

IN THE SUPREME COURT OF THE STATE OF NEVADA

NEVADA ROYALE, LLC, A NEVADA  
LIMITED LIABILITY CORPORATION,  
Appellant,

vs.

ARCS MORTGAGE, INC., LP, A  
CALIFORNIA LIMITED  
PARTNERSHIP; AND MADELEINE  
STEINMAN, AN INDIVIDUAL,  
Respondents.

No. 50710

**FILED**

**APR 09 2010**

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court summary judgment in a real property contract action. Second Judicial District Court, Washoe County; Jerome Polaha, Judge.

On appeal, appellant Nevada Royale, LLC, asserts that the district court erred when it granted summary judgment to respondent ARCS Mortgage, Inc., LP, concluding that a prepayment premium provision with respect to Nevada Royale's loan from ARCS was enforceable. Having reviewed the briefs and appendices, we conclude that the district court did not err when it granted summary judgment to respondent.<sup>1</sup>

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<sup>1</sup>Nevada Royale failed to raise any argument in its opening brief with respect to the district court's order dismissing its claims against respondent Madeleine Steinman and our review of the record reveals no plain error with respect to that interlocutory order. Accordingly, the district court's order dismissing Nevada Royale's claims against Steinman stands. See Williams v. Zellhoefer, 89 Nev. 579, 580, 517 P.2d 789, 789 (1973).

As an initial matter, Nevada Royale's causes of action for fraudulent and negligent misrepresentation and breach of the covenant of good faith and fair dealing were barred by the applicable 3- and 4-year statutory limitation periods. See NRS 11.190(3)(d) (stating that a cause of action based on fraud "may only be commenced . . . [w]ithin 3 years" of "the discovery by the aggrieved party of the facts constituting the fraud"); NRS 11.220 (noting that "[a]n action for relief" not otherwise provided for "must be commenced within 4 years after the cause of action shall have accrued"); Bemis v. Estate of Bemis, 114 Nev. 1021, 1024, 1025 n.1, 967 P.2d 437, 440 & n.1 (1998) (recognizing that if a statute does not specify when a cause of action accrues, the cause of action accrues when the claimant knows or should know of facts on which the cause of action is based). If Nevada Royale's principals were not aware that the contract contained a prepayment premium provision when they signed it, the record demonstrates that they became aware of its operation by 2001 when they attempted to calculate the prepayment premium amount. Thus, Nevada Royale's January 2006 complaint is untimely with respect to those claims.

In any event, the evidence that Nevada Royale attempted to proffer in support of its fraudulent and negligent misrepresentation claims was inadmissible under the parol evidence rule. Nevada Royale wished to offer testimony that its principals were told that the contract would not include a loan prepayment premium. But that directly contradicts the clear terms of the contract and Nevada Royale offered no independent proof of such conversations to render the parol evidence admissible within the exception to the parol evidence rule for evidence of fraud. Crow-Spieker #23 v. Robinson, 97 Nev. 302, 305, 629 P.2d 1198, 1199 (1981)

(noting that “[i]f the terms of an agreement are clear, definite and unambiguous, parol evidence may not be introduced to vary those terms”); Tallman v. First Nat. Bank, 66 Nev. 248, 258, 208 P.2d 302, 307 (1949) (providing that the exception to the parol evidence rule for evidence of fraud applies when the claimant proves “independent facts constituting fraud”); cf. Chiquita M. Co. v. F. M. & Co., 60 Nev. 142, 153, 104 P.2d 191, 196 (1940) (stating that “when parties reduce their contract to writing, . . . parol proof is not admissible to alter its terms, . . . unless the party attacking the instrument can establish fraud or mistake in its execution” (quoting Gage v. Phillips, 21 Nev. 150, 153, 26 P. 60, 61 (1891))). Further, appellant failed to demonstrate that any genuine issue of material fact existed with regard to its breach of the implied covenant of good faith and fair dealing cause of action, regardless of whether that claim is contract- or tort-based. Frantz v. Johnson, 116 Nev. 455, 465 n.4, 999 P.2d 351, 358 n.4 (2000) (noting that the implied covenant of good faith and fair dealing generally “forbids arbitrary, unfair acts by one party that disadvantage the other”); K Mart Corp. v. Ponsock, 103 Nev. 39, 49, 732 P.2d 1364, 1370 (1987) (stating that the tortious breach of the implied covenant of good faith and fair dealing arises only when there is a special relationship between the contracting parties), abrogated on other grounds by Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990).

In addition, the loan’s prepayment premium provision did not constitute an unenforceable penalty, as Nevada Royale asserts, but rather an enforceable contract provision intended to compensate the lender for the loss of interest when, as here, a borrower pays off the loan prematurely. Mason v. Fakhimi, 109 Nev. 1153, 1156-57, 865 P.2d 333, 335 (1993); Matter of LHD Realty Corp., 726 F.2d 327 (7th Cir. 1984).

Thus, Nevada Royale's argument in this regard is unavailing. Finally, Nevada Royale failed to demonstrate the existence of any genuine issue of material fact that a mutual mistake existed between the parties as to the prepayment premium provision's inclusion in the contract to support reforming the contract. See Realty Holdings v. Nevada Equities, 97 Nev. 418, 419, 633 P.2d 1222, 1223 (1981). The record demonstrates that any mistake was, at best, unilateral on Nevada Royale's part and unreasonable.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>2</sup>

Cherry, J.  
Cherry

Saitta, J.  
Saitta

Gibbons, J.  
Gibbons

cc: Hon. Jerome Polaha, District Judge  
Robert L. Eisenberg, Settlement Judge  
Jeffrey A. Dickerson  
Lionel Sawyer & Collins/Reno  
Washoe District Court Clerk

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<sup>2</sup>Because the district court did not err when it entered summary judgment against Nevada Royale, to the extent Nevada Royale challenges the jury trial waiver provision in the contract, we do not address these arguments.