IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID HABIBIAN, AN INDIVIDUAL; NOSHIN HABIBIAN, AN INDIVIDUAL; AND FRANK HABIBIAN, AN INDIVIDUAL,
Appellants,
vs.
JOSEPH A. MARZAN, AN INDIVIDUAL; AND JACQUELYN A. MARZAN, AN INDIVIDUAL,
Respondents.

No. 46784

FILED

OCT 29 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER AFFIRMING JUDGMENT AND REMANDING WITH INSTRUCTIONS

This is an appeal from a district court judgment in a real property contract dispute. Eighth Judicial District Court, Clark County; Michael A. Cherry, Judge. Appellants also challenge an interlocutory order awarding attorney fees and costs to respondents.[1]

Appellants challenge the district court's decision to set aside the sale of a Las Vegas home between them and to order appellants David and Noshin Habibian (sellers) to specifically perform a contract to sell the property to respondent Joseph Marzan. Joseph's original offer stated that he, his wife (Jacquelyn) and his mother (Gregoria) were offering to buy the sellers' home. After various counteroffers, the sellers accepted the offer. Before escrow closed, Gregoria passed away. In the interim, Joseph and

[1]As the district court entered an amended judgment that substantively changed the original judgment, this amended judgment became the appealable final judgment and rendered the attorney fees and costs award interlocutory. See Morrell v. Edwards, 98 Nev. 91, 92, 640 P.2d 1322, 1324 (1982).

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the sellers signed an "addendum," acknowledging that Joseph would be the sole buyer; sellers also added a $65/day penalty if escrow did not close by October 13, 2003. Following Gregoria's burial in early October, Joseph proceeded to have the loan documents redrawn in his name alone.

Joseph's loan was not funded by October 13. On October 14, 2003, the sellers entered into a contract to sell the property to David's brother, appellant Frank Habibian, and opened escrow with United Title. On October 16, 2003, the sellers issued instructions, without Joseph's approval, to cancel the escrow with Joseph at United Title.

Aware of the dispute between the sellers and Joseph, United Title refused to proceed with the escrow between the sellers and Frank. Consequently, on October 24, 2003, the sellers and Frank cancelled their escrow at United Title and four days later, opened a new escrow with Ticor Title, which apparently did not know about the dispute with Joseph.

Joseph's loan was ready to fund on October 29, but delivery to United Title was delayed until November 4 because of the sellers' cancellation of the escrow. Joseph tendered all funds on November 5, and sellers still refused to close.

On November 12, 2003, Joseph sued for specific performance and breach of contract, and filed a notice of lis pendens on the property. Nevertheless, the sellers completed the sale of the property to Frank on November 14, 2003. Approximately three months later, in February 2004, Frank listed the property for sale at $499,000—$129,500 more than the contract price with Joseph—claiming that he wanted to find another home closer to where David and Noshin had moved.

After a bench trial, the district court found that the sale of the property to Frank was fraudulent and set it aside. The court also granted specific performance to Joseph and ordered the sellers to convey the

property to him, subject to Joseph's payment of $1,495 for twenty-three days' late charges. Moreover, the court awarded $40,287.29 in attorney fees and $5,029.84 in costs to Joseph and his wife, holding the sellers and Frank jointly and severally liable.

Appellants raise four main points on appeal: (1) the validity of the contract without Jacquelyn's and Gregoria's signatures; (2) whether Joseph timely closed escrow; (3) whether the district court erred in determining that the transfer to Frank was fraudulent; and (4) whether the district court abused its discretion in awarding attorney fees to Jacquelyn and holding Frank to be jointly liable under the contract to which he was not a party.

This court reviews findings of fact and conclusions of law for substantial evidence, which is "that quantity and quality of evidence which a reasonable [person] could accept as adequate to support a conclusion."[2] If supported by substantial evidence, the district court's findings will not be set aside unless clearly erroneous."[3]

With regard to the district court's purely legal determinations, including its interpretations of statutes and contracts, this court conducts de novo review.[4] "In interpreting a contract, 'the court shall effectuate the

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[2]Installation & Dismantle v. SIIS, 110 Nev. 930, 932, 879 P.2d 58, 59 (1994) (citing State, Emp. Security v. Hilton Hotels, 102 Nev. 606, 608 n.1, 779 P.2d 497, 498 n.1 (1986)).

[3]Edwards Indus. v. DTE/BTE, Inc., 112 Nev. 1025, 1031, 923 P.2d 569, 573 (1996).

[4]Firestone v. State, 120 Nev. 13, 16, 83 P.3d 279, 281 (2004) (quoting Construction Indus. v. Chalue, 119 Nev. 348, 351, 74 P.3d 595, 597 (2003)); Musser v. Bank of America, 114 Nev. 945, 947, 964 P.2d 51, 52

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intent of the parties, which may be determined in light of the surrounding circumstances if not clear from the contract itself.'"[5]

We conclude that there is no merit to appellants' contentions with respect to the validity of the contract without Jacquelyn's or Gregoria's signatures and as to whether Joseph timely closed escrow. Further, appellants provided no support for their argument that the district court erred in finding that the sale to Frank was fraudulent.

With respect to the attorney fee issues, we conclude that, since Joseph was ultimately the sole buyer under the contract and specific performance was awarded to Joseph alone, the district court erred in awarding attorney fees to both Joseph and Jacquelyn.[6] We conclude, however, that substantial evidence in the record supports the district court's attorney fee award of $40,287.29 to Joseph under the terms of the purchase agreement.[7] But while the district court's order properly awarded the attorney fees to Joseph as a joint and several liability of David and Noshin, the court abused its discretion in awarding them as the

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(1998); NGA #2 Ltd. Liab. Co. v. Rains, 113 Nev. 1151, 1158, 946 P.2d 163, 167 (1997).

[5]NGA, 113 Nev. 1158, 946 P.2d 167 (quoting Davis v. Nevada National Bank, 103 Nev. 220, 223, 737 P.2d 503, 505 (1987)).

[6]The district court properly denied appellants' attorney fees request with respect to Jacquelyn, however. Appellants were not prevailing parties entitled to attorney fees under the purchase agreement.

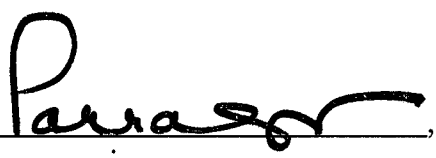
[7]See Panicaro v. Robertson, 113 Nev. 667, 941 P.2d 485 (1997) (noting that while the district court failed to cite any statutory authority for its attorney fee award, this court may imply findings when the record is clear and will support the district court's judgment).

joint and several liability of Frank, as he was not a party to the contract and Joseph failed to specifically prove the attorney fees as damages during trial.[8]

As to the $5,029.84 award of costs against David, Noshin, and Frank, jointly and severally, the district court was required to award costs to Joseph as the prevailing party in "an action for the recovery of real property or a possessory right thereto" under NRS 18.020. Therefore, the district court properly awarded the costs as the joint and several liability of David, Noshin and Frank.

Accordingly, we affirm the district court's judgment, but remand this matter with instructions that it vacate those portions of its attorney fee order awarding attorney fees to Jacquelyn and making Frank Habibian jointly and severally liable for attorney fees.[9]

It is so ORDERED.



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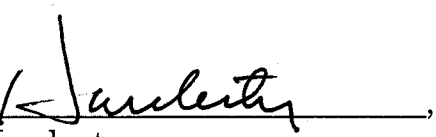

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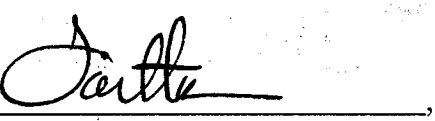

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[8]See Sandy Valley Associates v. Sky Ranch Estates, 117 Nev. 948, 956, 35 P.3d 964, 969 (2001).

[9]Pursuant to NRAP 34(f)(1), we have determined that oral argument is not warranted in this appeal.

cc: Eighth Judicial District Court, Dept. 17
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