IN THE SUPREME COURT OF THE STATE OF NEVADA

CENTURY 21, CLARK PROPERTIES, INC., A NEVADA CORPORATION,
Appellant/Cross-Respondent,
vs.
JOHN SHAHIN, INDIVIDUALLY,
Respondent/Cross-Appellant.

No. 39706

FILED

DEC 21 2004

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

Appeal and cross-appeal from a district court judgment in a dispute concerning a real estate commission. Ninth Judicial District Court, Douglas County; Steven P. Elliott, Judge.

Respondent John Shahin, as president of the Buckeye Creek Corporation (Buckeye), entered into a listing agreement with appellant Century 21 Clark Properties, Inc. to sell the Buckeye Creek Project, a large tract of land and water rights in Douglas County.

Century 21 brokers introduced Steve Mothersell, president of SCM Corporation and a potential buyer, to the property. On behalf of SCM, Mothersell entered into a purchase and sale agreement with Shahin. However, due to some clouds on the title and Mothersell's difficulty in securing financing, SCM was unable to close as quickly as Shahin wanted. Don Bently and the Bently Family Limited Partnership, who were other potential buyers that Century 21 had also introduced to the property, made an offer to buy it. Despite ongoing negotiations with SCM, Shahin ultimately sold the property and water rights to Bently. Shahin did not pay a commission to Century 21.

SCM sued Bently, recovering the property and water rights at the same price for which it had bargained with Shahin. Century 21 sued Buckeye Creek Corporation, Shahin and Bently for breach of contract and

tortious interference with contractual relations. Bently and Century 21 settled, but Century 21 pursued its claims against Shahin and Buckeye. After a bench trial, the district court determined that Century 21 was not entitled to a commission on the Buckeye/SCM transaction because SCM was not a ready, willing and able buyer, but that it was entitled to the seller's portion of the commission on the Bently transaction. The district court also pierced the corporate veil, holding Shahin personally liable on behalf of Buckeye for Century 21's commission. On appeal, Century 21 challenges the district court's determination that it was not entitled to a commission on the SCM transaction. On cross-appeal, Shahin challenges the district court's determination that Century 21 was the procuring cause of the Bently sale and that Shahin was personally liable.

We will not disturb a district court's findings of fact if substantial evidence supports the findings. We review the district court's conclusions of law de novo.[1]

Entitlement to sales commission on Buckeye/SCM transaction

Century 21 argues that it was entitled to its commission on the Buckeye/SCM transaction because Century 21 brought SCM, a ready, willing and able buyer, to Shahin. Century 21 argues that, by signing the purchase and sale agreement, Shahin accepted SCM as a buyer and assumed any risk of breach or non-performance. Century 21 further contends that the evidence shows that SCM had two funding sources and, therefore, demonstrated ability to access funds for the purchase price within as little as twenty-four hours.

Generally, a real estate broker becomes entitled to his or her commission

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[1]Keife v. Logan, 119 Nev. 372, 374, 75 P.3d 357, 359 (2003).

> "when he has brought to the vendor a purchaser who is ready, willing and able to buy the property upon the terms on which the agent is authorized to sell, or when a written contract upon any terms acceptable to the seller has been entered into with the purchaser originally brought to the vendor by the agent."[2]

Century 21 argues that once the seller has entered into a valid contract with the buyer, the question of whether the buyer is ready, willing and able is no longer material because the seller had an opportunity to satisfy himself as to the buyer's ability to perform before executing the contract and, therefore, has assumed the risk of the buyer's nonperformance.[3] However, a real estate broker may not become entitled to the commission if a condition precedent to the earning of the commission exists.[4] For example, the seller may condition a broker's commission upon the closing of the sale or upon consummation of the land sale contract.[5]

The letter granting a nonexclusive listing agreement to Century 21, authored and signed by Shahin as president of Buckeye Creek Corporation, is ambiguous regarding whether the commission should be

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[2]Fleshman v. Hendricks, 93 Nev. 103, 104, 560 P.2d 1350, 1351 (1977) (quoting Engel v. Wilcox, 75 Nev. 323, 326, 340 P.2d 93, 94 (1959)).

[3]49 Am. Jur. 3D Proof of Facts § 5 (1998).

[4]12 Am. Jur. 2D Brokers § 242 (1997); see also Ferrara v. Firsching, 91 Nev. 254, 256, 533 P.2d 1351, 1352 (1975) (stating that "[w]hile it is the general rule that a broker's commission is earned when a valid and binding contract for sale or purchase is entered into with a ready, willing, and able buyer, even though the buyer later fails or refuses to comply with the agreement, it is equally well established that the payment of a commission may be dependent on a condition beyond that implied by the ordinary broker's contract").

[5]12 Am. Jur. 2D Brokers § 242 (1997).

earned upon finding a ready, willing and able buyer or upon some other condition precedent, such as close of escrow. The language in the letter requires that the agent succeed with an acceptable transaction; this language could be construed to mean that a sale must be completed or simply that the agent must bring an acceptable buyer to the table. Generally, ambiguities in a contract are construed against the drafter.[6]

When a contract is ambiguous, parol evidence also may be introduced to determine the parties' intent in construing the contract.[7] Shahin testified that he believed that a real estate broker was not entitled to a commission unless the transaction closed. The clause in the purchase and sale agreement also specified that the seller would pay Century 21 its commission at closing. Hence, some evidence was presented that a condition precedent existed to the earning of a commission, i.e., that the transaction had to close for the real estate brokers' rights to a commission to vest. However, Century 21 was not a party to the purchase and sale agreement, and we conclude that the clause in the purchase and sale agreement does not clearly show that a condition precedent existed. Therefore, we construe the ambiguous letter against the drafter and apply the general rule that a real estate broker need only bring a ready, willing and able purchaser to the transaction.

Thus, we turn to whether SCM was a ready, willing and able purchaser. The record reveals that SCM timely deposited $50,000 in earnest money into escrow upon execution of the purchase and sale

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[6]Dickenson v. State, Dep't of Wildlife, 110 Nev. 934, 937, 877 P.2d 1059, 1061 (1994).

[7]Margrave v. Dermody Properties, 110 Nev. 824, 829, 878 P.2d 291, 294 (1994).

agreement. The record also reflects that SCM was working with two potential lenders. However, other evidence demonstrates that SCM had not submitted a formal loan application to one potential lender, which would take at least two weeks to process, and another potential lender testified that he intended to buy the property himself and hold it until SCM could acquire funds to purchase it.

The district court concluded that SCM was not financially able because it could not obtain financing in a timely manner after the contract was executed. Century 21 contends that, by signing the purchase and sale contract, Shahin assumed the risk that SCM would not be financially able to complete the transaction. We previously have considered a buyer's financial ability after the execution of a purchase and sale contract and determined that the buyer need not have the cash in hand to be financially able to complete the purchase, but must be able to command the necessary funds.[8]

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[8]See Nolan v. State Dep't of Commerce, 85 Nev. 611, 614-15, 460 P.2d 153, 155-56 (1969) (determining that when buyers, who had no binding commitment from a lender when the seller accepted their offer, were not financially able, the broker had not earned his commission when the parties executed the purchase and sale contract). Although Nolan dates from 1969, modern authority from other jurisdictions continues to support its holding; see Daybreak Const. Specialties v. Saghatoleslami, 712 P.2d 1028, 1032 (Colo. Ct. App. 1985) (holding that a real estate broker was not entitled to a commission where the purchasers did not personally have sufficient funds to close and had no binding loan commitments); Margaret H. Wayne Trust v. Lipsky, 846 P.2d 904, 911 (Idaho 1993) (adopting the rule that, where escrow does not close because the buyer is financially unable to consummate the land sale transaction, the real estate broker is not entitled to a commission); Winkelman v. Allen, 519 P.2d 1377, 1383 (Kan. 1974) (stating that "[t]he general rule is that a real estate agent or broker is entitled to a commission if (a) he produces a buyer who is able, ready and willing to purchase upon the

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We conclude that substantial evidence supports the district court's findings that SCM was not a ready, willing and able purchaser. Although the purchase and sale agreement gave SCM the unilateral option of extending the close of escrow, SCM was required to exercise that option reasonably and in good faith.[9] SCM placed unreasonable demands on Shahin related to clearing title; SCM knew that this sale was a distress sale and the contract provided that time was of the essence. Therefore, we hold that the district court properly concluded that the January 29, 1998, deadline was a reasonable time for closing, after which Shahin properly cancelled the contract. Potential lenders' testimony supports the district court's finding that SCM could not tender the purchase price by January 29, 1998. Therefore, SCM was not a ready, willing and able buyer, and Century 21 was not entitled to a commission on the Buckeye/SCM transaction under the listing agreement.

Century 21 argues that, even if it is not entitled to the broker's commission under the listing agreement, the district court erred in failing to award Century 21 a commission on the Buckeye/SCM transaction under theories of unjust enrichment or quantum meruit.

Unjust enrichment is a quasi-contractual claim made in the absence of an express written agreement.[10] It appears from the record

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proffered terms or upon terms acceptable to the principal; (b) he is the efficient and procuring cause of a consummated deal").

[9]Hilton Hotels v. Butch Lewis Productions, 109 Nev. 1043, 1046, 862 P.2d 1207, 1209 (1993) (stating that all contracts impose upon the parties "the duty of good faith and fair dealing").

[10]LeasePartners Corp. v. Brooks Trust, 113 Nev. 747, 755, 942 P.2d 182, 187 (1997).

that the district court concluded, as Century 21 asserts, that the writing itself did not constitute the parties' agreement, but rather memorialized their oral agreement. To prove unjust enrichment, Century 21 had to show: (1) that it conferred a benefit upon Shahin, (2) that Shahin appreciated such benefit, (3) that Shahin accepted and retained such benefit, and (4) that it would be inequitable to allow Shahin to retain the benefit without paying for its value.[11]

The record reveals that Shahin, a former real estate broker, retained Century 21 to sell the Buckeye Creek Project and was aware of the extent of work required to sell such a large piece of real property as well as water rights. Century 21 performed by creating marketing materials and contacting potential buyers. Century 21's efforts resulted in Shahin and Mothersell entering into a purchase and sale agreement. However, as that transaction was not completed, it was not unfair to allow Shahin to retain the benefit of Century 21's marketing efforts.[12] Therefore, we agree with the district court's conclusion that Century 21 did not prove its unjust enrichment claim with regard to SCM.

With regard to Century 21's quantum meruit theory, the district court determined that it was not an appropriate theory of recovery "because real estate agents expend labor and money promoting a listing but are not entitled to a commission unless they procure a sale."

We have previously stated that "[q]uantum meruit recovery has been allowed where the buyer and seller act in bad faith to deprive the

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[11]Id.

[12]On the other hand, it would have been inequitable to allow Shahin to benefit from the sale to Bently, when Century 21 expended so much effort in marketing the property and introduced Bently to the property.

broker of his commission."[13] In all of the cases in which this court has held that a real estate broker was entitled to recovery based upon quantum meruit, the broker procured a ready, willing and able buyer, and the seller later sold the listed property directly to that same buyer without paying the broker's commission.[14] Because substantial evidence supports the district court's finding that SCM was not a ready, willing and able buyer, the district court properly found that quantum meruit was inapplicable to the SCM transaction.

Entitlement to commission on Buckeye/Bently transaction

On cross-appeal, Shahin argues that Century 21 was not entitled to a commission on the Buckeye/Bently transaction. Shahin asserts that Century 21 was not the procuring cause of the sale to Bently because Century 21 only had a non-exclusive listing agreement and so Shahin also could sell the land himself. Shahin further contends that, even if Century 21 were the procuring cause, it waived its right to any commission on the Bently transaction.

In determining whether a broker/agent is the procuring cause of a sale, the district court must consider whether the broker's conduct was trifling or substantial.[15] In non-exclusive listing agreements, "merely introducing the eventual purchaser is insufficient."[16] However, the

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[13]Summa Corp. v. DeSure Corp., 103 Nev. 144, 147, 734 P.2d 715, 717 (1987).

[14]See, e.g., Flamingo Realty v. Midwest Development, 110 Nev. 984, 879 P.2d 69 (1994); Morrow v. Barger, 103 Nev. 247, 737 P.2d 1153 (1987).

[15]Atwell v. Southwest Securities, 107 Nev. 820, 825, 820 P.2d 766, 769 (1991).

[16]Id. at 825, 820 P.2d at 769-70.

district court should give considerable weight to evidence that the broker first brought the sale to the buyer's attention or otherwise brought the buyer into the picture.[17]

Substantial evidence supports the district court's conclusion that Century 21 provided more than a mere introduction. After Shahin listed the property with Century 21 in 1995, Jim Nickerson contacted Bently about the property and registered Bently as a potential buyer with Shahin. Shahin testified that he understood that this was to protect Nickerson's right to a commission. Furthermore, Patricia Clark, of Century 21, testified that she communicated repeatedly with Bently regarding the Buckeye Creek Project and provided Bently with volumes of information, including information on water rights and maps. Additionally, because Century 21 had done significant work to clear title for Shahin in the SCM transaction, there was virtually nothing left for him to do in the Bently transaction. We conclude that substantial evidence supports the district court's conclusion.[18]

Shahin also contends that Clark waived her right to a commission. "Waiver occurs where a party knows of an existing right and either actually intends to relinquish the right or exhibits conduct so inconsistent with an intent to enforce the right as to induce a reasonable

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[17]Id. at 825, 820 P.2d at 770.

[18]As we noted earlier in this order, a real estate broker may be entitled to recovery based on quantum meruit. Thus, the district court erred as a matter of law in determining that quantum meruit is inapplicable to brokers and, therefore, was not an appropriate theory of recovery with respect to the Bently transaction. Nevertheless, the district court's error was harmless because it properly concluded that Century 21 could recover the seller's portion of the commission in the Bently transaction under either breach of contract or unjust enrichment theories.

belief that the right has been relinquished."[19] After closing with Bently, Shahin sought a letter from Clark waiving any claim to commission on the Bently transaction. Shahin implied that he would not pay the $17,850 that he owed on a promissory note to Clark and her business associate if she did not waive the commission. Shahin told Clark that he was moving to California, which would make collecting on the note more difficult, and Clark owed a fiduciary duty to her business partner to recover the amount of the note. While Clark did provide the waiver, we note that Shahin paid her no consideration to waive her right to a commission.[20] Substantial evidence supports the district court's findings that Shahin coerced Clark into writing the waiver letter and that Clark never intended to relinquish the right to a commission. Therefore, we determine that substantial evidence supports the court's conclusion that Century 21 did not intentionally and voluntarily waive its right to a commission on the Bently transaction.

Percentage of sales commission

Century 21 contends that its sales commission should be 6 percent. At issue is whether the letter from Shahin to Century 21 granting Century 21 a 5 percent commission was the controlling listing agreement, or whether Shahin and Century 21 subsequently increased the commission to 6 percent. The district court determined that the letter

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[19]Hudson v. Horseshoe Club Operating Co., 112 Nev. 446, 457, 916 P.2d 786, 792 (1996).

[20]Chwialkowski v. Sachs, 108 Nev. 404, 406, 834 P.2d 405, 406 (1992) (stating that "[a] release [of a claim] may be rescinded if obtained by mutual mistake or inadequate consideration"); see also Maynard v. Durham & S. R. Co., 365 U.S. 160, 163 (1961) (noting that a release given to a party without additional legal detriment lacks sufficient consideration).

embodied the parties' oral listing agreement and that no evidence indicated that the parties had otherwise altered the agreement.

Neither party disputes the fact that Century 21 entered into a listing agreement with Shahin for a 5 percent commission as represented by Shahin's letter to real estate broker Jim Nickerson. Shahin and Nickerson both testified that the commission later was increased to 6 percent. Generally, a promise to pay additional compensation for the same performance as already promised under a contract is not supported by consideration, and therefore, is unenforceable.[21] An exception to this general rule exists when the contracting parties did not anticipate adverse conditions or unforeseen difficulties so severe as to give rise to the promise of additional compensation.[22] No evidence in the record indicates that Shahin's promise to pay 6 percent resulted from unforeseen, adverse conditions or that Century 21 agreed to incur additional legal detriment. Additionally, nothing in the record shows that Century 21 relied to its detriment on the promise of a 6 percent commission. Thus, the doctrine of promissory estoppel does not apply,[23] and Century 21's commission was 5 percent.

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[21]Walden v. Backus, 81 Nev. 634, 637, 408 P.2d 712, 714 (1965) (recognizing that "consideration for an agreement is not adequate when it is a mere promise to perform that which the promisor is already legally bound to do").

[22]See Gregory G. Sarno, J.D., Annotation, Enforceability of Voluntary Promise of Additional Compensation Because of Unforeseen Difficulties in Performance of Existing Contract, 85 A.L.R. 3d §§ 2(a)-2(b), at 264-72 (1978).

[23]Merrill v. DeMott, 113 Nev. 1390, 1396, 951 P.2d 1040, 1043 (1997).

Calculation of commission owed

While the district court correctly awarded Century 21 the seller's portion of the commission on the Bently transaction, the court awarded an incorrect amount. Because Bently used his own agent, Century 21 was only entitled to the seller's portion of the transaction, or half of the 5 percent commission rate. The district court awarded a 2.5 percent commission on a $3,000,000 sale price. The district court erred in calculating Century 21's commission, because the undisputed sale price to Bently was $2,955,000. The commission should have been 2.5 percent of the $2,955,000 sale price, or $73,875. The district court's decision to award $75,000 was manifestly contrary to the evidence, and therefore, we reverse that portion of the district court's order setting the commission amount and remand for recalculation and reduction of the commission due Century 21 based on the $2,955,000 sale price.

Piercing the corporate veil

Shahin argues in his cross-appeal that no evidence supports the district court's finding that Buckeye Creek Corporation was Shahin's alter ego. Shahin contends that he formed Buckeye Creek Corporation as the developing entity of the Buckeye Creek Project, that there was no unity of ownership or interest, and that there was no actual or constructive fraud to warrant piercing the corporate veil.

This court "will uphold a district court's determination with regard to the alter ego doctrine if substantial evidence exists to support the decision," unless it is clear that the district court reached the wrong conclusion.[24] To pierce the corporate veil, the district court must find by a

[24]LFC Mktg. Group, Inc. v. Loomis, 116 Nev. 896, 904, 8 P.3d 841, 846 (2000).

preponderance of the evidence that the person asserted to be the alter ego influences and governs the corporation, there is unity of interest and ownership, and "'adherence to the corporate fiction of a separate entity would, under the circumstances, sanction [a] fraud or promote injustice.'"[25] Factors to consider in determining whether an alter ego relationship exists include "(1) commingling of funds; (2) undercapitalization; (3) unauthorized diversion of funds; (4) treatment of corporate assets as the individual's own; and (5) failure to observe corporate formalities."[26]

Here, Shahin does not dispute that he is the sole shareholder, director and officer of Buckeye Creek Corporation, or that he exerted complete control over the corporation. Regarding the unity of interest and ownership element, the evidence suggests that Shahin personally purchased the real property and water rights and transferred that property to Buckeye in 1991 in exchange for the corporation's stock. Buckeye was selling its holdings in large part to pay Shahin's personal debt to the IRS, which had recorded a lien against Buckeye's holdings that noted Buckeye was the alter ego of Shahin. The preliminary title report indicated that Shahin was personally liable on certain deeds of trust, which were paid through the Bently transaction, though Shahin testified that the debts were transferred to Buckeye. Shahin also admitted that Buckeye had no capital, indicating that it was undercapitalized. After the sale of Buckeye's real property, which covered Shahin's personal obligations, Buckeye declared bankruptcy. We conclude that substantial

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[25]Id. at 904, 8 P.3d at 846-47 (alteration in original) (quoting Polaris Industrial Corp. v. Kaplan, 103 Nev. 598, 601, 747 P.2d 884, 886 (1987)).

[26]Id. at 904, 8 P.3d at 847.

evidence supports the district court's determination of inseparable unity of interest and ownership.

Regarding whether adherence to the corporate fiction would promote fraud or injustice, the district court determined that, to allow Shahin to avoid liability to Century 21, after he had gone around Century 21 to close the sale with Bently, would promote an injustice. Again, substantial evidence supports the district court's determination. During escrow, there was enough money to pay Century 21 the seller's portion of the commission. However, Shahin used the purchase money primarily to pay his personal debts and to pay Eastside Memorial Park, an entity wholly owned and controlled by Shahin, approximately $200,000 for alleged loans to Buckeye Creek Corporation. This left the corporation penniless, and Buckeye subsequently filed for bankruptcy. Shahin testified that, if he had closed with SCM, he would have been approximately $200,000 short, and that Eastside Memorial Park would not have been paid because, as its sole shareholder, Shahin controlled that decision. In that case, Shahin could have paid Century 21 from the escrow funds available in the Bently transaction and partially repaid Eastside Memorial Park the remainder of the money. Although Shahin may not have defrauded Century 21, his actions certainly were unjust. He treated the corporation as if its assets were his own. Allowing him the corporate shield to avoid personal liability to Century 21 would promote injustice. The district court did not err in this regard.

Offsetting the award

The district court denied Shahin's motion to offset the judgment for $75,000 against him by the $79,000 Century 21 received from Bently pursuant to a settlement agreement. Whether Bently's

settlement should offset the judgment against Shahin is a question of law; hence, we review the district court's determination de novo.[27]

Shahin asserts that Century 21 essentially received a double recovery for the seller's portion of the commission: one recovery from Bently and a similar recovery from Shahin. Shahin contends that Bently was jointly and severally liable with Buckeye Creek Corporation. Shahin argues that the district court erred as a matter of law because NRS 101.040[28] mandates that the amount Bently paid be credited against any damages for the same injury assessed against Buckeye Creek Corporation or Shahin.

Century 21 counters that the claims against Bently and those against Buckeye and Shahin were distinct. Century 21 contends that it recovered damages from Shahin for breach of contract for Shahin's failure to pay Century 21's commission, but recovered damages from Bently for intentional torts.

Unlike other jurisdictions, this court has never held that a party who breaches a contract and a party who tortiously interferes with

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[27]Keife, 119 Nev. at 374, 75 P.3d at 359.

[28]NRS 101.040 provides:

> The amount or value of any consideration received by the obligee from one or more of several obligors, or from one or more of joint, or of joint and several obligors, in whole or in partial satisfaction of their obligations, shall be credited to the extent of the amount received on the obligations of all coobligors to whom the obligor or obligors giving the consideration did not stand in the relation of a surety.

that contract are jointly and severally liable.[29] Century 21 brought distinct claims against Shahin and Bently. The damages awarded against Shahin were for breach of contract, while Century 21's claims against Bently sounded in tort. Hence, the district court properly refused to apply the Bently settlement as an offset against the judgment against Shahin.

Based upon the foregoing discussion, we reverse that portion of the district court's judgment pertaining to the amount of Century 21's commission, affirm the remainder of the judgment and remand for a recalculation of Century 21's commission.

It is so ORDERED.

Becker, J.
Becker

Agosti, J.
Agosti

Gibbons, J.
Gibbons

cc: Hon. Steven P. Elliott, District Judge
Bader & Ryan
Prezant & Mollath
Douglas County Clerk

[29]See Bermil Corp. v. Sawyer, 353 So. 2d 579, 585 (Fla. Ct. App. 1977); Ross v. Holton, 640 S.W.2d 166, 173 (Mo. Ct. App. 1982); Armendariz v. Mora, 553 S.W.2d 400, 406 (Tex. App. 1977).