IN THE SUPREME COURT OF THE STATE OF NEVADA

DEL BUNCH, JR., AND ERNESTINE BUNCH,
Appellants/Cross-Respondents,
vs.
CANYON FAIRWAYS COMMUNITY ASSOCIATION, A NON-PROFIT CORPORATION,
Respondent/Cross-Appellant.

No. 42014

FILED

JUN 15 2005

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

ORDER OF AFFIRMANCE

This is an appeal and cross-appeal from an amended judgment in an action involving the interpretation of covenants, conditions, and restrictions. Eighth Judicial District Court, Clark County; Mark R. Denton, Judge.

In December 1996, appellants/cross-respondents Del Bunch, Jr. and Ernestine Bunch (collectively the Bunches) purchased a lot within Canyon Fairways Residential Community (Canyon Fairways) in Las Vegas, Nevada. The Covenants, Conditions and Restrictions, and Reservation of Easements for Canyon Fairways Community Association (CC&Rs) required that construction commence no later than three years after the first transfer date. If construction did not commence on time, the Association would levy a $50.00 per day assessment on the property. The Bunches did not begin building within the required time frame, and the specific assessment was levied. After the Bunches filed an action, the district court held that the assessment was valid and enforceable as reasonable liquidated damages, and awarded attorney fees to Canyon Fairways. The Bunches appeal this judgment, arguing that the failure to receive a hearing before the assessment violated Nevada law and the

CC&Rs; that the assessment was a fine, not liquidated damages; and that the fines are limited by Nevada law. The Association appeals the district court's award of attorney fees.

DISCUSSION

The Bunches' failure to commence construction within the time limits imposed by the CC&Rs is undisputed. The Bunches maintain that the CC&Rs and Nevada law require the executive board of the Canyon Fairways Association to hold a hearing before seeking the specific assessment.

Covenants, conditions, and restrictions have been interpreted as contracts in Nevada when a conveyance has been made within the specific language of a set of covenants, conditions, and restrictions.[1] Other states have held more specifically that covenants, conditions, and restrictions are contracts binding the parties to their terms.[2] The paramount consideration in interpretation of covenants, conditions, and restrictions is the parties' intent.[3] Therefore, contract principles govern. Contract interpretation is a question of law subject to a de novo standard

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[1]Sandy Valley Assocs. v. Sky Ranch Estates, 117 Nev. 948, 954, 35 P.3d 964, 968 (2001).

[2]Ticor Title Ins. Co. v. Rancho Santa Fe Ass'n., 223 Cal. Rptr. 175, 177 (Ct. App. 1986); Heritage Heights Home Owners Ass'n v. Esser, 565 P.2d 207, 210 (Ariz. 1977).

[3]14859 Moorpark Homeowner's Assn. v. VRT Corp., 74 Cal. Rptr.2d 712, 721 (Ct. App. 1998).

of review.[4] Contracts will be construed based upon their written language and enforced as written whenever possible.[5]

This court follows the well-established principle that "where two interpretations of a contract provision are possible, a court will prefer the interpretation which gives meaning to both provisions."[6] When a contract's meaning is ambiguous, it is proper to look beyond the contract's words for the parties' intent, which can be determined by evaluating the circumstances surrounding the agreement and also the parties' subsequent acts.[7] These are factual determinations, and accordingly, we defer to the district court's findings that are supported by substantial evidence.[8]

Section 6.4 of the CC&Rs contains the applicable design and construction schedules. This provision, with emphasis added, mandates that, "[t]he Owner of each Unit (other than Declarant) shall cause the design and construction of a Residence to occur" within three years from the First Transfer Date. Section 6.4 further provides that the amount of $50.00 per day is the proper assessment to be levied and that the assessments are considered liquidated damages.

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[4]Grand Hotel Gift Shop v. Granite St. Ins., 108 Nev. 811, 815, 839 P.2d 599, 602 (1992).

[5]Kaldi v. Farmers Ins. Exch., 117 Nev. 273, 278 21 P.3d 16, 20 (2001) (quoting Ellison v. C.S.A.A., 106 Nev. 601, 603, 797 P.2d 975, 977 (1990)).

[6]Quirrion v. Sherman, 109 Nev. 62, 65, 846 P.2d 1051, 1053 (1993).

[7]Stuhmer v. Centaur Sculpture Galleries, 110 Nev. 270, 273, 871 P.2d 327, 330 (1994).

[8]Jordan v. Bailey, 113 Nev. 1038, 1044, 944 P.2d 828, 832 (1997).

The Bunches maintain that Section 6.4 is ambiguous because it provides that "[A]ny sum so assessed shall be a Specific Assessment against the applicable Owner and Unit in accordance with Article 7." The Bunches suggest that this statement is ambiguous since, according to them, it is unclear whether Article 7 is referring to Article 7 in the CC&Rs or Article 7 in the Bylaws. We conclude that the quoted language is not susceptible to two interpretations because it is clear from the CC&Rs that the "Article 7" refers to specific assessments found in Section 7 of the CC&Rs.

Section 7.4 of the CC&Rs, dealing with specific assessments, states that, "the Board shall give the Owner prior written notice and an opportunity for a hearing before levying any Specific Assessment under this subsection (b)." In 1999, however, the requirements in the CC&Rs were all permissive, and there was no affirmative requirement on Canyon Fairways to hold a hearing if the Bunches did not request one in writing.

The Bunches also argue that NRS 116.31085 requires reversal of the district court's decision. NRS 116.31085, as it read in 1999, stated in pertinent part, "[a]n executive board shall meet in executive session to hold a hearing on an alleged violation of the governing documents unless the unit's owner who allegedly committed the violation requests in writing that the hearing be conducted by the executive board at an open meeting."

Statutory interpretation is a question of law subject to de novo review.[9]

Read in context, this statute deals with the ability of a unit member to be present at meetings and addresses whether meetings are to

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[9]Firestone v. State, 120 Nev. 13, ____, 83 P.3d 279, 281 (2004).

be open or closed. NRS 116.31085(3) is therefore not pertinent to the Bunches' claim of error. Additionally, the record reflects that in 1999, the executive board met in February, May, and November, and at all meetings specific assessments for failure to abide by the construction schedule were discussed. Thus, the open meeting requirements of NRS 116.31085 have been met, and NRS 116.31085(3) does not demand reversal.

The Bunches did not comply with the construction time limits or request a hearing pursuant to the CC&Rs. The district court held that the Bunches violated the CC&Rs, and in particular, that Section 7.4 of the CC&Rs required a hearing only if the Bunches requested one. The Association sent several letters informing the Bunches of the possibility of a specific assessment being levied against their property, and that if they wished to dispute this assessment, they had to request a hearing in writing. The Bunches never requested a hearing in writing. Failure to request a hearing as required may result in a waiver of that right.[10] The

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[10]National Independent Coal Operators Association v. Kleppe, 423 U.S. 388, 397-98 (1976) (stating in dictum that a failure to request a hearing waives any right to a hearing and that the power to require a hearing by a request therefore constitutes an opportunity for a hearing); United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33, 37 (1952) (stating that failure to request a hearing results in the waiver of any right a party may have had to a hearing); Crownite Corp. v. Watt 752 F.2d 1500, 1502 (9th Cir. 1985) (stating, "Absent extreme circumstances, failure to request a hearing results in the waiver of any right a party may have had to a hearing"); Georgia-Pacific Corp. v. EPA, 671 F.2d 1235, 1242-43 (9th Cir. 1982) (stating that failure to request a hearing results in the waiver of any right a party may have had to a hearing); Tracy A. v. Superior Court, 12 Cal. Rptr. 3d 684, 691-92 (Ct. App. 2004) (stating that following notice of a guardianship hearing "the parent has a right to an evidentiary hearing; that right, however, can be waived by failure to request the hearing or object to the contents of the section 1513 report");

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Bunches waived any potential right to a hearing they may have had when, after notice, they failed to request in writing that a hearing be held. Furthermore, the Bunches have never articulated what matters should have been considered at a hearing or how conducting one would have prevented or mitigated the specific assessment.

The Specific assessment was not a fine, and the liquidated damages provision is valid.

The Bunches next argue that the amount of the specific assessment violates NRS 116.31031. We disagree. NRS 116.31031 empowers the executive board of an association to impose a fine on a unit owner for failure to comply with the governing documents for those violations that do not threaten the health and welfare of the common-interest community. Clearly the imposition of a fine does not apply to a violation that threatens the community's health and welfare. Failure to construct within the time frame imposed in the CC&Rs poses just such a threat. Failure to commence construction as required by the CC&Rs threatens the health and welfare of the community because of the environmental impact, potential damage to the infrastructure of the community (including streets, curbs, sidewalks, etc.), and the expectation of purchasers who count on construction to commence so that they are not residing next to an empty lot indefinitely. Therefore, we conclude that a specific assessment for delaying commencement of construction does not come within the intention of NRS 116.31031 as a fine. Additionally, we

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In re Rentel, 729 P.2d 615, 617 (Wash. 1986) (stating in a bar disciplinary proceeding, when neither respondent nor his attorney requested oral argument, that right was waived).

note that NRS 116.310305 was added in 2003 and indicates that a construction penalty is not a fine.[11] Subsequent enactments to the Nevada Revised Statutes are considered "persuasive evidence of what the legislature intended by the first statute."[12] Even without NRS 116.310305, the assessment levied against Bunch was not a fine; it was a specific assessment for failure to comply with a contractual term set forth in the CC&Rs.

A liquidated damages clause is prima facie valid unless the challenging party proves that its application amounts to an unenforceable penalty.[13] In order to prove that liquidated damages constitute a penalty, "the challenging party must persuade the court that the liquidated damages are disproportionate to the actual damages sustained by the injured party."[14] "A clause setting liquidated damages is favored and will be enforced if reasonable and not a penalty."[15]

This court has differentiated between penalties and liquidated damages by stating that, "the distinction between a penalty and liquidated damages is that a penalty is for the purpose of securing performance,

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[11]NRS 116.310305(3).

[12]Sheriff v. Smith, 91 Nev. 729, 734, 542 P.2d 440, 443 (1975).

[13]Joseph F. Sanson Investment v. 268 Limited, 106 Nev. 429, 435, 795 P.2d 493, 497 (1990).

[14]Mason v. Fakhimi, 109 Nev. 1153, 1156-57, 865 P.2d 333, 335 (1993).

[15]Buchanan v. Kettner, 984 P.2d 1047, 1048 (Wash. Ct. App. 1999).

while liquidated damages is the sum to be paid in the event of non-performance."[16]

The unfortunate use of terminology by Canyon Fairways does not change the fact that the specific assessments were liquidated damages set forth in the CC&Rs, and thus valid. The amount assessed does not represent a penalty, for Section 6.4 of the CC&Rs indicates that "per diem amounts [assessed] represent liquidated damages rather than a penalty." These sums were to be paid in the event of non-performance as opposed to penalties to secure performance. The record demonstrates the harm to the community and its infrastructure if construction was unduly delayed. Further, the total assessment against the Bunches at the time of judgment was approximately ten and one half percent (10.5%) of the total resale price of the property. Similar percentages have been held to be reasonable in determining an amount for liquidated damages.[17]

Finally, the Bunches suggest that the specific assessments in this case constitute an adhesion contract. Contracts of adhesion involve

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[16]Mason, 109 Nev. at 1156-57, 865 P.2d at 335.

[17]See, e.g., Forest Marketing Enterprises, Inc. v. State, Department of Natural Resources, 104 P.3d 40 (Wash. Ct. App. 2005) (thirty-five percent of timber contract price reasonable); Mason, 109 Nev. 1153, 865 P.2d 333, (ten percent of purchase price reasonable); Hooper v. Breneman, 417 So.2d 315 (Fla. Dist. Ct. App. 1982) (thirteen and one third percent of purchase price reasonable); Gomez v. Pagaduan, 613 P.2d 658 (Haw. Ct. App. 1980) (approximately twelve and one half percent total damages reasonable); Wilfong v. W.A. Schickedanz Agency, Inc., 406 N.E.2d 828 (Ill. App. Ct. 1980) (ten percent of purchase price reasonable); Curtin v. Ogborn, 394 N.E.2d 593 (Ill. App. Ct. 1979) (approximately seven percent of purchase price reasonable).

questions of unconscionability.[18] Whether a contractual provision is unconscionable is a question of law subject to de novo review.[19]

Adhesion contracts have been defined in Nevada as, "standardized contract forms offered to consumers of goods and services essentially on a 'take it or leave it' basis, without affording the consumer a realistic opportunity to bargain."[20] "The distinctive feature of an adhesion contract is that the weaker party has no choice as to its terms."[21] Such a contract is unconscionable if it is unduly oppressive and does not fall within the reasonable expectations of the weaker party.[22]

Adhesion contracts may be enforced when there is "'plain and clear notification of the terms and an understanding of consent.'"[23] Further, adhesion contracts may be valid if they fall "within the reasonable expectations of the weaker . . . party."[24]

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[18]D.R. Horton, Inc. v. Green, 120 Nev. ____, ____, 96 P.3d 1159, 1162 (2004); Patterson v. ITT Consumer Financial Corp., 18 Cal. Rptr. 2d 563, 565 (Ct. App. 1993).

[19]D.R. Horton, Inc., 120 Nev. at ____, 96 P.3d at 1162.

[20]Obstetrics and Gynecologists v. Pepper, 101 Nev. 105, 107, 693 P.2d 1259, 1260 (1985).

[21]Id.

[22]Id. at 107-08, 693 P.2d at 1261.

[23]Burch v. Dist. Ct., 118 Nev. 438, 443, 49 P.3d 647, 650 (2002) (quoting Obstetrics and Gynecologists, 101 Nev. at 107, 693 P.2d at 1261).

[24]Obstetrics and Gynecologists, 101 Nev. at 107-08, 693 P.2d at 1261; see also Bernstein v. GTE Directories Corp., 827 F.2d 480, 482 (9th Cir. 1987) (applying Nevada law).

While the CC&Rs were not a bargained-for exchange between the parties, Del Bunch, Jr. indicated at trial that he was familiar with the requirements of the CC&Rs and that he had studied them extensively. Also, Bunch's familiarity with the CC&Rs indicates that the provisions fit within Bunch's reasonable expectations. The Bunches' assertion that the CC&Rs is a contract of adhesion is without merit.

Attorney fees

In its cross-appeal, the Association asserts that the district court erred by not awarding it attorney fees incurred during arbitration. An award of attorney fees will not be disturbed without a showing of a manifest abuse of discretion.[25] Attorney fees are recoverable if a contractual or statutory provision allows those fees.[26]

Attorney fees are provided for in sections 18.14 and 18.2(f) of the CC&Rs. Additionally, NRS 38.330(7)(b) provides for statutory attorney fees after a complaint in a civil action is filed. Therefore, the district court did not abuse its discretion by not including an award for attorney fees generated in connection with the arbitration.

CONCLUSION

The district court properly determined that the Bunches failed to comply with the requirements set forth in the CC&Rs, violated the contractual provisions of the CC&Rs, and are subject to any contracted-for liquidated damages provision contained within the CC&Rs, in particular

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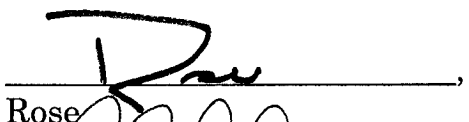
[25]Nelson v. Peckham Plaza Partnerships, 110 Nev. 23, 26, 866 P.2d 1138, 1139-40 (1994).

[26]Bd. of Gallery of History v. Datecs Corp., 116 Nev. 286, 288, 994 P.2d 1149, 1150 (2000).

the specific assessments of $50.00 per day for failure to commence construction. Additionally, the district court did not abuse its discretion in failing to award attorney fees stemming from work done in preparation for the arbitration in this matter.

Accordingly we,

ORDER the judgment of the district court AFFIRMED.



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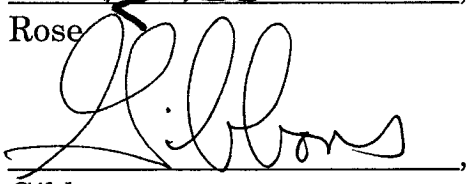

_____, J.
Gibbons

_____, J.
Hardesty

cc: Hon. Mark R. Denton, District Judge
Ellsworth Moody & Bennion Chtd
Lavelle & Associates
Clark County Clerk