IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MAIN STREET INVESTMENTS III, LLC,
Appellant,
vs.
HUDL BREWING COMPANY, LLC,
Respondent.

No. 87102-COA

ORDER REVERSING, VACATING, AND REMANDING

Main Street Investments III, LLC (MSI) appeals from a district court judgment following a bench trial in a contractual dispute. Eighth Judicial District Court, Clark County; Erika D. Ballou, Judge.

MSI is the owner of real property located in downtown Las Vegas (the subject property). In April 2019, MSI and respondent HUDL Brewing Company, LLC (HUDL) executed a lease agreement for HUDL to rent the subject property for a five-year period for the purposes of operating a microbrewery and tasting room.[1] Because the subject property was uninhabitable at the time the parties executed the contract, the lease agreement set forth the scope of work to be completed by each party to render the property usable for HUDL's intended purpose. MSI was to obtain lender approval for financing and HUDL was to obtain all required permits and licenses needed to operate its business by June 1. The lease agreement also required MSI to contract with Titanium Builders LLC (Titanium) to finalize plans for MSI's improvements to the property.

While the lease agreement did not set forth a definite timeline for construction, it stated that HUDL's rent would not commence until "the

[1]We do not recount the facts except as necessary to our disposition.

Tenant Improvements [were] substantially complete and [HUDL received] a temporary or regular Certificate of Occupancy for the premises, but in any event no later than October 1, 2019." The agreement also contained a general time-is-of-the-essence clause. Additionally, section 2611 of the lease agreement contained a provision requiring HUDL to provide MSI with written notice and an opportunity to cure before MSI could be considered in default, which stated, in pertinent part:

> Landlord shall not be in default unless Landlord fails to perform obligations required of Landlord within 30 days after receipt of *written notice* by Tenant to Landlord specifying wherein Landlord has failed to perform such obligation; provided, however, that if the nature of Landlord's obligation is such that more than 30 days are required for performance than [sic] Landlord shall not be in default if Landlord commences performance within such 30 day period and thereafter diligently and with continuity prosecutes the same to completion. In the event of Landlord's default hereunder that remains uncured after the applicable notice and cure period, Tenant shall have all remedies available to it at law or in equity.

(Emphasis added.) HUDL provided MSI with an initial security deposit of $20,105 pursuant to the agreement.

Neither party made substantial progress on the project over the next few months. In July, Ken Cooper and Dale Norfolk, the owners of HUDL, reached out to Chris Heffinger, the owner of Titanium, about introducing HUDL to the owner of the adjacent property so they could discuss building HUDL's brewery there instead of at MSI's property. Later that month, Paul Murad, the project manager for MSI, and Heffinger had an argument via email regarding the pricing of the project. Heffinger forwarded the email correspondence to Cooper and Norfolk and suggested

that they get their attorney involved because Heffinger believed that Murad would continue to delay the project.

By the end of July, HUDL had obtained all the permits and licenses needed to operate its business, but MSI had not obtained approval from its lender. On August 1, Cooper sent an email to Murad communicating HUDL's frustrations with the lack of progress on the project. On August 5, Cooper, on behalf of HUDL, sent MSI a notice of termination of the lease agreement, stating that HUDL was terminating the lease due to HUDL's failure to obtain all permits and licenses by June 1 and MSI's failure to obtain lender approval by June 1. In the letter, HUDL requested that MSI return HUDL's security deposit and reimburse HUDL for its out-of-pocket expenses incurred from engineering and architectural work. HUDL subsequently leased the adjacent property and opened its brewery.

After MSI refused to return HUDL's security deposit and reimburse its out-of-pocket costs, HUDL filed a complaint in district court alleging breach of contract and unjust enrichment. MSI answered and filed a counterclaim alleging breach of contract, breach of the covenant of good faith and fair dealing, and unjust enrichment. The case proceeded to a three-day bench trial where Norfolk, Cooper, Heffinger, and Murad testified. At trial, when asked if HUDL ever provided MSI with written notice and an opportunity to cure under section 2611 of the lease agreement, Norfolk answered "So no, at no point did we send any letter that said, you're in default . . . prior to the termination." Murad likewise testified that HUDL did not provide MSI with written notice of default prior to HUDL's termination of the lease agreement. Further, Murad testified that MSI retained a brokerage company following HUDL's termination of the lease agreement, which was able to find a new party to rent the subject property

in February 2021. Murad testified that MSI incurred $236,885.52 in lost rent between HUDL's termination and the new lease in February 2021, and that MSI paid the brokerage company a leasing commission of $110,952.65.

Following the trial, the district court entered findings of fact, conclusions of law, and judgment in favor of HUDL. Specifically, the district court found that MSI committed four material breaches of the lease agreement, including (1) MSI failed to timely enter into a contract with Titanium; (2) MSI failed to timely complete its portion of the tenant improvement plans; (3) MSI breached the covenants of quiet enjoyment and good faith and fair dealing by leasing a portion of the building to another company; and (4) MSI failed to obtain lender approval by June 1. Based on these breaches, the district court found that HUDL was excused "from performing all terms of the contract," and specifically stated that "HUDL was excused from providing written notice of Landlord's default pursuant to section 2611 of the Lease." Finally, the district court found that, "while both Norfolk and Cooper testified as to the damages claimed by HUDL, MSI never adduced any testimony related to its alleged damages." The district court awarded HUDL $32,518 in damages for the cost of HUDL's initial security deposit plus its out-of-pocket expenses for architectural and engineering work.

After the district court entered its findings of fact, conclusions of law, and judgment, HUDL filed a motion requesting attorney fees and costs. MSI subsequently filed a motion to alter or amend findings of fact and conclusions of law under NRCP 52(b) or alter or amend judgment under NRCP 59(e), and alternatively for a new trial under NRCP 59(a). While MSI's motion to alter or amend was pending, the district court granted HUDL's request for attorney fees and costs and in turn issued judgment for

HUDL in the amount of $71,136.86: $32,518.00 in compensatory damages and $38,618.86 in attorney fees, costs, and prejudgment interest. Several months later, the district court summarily denied MSI's motion to alter or amend, and this appeal followed.

On appeal, MSI raises five issues, including, as relevant here, that the district court incorrectly found that HUDL was excused from providing MSI with written notice of its alleged breaches and a 30-day period to cure those breaches as required by the plain language of section 2611 of the lease agreement.[2] HUDL argues in response that section 2611 of the lease agreement only required written notice and an opportunity to cure defaults; however, MSI committed material breaches, not defaults, and therefore was not entitled to written notice and an opportunity to cure under section 2611. Alternatively, HUDL argues that MSI received written notice of all its apparent breaches, and therefore the district court's failure to find that MSI was entitled to written notice and an opportunity to cure in accordance with section 2611 was harmless.

A district court's findings of fact will not be disturbed on appeal if they are supported by substantial evidence in the record. *County of Clark v. Sun State Props., Ltd.*, 119 Nev. 329, 334, 72 P.3d 954, 957 (2003). However, contract interpretation is a question of law and therefore reviewed

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[2]MSI also argues that the district court erroneously found that MSI failed to adduce evidence of its alleged damages at trial, which we discuss below. Further, MSI argues that the district court erred in failing to make findings as to its arguments of waiver and estoppel; the district court erred in considering several of HUDL's alleged breaches at trial that were not raised in HUDL's pleadings; and that the district court erred in failing to make findings as to the timeliness of HUDL's termination of the lease agreement. However, we need not reach these issues in light of our disposition.

de novo. *Am. First Fed. Credit Union v. Soro*, 131 Nev. 737, 739, 359 P.3d 105, 106 (2015). Ordinarily, "[w]hen parties exchange promises to perform, one party's material breach of its promise discharges the non-breaching party's duty to perform," allowing for termination or recission of the contract. *Cain v. Price*, 134 Nev. 193, 196, 415 P.3d 25, 29 (2018) (citing Restatement (Second) of Contracts § 237 (Am. Law Inst. 1981)).

It has been long understood that contracts must be read as a whole and, if the language is clear and unambiguous, enforced as written. *Rd. & Highway Builders v. N. Nev. Rebar, Inc.*, 128 Nev. 384, 390, 284 P.3d 377, 380 (2012) (explaining that contracts must be read as a whole without negating any provision therein); *Soro*, 131 Nev. at 739, 359 P.3d 105 (explaining that unambiguous contracts are enforced as written). Further, "[n]otice to terminate a contract must be clear and unambiguous, reasonable, and in accordance with the terms of the contract," and "[i]f a time for giving notice is stipulated [in the contract], the notice must be given at that time." 17B C.J.S. Contracts § 614 (2023).

The district court in this case found that, because MSI materially breached the lease agreement on four separate occasions, HUDL was excused from providing MSI with written notice of its apparent breaches and an opportunity to cure those breaches under section 2611 of the lease agreement. While this court recognizes that a material breach is ordinarily grounds for termination or recission of a contract, *see Cain*, 134 Nev. at 196, 415 P.3d at 29, the determination of what constitutes a material breach is dependent upon the interpretation of the plain language of the contract. *See Breach of Contract, Black's Law Dictionary* (11th ed. 2019) (defining "material breach" as "[a] breach of contract that is significant enough to permit the aggrieved party to elect to treat the breach as total (rather than

partial), thus excusing that party from further performance and affording it the right to sue for damages"); *Rd. & Highway Builders*, 128 Nev. at 390, 284 P.3d at 380 (explaining that contracts must be interpreted as a whole). Accordingly, it was incumbent upon the district court to first interpret the contract as a whole—including section 2611, which purports to change the terms of default for the parties and their contractual remedies—prior to determining whether that provision was waived by any other purported material breach under the contract. Here, however, the district court seemingly disregarded the plain language of the lease agreement, which required HUDL to provide MSI with written notice of its ostensible breaches and at least a 30-day period to cure those breaches before it could terminate the lease agreement and pursue remedies in law and in equity. We conclude that the failure to do so was in error.

Turning to the interpretation of the contract in this case, this court will generally assign common or normal meanings to words in a contract. *Tompkins v. Buttrum Constr. Co. of Nev.*, 99 Nev. 142, 144, 659 P.2d 865, 866 (1983) (stating that, in general, words in a contract are "given their plain, ordinary and popular meaning"); *see also Westgate Planet Hollywood Las Vegas, LLC v. Tutor-Saliba Corp.*, No. 65130, 2017 WL 1855006 (Nev. May 5, 2017) (Order affirming in part, reversing in part, vacating in part, and remanding) (using dictionary definitions to ascertain the common meaning of terms used in a contract). In this context, a "material breach" is generally defined as "a failure to do something that is so fundamental to a contract that the failure to perform that obligation defeats the essential purpose of the contract or makes it impossible for the other party to perform under the contract." 23 Richard A. Lord, Williston on Contracts § 63:3 (4th ed. 2021). However, the term "default" is defined

broadly as "[t]he omission or failure to perform a legal or contractual duty," which would necessarily include a material breach. *Default*, *Black's Law Dictionary* (11th ed. 2019).

Here, HUDL points to nothing in the lease agreement supporting its assertion that the agreement's use of the term "default" did not apply to material breaches, and notably, fails to rebut MSI's argument that "when a contract has a 'notice and cure' provision, a cause of action does not arise until notice and the opportunity to cure has been given." Instead, HUDL solely relies on *L.K. Comstock & Co. v. United Engineers & Constructors Inc.*, 880 F.2d 219, 232 (9th Cir. 1989), to support its assertion that the term "default" does not include material breaches. This reliance is misplaced. In *L.K. Comstock*, the district court found that a nonbreaching party did not have to provide the breaching party with a contractually required 48-hour period to cure because the breach there was so "vital" that it would not have been curable within 48 hours.[3] *Id.* at 231. The United States Court of Appeals for the Ninth Circuit affirmed, explaining that the district court properly interpreted the contract's 48-hour notice-and-cure provision to only apply to breaches that were curable within 48 hours. *Id.* at 232. Thus, HUDL's reliance on *L.K. Comstock* is improper, as HUDL did not argue below and does not argue on appeal that MSI's breaches were not curable within 30 days. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (providing that issues not raised on appeal are deemed waived). And, in any event, because the lease

[3]Additionally, the contract at issue there contained a second, conflicting cancellation provision, which further distinguishes *L.K. Comstock* from the issues before this court. *See L.K. Comstock*, 880 F.2d at 232.

agreement here provided that MSI would be entitled to further time as needed for breaches that were incurable within 30 days, we conclude that the court's reasoning in *L.K. Comstock* is inapposite to this case, and reject HUDL's argument that "default," as used in section 2611 of the lease agreement, did not include material breaches.

We therefore conclude that the proper interpretation of the term "default," is its common usage, meaning: "[t]he omission or failure to perform a legal or contractual duty." *Default*, *Black's Law Dictionary* (11th ed. 2019). And this definition would necessarily include a material breach by a contracting party. Additionally, the broad language of section 2611 requires written notice and an opportunity to cure upon MSI's failure to perform *any* "obligation" under the lease agreement, so it would contravene the plain language of the provision to exclude material breaches from requiring written notice and an opportunity to cure. *Cf. Matrix Grp. Ltd., Inc. v. Rawlings Sporting Goods Co.*, 477 F.3d 583, 589 (8th Cir. 2007) (rejecting a party's argument that material breaches were excluded from a contract's notice-and-cure provision because the plain text of the contract required notice and an opportunity to cure "any" breach).

For the foregoing reasons, and because HUDL has failed to present any argument on appeal or below demonstrating that the lease agreement requires interpretation outside of the scope of its plain language, we conclude that the district court erred by failing to enforce the plain language of section 2611 of the lease agreement, which required HUDL to provide MSI with written notice specifying the obligations that MSI failed to perform under the contract in order to give MSI the opportunity to cure within 30 days. *See Soro*, 131 Nev. at 739, 359 P.3d at 106 (explaining that unambiguous contracts are enforced as written); *see also Edwards v.*

Emperor's Garden Rest., 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (holding that the court need not consider claims that are not cogently argued or lack relevant authority).

Nevertheless, HUDL also asserts that, even if this court concludes the notice-and-cure provision is applicable here, any error by the district court in failing to apply the provision was harmless as HUDL provided MSI with sufficient notice of its alleged breaches. Our review of the record, however, reveals that HUDL did not provide MSI with the requisite written notice or an opportunity to cure its alleged breaches. Indeed, Norfolk testified at trial that HUDL did not provide MSI with written notice and an opportunity to cure any of MSI's apparent breaches in accordance with section 2611 of the lease agreement.

As stated above, a party's notice of termination "must be clear and unambiguous, reasonable, and in accordance with the terms of the contract." 17B C.J.S. Contracts § 614 (2023); *see also Nev. State Educ. Ass'n v. Clark Cnty. Educ. Ass'n (NESA)*, 137 Nev. 76, 81, 482 P.3d 665, 671 (2021) (stating that a party must give "clear and unequivocal notice of its intent" to terminate a contract (internal quotation marks omitted)). HUDL points to several emails in the record that it asserts provided sufficient notice to MSI of the four breaches found by the district court. However, these emails did not clearly and unambiguously identify the specific obligations that MSI had failed to timely perform under the lease agreement or inform MSI that it had 30 days to perform those obligations.[4] And HUDL admitted at trial that

[4]HUDL also points to emails from Titanium to MSI stating that MSI needed to enter a contract with Titanium as evidence of sufficient notice, but these emails are irrelevant here insofar as the lease agreement specifically required HUDL to provide MSI with written notice of its breaches, not a third party.

it did not provide the requisite written notice and opportunity to cure as required by the agreement. Further, to the extent that HUDL's August 5 notice of termination provided clear and unambiguous notice that MSI failed to obtain lender consent, it did not provide MSI with at least 30 days to cure. Thus, we conclude that HUDL did not provide MSI with written notice and an opportunity to cure any of MSI's four alleged breaches prior to termination, as required under section 2611 of the lease agreement.

We also conclude that the district court erroneously found that MSI adduced *no* testimony related to its alleged damages in support of its counterclaims at trial. The record supports that MSI presented *some* evidence of its alleged damages at trial which will also necessarily need to be considered on remand.

In summary, we conclude that, based on the plain language of the lease agreement, HUDL was required to provide MSI with written notice and an opportunity to cure its ostensible breaches pursuant to section 2611. Further, based on the record, we conclude that HUDL did not provide MSI with the requisite written notice or opportunity to cure its alleged breaches before seeking legal recourse in district court. Thus, we reverse the district court's findings of fact and conclusions of law, which were based upon its erroneous determination that the agreement's notice-and-cure provision did not apply thereby finding that MSI breached the lease agreement, and remand for further proceedings consistent with this order.[5]

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[5]While not addressed by the parties on appeal, we note that the lease agreement also contained a notice-and-cure provision that required MSI to provide HUDL with written notice and an opportunity to cure in the event HUDL failed to perform certain obligations, which the district court may need to consider in conjunction with MSI's counterclaims on remand.

It is so ORDERED.[6]

_____, C.J.
Gibbons

_____, J.
Bulla

_____, J.
Westbrook

cc: Hon. Erika D. Ballou, District Judge
Sylvester & Polednak, Ltd.
Luh & Associates
Eighth District Court Clerk

[6]Based on our disposition, we need not address MSI's remaining arguments on appeal. *See Engelson v. Dignity Health*, 139 Nev., Adv. Op. 58, 542 P.3d 430, 446 n.14 (Ct. App. 2023) (explaining that this court need not address issues that are unnecessary to resolve the case at bar). Additionally, insofar as the parties raise other arguments that are not specifically addressed herein, we have considered the same and conclude that they do not present a basis for further relief. Finally, we also necessarily vacate the district court's order awarding HUDL attorney fees, costs, and prejudgment interest. *See Iliescu, Tr. of John Iliescu, Jr. & Sonnia Iliescu 1992 Fam. Tr. v. Reg'l Transp. Comm'n of Washoe Cnty.*, 138 Nev., Adv. Op. 72, 522 P.3d 453, 462 (Ct. App. 2022) (vacating an award of attorney fees and costs when reversing the district court's decision).