IN THE SUPREME COURT OF THE STATE OF NEVADA

GREEN LEAF FARMS HOLDINGS LLC, A NEVADA LIMITED LIABILITY COMPANY, F/K/A GREEN LEAF FARMS HOLDINGS, INC.; MARK BRADLEY, A/K/A MARK BRADLEY FELDGREBER, AN INDIVIDUAL; AND PLAYERS NETWORK, INC., A NEVADA CORPORATION,
Appellants,
vs.
BELMONT NLV, LLC, A NEVADA LIMITED LIABILITY COMPANY,
Respondent.

No. 84779

FILED

JUN 13 2024

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a final judgment in a contract action. Eighth Judicial District Court, Clark County; Timothy C. Williams, Judge.

Green Leaf Farms Holdings, LLC and Belmont NLV, LLC entered into a five-year lease agreement for Belmont's property. The agreement included options to extend the lease and to purchase the property. The parties also executed an agreement granting Belmont a security interest in Green Leaf's cannabis licenses, subject to approval by regulatory authorities. Green Leaf fell behind on rent payments, and the parties executed an amendment to the lease, noting the default. Again, Green Leaf fell behind, and Belmont requested several times that Green Leaf cure the arrearages. When Green Leaf failed to do so, Belmont informed Green Leaf's president, Mark Bradley, that Green Leaf could not exercise the option to extend the lease and requested that Green Leaf vacate the property. Shortly before the time arrived to vacate, Green Leaf notified

Belmont that it elected to exercise its option to purchase and requested Belmont's consent to assign the option. The next day, Belmont notified Green Leaf that it was terminating the lease for default and retaking the premises.

Green Leaf filed a complaint against Belmont in district court, alleging that Green Leaf timely exercised its option to purchase the property and that Belmont's refusal to honor the option was a breach of the lease and of the implied covenant of good faith and fair dealing. Belmont filed its own complaint against Green Leaf, seeking damages for breach of contract and breach of the implied covenant of good faith and fair dealing. Belmont also requested declaratory relief that Green Leaf could not exercise its lease options. The cases were consolidated, and the district court concluded that Green Leaf's rent default was a failure of consideration for the purchase option. The district court ordered Green Leaf to vacate the property but ordered that Belmont provide "[r]easonable time" for Green Leaf to do so and that both parties "work together with cooperation" to ensure "an orderly transition."

Following this written order, entered about a week and a half after the court's oral ruling, Belmont locked Green Leaf out of the property. Green Leaf alleged that during the lockout, Belmont destroyed Green Leaf's property and asked that the district court find a violation of its previous order. At Green Leaf's request, the court held an emergency telephone conference. The court found that "Green Leaf has had a reasonable amount of time to vacate the premises," and directed parties to file motions if they had concerns about personal property being improperly removed from or confined to the premises. The record does not show that either party filed a motion regarding those concerns.

Next, Belmont moved for partial summary judgment and included a statement of Green Leaf's total outstanding rent, interest, and late fees. In its opposition, Green Leaf asked for discovery, but did not specifically request NRCP 56(d) relief. It argued for the first time that it should be allowed to assert a claim for conversion and a defense of offset. Green Leaf also acknowledged that Belmont was "likely entitled" to refuse Green Leaf's attempt to exercise the option to purchase and withdrew its breach-of-the-lease and declaratory-relief claims. Finally, Green Leaf contended that the security agreement in its cannabis licenses violated Nevada law and was therefore void. At the motion hearing, Green Leaf told the court that it had filed a separate complaint that included its conversion and offset theories.

The district court found that Belmont's evidence that Green Leaf owed it $1,109,107.23 was uncontroverted. It granted summary judgment in favor of Belmont against all Green Leaf's claims and awarded $1,109,107.23 to Belmont. Additionally, the court ordered Green Leaf to assign its cannabis licenses and permits to Belmont subject to regulatory approval, as required by the parties' security agreement. Because Green Leaf never asserted a conversion claim or an offset affirmative defense in this action and the deadline to amend the pleadings had passed, the court did not consider either point.

Green Leaf appeals, arguing that it is entitled by the contract to exercise the purchase option because Belmont did not properly terminate the lease and waived Green Leaf's breaches; that the district court abused its discretion by declining to consider Green Leaf's offset defense because Belmont would not have been prejudiced by it; and that the district court erroneously denied NRCP 56(d) relief in view of Belmont's failures during

discovery and Green Leaf's need to obtain evidence of property damage and amounts still owing to Belmont. Green Leaf additionally contends the district court's order to transfer its cannabis license to Belmont subject to the parties' security interest was error because Nevada law does not allow for the creation of a security interest in a cannabis license.

Green Leaf was not entitled to exercise the option to purchase

When an option to purchase is incorporated into a real estate lease, the consideration for the contract is consideration for the purchase option. 49 Am. Jur. 2d *Landlord and Tenant* § 296 (2d ed. 2018). So long as the lease and option-to-purchase provisions are seen as dependent, the failure to pay rent is a failure of consideration that nullifies the option. *Id.* § 343. "The majority view is that an option contained in a lease is inseparable from and an integral part of the whole contract." *Id.* § 297. Whether the option and lease constitute one complete contract or separate agreements is a matter of contract construction. *See Am. Fence, Inc. v. Wham*, 95 Nev. 788, 793, 603 P.2d 274, 277-78 (1979). An option to purchase is not a separate contract if there is no separate consideration for the option. *Id.* at 793, 603 P.2d at 277.

On appeal, Green Leaf attempts to revive the breach-of-lease and declaratory-judgment claims that it conceded below when it admitted that Belmont was entitled to refuse to allow Green Leaf to exercise its purchase option. In view of Green Leaf's concession, we do not address those claims. And to the extent that Green Leaf argues that the district court erred in not allowing Green Leaf to exercise its option to purchase under its claim for breach of the covenant of good faith and fair dealing, that argument fails. Because no separate consideration exists in the lease for the option to purchase, Green Leaf's failure to pay rent was a failure of

consideration. Accordingly, Green Leaf was not entitled to exercise the option to purchase. Moreover, Belmont repeatedly notified Green Leaf of this failure and warned Green Leaf that it would have to vacate if it did not pay rent, belying Green Leaf's argument that Belmont impliedly waived the prior breaches.

The district court did not abuse its discretion by declining to consider Green Leaf's offset defense

Offset allows parties who are indebted to each other to extinguish their debts in the same proceeding. *Aviation Ventures, Inc. v. Joan Morris, Inc.*, 121 Nev. 113, 121, 110 P.3d 59, 64 (2005). A defendant may raise offset as a defense or as a counterclaim to obtain a judgment from the plaintiff. *Id.* at 119-20, 110 P.3d at 63. When used as a defense, offset must be pleaded affirmatively. *Clark Cnty. Sch. Dist. v. Richardson Constr., Inc.*, 123 Nev. 382, 394 n.21, 168 P.3d 87, 95 n.21 (2007). If an affirmative defense is not pleaded, it is generally waived. *See* NRCP 8(c). But a district court may consider an unpleaded affirmative defense if "fairness warrants consideration of the affirmative defense and the plaintiff will not be prejudiced by the district court's consideration of it." *Douglas Disposal, Inc. v. Wee Haul, LLC*, 123 Nev. 552, 558, 170 P.3d 508, 513 (2007).

Even if the district court mistakenly concluded that it could not consider offset and that Green Leaf did not waive this argument for appeal, that misstep was not reversible error on the record facts. Following the alleged destruction of Green Leaf's property, the district court stated that Green Leaf could file a motion with the court. Green Leaf filed an answer to Belmont's complaint—without including offset as an affirmative defense, despite having a clear opportunity to do so. Nor did Green Leaf move to amend or supplement its pleadings, instead asserting the offset claim in a separate lawsuit and advising the district court of that fact. Green Leaf

therefore chose a different path to pursue its offset claim against Belmont and fails to show reversible error in this appeal.

Related to the arguments regarding offset, in Belmont's responding brief, and Green Leaf's reply brief, the parties briefly dispute whether Green Leaf's arguments below regarding conversion fail as a matter of law. Belmont's counsel agreed during oral argument that no party had argued in this case that conversion was a compulsory counterclaim, and relatedly acknowledged that no party argued that preclusion by reason of nonassertion was an issue on this appeal. We therefore do not address conversion.

The district court did not abuse its discretion by not granting NRCP 56(d) relief

Rule 56(d) allows a district court to provide additional time for discovery when, in opposing a motion for summary judgment, the "nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition." NRCP 56(d). This court reviews a district court's denial Rule 56(d) relief for abuse of discretion. *Aviation Ventures*, 121 Nev. at 118, 110 P.3d at 62. The party opposing summary judgment must explain in an affidavit why the party is seeking a continuance to conduct further discovery. *Choy v. Ameristar Casinos, Inc.*, 127 Nev. 870, 873, 265 P.3d 698, 700 (2011). In the affidavit, the nonmovant must identify additional facts essential to its opposition. *Bakerink v. Orthopaedic Assocs., Ltd.*, 94 Nev 428, 431, 581 P.2d 9, 11 (1978). Further, the nonmovant must "affirmatively demonstrate why [it] cannot respond to [the moving party's] evidence without further delay." *Sciarratta v. Foremost Ins. Co.*, 137 Nev. 327, 334, 491 P.3d 7, 13 (2021).

Green Leaf never expressly requested additional time for discovery under Rule 56(d). But even construing Green Leaf's argument

that the case was not ripe for summary judgment as a request for additional time under Rule 56(d), Green Leaf does not meet the rule's requirements. Mark Bradley's affidavit, attached to Green Leaf's opposition to Belmont's summary-judgment motion, does not identify the specific facts Green Leaf would obtain in discovery, how that discovery would alter the court's determination, or why Green Leaf could not respond without further delay. The failure to grant Rule 56(d) relief was not an abuse of discretion.

The district court's order directing Green Leaf to assign its cannabis licenses and permits to Belmont is not reversible based on the arguments presented

A security interest will be enforceable if the debtor has "rights in the collateral or the power to transfer rights in the collateral to a secured party." NRS 104.9203(2)(b). Although Nevada law provides that cannabis licenses are a revocable privilege in which the holder has no vested right, NRS 678B.010; *see also* NRS 453A.320 (repealed 2020), other states addressing analogous situations have recognized that the licensee has a property interest in the license, which may be assigned or sold. *See, e.g., In re Coed Shop, Inc.*, 435 F. Supp. 472, 473 (N.D. Fla. 1977) (recognizing a property interest in a liquor license that may be transferred), *aff'd*, 567 F.2d 1367 (5th Cir. 1978); *Bogus v. Am. Nat'l Bank of Cheyenne, Wyo.*, 401 F.2d 458, 460-61 (10th Cir. 1968) (same). And while Nevada regulations require board approval before a cannabis license may be transferred, *see* NCCR 5.110(1), (2) & (4) (current regulation); NRS 453A.334 (repealed 2020), any transfer here appears, by contract and by district court order, subject to regulatory approval. Indeed, the parties do not cogently argue otherwise, making reversal on this basis inappropriate. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (noting that the court need not consider a point not cogently argued or supported by authority that supports reversal).

Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Stiglich, J.
Stiglich

Pickering, J.
Pickering

Parraguirre, J.
Parraguirre

cc: Hon. Timothy C. Williams, District Judge
Eleissa C. Lavelle, Settlement Judge
Markman Law
Fox Rothschild, LLP/Las Vegas
Eighth District Court Clerk