IN THE SUPREME COURT OF THE STATE OF NEVADA

NATIONAL REHAB PARTNERS, INC., A DELAWARE CORPORATION,
Appellant,
vs.
HIGH DESERT THERAPISTS, INC., A NEVADA CORPORATION; L. RICHARD STEPHENSON, AN INDIVIDUAL; REGINA STEPHENSON, AN INDIVIDUAL; WESLEY P. GRANSTROM, AN INDIVIDUAL; AND LAURA R. GRANSTROM, AN INDIVIDUAL,
Respondents.

No. 42629

FILED

SEP 29 2006

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

ORDER OF AFFIRMANCE

This is an appeal from a district court summary judgment in an action for declaratory relief. First Judicial District Court, Carson City; Michael R. Griffin, Judge.

Appellant National Rehab Partners, Inc. (NRP) appeals from an order granting summary judgment in favor of respondents High Desert Therapists, Inc. and others[1] (collectively HDT) on an issue of contract interpretation. The parties are familiar with the facts, and we do not recount them in this order except as necessary for our disposition.

NRP contends that the district court erred by granting summary judgment because it misinterpreted the contract provisions at issue. Specifically, NRP argues that Asset Purchase Agreement section 1.6.3 required NRP to apply Generally Accepted Accounting Principles

[1]The other respondents include Richard Stephenson, Regina Stephenson, Wesley P. Granstrom, and Laura R. Granstrom.

(GAAP) to calculate its earnings for the Earnout. By applying Financial Accounting Standard (FAS) 121 under GAAP, NRP asserts that it permissibly calculated a loss of the assumed contracts cancelled by Carson-Tahoe Hospital in December 2001. According to NRP, this loss resulted in no Earnout due to HDT for the fiscal year ending September 30, 2001.

Conversely, HDT contends that the district court did not err by granting summary judgment. According to HDT, NRP's application of FAS 121 to account for a loss of the assumed contracts was nothing more than a setoff provided by Asset Purchase Agreement section 1.7.3. However, because the assumed contracts were cancelled in December 2001—after the June 30, 2001, deadline by which NRP could claim a setoff—NRP had no right under the contract to a setoff. HDT also argues that if NRP were permitted to take a loss in the way it suggests, then section 1.7.3 would be meaningless, which is inconsistent with the principles of contract interpretation. We agree with HDT and, thus, with the district court's grant of summary judgment.

This court reviews orders granting summary judgment de novo, without deference to the district court's findings.[2] Summary judgment is appropriate when the pleadings and other evidence on file demonstrate that no genuine issue of material fact exists and that the

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[2]Wood v. Safeway, Inc., 121 Nev. ___, ___, 121 P.3d 1026, 1029 (2005) (citing GES, Inc. v. Corbitt, 117 Nev. 265, 268, 21 P.3d 11, 13 (2001) (citing Caughlin Homeowners Ass'n v. Caughlin Club, 109 Nev. 264, 266, 849 P.2d 310, 311 (1993))).

moving party is entitled to judgment as a matter of law.[3] Summary judgment is appropriate for interpretation of a contract when no extrinsic evidence has been submitted by the parties raising genuine issues of material fact.[4]

The parties presented no extrinsic evidence to support their interpretations of the Asset Purchase Agreement. Therefore, this court is, as the district court was, limited to the face of the contract for interpretation.

Asset Purchase Agreement section 6.7 provides that the agreement shall be construed under the laws of Tennessee.[5] Under Tennessee law, "[t]he central tenet of contract construction is that the intent of the contracting parties at the time of executing the agreement should govern."[6] The parties' intent is presumed to be that specifically expressed in the body of the contract.[7] "'In other words, the object to be attained in construing a contract is to ascertain the meaning and intent of the parties as expressed in the language used and to give effect to such

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[3]Id. (citing NRCP 56(c); Tucker v. Action Equip. and Scaffold Co., 113 Nev. 1349, 1353, 951 P.2d 1027, 1029 (1997)).

[4]See Musser v. Bank of America, 114 Nev. 945, 947, 964 P.2d 51, 52 (1998) (citing Grand Hotel Gift Shop v. Granite St. Ins., 108 Nev. 811, 815, 839 P.2d 599, 602 (1992)).

[5]The parties do not dispute that Tennessee law applies to the interpretation of the Asset Purchase Agreement.

[6]Planters Gin v. Federal Compress, 78 S.W.3d 885, 890 (Tenn. 2002) (citing Empress Health and Beauty Spa, Inc. v. Turner, 503 S.W.2d 188, 190 (Tenn. 1973)).

[7]Id.

intent if it does not conflict with any rule of law, good morals, or public policy.'"[8]

The court's first task is to determine whether the contract's language is ambiguous.[9] If the contractual provision in question is susceptible to more than one reasonable interpretation, then the provision is ambiguous.[10] If ambiguous, the court will generally construe the contract's language against the drafting party.[11] If unambiguous, then the literal meaning of the contract's language controls.[12] When a contract's language is '"'"plain, complete, and unambiguous, the intention of the parties must be gathered from that language, and from that language alone . . . .' A strained construction may not be placed on the language used to find an ambiguity where none exists.'"[13]

We conclude that the language in Asset Purchase Agreement sections 1.6.3 and 1.7.3 is unambiguous and can be read harmoniously under HDT's interpretation. First, the language in section 1.6.3 referencing GAAP clearly indicates the parties' intent to only apply GAAP

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[8]Id. (quoting 17 Am. Jur. 2d Contracts § 245 (1964)).

[9]Id.

[10]Id.

[11]Hanover Insurance Company v. Haney, 425 S.W.2d 590, 592 (Tenn. 1968). This tenet of contract interpretation remains applicable to current Tennessee law. See, e.g., Ralph v. Pipkin, 183 S.W.3d 362, 367 (Tenn. Ct. App. 2005).

[12]Planters Gin, 78 S.W.3d at 890.

[13]Id. at 891 (quoting Turner, 503 S.W.2d at 190-91 (quoting 17 Am. Jur. 2d Contracts § 245)).

to the calculation of interest, taxes, depreciation and amortization, which are not to be included in calculating earnings for the Earnout. Rather, section 1.6.3 specifies that earnings are to be calculated before interest, taxes, depreciation and amortization (EBITDA). Because earnings for the Earnout are to be calculated as EBITDA, the parties did not intend GAAP to apply to calculation of the Earnout.[14]

Second, under Asset Purchase Agreement section 1.7.3, the parties clearly intended that NRP's right to a setoff would end on June 30, 2001. We agree with HDT that NRP's calculation of a loss from cancellation of the assumed contracts to reduce the amount of the Earnout was nothing more than a setoff. Because the assumed contracts were terminated in December 2001, NRP no longer had a right to a setoff. Therefore, NRP's reduction of its earnings by the loss of the assumed contracts was improper.

Third, if NRP were permitted to reduce its earnings as it did, Asset Purchase Agreement section 1.7.3 would be meaningless. As mentioned, section 1.7.3 provided for a right to setoff if the assumed contracts were terminated before June 30, 2001. However, if the assumed contracts were terminated before June 30, 2001, and if NRP were permitted to apply FAS 121 as it did, then it would always have the effect of reducing NRP's earnings from the assumed contracts to zero or a negative number. Thus, section 1.7.3 would never be invoked.

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[14]This conclusion is also supported by the Securities and Exchange Commission's (SEC) interpretation of EBITDA as a non-GAAP financial measure. See Conditions for Use of Non-GAAP Financial Measures, 68 Fed. Reg. 4820, 4822 (March 28, 2003) (discussing that definition of non-GAAP financial measure in SEC Regulation G, codified at 17 C.F.R. § 244.101, includes EBITDA).

NRP's construction of the Asset Purchase Agreement does not give full effect to all of the contract's provisions. We conclude that HDT's interpretation is the only reasonable interpretation and does not create an ambiguity. Therefore, the district court correctly determined that HDT was entitled to judgment as a matter of law. Accordingly, we

ORDER the judgment of the district court AFFIRMED.[15]

Douglas, J.

Becker, J.

Parraguirre, J.

cc: Hon. Michael R. Griffin, District Judge
Wm. Patterson Cashill, Settlement Judge
Hale Lane Peek Dennison & Howard/Reno
Dyer, Lawrence, Penrose, Flaherty & Donaldson
Carson City Clerk

[15]We note that the parties have stipulated to the amount of the Earnout owed by NRP to HDT in the event that this court affirms the district court's grant of summary judgment. Therefore, we need not address that issue.