

IN THE SUPREME COURT OF THE STATE OF NEVADA

CARTANIA, INC., A NEVADA  
CORPORATION,  
Appellant,  
vs.  
GKT ACQUISITIONS, LLC, A NEVADA  
LIMITED LIABILITY COMPANY,  
Respondent.

No. 40372

**FILED**

APR 06 2004

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

ORDER OF AFFIRMANCE

Appellant, Cartania, Incorporated, appeals from a district court judgment awarding specific performance of a land sale contract.<sup>1</sup> On appeal, Cartania claims that the district court erred in concluding that the parties reached an enforceable agreement and in finding that respondent, GKT Acquisitions, LLC, was ready, willing and able to perform. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Cartania is a shell corporation owned by its sole principal, Frank Catania. Frank's son, Myles Catania, is a licensed real estate broker who handles Cartania's business affairs. GKT is a land holding company owned and operated by its three principals: Scott Gragson, John Kilpatrick and Robert Torres. GKT buys and sells vacant property in the Las Vegas area.

On August 3, 2000, GKT offered to purchase an unlisted property owned by Cartania. On October 13, 2000, Cartania submitted a "form" counteroffer dated October 12, 2000, which included the following handwritten terms.

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<sup>1</sup>See NRAP 3A.

1. Sales Price: \$850,000 Cash.
2. Earnest Money: \$5,000 to go Non-Refundable Immediately. 30 Days \$15,000 for [sic] Total \$20,000.
3. Seller Proceeds go to 1031 Tax Exchange.

The handwritten terms were drafted by Myles Catania and signed by Frank Catania. The Cartania counteroffer form contained "boxes" to be "checked" that were designed to confirm all other terms of the original offer and, theoretically, terms "agreed to" in previous counteroffers. Both boxes were left blank. Also, the counteroffer contained no expiration terms or a date of expiration.

On October 20, 2000, GKT accepted Cartania's counteroffer by opening escrow with United Title and depositing \$5,000, representing the non-refundable earnest money due in the counteroffer. On October 31, 2000, United Title forwarded a title report to GKT and Cartania. On November 6, 2000, the title company prepared an escrow package with a written escrow time line reciting, in part, as follows: "Buyer to make additional deposit in the amount of \$15,000 (as defined in paragraph 2 of Counter Offer) [on] 11/30/00." This deadline was set thirty days following the buyer's receipt of the preliminary title report. While Myles Catania received the escrow documents on November 7, 2000, neither he nor his father ever reviewed, read or signed them. On that same date, Myles Catania contacted United Title to verify the opening of escrow, and separately contacted GKT to verify acceptance of the counteroffer.

At some point, the parties came to disagree regarding the date the additional \$15,000 earnest money was due. Cartania asserted that the \$15,000 payment was due thirty days from the counteroffer of October 12, 2000, thus making the payment due on or before November 12, 2000. Although asserting that the payment was due November 30, 2000, GKT

claimed to have sent its \$15,000 check to United Title on November 17, 2000, which United Title receipted on November 30, 2000.

Following a heated exchange with GKT on November 30, 2000, Myles Catania communicated his desire to cancel the escrow to United Title. Thereafter, United Title sent cancellation instructions to the parties, indicating that it would only cancel escrow if both the buyer and the seller agreed. Catania signed the instructions and forwarded them to United Title. GKT refused cancellation and informed United Title that it intended to complete the transaction. Catania at all times refused to execute the escrow documents.

From November 30, 2000, to June 21, 2001, GKT and Catania did not communicate. On June 21, 2001, GKT filed suit against Catania, alleging breach of contract and seeking specific performance. On October 5, 2001, Catania filed an amended answer and counterclaim. In the answer, Catania denied the formation of a valid contract. In the counterclaim, it alleged breach of contract for failure to timely deposit the additional \$15,000 in earnest money, abuse of process, and slander of title.<sup>2</sup>

Following a bench trial, the district court concluded that a valid contract existed between the parties, which did not indicate that time was of the essence. Additionally, the court determined that provision concerning the due date for payment of the additional \$15,000 was ambiguous, and that it would construe the ambiguity against Catania as the drafter. The court also concluded that GKT was ready, willing, and able to purchase the subject property at the time of the contract.

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<sup>2</sup>Catania withdrew the counterclaim at trial. Its primary claim at trial was that no contract per the escrow time line was ever formed.

Accordingly, the court ordered specific performance of the contract, and required GKT to place sufficient funds to complete the sales transaction with United Title on or before September 18, 2002.

At a hearing on September 17, 2002, GKT requested that the district court stay its escrow deposit order because the purchase was to be funded from an Internal Revenue Code 1031 exchange and an appeal by Cartania would result in a substantial tax loss.<sup>3</sup> The district court stayed the transaction pending this appeal.

The district court denied Cartania's subsequent motions, including a motion to retax costs and disbursements, a motion to amend findings of facts and conclusions of law, and a motion to stay execution on any award of costs and disbursements. Cartania filed its timely notice of appeal.

## DISCUSSION

### Essential terms

Cartania argues that it never agreed to the additional terms concerning the due date for payment of the additional \$15,000 earnest money contained in the escrow documents sent to Myles Catania. More particularly, that the counteroffer required the payment thirty days after GKT's receipt of the counteroffer, on or before November 12, 2000; not thirty days following receipt of the preliminary title report as set forth in the escrow time line. Cartania goes on to argue that the time frame for payment of the funds was a term essential to the formation of a contract.

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<sup>3</sup>26 U.S.C. § 1031 (2001) allows a seller of land to defer paying federal capital gains taxes on any gain if the money is held by a qualified intermediary and used for replacement property to be closed within 180 days of the initial sale. GKT also presented evidence that they were ready to deposit one million dollars from 1031 tax exchange funds.

It therefore argues that the district court manifestly erred in concluding that an agreement was reached per the time line, thus precluding specific performance. GKT contends that the counteroffer provided the essential terms of a valid, binding and enforceable land-sales contract.

A contract for the sale of land must satisfy the statute of frauds<sup>4</sup> and contain the essential terms of (1) the names of the parties; (2) the terms and conditions of the parties; (3) the subject matter or property involved; and (4) the amount of consideration.<sup>5</sup>

Here, each party to the contract is listed by name. The land to which the contract relates is listed as Clark County Assessor's Office parcel number 176-04-601-012. The terms and conditions of the parties and the amount of consideration are evidenced by the sales price of \$850,000; \$5,000 due immediately, \$15,000 in thirty days, and seller proceeds go to a 1031 exchange. Thus, the counteroffer contained all of the essential terms for the formation of a valid contract and the acceptance by GKT resulted in an enforceable agreement. Supplementary details such as the time of performance may be shown by parol evidence or can be implied by law or custom.<sup>6</sup> Parol evidence is inadmissible to contradict or vary unambiguous terms of contract.<sup>7</sup> However, "parol

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<sup>4</sup>NRS 111.210(1).

<sup>5</sup>Pentax Corp. v. Boyd, 111 Nev. 1296, 1299-1300, 904 P.2d 1024, 1026 (1995).

<sup>6</sup>United Services Auto Ass'n v. Schlang, 111 Nev. 486, 493, 894 P.2d 967, 971 (1995); NRS 104.2202(1).

<sup>7</sup>Sandy Valley Assocs. v. Sky Ranch Estate, 117 Nev. 948, 954, 35 P.3d 964, 967-68 (2001).

evidence is admissible to determine the true intent of the parties when a contract is ambiguous.”<sup>8</sup>

While we conclude that the \$15,000 payment term was an essential element of the contract, the timing of the payment as worded was not. The counteroffer was silent as to what would stimulate the running of the thirty-day period, and contained no explicit deadline for the payment. Based upon the evidence at trial, the thirty-day period could have reasonably been construed to start on the date of receipt of the counteroffer by GKT, or thirty days from GKT’s receipt of the preliminary title report as per the escrow time line. Thus, as worded, the time for payment language is ambiguous because it can be reasonably construed as either party now seeks to construe it. This ambiguity was certainly subject to clarification through parol evidence.

We will not overrule a district court’s judgment unless it is clearly erroneous or is not supported by substantial evidence.<sup>9</sup> The record reveals substantial evidence from which the district court could determine that the \$15,000 payment was due thirty days from receipt of the escrow documentation. Here, the district court properly considered the customary practices of the parties and United Title’s escrow documents as parol evidence, along with Cartania’s counteroffer, in concluding that the \$15,000 was due thirty days from the parties’ receipt of the preliminary title report. Additionally, Myles Catania received a copy of the escrow documents from United Title and did not object to the terms to either

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<sup>8</sup>Id.

<sup>9</sup>Id. at 954, 35 P.3d at 968.

United Title or GKT.<sup>10</sup> Finally, the actual timing of the \$15,000 payment effected substantial performance of the agreement.

We therefore conclude that the district court's decision that the parties entered into a valid enforceable agreement as clarified in the escrow instructions was supported by substantial evidence and was not clearly erroneous.

Ready, willing and able

Cartania contends that the district court erred in finding that GKT was ready, willing and able to perform the contract because GKT never deposited the total purchase money with United Title. We disagree.

"To be awarded specific performance, a purchaser who has not tendered the purchase price must demonstrate that she is ready, willing, and able to perform."<sup>11</sup>

At trial and on hearing of its motion to stay, GKT provided evidence that it had sufficient funds to purchase Cartania's property through its 1031 account. GKT did not deposit the remaining balance with United Title out of fear that it could not comply with the 1031 guidelines, thus subjecting it to exorbitant taxes, if Cartania proceeded with an appeal.<sup>12</sup>

We conclude that GKT provided substantial evidence to demonstrate it was ready, willing and able to perform both at the time the

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<sup>10</sup>Cartania contends that only Frank Catania could accept any changes in the terms stated in the counteroffer. We disagree and conclude that, at all times, Myles Catania was authorized to act, and acted for, Cartania. His receipt of the escrow documents and his actions in response thereto bound Cartania.

<sup>11</sup>Serpa v. Darling, 107 Nev. 299, 304, 810 P.2d 778, 782 (1991).

<sup>12</sup>See supra n.3.


parties entered the contract and at trial. Therefore, the district court did not err in determining GKT was ready, willing and able to perform the contract.<sup>13</sup>


CONCLUSION

We affirm the district court's judgment awarding GKT specific performance of the land sale contract. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 C.J.  
Shearing

 J.  
Rose

 J.  
Maupin

cc: Hon. Ronald D. Parraguirre, District Judge  
Law Offices of F. Jonathan Farren  
Lionel Sawyer & Collins/Las Vegas  
Jones Vargas/Las Vegas  
Clark County Clerk

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<sup>13</sup>We have considered Cartania's other assignments of error and find them without merit.