

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT M. FISK,
Appellant,

vs.

RIVIERA HOTEL AND CASINO, A/K/A
RIVIERA OPERATING
CORPORATION,
Respondent.

No. 38583

FILED

MAY 15 2003

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

ORDER OF AFFIRMANCE

Appellant, Robert Fisk, appeals the district court's order granting summary judgment in favor of respondent, Riviera Hotel and Casino, a/k/a Riviera Operating Company, the defendant below. Fisk leased retail space at the Riviera Hotel and Casino. A dispute arose after Riviera exercised its right under the lease agreement to relocate Fisk's store. After Fisk filed a complaint for breach of contract, along with other related claims, the district court granted summary judgment in Riviera's favor. On appeal, Fisk asserts that the district court erred when it granted summary judgment in Riviera's favor because: (1) the lease agreement is unenforceable; and (2) genuine issues of material fact remain unresolved. We conclude that Fisk's arguments are without merit, and, accordingly, we affirm the district court's order granting summary judgment in favor of Riviera.

Fisk asserts that the lease agreement with Riviera was an unconscionable adhesion contract and that it should not be enforced. In particular, Fisk challenges a provision that limits his right to recover monetary damages and a "Transfer Premium" provision.

We conclude that the lease agreement is enforceable because it is not an adhesion contract or unconscionable. First, Fisk was not a mere

consumer,¹ but a business owner, who had prior experience operating a business and leasing commercial space. While Fisk was unable to negotiate more favorable terms, and he claims that he was unaware of many of the provisions in the lease agreement, these failures do not transform him into a consumer. Second, we have held that “both procedural and substantive unconscionability must be present [before] a court [may] exercise its discretion to refuse to enforce a contract or clause as unconscionable.”² Here, even if the challenged provisions of the lease agreement were viewed as being oppressive, or substantively unconscionable, there is no evidence that Fisk was denied a meaningful opportunity to decide if he wanted to agree to Riviera’s terms.³

Fisk also asserts that the district court erred in granting summary judgment because there remain genuine issues of material fact concerning whether: (1) Riviera had breached the terms of the lease agreement; (2) Riviera had interfered with Fisk’s prospective economic advantage; and (3) Riviera had breached its duty of good faith and fair dealing.

The district court correctly granted summary judgment. First, while Riviera failed to provide written notice as required by the lease

¹See, e.g., Burch v. Dist. Ct., 118 Nev. ___, ___, 49 P.3d 647, 650-51 (2002) (holding that purchasers of a new home were not bound by an unconscionable arbitration clause); Obstetrics and Gynecologists v. Pepper, 101 Nev. 105, 108, 693 P.2d 1259, 1261 (1985) (holding that hospital patients were not bound by an unenforceable term in an adhesion contract with a hospital).

²See Burch, 118 Nev. at ___, 49 P.3d at 650.

³See id.

agreement, Fisk ignored this requirement and proceeded as if the requirement had been satisfied. In McKeeman v. General American Life Insurance, this court stated that:

Waiver requires "an existing right, a knowledge of its existence, and an actual intention to relinquish it, or conduct so inconsistent with the intent to enforce the right as to induce a reasonable belief that it has been relinquished."⁴

Although waiver is ordinarily a question of fact,⁵ there are no facts to indicate that Fisk did not intend to waive the written notice requirement. Second, no genuine issues of material fact exist as to whether Riviera interfered with Fisk's prospective economic advantage. The plain language of the lease agreement granted Riviera the right to withhold its consent to the transfer of Fisk's lease "for any reason whatsoever." Therefore, since Riviera had a contractual justification for refusing to transfer Fisk's lease, Fisk's claim fails as a matter of law.⁶ Finally, there are no genuine issues of material fact remaining with regard to Riviera's alleged breach of its duty of good faith and fair dealing because Riviera did not breach the terms of the lease agreement and because there is no

⁴111 Nev. 1042, 1048, 899 P.2d 1124, 1128 (1995) (quoting Scott v. Federal Life Insurance Company, 19 Cal. Rptr. 258, 262 (Ct. App. 1962)).


⁵See Mill-Spex, Inc. v. Pyramid Precast Corp., 101 Nev. 820, 822, 710 P.2d 1387, 1388 (1985).

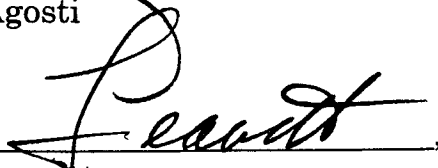
⁶See Consolidated Generator v. Cummins Engine, 114 Nev. 1304, 1311, 971 P.2d 1251, 1255 (1998) (holding that a plaintiff is required to prove that the defendant lacked a privilege or justification for its alleged interference in order to succeed on a cause of action for interference with economic advantage).


evidence to suggest that Riviera deliberately undermined the spirit or intention of the lease agreement.⁷

We conclude that the district court did not err when it granted summary judgment in favor of Riviera because the terms of the lease agreement were enforceable, and because there are no genuine issues of material fact remaining.⁸ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Agosti


_____, J.
Leavitt


_____, J.
Becker

cc: Hon. Sally L. Loehrer, District Judge
Frederick A. Santacrose
Gordon & Silver, Ltd.
Clark County Clerk

⁷See Hilton Hotels v. Butch Lewis Productions, 107 Nev. 226, 232, 808 P.2d 919, 922-23 (1991).

⁸After review, we conclude that Fisk's remaining arguments are without merit.