IN THE SUPREME COURT OF THE STATE OF NEVADA

ALBERT D. MASSI,
Appellant,
vs.
CHARLES L. RUTHE, TRUSTEE OF THE CHARLES L. RUTHE SEPARATE PROPERTY TRUST DATED 04/25/95,
Respondent.

No. 42589

FILED

JUN 15 2005

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

ORDER OF AFFIRMANCE

This is an appeal from a summary judgment in a real property case. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

This case arises out of an agreement to purchase real property in North Las Vegas, Nevada. Albert Massi entered into an agreement to purchase a tract of undeveloped land from the Charles L. Ruthe Separate Property Trust (Trust).[1] Realtor Eddie Gutzman represented Massie in the transaction, Ruthe represented himself and all discussions concerning the terms of the contract took place between Gutzman and Ruthe. The sale agreement required Massi to deposit $25,000.00 in earnest money. The earnest money was to be applied to the final purchase price. If Massi accepted the title report, the earnest money was considered non-refundable, whether or not the sale was concluded. The title report was accepted, and the earnest money became non-refundable.

The property was initially zoned for commercial use, but after execution of the sale agreement and prior to the close of escrow, the property was rezoned residential. Ruthe had no involvement in the City's

[1]The Trust held the property; however, Charles Ruthe was a negotiating party to this contract.

decision to rezone the property, and Gutzman discovered the change in zoning while escrow was pending. Massi refused to continue with the transaction and requested a refund of his earnest money deposit. Ruthe refused, and the district court granted summary judgment in favor of Ruthe, finding the earnest money non-refundable since the title report had been accepted. Massi appeals that order, arguing that ambiguity in the contract formation and mutual mistake of fact preclude a grant of summary judgment.

DISCUSSION

This court will conduct a de novo review of a decision by the lower court to grant summary judgment.[2] To successfully oppose a motion for summary judgment, the non-moving party must affirmatively demonstrate that there is either a disputed question of material fact or that the moving party is not entitled to judgment as a matter of law.[3] These allegations must be demonstrable with admissible evidence or relevant legal authority.[4]

Contract interpretation is a question of law subject to a de novo standard of review.[5] Contracts are reviewed, interpreted, and enforced based on their clear and unambiguous language and terms.[6]

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[2]Continental Ins. Co. v. Murphy, 120 Nev. ___, ___, 96 P.3d 747, 749 (2004).

[3]Wayment v. Holmes, 112 Nev. 232, 235, 912 P.2d 816, 819 (1996).

[4]Id.

[5]Farmers Ins. Exch. v. Neal, 119 Nev. 62, 64, 64 P.3d 472, 473 (2003).

[6]Kaldi v. Farmers Ins. Exch., 117 Nev. 273, 278, 21 P.3d 16, 20 (2001).

Courts may not distort the plain meaning of an agreement using the "guise of interpretation."[7] Whether an ambiguity exists is a question of law.[8]

"A contract is ambiguous if it is reasonably susceptible to more than one interpretation."[9] When interpreting an ambiguous contract, the court may go beyond the express terms and "'examine the circumstances surrounding the parties' agreement in order to determine the true mutual intentions of the parties.'"[10] The examination should include the circumstances surrounding the contract's execution, as well as subsequent acts and declarations of the parties.[11] "An interpretation which results in a fair and reasonable contract is preferable to one that results in a harsh and unreasonable contract."[12] Since 1878, this court has held that a contract is to be interpreted through all of its provisions in light of the subject matter of the contract, as well as the circumstances surrounding the creation of the contract.[13]

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[7]Watson v. Watson, 95 Nev. 495, 496, 596 P.2d 507, 508 (1979).

[8]Margrave v. Dermody Properties, 110 Nev. 824, 827, 878 P.2d 291, 293 (1994).

[9]Id.

[10]Shelton v. Shelton, 119 Nev. 492, 497, 78 P.3d 507, 510 (2003) (quoting Hilton Hotels v. Butch Lewis Productions, 107 Nev. 226, 231, 808 P.2d 919, 921 (1991)).

[11]Trans Western Leasing v. Corrao Constr. Co., 98 Nev. 445, 447, 652 P.2d 1181, 1183 (1982).

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

[13]See Kennedy v. Schwartz, 13 Nev. 229, 231 (1878).

The final contract for purchase and sale of the property did not contain any provisions that related directly to zoning and zoning changes. Massi and Ruthe were never in direct contact while negotiating the purchase of the property. Negotiations were conducted between Ruthe and Eddie Gutzman, who was acting on behalf of Massi.[14] Gutzman and Ruthe never discussed possible zoning issues until after the contract was signed. It was not until after the proposed zoning change by the city and Massi's rejection of Ruthe's counteroffer for extension of time at closing that Massi indicated that zoning was a basis of the bargain.

Nevertheless, Massi directs our attention to clause 4 and the language in the drafts of that clause before the agreement was signed. While the initial drafts of the agreement make reference to Massi's right to create a parcel map and apply for a zoning change, nothing in the final agreement addresses zoning or parcel map applications or changes. Clause 4 simply requires each party to execute, acknowledge and deliver documents reasonably necessary to carry out the intent and purpose of the agreement. Nothing about this language is susceptible to different meanings or creates an ambiguity. Further, the evidence surrounding, and subsequent to, the execution of the contract may be examined in order to determine the intent of the parties, for it is not barred by the parol evidence rule.[15] Neither the initial drafts of the agreement nor any other evidence presented on the motion for summary judgment creates a

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[14]No one claims Gutzman acted as a dual sales agent in the transaction.

[15]Crow-Spieker # 23 v. Robinson, 97 Nev. 302, 305, 629 P.2d 1198, 1199 (1981).

genuine issue of material fact that it was the intention of both parties that the property must be zoned commercial as a condition to the purchase.

Mutual mistake of fact

Massie next argues that there exists a genuine issue of material fact precluding summary judgment as to a mutual mistake by the parties. We disagree.

Through equity, where the contract no longer conforms to the parties' previous understanding or intentions, the parties may reform a contract based on a mutual mistake of fact.[16] Both parties must be mistaken as to a vital fact upon which they base their bargain for a mutual mistake of fact to exist.[17] "One who acts, knowing that he does not know certain matters of fact, makes no mistake as to those matters."[18] If a person is aware of uncertainties, a mistake does not exist at all.[19]

No mutual mistake of fact existed in this instance. Gutzman and Ruthe never discussed the zoning of the property, and it was not a term on which the bargain for both parties was based. Ruthe was not concerned with the zoning of the property, and he never represented that the property was zoned commercial. The zoning of the property was discussed by Gutzman and Massi, independent of Ruthe.

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[16]Helms Constr. v. State ex rel. Dep't Hwys., 97 Nev. 500, 503, 634 P.2d 1224, 1225 (1981); see also Allenbach v. Ridenour, 51 Nev. 437, 279 P. 32 (1929).

[17]General Motors v. Jackson, 111 Nev. 1026, 1032, 900 P.2d 345, 349 (1995).

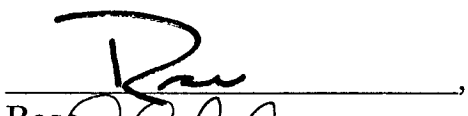
[18]Tarrant v. Monson, 96 Nev. 844, 845, 619 P.2d 1210, 1211 (1980).

[19]Id.; cf. Prince v. Friedman, 42 S.E.2d 434, 437 (1947) ("Lack of knowledge or ignorance of a fact is not the same as mistake.").

There was a change in the zoning of the property after the parties entered into the agreement. But neither party knew of the zoning change before Gutzman's assistant attended a workshop where the zoning change was discussed. Also, the only language in initial drafts of the agreement relating to zoning did not speak to the parties' belief as to existing zoning use; it merely spoke to costs associated with applications for zoning changes to be initiated by Massie. There is no evidence that Ruthe knew of a mistaken belief by Massi that the property would remain zoned commercial through the close of escrow.

Accordingly we,

ORDER the judgment of the district court AFFIRMED.



_____, J.
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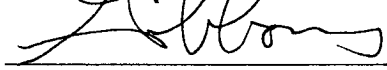

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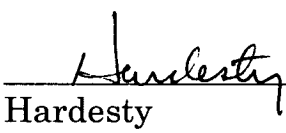

_____, J.
Hardesty

cc: Hon. Valerie Adair, District Judge
Albert D. Massi, Ltd.
Lyles & Associates
Clark County Clerk