Kong Trust a nonrefundable down payment of \$25,000, whereby \$5,000 was due immediately upon signing the agreement, and \$20,000 was due no later than sixty days from signing the agreement. Accordingly, the agreement additionally required KH Real Estate to pay Kong Trust \$1,775,000, the total principal balance of the purchase price, within twenty-four months. Finally, the agreement included a "Mutual Understanding" provision

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stating: "Amendments can be made at any time through friendly compromise and negotiation between both parties."

According to Chan, prior to executing the written agreement, he and Kong orally agreed to a \$200,000 purchase price, and they included the \$1,800,000 purchase price in the written agreement solely for "feng shui" purposes. Chan further testified that, prior to executing the agreement, Kong told him that they could always extend the time period Chan had to pay the remaining principal for the property by amendment.

On July 20, 2012, the day the Amended Notice of Agreement was recorded, Chan contended that he and Kong orally agreed to change the purchase price on the agreement to \$200,000, and to extend the two-year time period to July 20, 2014. However, the parties never reduced the alleged oral modification to writing.

On August 20, 2012, Chan asserted that he traveled to Hawaii to discuss formally transferring title of the property. Chan further contended that Kong gave him a blank signature page, dated March 15, 2012, in case they agreed to change anything in the future.

On September 1, 2012, Chan wrote Kong a \$15,000 check for the property. And, about a year later, Kong passed away.

On May 28, 2014, First Hawaiian Bank, as successor trustee of Kong Trust, notified KH Real Estate of the termination and cancellation of the agreement due to the remaining \$1,775,000 unpaid total principal balance, and further requested KH Real Estate to surrender possession of the property and execute appropriate documentation to quiet title.

Kong Trust filed a complaint in the district court against KH Real Estate, seeking declaratory relief and to quiet title.

Following depositions of pertinent witnesses, Kong Trust served KH Real Estate an offer of judgment in the amount of \$20,000, and subsequently filed a third motion for summary judgment. KH Real Estate did not timely accept Kong Trust's offer of judgment, and after the offer expired, KH Real Estate filed its opposition to Kong Trust's motion.

After a hearing, the district court granted Kong Trust's motion for summary judgment in its entirety, and dismissed KH Real Estate's counterclaims. The district court also awarded Kong Trust \$39,271 in attorney fees.

On appeal, KH Real Estate contends that the district court erred in granting Kong Trust's motion for summary judgment because (1) extrinsic evidence should have been admissible to show that Kong and Chan intended to amend the agreement orally, and (2) the doctrines of part performance and equitable estoppel apply to negate the statute of frauds. Finally, KH Real Estate contends that the district court erred in awarding Kong Trust attorney fees. We address each of KH Real Estate's contentions in turn.

*The district court did not err in granting Kong Trust's motion for summary judgment*

*Standard of review*

A district court's decision to grant summary judgment is reviewed de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper if the pleadings and all other evidence on file demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Id.* All evidence must be viewed in a light most favorable to the nonmoving party. *Id.*

To withstand summary judgment, the nonmoving party cannot rely solely on general allegations and conclusions set forth in the pleadings, but must instead present specific facts demonstrating the existence of a genuine factual issue supporting his claims. *Id.* at 731, 121 P.3d at 1030-31.

*Parol evidence rule*

“The parol evidence rule forbids the reception of evidence which would vary or contradict the [unambiguous] contract, since all prior negotiations and agreements are deemed to have been merged therein.” *Galardi v. Naples Polaris, LLC*, 129 Nev. 306, 313, 301 P.3d 364, 368 (2013) (internal quotation marks omitted). In other words, “parties to a written contract are bound by its terms regardless of their subjective beliefs at the time the agreement was signed.” *Id.* at 313, 301 P.3d at 369.

However, “Nevada law does allow for the admission of extrinsic oral agreements under certain circumstances.” *Kaldi v. Farmers Ins. Exch.*, 117 Nev. 273, 283, 21 P.3d 16, 22 (2001). Parol evidence may be admitted “to show subsequent oral agreements to rescind or modify a written contract.” *M.C. Multi-Family Dev., L.L.C. v. Crestdale Assocs., Ltd.*, 124 Nev. 901, 914, 193 P.3d 536, 545 (2008) (internal quotation marks omitted).

Here, KH Real Estate’s asserted ambiguity of the “Mutual Understanding” provision is displaced, as Nevada clearly allows parties to orally amend their written agreement, irrespective of an express provision stating otherwise. *See Tallman v. Eighth Judicial Dist. Court*, 131 Nev. 713, 721, 359 P.3d 113, 119 (2015) (recognizing that parties may later orally agree to modify their written agreement, even when the written contract contains an express provision requiring subsequent modifications to be in writing). Therefore, extrinsic evidence of Chinese trade and custom in

business transactions, which KH Real Estate sought to introduce to prove that the parties intended to allow for oral amendments to the agreement, was not necessary for the stated intention. KH Real Estate also sought to introduce evidence of Chan's and Kong's negotiations and oral agreements that occurred prior to executing the written agreement in order to show that the parties intended a \$200,000 sale price. Nevada law clearly prohibits admission of this evidence to contradict the terms of the unambiguous agreement, regardless of Chan's subjective beliefs at the time the parties signed the agreement. Accordingly, the parol evidence rule forbade KH Real Estate from introducing evidence of the conversations Chan and Kong had prior to executing the written agreement.

However, Nevada law did allow KH Real Estate to admit extrinsic evidence to show that the parties entered into a subsequent oral agreement to modify the written agreement. Thus, the district court erred in precluding evidence of the alleged oral amendment Chan and Kong made after executing the written agreement, which purportedly changed the sales price to \$200,000 and extended the two-year time period by a few months. Although evidence was admissible to show that the parties modified the written agreement, the statute of frauds rendered the alleged oral modification unenforceable, as we explain next.

#### *Statute of frauds*

Under Nevada's statute of frauds, every contract for the sale of land must be in writing. NRS 111.210(1). However, "oral agreements otherwise unenforceable because of the statute of frauds may be enforced under the doctrines of part performance or estoppel." *Capital Mortg. Holding v. Hahn*, 101 Nev. 314, 315, 705 P.2d 126, 127 (1985). Both of these exceptions to the statute of frauds requires "an extraordinary measure or

quantum of evidence.” *Id.* at 316, 705 P.2d at 127. Moreover, the doctrines require the party’s part performance or acts he performed to his detriment to be “unequivocally referable to the oral modification,” in order for the alleged oral modification to be enforceable. *Vogel v. Vogel*, 9 N.Y.S.3d 97, 100 (App. Div. 2015) (internal quotation marks omitted); *La Rosa v. Matthews*, 214 N.Y.S.2d 463, 465 (App. Div. 1961). “In order to be unequivocally referable, conduct must be inconsistent with any other explanation.” *Vogel*, 9 N.Y.S.3d at 100 (internal quotation marks omitted). Thus, acts that are consistent with the terms of the written agreement are insufficient to enforce an alleged oral modification. *See La Rosa*, 214 N.Y.S.2d at 465.

Here, KH Real Estate’s alleged oral modification to the sale of land must have been in writing. In order for the oral modification to be enforceable, the conduct by KH Real Estate or Chan must be unequivocally referable to the oral modification of changing the purchase price to \$200,000 and extending the time period a few months to satisfy full payment. Review of the record reveals that such conduct could not unequivocally be attributed to the alleged oral modification. Rather, the conduct put forth in the record demonstrates that the acts were consistent with the terms of the written agreement, as the district court found. Therefore, KH Real Estate’s alleged oral modification of the parties’ written agreement is unenforceable under the statute of frauds. Accordingly, the district court did not err in granting Kong Trust’s motion for summary judgment, and similarly did not err in denying KH Real Estate’s counterclaims, despite the district court’s reasoning. *See Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010) (stating that this court may affirm the district


court's decision "if the district court reached the correct result, even if for the wrong reason").<sup>1</sup>

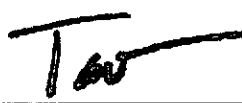
*The district court did not err in awarding Kong Trust attorney fees*


It is undisputed that the four factors prescribed in *Beattie v. Thomas*, 99 Nev. 579, 608 P.2d 268 (1983), applies to this case, as the issue is whether the district court should have awarded Kong Trust attorney fees based upon KH Real Estate's rejected offer of judgment. See NRCP 68(f)(2) (stating that failure to accept an offer of judgment that is more favorable than the judgment obtained may require the offeree to pay the offeror's attorney fees). KH Real Estate argues that only one factor was in Kong Trust's favor, namely, that the attorney fees were reasonable and justified.

After review of the record, we conclude that the district court did not abuse its discretion in awarding Kong Trust attorney fees, as it made findings, based on the evidence, on all four factors pursuant to *Beattie* factors. See *Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 82, 319 P.3d 606, 616 (2014) (recognizing that an award of attorney fees is generally reviewed for an abuse of discretion). Based on the foregoing, we

ORDER the judgments of the district court AFFIRMED.

  
\_\_\_\_\_, A.C.J.  
Douglas

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Gibbons

<sup>1</sup>Because we conclude that KH Real Estate's alleged oral modification was unenforceable under the statute of frauds, we need not address the parties' additional contentions regarding the preexisting duty rule.

cc: Hon. Joseph Hardy, Jr., District Judge  
Hong & Hong  
Olson, Cannon, Gormley, Angulo & Stoberski  
Eighth District Court Clerk