

IN THE SUPREME COURT OF THE STATE OF NEVADA

KERALA PROPERTIES, INC.,
Appellant,
vs.
BRUCE FAMILIAN,
Respondent.

No. 37855

FILED

JUL 11 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a judgment on remand, after an appeal from a judgment following a bench trial, and from an order denying appellant Kerala Properties, Inc.'s motion for a new trial.¹ Kerala agreed to sell a five-acre parcel of real property to respondent Bruce Familian's predecessor-in-interest for \$850,000, less the cost of flood mitigation work. The contract provided that the cost would be determined through a bid process. After Kerala refused to perform, Familian filed suit for breach of contract, seeking specific performance. Following a bench trial, the district court awarded specific performance, but modified the contract to determine the cost of flood mitigation using Familian's estimate, with Familian to bear certain costs.

¹To the extent that Kerala attempts to appeal the order denying its motion to alter or amend judgment, that order is not appealable. See Uniroyal Goodrich Tire v. Mercer, 111 Nev. 318, 320 n.1, 890 P.2d 785, 787 n.1 (1995).

Kerala appealed and Familian cross-appealed.² We reversed and remanded, on the ground that the district court could only order specific performance of the contract as written. On remand, the parties stipulated to a process through which either could obtain bids. Familian obtained a bid for over \$1.2 million, while Kerala did not obtain a bid. The district court entered new findings of fact and conclusions of law, applying Familian's bid to the contract, and ordered Kerala to deed the land to Familian for a purchase price of \$0.

Kerala moved for a new trial, or, in the alternative, to alter or amend the judgment. The district court denied these motions, and Kerala appeals.

Unilateral mistake of fact

Kerala argues that the district court should have allowed it to re-litigate its affirmative defense of unilateral mistake of fact. Under the Restatement (Second) of Contracts § 153 (1981), a party seeking to rely on his unilateral mistake must establish, among other things, that "the other party had reason to know of the mistake or his fault caused the mistake." Even using Familian's bid as new evidence, Kerala cannot establish that Familian had reason to know of Kerala's mistake or that Familian caused Kerala's mistake.

Familian and Kay Rodriguez, Kerala's real estate agent, submitted almost identical estimates for the cost of flood mitigation work. Nothing in the record indicates that Familian had reason to know that Kerala did not understand the contract. In fact, Rodriguez's cooperation

²Although Kerala was first to file a notice of appeal, briefing proceeded with Familian as appellant and Kerala as cross-appellant.

with Familian in estimating the cost of flood mitigation would have led Familian to believe that Kerala fully understood the contract.

Additionally, there is no evidence to suggest that Familian had reason to know that the bid process would ultimately yield a purchase price of \$0. Familian's estimate was slightly lower than the one Rodriguez submitted, and Familian litigated through the first trial using his estimate rather than acquiring a bid. Further, in the first appeal, Kerala, not Familian, argued that the district court erred in using Familian's estimate rather than the bid process. Familian had no reason to know that the bid process would yield a lower purchase price than the estimate.

Additionally, Restatement (Second) of Contracts § 154 (1981), requires a party seeking to establish a unilateral mistake defense to show that "the effect of the mistake is such that enforcement of the contract would be unconscionable." Unconscionability is measured from the time of contracting; the fact that the end result seems unfair does not render the contract unconscionable.³ The evidence here showed that, at the time of contracting, the property had an appraised value of \$710,000, less the cost of flood mitigation. The contract provided a price of \$850,000, less the then undetermined cost of flood mitigation. Thus, the contract was not unconscionable when made.

³Nelson v. Rice, 12 P.3d 238, 243 (Ariz. Ct. App. 2000).

Having concluded that the contract was valid,⁴ we now turn to the remedy for breach.

Specific performance

The district court considered itself bound by its original judgment and our order of remand to award specific performance. Initially, we note that our order of reversal and remand, although addressing the manner in which the district court granted specific performance, did not prohibit the district court from granting damages in lieu of specific performance. Further, the law of the case doctrine applies only where the facts remain substantially the same on remand.⁵ Here, the parties litigated through the first appeal with the belief that specific performance would yield a meaningful purchase price. On remand, it became clear that specific performance amounted to a purchase price of \$0.

Although specific performance is the strongly preferred remedy where a seller of land breaches the contract,⁶ it is not always available. "Specific performance is available only when: (1) the terms of

⁴At oral argument, Kerala discussed the mistake defense without specifically distinguishing unilateral mistake from mutual mistake. Kerala's answer pleaded "a mistake which would have been obvious to [Familian] in that [Kerala] never intended to be responsible for the payment of all costs." This pleading describes the elements of unilateral mistake, not mutual mistake. Additionally, Kerala's briefs in both appeals, and moving papers in the district court, have consistently discussed the Restatement provisions relating to unilateral mistake, not mutual mistake. Accordingly, we will not address mutual mistake.

⁵See Pellegrini v. State, 117 Nev. ___, ___, 34 P.3d 519, 535 (2001).

⁶See Stoltz v. Grimm, 100 Nev. 529, 533, 689 P.2d 927, 930 (1984).

the contract are definite and certain; (2) the remedy at law is inadequate; (3) the [party seeking specific performance] has tendered performance; and (4) the court is willing to order it.”⁷ The district court’s statements at the hearing on Kerala’s motion to alter or amend make clear that it was against ordering specific performance, but did so only because it concluded that the law of the case doctrine applied. Yet, the change in the net purchase price, with its corresponding effect on the availability of specific performance, represents a substantial change in the facts, such that the law of the case doctrine is inapplicable.

Specific performance is an equitable remedy, and the district court must take into account what, in good conscience, should have been done.⁸ Familian’s complaint prayed for “such other and further relief as the Court deems proper.” This language indicates a willingness to accept damages in lieu of specific performance. In light of the \$0 net purchase price, specific performance would violate fundamental precepts of equity.⁹ Also, under these circumstances, damages would provide an adequate remedy at law. Thus, the district court should have awarded Familian damages rather than specific performance.

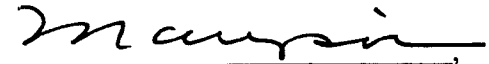
⁷Serpa v. Darling, 107 Nev. 299, 305, 810 P.2d 778, 782 (1991) (citing Carcione v. Clark, 96 Nev. 808, 811, 618 P.2d 346, 348 (1980)).

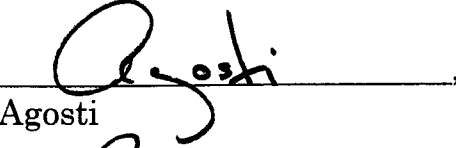
⁸See Stoltz, 100 Nev. at 533, 689 P.2d at 930.

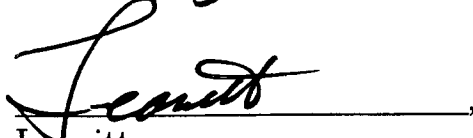
⁹See Breitbach v. Christenson, 541 N.W.2d 840, 843 (Iowa 1995) (Specific performance will be denied “where it would produce a hardship or injustice on either party.”).

The measure of damages should include Familian's losses in reliance on the contract,¹⁰ such as expenses incurred in the bid process and escrow expenses. Additionally, Familian may recover attorney's fees, as provided by the contract, and prejudgment interest as authorized by statute. In light of the foregoing, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.


_____, C. J.
Maupin


_____, J.
Agosti


_____, J.
Leavitt

cc: Hon. Mark W. Gibbons, District Judge
William L. McGimsey
Lionel Sawyer & Collins/Las Vegas
Lionel Sawyer & Collins/Reno
Clark County Clerk

¹⁰We reject Familian's novel argument that the district court's judgment must be affirmed because he detrimentally relied on the award of specific performance. Familian may recover his reliance costs as damages.