

IN THE SUPREME COURT OF THE STATE OF NEVADA

SIEGFRIED LINKE,
Appellant,
vs.
MOISE J. HAMAOU AND
MARGHUERITE HAMAOU,
Respondents.

No. 38057

FILED

APR 18 2003

ORDER OF AFFIRMANCE

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

This is an appeal from a final judgment entered in favor of respondents in connection with a dispute over an agreement to sell commercial real estate.¹ We affirm.

FACTUAL BACKGROUND

In the action below, Moise and Marghuerite Hamaoui claimed that Siegfried Linke breached an agreement under which Mr. Linke was to purchase a commercial building and land (“the property”) owned by Mr. and Mrs. Hamaoui. Negotiations concerning the sale commenced in early October 1994, when Ms. Vi Marsh, a real estate broker and Mr. Linke’s office manager, informed Mr. Hamaoui of Mr. Linke’s interest in purchasing the property. The property was encumbered at that time by first and second deeds of trust securing loans of \$364,000 and \$60,000, respectively. Mr. and Mrs. Hamaoui were motivated to sell because of then existing difficulties in meeting these obligations due to an insufficient rental income stream from the property. More particularly, a substantial “balloon” payment was due in connection with the first deed of trust later that same month, October 1994.

¹See NRAP 3A(b)(1).

Based upon prior dealings with the Hamaouis, Ms. Marsh knew of the impending balloon payment. She therefore knew that time was of the essence in consummating the sale. Although Linke had not inspected the property, his interest in the purchase was based upon an older appraisal that was, in turn, based upon an assumption that the property was fully leased to commercial tenants.

Mr. Linke submitted a written offer to purchase the property on October 7, 1994. The initial payment terms consisted of a down payment of \$250,000 at the close of escrow, assumption of the pre-existing debt against the property, and a deferred cash payment plus interest memorialized via promissory note. On October 11, 1994, the Hamaouis counter-offered with payment terms similar to those stated in the original offer, but added that the purchase of the property was to be "as is" with no express or implied warranties. The counter-offer required that the transaction close on or before October 23, 1994.

Mr. Linke then made several additions and changes to the counter-offer, most importantly that his "payment" of the notes secured by the first and second deeds of trust be "contingent upon financing to be acceptable to Buyer." Both sides finally agreed to the additional terms as of October 14, 1994.²

Escrow never closed. At some point after the deadline for closing, Marsh told Mr. Hamaoui that Mr. Linke was not interested in the purchase. On October 24, 1994, the first deed of trust holder served Mr.

²Final payment terms were (1) \$250,000 at the close of escrow; (2) exoneration of the first and second trust deeds securing notes with total balances of \$402,000; and (3) a deferred payment of \$248,000 plus interest memorialized via promissory note.

Hamaoui with a notice of default and election to sell the property. Unhappily, on October 31, 1994, an electrical fire broke out on the premises, the water damage from which rendered it uninhabitable and untenable. On November 4, 1994, the second deed of trust holder sent the Hamaouis a separate notice of default and election to sell the property.

Some two months later in January 1995, Mr. Linke purchased the second deed of trust on the property for the outstanding balance on the note. In February 1995, he purchased the first deed of trust on the property.

On October 7, 1997, the Hamaouis filed a complaint in district court against Mr. Linke and others³ for breach of the October 1994 agreement. The matter proceeded to trial in February of 2002, at which time Mr. Linke owned the property free and clear of the prior encumbrances, subject to a refinancing arrangement consummated in September of 1995.

The primary issue at trial was whether Mr. Linke used due diligence in seeking financing before renouncing the transaction. As is discussed below, the jury heard conflicting evidence on that issue and, following deliberations, found that Mr. Linke breached his duty of due diligence and awarded the Hamaouis damages in the amount of \$498,000. This figure reflects the proceeds they would have received had the sales transaction closed. Following the verdict, Mr. Linke's attorney made an

³The Hamaouis also named the Hartford Fire Insurance Company, Arthur W. Poehlman, the Arthur W. Poehlman Trust, Marsh, and Doe Defendants I through IV in their complaint. Only the claim against Mr. Linke survived the trial and was submitted to the jury for a verdict.

oral motion for a judgment notwithstanding the verdict. The court denied that motion.

Mr. Linke appeals from the district court's final judgment, claiming that the due diligence issue was not properly before the district court; that the verdict was not supported by substantial evidence; and that the Hamaouis failed to prove that his failure to close the transaction caused them to lose title to the property.

DISCUSSION

Plain error

Mr. Linke claims that the district court committed reversible error when it changed respondents' theory of the case without notice from straight breach of contract to one founded on breach of an implied covenant of good faith and fair dealing based upon his lack of due diligence in obtaining financing for the purchase. In this he claims that he had no prior notice in the pleadings of the theory of liability that went to the jury. Accordingly, Mr. Linke reasons that the district court should not have instructed the jury on the issue of his due diligence.⁴

The jury instructions of which Mr. Linke now complains on appeal informed the jury that a promise of good faith and fair dealing is implied in every contract. Additionally, the instructions stated that "where there is a financing contingency [in a contract], the purchaser has an implied duty to diligently seek to have the contingency take place and

⁴See Sprouse v. Wentz, 105 Nev. 597, 781 P.2d 1136 (1989) (insufficient notice in pleadings and pre-trial statement barred punitive damage award).

this implied duty must be exercised in good faith.”⁵ In accordance with the instruction on good faith and fair dealing, the district court instructed the jury to find in favor of Mr. Linke if it found he diligently and in good faith sought to fulfill the financing contingency. The jury was likewise instructed to find for Mr. and Mrs. Hamaoui in the event it concluded that Mr. Linke did not diligently attempt to fulfill the financing contingency, or never had any intention of purchasing the property. Finally, the jury was also instructed to assess damages if it found that Mr. Linke breached the agreement.

Mr. Linke did not object to statements by the district court near the end of trial that due diligence was the primary trial issue, and made no objections to the jury instructions defining his duty of due diligence. NRCP 51⁶ requires that a party distinctly object to a jury instruction before the jury retires to preserve any issue concerning the instruction for appeal. We conclude that NRCP 51 precludes our consideration of this claim because of Mr. Linke’s failure to object to instructions that he only now contends were beyond the scope of the pleadings.

⁵Both parties concede that the language “[c]ontingent on financing to be acceptable to buyer” did not give Mr. Linke the right to unilaterally reject any financing, *i.e.*, that any rejection of financing had to be reasonable.

⁶NRCP 51 provides, in part:

No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.

Mr. Linke argues that the NRCP 51 waiver rule does not obtain in this instance because of his demonstration in this appeal of “plain error”;⁷ again, that the claim of breach based upon the implied covenant of good faith and fair dealing was not properly before the district court. We disagree, having concluded that the issue of due diligence was properly before the court via the pleadings, pre-trial statements and conduct of the parties at trial.

First, the pre-trial statement submitted by the Hamaouis confirmed their allegation that Mr. Linke breached the agreement when he did not close escrow. Second, Mr. Linke contended in his pre-trial statement that his obligation of performance under the contract was contingent upon the finding of financing.⁸ Third, Mr. Linke presented evidence that he attempted to find financing in good faith, subject to impeachment by the Hamaouis’ counsel through Mr. Linke’s prior inconsistent statements on this issue. Thus, the pre-trial statements and the parties’ actions at trial demonstrate the intent to fully litigate the

⁷See Arco Prods. Co. v. May, 113 Nev. 1295, 948 P.2d 263 (1997), (distinguishing the procedural fact pattern presented therein from situations governed by NRCP 51); see also DeJesus v. Flick, 116 Nev. 812, 816, 7 P.3d 459, 462 (2000) (misconduct of attorneys) (citing Bradley v. Romeo, 102 Nev. 103, 104, 716 P.2d 227, 228 (1986) (failure of district court to use proper statute)); cf. Carson Ready Mix v. First Nat’l Bk., 97 Nev. 474, 475, 635 P.2d 276, 277 (1981) (failure to properly object precludes appellate review).

⁸See NRCP 9(c), which states in part:

In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred.

issue of Mr. Linke's obligation of good faith and fair dealing through his claim of due diligence in seeking financing. Accordingly, although the implied covenant theory was not specifically pled, i.e., the complaint generally alleged that Mr. Linke breached the agreement by not closing the transaction, the issue of good faith and fair dealing was tried by consent.⁹ As is further explained below, Mr. Linke's alleged failure to exercise due diligence in seeking financing was relevant under the pleadings to the question of whether his failure to close the transaction was excused.

We therefore conclude that the issue of breach of contract, i.e., Mr. Linke's alleged failure to exercise due diligence, was properly before the district court and it was not plain error for the court to instruct the jury on that theory of contract liability. Additionally, the trier of fact is the proper vehicle by which a determination of whether reasonable diligence had occurred.¹⁰

⁹See Hilton Hotels v. Butch Lewis Productions, 107 Nev. 226, 233-34, 808 P.2d 919, 923 (1991) and NRCPC 15(b), which provides in part:

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.

¹⁰See e.g., Bemis v. Estate of Bemis, 114 Nev. 1021, 1025, 967 P.2d 437, 440 (1998) (factual question for jury whether attorney used due diligence in determining causes of action).

Substantial evidence

Mr. Linke argues on appeal that the jury's verdict finding him in breach was not supported by substantial evidence because the Hamaouis failed to prove that "acceptable financing" was available to fund the purchase.¹¹ We disagree.

"A . . . verdict supported by substantial evidence will not be overturned unless the verdict is clearly erroneous when viewed in light of all the evidence presented."¹² Substantial evidence has been defined as that which ""a reasonable mind might accept as adequate to support a conclusion.""¹³ We conclude that the record contains substantial evidence to support the jury's conclusion that Mr. Linke failed to exercise due diligence in seeking financing.

As noted supra, Mr. Linke agrees that a contract was formed between the parties, and he cannot seriously contest that a breach did occur when escrow failed to close on the date specified in the contract. Mr. Linke, however, claimed he was excused from performance based upon the failure of a condition precedent to his performance under the contract, to

¹¹Fundamentally, the case went to the jury on the question of whether a breach of an existing contract occurred, not on whether a valid contract was formed. Even if Mr. Linke alleged that no contract existed at trial, his concession at oral argument that a contract existed is sufficient to remove contractual existence as an issue from the case.

¹²Dillard Department Stores v. Beckwith, 115 Nev. 372, 378, 989 P.2d 882, 886 (1999) (quoting Frances v. Plaza Pacific Equities, 109 Nev. 91, 94, 847 P.2d 722, 724 (1993)).

¹³Currier v. SIIS, 114 Nev. 328, 333, 956 P.2d 810, 813 (1998) (quoting State Emp. Security v. Hilton Hotels, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986) (quoting Richardson v. Perales, 402 U.S. 389, 400 (1971))).

wit: that he find acceptable financing. Excuse of performance constitutes an avoidance of the contract.¹⁴ Thus, he was affirmatively obligated to plead and prove excused performance.¹⁵ Because of the implied covenant of good faith, excuse of performance for lack of acceptable financing could only be proved by evidence of his due diligence to secure the financing, or other proof that financing was simply unavailable. Again, he was not free to refuse a reasonable financing package. Accordingly, the burden was not on the Hamaouis to prove the converse, that acceptable financing was available in the interim period between acceptance and the failure to close escrow. We conclude that Mr. Linke failed to meet his affirmative burden to justify excuse of performance.¹⁶

Mr. Linke's banker testified to a letter documenting his purported denial of financing for the purchase. However, the letter was not dated, contrary to the banker's common practice, and the letter was evidently written after the date set for closing because it referenced insurance proceeds from the October 31, 1994, fire. From this, the jury

¹⁴See, e.g., Nebaco, Inc. v. Riverview Realty, Co., 87 Nev. 55, 57, 482 P.2d 305, 307 (1971) (citing 6 Williston on Contracts, § 1968 (Rev. ed. 1938)).

¹⁵See NRCP 8(c).

¹⁶It is arguably unclear under NRCP 9(c) who had the burden of specifically pleading the failure of the condition precedent. We conclude that, because excuse of performance is an affirmative defense, Mr. Linke was under the duty to specifically plead the basis of non-performance or non-occurrence of the condition precedent to performance. This, however, is not pertinent to the resolution of this appeal because the issue of breach of the implied covenant of good faith was tried by consent of the parties.

could reasonably infer that the banker's letter was written only for trial purposes.

The Hamaouis also presented evidence that Mr. Linke was able to finance the purchase of the two deeds of trust on the property and obtain a large construction loan within one year of his inability to find financing in October 1994. In this connection, we note Mr. Linke's testimony that he was never able to obtain financing for this type of deal in such a short period of time. However, the jury was free to disregard this contention and infer that he never fully intended to go through with the arrangement and thus, did not exercise due diligence in seeking financing. Additionally, the Hamaouis confronted Mr. Linke with his prior inconsistent deposition testimony in which he stated that he did not apply for financing and that, once he saw the condition of the property, he was no longer interested in the purchase.

Mr. Linke testified that he contacted three Las Vegas banks and that he made an appointment with a local branch of Bank of America. But he presented no evidence as to when he effected these contacts or that he ever filled out a loan application. Instead, he offered the bare assertion that no local bank would provide financing because he was not a resident of Las Vegas. Thus, the jury was also free to disregard his explanation in open court that, while he did not apply for financing, he went to several bankers to inquire about financing.

Mr. Linke relies upon Saltzman v. McCombs¹⁷ for the proposition that he need not have filled out an application for financing to show that he acted with due diligence and in good faith. In Saltzman,

¹⁷71 Nev. 93, 281 P.2d 394 (1955).

buyers under a contract of sale conditioned their performance on obtaining a specific type of loan. This court accordingly found that failure to fill out a loan application was not material where the financing was clearly unavailable and, thus, there was no purpose for doing something the buyers knew would fail. Here, however, Mr. Linke was obligated to exercise due diligence to find “acceptable financing,” whatever the source. The present case deals not with whether Linke filled out loan applications, but rather whether he diligently sought financing at all.

The jury evidently determined that Mr. Linke’s testimony and evidence was not credible. We will not overturn that determination. The jury was entitled to conclude on the record that Mr. Linke did not pursue financing with due diligence.

Proximate cause

Mr. Linke argues there was no evidence that his actions proximately caused the Hamaouis to lose title to the property. We disagree.


“The purpose of an award of damages [in a contracts case] is to put the nonbreaching party in as good a position as if the contract had been performed.”¹⁸ If the parties had performed in this instance, the Hamaouis would have ultimately received \$498,000 in principal payments and the deeds of trust would have been exonerated. As noted, the verdict seems reflective of the cash proceeds exclusive of the loan pay-offs that would have been realized had the purchase been completed. The signed and initialed agreement tied up the property until escrow was set to close,


¹⁸Covington Bros. v. Valley Plastering, Inc., 93 Nev. 355, 363, 566 P.2d 814, 819 (1977).

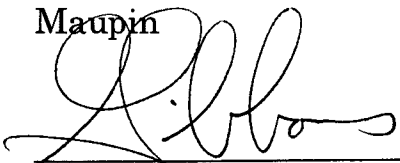
one day before the balloon payment on the note secured by the first deed of trust was due. Therefore, the failure to close escrow on that day led to foreclosure proceedings and the existence of the contract arguably kept the Hamaouis from making other arrangements to save the property prior to the default that led to foreclosure. Thus, there was substantial evidence supporting a finding that damages were proximately caused by Mr. Linke's breach of the agreement.¹⁹

In light of the above, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Rose


_____, J.
Maupin


_____, J.
Gibbons

cc: Hon. Michael L. Douglas, District Judge
Lionel Sawyer & Collins/Las Vegas
William L. McGimsey
Clark County Clerk

¹⁹Additionally, because we conclude that the jury properly found a breach of contract, we also conclude that NRS 99.040 was the proper statute upon which to base the calculation of interest on the judgment.