IN THE SUPREME COURT OF THE STATE OF NEVADA

JULIAN MARCUERQUIAGA AND EDITH MARCUERQUIAGA, TRUSTEES OF THE JULIAN W. MARCUERQUIAGA AND EDITH M. MARCUERQUIAGA 1980 LIVING TRUST,
Appellants,
vs.
THE STATE OF NEVADA, DIVISION OF WILDLIFE,
Respondent.

No. 33658

FILED

SEP 11 2002

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

JULIAN MARCUERQUIAGA AND EDITH MARCUERQUIAGA, TRUSTEES OF THE JULIAN W. MARCUERQUIAGA AND EDITH M. MARCUERQUIAGA 1980 LIVING TRUST,
Appellants,
vs.
STATE OF NEVADA, DIVISION OF WILDLIFE,
Respondent.

No. 35628

ORDER OF AFFIRMANCE

These consolidated appeals stem from a failed transaction for the sale of a conservation easement between the Marcuerquiagas, the appellants, and the Nevada Department of Wildlife (NDOW), the respondent. In Docket No. 33658, the Marcuerquiagas appeal the district court's order granting NDOW's motion to dismiss and denying the Marcuerquiagas' motion for leave to amend their complaint. In Docket No. 35628, the Marcuerquiagas appeal the district court's order granting

NDOW's motion to dismiss. We affirm the district court's orders in both cases.

Regarding Docket No. 35628, we note that the essence of the Marcuerquiagas' separate action against NDOW is their allegation that the parties had memorialized the terms of their agreement in a memorandum sufficient to satisfy the statute of frauds. We agree, however, with the district court's conclusion that the statute of frauds was not satisfied.

On this issue, the Marcuerquiagas first contend that the requirements of the statute of frauds are met by reading together various documents. To satisfy the signature requirement, the Marcuerquiagas offer certain documents that arguably relate to the proposed transaction with NDOW, but which contain only the signatures of the Marcuerquiagas, not of any representative of NDOW. Conceding this, the Marcuerquiagas contend that Nevada's statute of frauds, as embodied in NRS 111.210(1), which requires a writing memorializing the transaction "be subscribed by the party by whom the . . . sale is to be made," requires only the signature of the party holding the interest in land that is the subject of the contract. The Marcuerquiagas misread this statute. NRS 111.210(1) is no abrogation of the common law requirement that the memorandum contain the signature of "the party to be charged," or the party against whom the agreement is sought to be enforced.[1] Requiring the signature of only the party seeking to sell an interest in land would defeat the purpose of the statute of frauds by potentially allowing a

[1]Restatement (Second) of Contracts § 135 cmt. a (1981).

landowner to unilaterally bind an unsuspecting party to a land sale contract without evidence of the alleged purchaser's intent to be bound.

The Marcuerquiagas next contend that NDOW should be estopped from raising the statute of frauds because NDOW asserted that an agreement had been reached and the Marcuerquiagas relied on those assertions in undertaking certain actions. Even assuming, however, that the Marcuerquiagas indeed relied on NDOW's conduct, and further assuming that their reliance was reasonable, the actions they allege to have taken in reliance are not sufficient to render the statute of frauds inapplicable.[2] The party seeking enforcement notwithstanding the statute of frauds must have "so changed his position that injustice can be avoided only by specific enforcement."[3] Actual conveyance to, or possession of the disputed property by, the party against whom enforcement of the purported transaction is sought is generally required.[4] Conducting a

---

[2]See Edwards Indus. v. DTE/BTE, Inc., 112 Nev. 1025, 1033, 923 P.2d 569, 574 (1996) (setting forth the requirements of estoppel where the statute of frauds has been invoked).

[3]Restatement (Second) of Contracts § 129 (1981).

[4]See Union Paving Co. v. Teglia, 70 Nev. 494, 497-98, 274 P.2d 841, 843 (1954) (concluding that conveyance of the parcel was part performance that made the statute of frauds inapplicable); Micheletti v. Fugitt, 61 Nev. 478, 487, 134 P.2d 99, 103 (1943) (concluding that the statute of frauds was not applicable where the contract was fully performed on one side and the buyer took possession of the property); see also Wiley v. Cook, 94 Nev. 558, 565, 583 P.2d 1076, 1080 (1978) (concluding that the statute of frauds did not invalidate a 99-year lease where there had been part performance that included assisting in the resale of the property, paying taxes, repairing and maintaining the property, assuming several notes and obligations, and permitting the claimant to occupy a portion of the property).

$2,500 appraisal and transferring the property to some third party unrelated to the transaction simply do not meet this standard.

We conclude, as a matter of law, that the Marcuerquiagas have not satisfied the statute of frauds.[5] Thus, the district court did not err in granting summary judgment to NDOW on this basis in Docket No. 35628. We need not address the other grounds the district court relied on in granting summary judgment to NDOW, the statute of limitations, res judicata, and failure to join an indispensable party, or the parties' arguments concerning those grounds.

Regarding Docket No. 33658, the Marcuerquiagas assert that the district court erred in refusing to allow them to amend their complaint to assert two claims directly against NDOW. Generally, leave to amend should be freely granted, but it need not be if the proposed claims are futile.[6]

The Marcuerquiagas first attempted to assert a claim of negligence, claiming that NDOW breached a duty to them by failing to create and provide the necessary documents to complete the transaction. In essence, the duty that the Marcuerquiagas ask us to impose would require negotiating parties to complete a transaction simply because they have settled some of the terms. Following the basic policies underlying

---

[5]See Ray Motor Lodge, Inc. v. Shatz, 80 Nev. 114, 118, 390 P.2d 42, 44 (1964) (noting that "whether the 'writing' required by the statute is legally sufficient presents a question of law").

[6]Allum v. Valley Bank of Nevada, 109 Nev. 280, 287, 849 P.2d 297, 302 (1993); see also Miller v. Rykoff-Sexton, Inc., 845 F.2d 209, 214 (9th Cir. 1988) (noting that proposed claims will be considered futile when "no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim or defense").

contract law, we conclude as a matter of law that no such duty exists.[7] Thus, the Marcuerquiagas' negligence claim would have been futile and dismissal was proper.

The Marcuerquiagas also sought leave to amend to assert a claim for breach of the implied covenant of good faith and fair dealing. The law imposes this covenant on all contracting parties.[8] But in order for the covenant to be imposed, there must first be an enforceable contract.[9] As discussed above, there was no enforceable contract here because the memorandum the Marcuerquiagas rely on does not satisfy the statute of frauds.[10]

---

[7]Lee v. GNLV Corp., 117 Nev. 291, 295, 22 P.3d 209, 212 (2001) (noting that the question of whether a duty exists "is a question of law solely to be determined by the court").

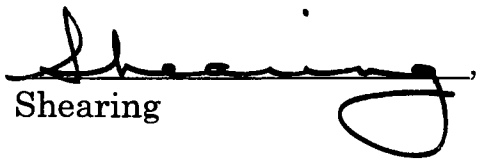
[8]See Hilton Hotels v. Butch Lewis Productions, 109 Nev. 1043, 1046, 862 P.2d 1207, 1209 (1993).

[9]See e.g., LaForge v. State, University System, 116 Nev. 415, 997 P.2d 130, (2000) (addressing the covenant of good faith implied in an employment contract); Consolidated Generator v. Cummins Engine, 114 Nev. 1304, 971 P.2d 1251 (1998) (purchase agreement); Powers v. United Servs. Auto. Ass'n, 114 Nev. 690, 962 P.2d 596 (1998) (insurance contract); Hilton Hotels, 109 Nev. at 1046, 862 P.2d at 1209 ("It is well established within Nevada that every contract imposes upon the contracting parties the duty of good faith and fair dealing.") (emphasis added).

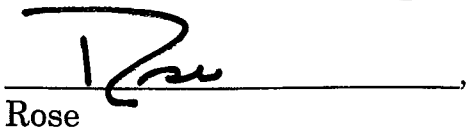
[10]Having concluded that the district court's ultimate ruling was correct, we need not address whether the district court properly treated the Marcuerquiagas' motion as one for summary judgment.

Having concluded that the Marcuerquiagas' contentions in both appeals lack merit, we

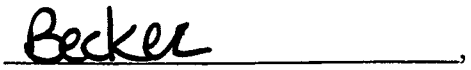
ORDER the judgments of the district court AFFIRMED.



_____, J.
Shearing



_____, J.
Rose



_____, J.
Becker

cc: Hon. Richard Wagner, District Judge
Lyle & Murphy
Attorney General/Carson City
Humboldt County Clerk
Bradley Drendel & Jeanney