IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CHRISTIAN EDY, AN INDIVIDUAL,
Appellant,
vs.
MCMANUS AUCTIONS,
Respondent.

No. 70737

FILED

OCT 31 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

Christian Edy appeals a district court final judgment, pursuant to a bench trial, for McManus Auctions. Eighth Judicial District Court, Clark County; Susan Scann, Judge.

Edy previewed a purported ruby pendant at McManus Auctions.[1] The pendant included a Gemological Laboratory of America ("GLA") certificate claiming that the ruby was genuine and the pendant was worth an estimated $127,500. The next day at auction, Edy placed the winning bid on the pendant and paid $15,482. When he subsequently had the pendant appraised, he discovered the gemstone was rubellite and not a ruby, and the pendant was valued at $8,675.

Edy sued McManus Auctions for breach of contract, unjust enrichment, fraudulent or intentional misrepresentation, and for violations of Nevada's Deceptive Trade Practices statutes. His fraudulent or intentional misrepresentation and deceptive trade practices claims were struck after he failed to timely submit a NRCP 16.1 damages calculation pursuant to a court order. The district court found for McManus Auctions at a bench trial.

[1]We do not recount the facts except as necessary to our disposition.

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On appeal, Edy argues that the district court's discovery sanction was an abuse of discretion. He also contends that the district court improperly concluded that no pre-auction contract was formed and that McManus Auctions made no representations about the gemstone.

The district court did not abuse its discretion in sanctioning Edy for delayed disclosure of his damages calculation

A party must disclose "[a] computation of any category of damages" it seeks to recover. NRCP 16.1(a)(1)(C). A court may sanction a party for failure to disclose damages. NRCP 16.1(e)(3); NRCP 37(c)(1). Permissible sanctions include "[a]n order striking out pleadings or parts thereof . . . or dismissing the action or proceeding or any part thereof . . . ." NRCP 37(b)(2)(C); *see* NRCP 37(c)(1); NRCP 16.1(e)(3)(A).

This court reviews discovery sanctions for an abuse of discretion. *Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. 243, 249, 235 P.3d 592, 596 (2010). When the sanction "is one of dismissal with prejudice . . . a somewhat heightened standard of review should apply." *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990).

We conclude that the district court did not abuse its discretion under either standard. Under the heightened standard of review, "the district court abuses its discretion if the sanctions are not just and do not relate to the claims at issue in the discovery order that was violated." *Foster v. Dingwall*, 126 Nev. 56, 65, 227 P.3d 1042, 1048 (2010). The sanction here directly relates to Edy's failure to provide a damages calculation pursuant to NRCP 16.1, during discovery, or within the time ordered by the district court.

Further, Edy failed to include in his appendix to his opening brief the transcript from the hearing striking his fraudulent or intentional

misrepresentation and deceptive trade practices claims.[2] He also failed to include his damages calculation in his appendix. Therefore, we presume that the district court correctly conducted an analysis applying the factors set forth in *Young*, 106 Nev. at 93, 787 P.2d at 780, before it decided to strike part of the complaint. *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007) (holding that an appellate court presumes missing parts of the record support the district court's decision). Because we conclude that the district court did not abuse its discretion under the heightened standard, we necessarily conclude it did not abuse its discretion under the less stringent standard.[3]

The district court properly found the contract was formed at the auction and its terms were satisfied

"Contract interpretation is subject to a de novo standard of review. However, the question of whether a contract exists is one of fact, requiring [the appellate court] to defer to the district court's findings unless they are clearly erroneous or not based on substantial evidence." *May v. Anderson*, 121 Nev. 668, 672-73, 119 P.3d 1254, 1257 (2005). "[P]reliminary negotiations do not constitute a binding contract unless the parties have agreed to all material terms." *Id.* at 672, 119 P.3d at 1257. "A valid contract cannot exist when material terms are lacking or are insufficiently certain and definite." *Id.*

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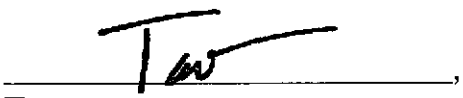
[2]No order following the hearing is in the record. Counsel for McManus Auctions was directed to prepare one but did not. The final judgment resolves all claims so this issue is properly before us. *See* NRAP 3A.

[3]As we have affirmed the district court's striking of Edy's fraudulent or intentional misrepresentation and deceptive trade practices claims, we do not address the merits of these claims further.

Edy offered a bid on the pendant at the auction, his bid was accepted at the auction, and he paid for the pendant after. *Id.* ("Basic contract principles require, for an enforceable contract, an offer and acceptance, meeting of the minds, and consideration."). Edy alleges a pre-auction contract was formed when he purchased his bid card from McManus Auctions. The record, however, does not show that Edy offered to buy and Patrick agreed to sell the pendant pre-auction or an agreement as to any other terms. Thus, the district court's finding and conclusion that the contract was not formed at the pre-auction viewing is supported by substantial evidence. Rather, the evidence shows the contract was formed at the auction. Thus, there was no breach of contract as the contract terms of the auction bid were fulfilled. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Silver



_____, J.
Tao

GIBBONS, J., concurring:

I agree with my colleagues that the district court's decision should be affirmed because Edy failed to provide an adequate appellate record. The district court at a hearing below struck his fraudulent or intentional misrepresentation and deceptive trade practices claims as a discovery sanction. Imposition of such a sanction is within the discretion of the district court. *Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. 243, 249, 235 P.3d 592, 596 (2010). On appeal, Edy failed to include in his

appellate appendix the transcripts from the hearings regarding the motion to strike the complaint nor his NRCP 16.1 damages calculation. Therefore, I concur that we presume under *Cuzze*[4] the district court correctly applied the *Young*[5] factors before striking those claims if the heightened standard even applies.

I write separately to explain that, had this court chosen to reach the merits of Edy's fraudulent or intentional misrepresentation and deceptive trade practices claims, reversal and remand may have been warranted.

When analyzing a claim for fraudulent or intentional misrepresentation, we review a district court's findings of fact for abuse of discretion and conclusions of law de novo. *Collins v. Burns*, 103 Nev. 394, 399, 741 P.2d 819, 822 (1987), *distinguished on other grounds by Goodrich & Pennington Mortg. Fund, Inc. v. J.R. Woolard, Inc.*, 120 Nev. 177, 101 P.3d 792 (2004). The district court made a conclusion of law that McManus Auctions made no representations or warranties about the pendant's value. Thus, we would apply a de novo standard of review.

Under a de novo standard of review, this court reviews whether Edy satisfied each element for fraudulent or intentional misrepresentation by clear and convincing evidence. *See Bulbman, Inc. v. Nevada Bell*, 108 Nev. 105, 110-11, 825 P.2d 588, 592 (1992). Edy would have to show that McManus Auctions (1) made a false representation; (2) knew or believed that the representation was false; (3) intended to induce Edy to act or to

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[4]*Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007).

[5]*Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 93, 787 P.2d 777, 787 (1990).

refrain from acting in reliance on the misrepresentation; (4) Edy justifiably relied on the misrepresentation; and, (5) Edy was damaged as a result of his reliance. *See id.* To prove misrepresentation, a party must show that a "false representation was made with knowledge or belief that it is false or without a sufficient basis of information." *Collins*, 103 Nev. at 397, 741 P.2d at 821.

McManus Auctions posts its auction terms and conditions in its lobby, on its online bidding site, and Edy's auction bid card. Its terms state that "All items are sold as is. (Please see our McManus guarantee list.)" The guarantee list states "We make no guarantees, express or implied. (Exceptions for gold, silver, or coin . . . .)" A final term is included stating, "If Patrick [McManus] says it's genuine, then it is!" (Emphasis in original). At trial, McManus testified that the pendant was shown before the auction with the GLA certificate next to it claiming the ruby was "genuine" with an estimated value of $127,500.

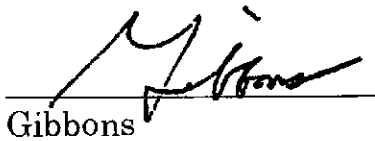
Edy and McManus spoke at the pre-auction viewing. Edy testified that McManus told him the pendant was worth $127,500. McManus testified that he remembered seeing Edy at the preview for the pendant and talking to him, but he did not recall what was said or saying anything specific about the pendant. McManus did not tell anyone at the pre-auction viewing, including Edy, that there was a $10,000 "reserve price" (the minimum amount for a successful bid), which meant that a pendant with a purported "genuine" ruby gemstone could sell for far less than the estimated value presented in the GLA certificate. Despite knowing this, McManus did not independently verify the gemstone and did not disclose to bidders that it might not be genuine.

While it is true that "a charge of fraud normally may not be based upon representations of value," *Clark Sanitation, Inc. v. Sun Valley Disposal Co.*, 87 Nev. 338, 341, 487 P.2d 337, 339 (1971), in this case, the ruby was presented as "genuine," and accordingly, the estimated value of $127,500 suggests the gemstone was what the certificate claimed it to be: genuine. "[A] person guilty of fraud should not be permitted to use the law as his shield, '[w]hen the choice is between the two – fraud and negligence – negligence is less objectionable than fraud. Though one should not be inattentive to one's business affairs, the law should not permit an inattentive person to suffer loss at the hands of a misrepresenter.'" *Collins*, 103 Nev. at 398, 741 P.2d at 821 (quoting *Besett v. Basnett*, 389 So.2d 995, 998 (Fla. 1980)).

Here, the pendant was not a ruby and instead was rubellite, which Edy's expert testified "is affordable by a middle class jewelry buyer . . . someone who would spend under $10,000 for a piece of jewelry. . . ." McManus testified he saw the estimated value on the certificate and that it was purported to be a "genuine" ruby; yet, he knew the reserve price was only $10,000, he did not have it independently appraised, and he refused to allow Edy to have it appraised before the auction. Finally, he did not inform bidders that he did not verify if the gemstone was a ruby, nor that the GLA certificate regarding genuineness was advisory. Thus, I would conclude that the district court erred in finding that McManus Auctions made no representations about the pendant. *See Collins*, 103 Nev. at 397, 741 P.2d

at 821 (concluding that statements made without a sufficient basis of information or with knowledge that they are false are misrepresentations).[6]

Under these circumstances, we could have reversed for a new trial for the district court to consider the misrepresentation related claims, if they had not been stricken. If we had reversed and remanded to the district court to consider the evidence in light of those claims, along with any other information that was received into evidence, the result may have been different. Nonetheless, I concur because this court cannot support an order of reversal without an adequate appellate record.



_____, J.
Gibbons

cc: Chief Judge Elizabeth Gonzalez, Eighth Judicial District Court
Eighth Judicial District Court Dept. 29
Carolyn Worrell, Settlement Judge
Canon Law Services, LLC
Olympia Law, P.C.
Law Offices of P. Sterling Kerr
Theresa L. Mains
Eighth District Court Clerk

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[6]The district court concluded that Edy's bid and McManus' acceptance of the bid were the contract terms but did not address consideration. There may have been inadequate consideration because the pendant's stone was not a genuine ruby. Nevertheless, a court cannot rescind the contract on the basis of inadequate consideration alone, *Oh v. Wilson*, 112 Nev. 38, 41-42, 910 P.2d 276, 279 (1996), but can factor it into its decision to rescind the contract on the basis of misrepresentation, *see id.* at 42, 910 P.2d at 279.