

IN THE SUPREME COURT OF THE STATE OF NEVADA

LANDMARK HOMES AND
DEVELOPMENT, INC., A NEVADA
CORPORATION; SANTERRA, LLC, A
NEVADA LIMITED LIABILITY
COMPANY; JAMES BAWDEN,
INDIVIDUALLY; AND LOU BORREGO,
INDIVIDUALLY,
Appellants,

vs.

SIERRA GATEWAY VENTURES, LLC,
A NEVADA LIMITED LIABILITY
COMPANY; SILVERSTAR
ASSOCIATES, INC., A NEVADA
CORPORATION; STRAND CAPITAL
CORPORATION, A NEVADA
CORPORATION; RENO
DEVELOPMENT, LTD., A NEVADA
CORPORATION; CONTE
DEVELOPMENT CORPORATION, A
NEVADA CORPORATION; AND
PAVICH & ASSOCIATES, A NEVADA
CORPORATION,
Respondents.

LANDMARK HOMES AND
DEVELOPMENT, INC., A NEVADA
CORPORATION; SANTERRA, LLC, A
NEVADA LIMITED LIABILITY
COMPANY; JAMES BAWDEN,
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SIERRA GATEWAY VENTURES, LLC,
A NEVADA LIMITED LIABILITY
COMPANY; SILVERSTAR
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CORPORATION; STRAND CAPITAL
CORPORATION, A NEVADA

No. 45951

FILED

SEP 18 2007

JANE T. M. BLOOM
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

No. 46442

07-20594

CORPORATION; RENO
DEVELOPMENT, LTD., A NEVADA
CORPORATION; CONTE
DEVELOPMENT CORPORATION, A
NEVADA CORPORATION; AND
PAVICH & ASSOCIATES, A NEVADA
CORPORATION,
Respondents.

ORDER OF REVERSAL AND REMAND

These are consolidated appeals from district court judgments awarding specific performance, interest, and attorney fees in a real property contract dispute. Second Judicial District Court, Washoe County; Robert H. Perry, Judge.

Appellants Landmark Homes and Development, Inc., et al., (collectively, "Landmark") challenge the district court's decision to award specific performance to respondents Sierra Gateway Ventures, LLC, et al., (collectively, "Sierra Gateway"), arguing that the district court erred in determining that the parties entered into an enforceable contract. The parties are familiar with the facts, and we do not recount them except as pertinent to our disposition. For the following reasons, we reverse.

Standard of review

Generally, "[c]ontract interpretation is subject to a de novo standard of review."¹ "However, the question of whether a contract exists is one of fact, requiring this court to defer to the district court's findings unless they are clearly erroneous or not based on substantial evidence."²

¹May v. Anderson, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005).

²Id. at 672-73, 119 P.3d at 1257.

“Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion.”³

Substantial evidence does not support the district court’s determination that Landmark and Sierra Gateway entered into an enforceable contract

The requirements for an enforceable contract in Nevada are “an offer and acceptance, meeting of the minds, and consideration.”⁴ “With respect to contract formation, preliminary negotiations do not constitute a binding contract unless the parties have agreed to all material terms.”⁵ Thus, “[a] valid contract cannot exist when material terms are lacking or are insufficiently certain and definite.”⁶ When parties agree to material terms, however, a contract can be formed even though the contract’s exact language is not finalized until later.⁷ Material terms “include, e.g., subject matter, price, payment terms, quantity, duration, compensation, and the dates of delivery and production, so that the promises and performance to be rendered by each party are reasonably certain.”⁸

In this case, the parties signed a “Term Sheet,” which opened with the following two sentences:

³Wright v. State, Dep’t of Motor Vehicles, 121 Nev. 122, 125, 110 P.3d 1066, 1068 (2005) (internal quotation marks omitted).

⁴May, 121 Nev. at 672, 119 P.3d at 1257.

⁵Id.

⁶Id.

⁷Id.

⁸17A Am. Jur. 2d Contracts § 190 (updated 2007).

“This Term Sheet sets forth the material terms and conditions of an agreement between the parties . . . regarding the formation of a limited liability company to acquire, entitle and develop and sell certain real property described below. This Term Sheet is intended to provide the basis for a definitive operating agreement between the parties.”

After a trial at which an advisory jury determined that the parties entered into an enforceable contract, the district court found that “the parties mutually intended to be bound, and are bound, by the provisions of [their] ‘Term Sheet.’” The district court also determined that “any additional terms that would have been included in [the ‘definitive operating agreement’ contemplated by the opening paragraph of the Term Sheet] were separate from, and incidental to, the agreement made in the ‘Term Sheet.’”

After reviewing the record, we conclude that substantial evidence does not support these findings. To the contrary, we believe that the evidence demonstrates that the parties intended the Term Sheet to indicate an agreement on certain material terms that would become binding only after the parties reached a “definitive operating agreement.”

Term Sheet’s opening paragraph

Initially, we note that the Term Sheet’s opening description of its purpose and scope limits its enforceability. Although, taken alone, the first sentence appears to demonstrate that the parties intended the Term Sheet to be binding because they had reached “the material terms and conditions of an agreement,” the second sentence of the opening paragraph reveals that this was not the case. That sentence states, “[t]his Term Sheet is intended to provide the basis for a definitive operating agreement between the parties.” In our opinion, the second sentence indicates a clear

contemplation of future negotiations, the result of which would be a more detailed, binding agreement.

Notably, in Loma Linda University v. Eckenweiler, this Court recognized that “there is no contract until [an] agreement is reached on all terms under negotiation.”⁹ There, the parties conducted oral negotiations, which resulted in an agreement on some terms of a contract but no agreement on other terms.¹⁰ After the district court found that the parties reached an enforceable contract with respect to the terms that they had agreed upon, this court reversed, concluding, “[e]ven though certain terms of the offer were agreed upon, other important terms were not. Further negotiation as to such other terms was contemplated” and thus no contract resulted.¹¹

Similarly, in this case, the parties reached an agreement with respect to certain of “the material terms and conditions” of the transaction between the parties. However, the plain language of the first paragraph of the Term Sheet shows that the parties contemplated those terms to be part of a greater, more detailed “definitive operating agreement.” In fact, one month before the parties executed the Term Sheet, Nick Pavich sent a letter to Silverstar Development explaining that Sierra Gateway intended “to meet all the obligations of our side, but only with the proper executed contracts and agreements in place . . . an executed Term Sheet [is] the first step toward the draft of those proper contracts and agreements[.]” In

⁹86 Nev. 381, 384, 469 P.2d 54, 56 (1970).

¹⁰Id. at 382-384, 469 P.2d at 55-56.

¹¹Id. at 384, 469 P.2d at 56.

addition, a second e-mail sent between parties on Sierra Gateway's side of the deal clearly illustrates that Sierra Gateway did not consider its obligations to be binding until "we all execute the definitive operating agreement."

In light of this evidence, the use of the phrase "the material terms" in the Term Sheet does not prove that the parties intended the terms to be enforceable at that time. Rather, we conclude both sides intended the Term Sheet to serve as merely "the first step toward the draft of [the] proper contracts and agreements" that were necessary before contractual obligations arose between them. Although the parties came to agreement in the Term Sheet on "the material terms" of their purchase and development enterprise, substantial evidence shows that both sides contemplated future negotiations towards a "definitive operating agreement" before those terms were to become enforceable.

Lack of material terms

Moreover, in the absence of a definitive operating agreement, the transaction could not go forward because the Term Sheet lacked material provisions necessary for the development and resale of the property. The missing terms include allocation of profits and losses, distribution of cash from operations and sales, project management, managerial impasses on "major decisions,"¹² additional funding, and

¹²While the Term Sheet stated that the parties would submit to mediation in cases where the managers could not agree, the first draft of the definitive operating agreement did not include such a clause; similarly, a clause providing for the dissolution of the partnership in certain circumstances was absent from the proposed definitive agreement. These changes demonstrate that "the material terms and conditions" of
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accounting. Both parties continued to negotiate in good faith with respect to these missing terms after they signed the Term Sheet, but because the parties never reached an agreement on them, we conclude that no contract resulted.

Language of the Term Sheet: Sections 3, 4, and 5

Furthermore, the language of sections 3, 4, and 5 of the Term Sheet reinforces our conclusion that the Term Sheet was preliminary and unenforceable. For example, section 3 ("Formation of LLC") sets forth "the material terms to be incorporated into the operating agreement for the [jointly owned limited liability company]." The district court and Sierra Gateway consider the fact that the parties reached an agreement on "the material terms" of the operating agreement as irrefutable proof that the Term Sheet was binding. The detail with which the Term Sheet covers topics such as "Capital Contributions," "Ownership," "Decision Making," "Loan Procurement," "Dissolution," and "Formation Costs" suggests that the parties reached an enforceable contract. However, in light of the entire Term Sheet and the record, we conclude that such a finding is unreasonable. We consider the fact that the parties contemplated future negotiations towards an "operating agreement" as strong evidence that the Term Sheet was merely a preliminary document serving only to list those terms as to which no further negotiation was needed.

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the Term Sheet were still open for negotiation even after the parties signed the Term Sheet.

Separately, while section 3 demonstrates “the material terms” of an agreement, it also plainly states that those terms are “to be incorporated into the operating agreement” of the future company. Thus, the existence of certain material provisions do not override the fact that the parties considered negotiations to be ongoing and, in Sierra Gateway’s own words, did not consider the Term Sheet to be binding until “we all execute the definitive operating agreement.”¹³

In addition, while section 3 states that the capital contribution of each party was to be \$2,000,000 total, and this contribution was to be used toward the purchase of the property, section 4 (“Deposit/Damages”) provides that Sierra Gateway was not required to deposit its \$2,000,000 contribution until “execution of the definitive operating agreement.” When viewed together, sections 3 and 4 of the Term Sheet essentially provide that Sierra Gateway had no duty to contribute capital to the transaction until after the parties entered into a definitive operating agreement. If the definitive operating agreement held no significance, as argued by Sierra Gateway, then the Term Sheet would not have left such an important term conditioned on its execution. In our opinion, the only reasonable interpretation of this provision is that the parties conditioned Sierra Gateway’s capital deposit on the execution of the definitive operating agreement because both parties understood that “the material

¹³Additionally, the “dissolution” portion of section 3 opens with the statement, “[t]he Operating Agreement for the Company shall have a provision which addresses what occurs in the event of the failure of the managers to reach consensus on a ‘major decision’ as defined in the Agreement.” This sentence again demonstrates that negotiations were ongoing as to the final “operating agreement.”

terms and conditions” of the Term Sheet would only become effective at that point.

Section 4 (remedies provision)

Sierra Gateway cites section 4 (the remedies provision of the Term Sheet) as “the most definitive evidence that the parties intended it to be binding and enforceable.” According to Sierra Gateway, section 4 established specific performance as an available remedy should Landmark fail to transfer title to the LLC jointly owned by Sierra Gateway and Landmark. However, Sierra Gateway fails to mention that section 4, by its own terms, only became effective “[u]pon execution of the definitive operating agreement by the parties[.]” The fact that neither party had a remedy until both parties executed a “definitive operating agreement” pointedly demonstrates that the Term Sheet alone was not enforceable. In addition, while the parties used the phrases “breach of the terms hereof” and “default . . . hereunder” to describe when breaches might occur, these phrases only exhibit that the parties had agreed to the language of the remedies provision that would become enforceable “upon execution of the definitive operating agreement by the parties.” In fact, the drafted versions of the definitive operating agreement included sections tracking the exact language of the Term Sheet’s remedies provision, which indicates that the parties understood the Term Sheet to be a mere preliminary step in their negotiations.

Separately, Sierra Gateway cites the last sentence of section 4 for support. That line reads, “[t]he obligations of Landmark under this paragraph shall cease upon completion of the purchase of the Property pursuant to the Purchase Agreement and the terms of this Term Sheet.” However, this line does not change the fact that Sierra Gateway’s capital contribution to the purchase of the property did not come due until the

parties executed their definitive operating agreement. Thus, it is clear that the acquisition portion of the Term Sheet depended upon the existence of a definitive contract that still required additional negotiations by and between the parties.

Moreover, the record indicates that the parties were not interested in merely acquiring the property. Instead, as noted by the opening paragraph of the Term Sheet, the parties understood the transaction as necessarily involving the development and sale of the land. If the parties had intended the Term Sheet alone to govern their long-term relationship, they should have included language about the remedies available to each side in the case of a breach during the ownership and development of the property. The fact that the Term Sheet does not address these issues demonstrates that it was only an unenforceable, preliminary agreement.

Section 5 (best efforts clause)

Finally, section 5 of the Term Sheet ("Definitive Agreement") requires that the parties "exercise their best efforts to enter into a definitive operating agreement on or before July 18, 2003." Sierra Gateway argues that the parties used the term "best efforts" to describe their duties to negotiate a definitive operating agreement by July 18, 2003, because the enforceability of the Term Sheet did not depend on that definitive agreement. In other words, Sierra Gateway views the "best efforts" clause as showing that the definitive operating agreement was unnecessary in light of the Term Sheet. We conclude that this view of the "best efforts" clause is unreasonable, particularly in light of the complex transaction between the parties.

In fact, based on the "best efforts" clause, the Term Sheet appears to be more of a "contract to negotiate" than a contract for the

acquisition, ownership, development, and sale of property.¹⁴ For example, in Copeland v. Baskin Robbins U.S.A., the California Court of Appeals recognized that when parties come to an agreement to negotiate, “[i]f, despite their good faith efforts, the parties fail to reach ultimate agreement on the terms in issue the contract to negotiate is deemed performed and the parties are discharged from their obligations.”¹⁵ In such a situation, “[f]ailure to agree is not, itself, a breach of the contract to negotiate. A party will be liable only if a failure to reach ultimate agreement resulted from a breach of that party's obligation to negotiate or to negotiate in good faith.”¹⁶

In this case, it is clear that the parties reached an agreement on some “material terms and conditions.” However, they also contemplated a “definitive operating agreement” and agreed to use their “best efforts” to reach such a definitive agreement by July 18, 2003. Given that this date was less than two weeks before the July 31 escrow deadline on the land sale contract that Landmark entered into with the initial seller of the property, the “best efforts” clause more likely describes an understanding that both parties would negotiate in good faith in an attempt to reach a final, enforceable agreement by that date.¹⁷

¹⁴See Copeland v. Baskin Robbins U.S.A., 96 Cal. App. 4th 1251, 1257, 117 Cal. Rptr. 2d 875, 880-81 (2002).

¹⁵Id. at 1257, 117 Cal. Rptr. 2d at 880.

¹⁶Id. at 1257, 117 Cal. Rptr. 2d at 880-881 (citation omitted).

¹⁷In the context of the entire transaction, July 18 was important because Landmark was under pressure to come up with the money necessary to complete the purchase of the property in question by the end
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of July. If the parties were unable to reach a definitive agreement by the time escrow closed on the initial deal, Landmark risked losing the property altogether.

After signing the Term Sheet, the parties sent copies of proposed definitive agreements back and forth until late July. In each proposal, the reviewing side made changes and suggestions based on the concerns of the other party. Eventually, the closing date of the land sale contract approached and Landmark began to seek outside financing. Landmark only bought the property with outside financing after the parties failed to reach a final agreement and Sierra Gateway refused to release the funding necessary to make the purchase. While Sierra Gateway argues that this purchase breached the Term Sheet, we conclude that Landmark's duties, if any, were discharged as in Copeland, when the parties were unable to reach a final agreement. See 96 Cal. App. 4th at 1257, 117 Cal. Rptr. 2d at 880-881.

Notably, the district court made findings that Landmark acted in bad faith throughout its negotiations with Sierra Gateway. Specifically, the district court focused on Landmark's insistence that Pavich be the manager of Sierra Gateway's side of the transaction. However, the district court did not explain how this insistence was in bad faith except that it was "contrary to the express provisions of the Term Sheet." Ostensibly, this finding stems from the provision of the Term Sheet that states both parties "shall designate" one manager of the future LLC.

Because the Term Sheet clearly contemplates future negotiations, we conclude that substantial evidence does not support a finding that Landmark negotiated in bad faith with regard to whom each side could appoint as its manager. In addition, we conclude that Landmark reviewed each definitive operating agreement proposed by Sierra Gateway and returned it to Sierra Gateway, with requests and concerns, in a timely manner. In fact, Sierra Gateway often took longer to return its revisions to Landmark.

While Landmark made numerous requests regarding the appointment of Pavich as manager, this request appears to be reasonable
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Conclusion


Sierra Gateway correctly notes that this court is not in a position to reweigh the evidence and credibility of the witnesses. In light of the complexity of the transaction contemplated by the parties and the Term Sheet's plain language, however, we conclude that the Term Sheet represented a preliminary agreement in a multi-faceted transaction that contemplated, and was dependent upon, a later "definitive operating agreement." For this reason, we conclude that substantial evidence does not support the district court's determination that the Term Sheet was an enforceable contract. We further conclude that the district court erred in

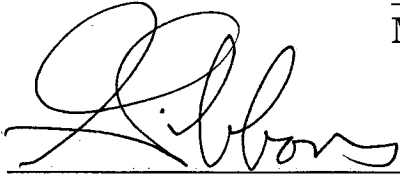
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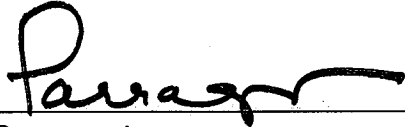
in light of the substantial evidence regarding the parties' relationships and the ongoing negotiation process. Thus, we conclude that the evidence establishes that Landmark negotiated in good faith and did everything it could to reach an agreement with Sierra Gateway. It was only under the pressure of the escrow deadline that Landmark abandoned the negotiations and purchased the property on its own.


granting attorney fees to Sierra Gateway. Accordingly, we

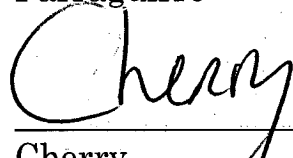
ORDER the judgments of the district court REVERSED and
REMANDED for proceedings consistent with this Order.¹⁸

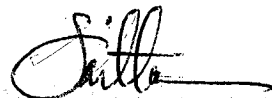

_____, C.J.
Maupin


_____, J.
Gibbons


_____, J.
Parraguirre


_____, J.
Douglas


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Earl¹⁹

cc: Hon. Robert H. Perry, District Judge
Leonard I. Gang, Settlement Judge
Lemons Grundy & Eisenberg
McDonald Carano Wilson LLP/Reno
Robison Belaustegui Sharp & Low
Washoe District Court Clerk

¹⁸Because we conclude that the parties failed to enter into a binding, enforceable agreement, we find it unnecessary to reach Landmark's remaining arguments. We note, however, that Landmark is responsible for all interest and other expenses related to the ownership of the property at issue.

¹⁹The Honorable Allan R. Earl, Judge of the Eighth Judicial District Court, was designated by the Governor to sit in place of the Honorable James W. Hardesty, Justice. Nev. Const. art. 6, § 4.