IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CHARLES F. PERROTTA, INDIVIDUALLY AND AS TRUSTEE OF THE FRANK & VIRGINIA PERROTTA FAMILY TRUST; AND SAN MICHELE SPARKS, LLC, A NEVADA LIMITED LIABILITY COMPANY, Appellants, vs. MARK KEYZERS, AN INDIVIDUAL, Respondent.	No. 80470-COA
CHARLES F. PERROTTA, INDIVIDUALLY AND AS TRUSTEE OF THE FRANK & VIRGINIA PERROTTA FAMILY TRUST; AND SAN MICHELE SPARKS, LLC, A NEVADA LIMITED LIABILITY COMPANY, Appellants/Cross-Respondents, vs. MARK KEYZERS, AN INDIVIDUAL, Respondent/Cross-Appellant.	No. 81174-COA

ORDER REVERSING (DOCKET NO. 80470-COA), VACATING (DOCKET NO. 81174-COA), AND REMANDING

These are consolidated appeals and a cross-appeal from a district court final judgment and award of attorney fees and costs in a contract action. Second Judicial District Court, Washoe County; Elliott A. Sattler, Judge.

21-17384

Charles Perrotta is the trustee of the Frank & Virginia Perrotta Family Trust and manager of San Michele Sparks, LLC.[1] The trust and San Michele own a portion of a shopping center located in Sparks, Nevada.

Mark Keyzers is a licensed commercial real estate broker and part owner of the Retail Properties Group in Alliance Commercial Real Estate Services, LLC (NAI Alliance). Keyzers and NAI Alliance represented buyers and sellers in commercial real estate transactions, as well as landlords and tenants in lease negotiations.

Perrotta engaged Keyzers to procure a new tenant for a vacant space in the shopping center. In doing so, Perrotta and Keyzers entered into a one-year exclusive listing agreement under which Perrotta employed Keyzers as the "sole and exclusive agent" to "find buyers or lessees/tenants" for the shopping center.

While the listing agreement was still in effect, Roger White, the spouse of The Lake Bar and Grill (TLBG) owner, Cindy White, contacted Keyzers about renewing TLBG's lease in the shopping center. In response, Keyzers, on behalf of Perrotta, sent a proposal to Roger outlining the terms for the renewal of the TLBG lease. Keyzers also spoke with Roger about the proposal and sent him an email regarding the same.

At or near the time Keyzers' listing agreement with Perrotta was set to expire, Cindy sent a letter regarding the renewal of TLBG's lease to NAI Management, which was forwarded to Keyzers for his review.[2] Shortly after the listing agreement between Perrotta and Keyzers expired,

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

[2]NAI Alliance and NAI Management are separate and distinct entities. Keyzers is part owner of NAI Alliance, while NAI Management assists Perrotta in the management of his properties.

Keyzers emailed Perrotta to inform him of Cindy's letter desiring a lease renewal, and to "discuss a response."

Eventually TLBG's lease expired; however, the bar and grill remained a tenant of the shopping center, and Cindy paid rent month to month. Over the next two and one-half years, Perrotta and Keyzers exchanged phone calls, emails, letters, and discussed ongoing lease negotiations and status updates. Perrotta left multiple voicemails on Keyzers' phone regarding the TLBG lease renewal. During this time, Keyzers also engaged in negotiations with TLBG's attorney, Shawn Pearson, and Perrotta regarding the terms and conditions for the renewal of the lease agreement as well as Perrotta's proposed modifications thereto.

During the negotiations, Keyzers had some difficulty contacting Perrotta regarding the TLBG lease renewal, but Perrotta eventually left Keyzers a voicemail indicating that he would send his final changes to the lease agreement, and once the agreement was finalized he would sign it. After exchanging additional correspondence, Keyzers sent Perrotta the final version of the lease, which incorporated Perrotta's and Pearson's changes to the agreement, and also contained a broker's provision that explicitly entitled Keyzers to a commission for his services. Throughout the negotiations with TLBG, Keyzers also sent to Perrotta several written proposals to extend their exclusive listing agreement; however, the parties never executed an extension of the original exclusive listing agreement, or entered into a new agreement.

Perrotta failed to communicate with Keyzers for the next several months, which led Keyzers to terminate his broker services with Perrotta. In response, Perrotta sent Keyzers a letter instructing him to "cease and desist" his work as a broker in connection with the shopping

center. Soon thereafter, Perrotta and TLBG signed a lease agreement, which included a provision for the broker's commission as drafted by Keyzers. Months later, Perrotta's former attorney, Steve Handelin, sent Pearson several revisions to the lease agreement, including a modification to the broker provision, which expressly excluded Keyzers from receiving a commission for the TLBG's lease renewal. Pearson objected to Handelin's change to the broker provision, pointing out that, "It would be patently false for [his] client to represent or warrant that it has not dealt with Mr. Keyzers." As a result, the broker provision in the final lease was changed to read, "INTENTIONALLY LEFT BLANK." TLBG and Perrotta then executed the revised lease agreement.

Keyzers eventually sent Perrotta a demand letter for outstanding commissions due and owing, including the commission from the TLBG lease renewal. Perrotta did not respond to the demand letter and Keyzers filed a complaint against Perrotta in district court for his outstanding commissions, alleging theories of breach of contract, unjust enrichment/quantum meruit/quasi contract, and breach of the implied covenant of good faith and fair dealing. Perrotta answered and filed a counterclaim against Keyzers for breach of contract and contractual and tortious breach of the covenant of good faith and fair dealing. After numerous failed attempts to settle the case, the parties participated in voluntary mediation, resulting in the dismissal of Perrotta's counterclaim against Keyzers. Both parties then moved for summary judgment.

The district court in its order partially granted Keyzers' motion for summary judgment as to the unjust enrichment/quantum meruit/quasi contract claim, awarding Keyzers his commission related to the TLBG lease renewal, and simultaneously denied Perrotta's motion for summary

judgment as to the TLBG claim. The parties filed competing motions for attorney fees, resulting in the district court partially awarding Keyzers his requested fees. These consolidated appeals and cross-appeal followed.

On appeal, Perrotta argues that the district court erred in granting Keyzers summary judgment because the parties were acting pursuant to an exclusive listing agreement, which precluded Keyzers from recovering under a theory of quantum meruit. Perrotta argues further that because the exclusive listing agreement failed to comply with the requirements of NRS 645.320, it was invalid, thereby precluding Keyzers from recovering commissions based on that agreement. Alternatively, Perrotta argues that even if Keyzers was not acting as an exclusive listing agent under an agreement, there was still no implied employment contract between the parties, precluding Keyzers from recovering his commission for the TLBG lease renewal under a theory of quantum meruit. Finally, Perrotta argues that even if there was an implied employment contract, Keyzers would still be precluded from recovering under quantum meruit because he was not the procuring cause of the lease renewal. In turn, Keyzers asserts that there are no disputed facts to warrant reversal of the district court's order awarding him a commission based on quantum meruit for the broker services he rendered to secure the TLBG lease renewal.

Because genuine disputes of material fact remain regarding whether Keyzers was entitled to recover under a theory of quantum meruit, we conclude that the district court erred in granting summary judgment.

"We review a district court's decision to grant summary judgment de novo." *Schueler v. Ad Art, Inc.*, 136 Nev., Adv. Op. 52, 472 P.3d 686, 689 (Ct. App. 2020). "Summary judgment is appropriate . . . when the pleadings and other evidence on file demonstrate that no genuine issue as

to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law." *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (alteration in original) (internal quotation marks omitted). "Whether an issue of fact is material is controlled by the substantive law at issue in the case, and such a factual dispute is genuine if the evidence is such that a rational trier of fact could return a verdict for the nonmoving party." *Estate of Lomastro v. Am. Fam. Ins. Grp.*, 124 Nev. 1060, 1066, 195 P.3d 339, 344 (2008) (internal quotation marks omitted). We "view the pleadings and evidence in the light most favorable to the party against whom summary judgment is sought." *Sprague v. Lucky Stores, Inc.*, 109 Nev. 247, 249-50, 849 P.2d 320, 322 (1993) (*abrogated on other grounds by Calloway v. City of Reno*, 116 Nev. 250, 993 P.2d 1259 (2000)).

"A promise to pay the reasonable value of services may be implied, and a real estate agent may recover under a theory of *quantum meruit*, unless the parties have executed an exclusive listing agreement which is invalid under NRS 645.320."[3] *Morrow v. Barger*, 103 Nev. 247,

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[3]NRS 645.320 provides the following:

> Every brokerage agreement which includes a provision for an exclusive agency representation must:
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> 1. Be in writing.
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> 2. Have set forth in its terms a definite, specified and complete termination.
>
> 3. Contain no provision which requires the client who signs the brokerage agreement to notify the real estate broker of the client's intention to cancel the exclusive features of the brokerage agreement after the termination of the brokerage agreement.

252, 737 P.2d 1153, 1156 (1987) (citing *Bangle v. Holland Realty Inv. Co.*, 80 Nev. 331, 335-36, 393 P.2d 138, 140 (1964)). Before a real estate agent is entitled to a commission under a theory of quantum meruit, an implied employment contract must be shown, *Lawry v. Devine*, 82 Nev. 65, 410 P.2d 761 (1966), and the agent must have been the procuring cause of the sale, *Carrigan v. Ryan*, 109 Nev. 797, 801, 858 P.2d 29, 32 (1993); *Humphrey v. Knobel*, 78 Nev. 137, 369 P.2d 872 (1962); *cf. Brewer v. Williams*, 362 P.2d 1033 (Colo. 1961) (affirming judgment for recovery of real estate commission where a realty company formed an employment contract with a principal and procured the sale of certain real estate for the same). If both the employment agreement and the causation are established, the broker is entitled to payment of a sales commission under the theory of quantum meruit. *See Smith v. Piper*, 423 S.W.2d 22 (Mo. Ct. App. 1967).

Perrotta first contends that the parties continuously operated under an exclusive listing agreement, which precluded Keyzers from recovering under quantum meruit. Specifically, Perrotta argues that there was an express exclusive listing agreement in place at all times because Keyzers sought to extend the expired listing agreement in writing and continued to work under the same terms and conditions of the expired listing agreement. Perrotta asserts that this express exclusive listing agreement was an invalid agreement pursuant to NRS 645.320 because it was not reduced to writing and was unsigned by the parties. Therefore, Keyzers was not entitled to a commission under a theory of quantum meruit

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> 4. Be signed by both the client or his or her authorized representative and the broker or his or her authorized representative in order to be enforceable.

because of the existence of an exclusive listing agreement as well as the invalidity of that agreement.

We are not persuaded by Perrotta's argument. The parties initially had a valid exclusive listing agreement, which would have precluded recovery for services under a theory of quantum meruit, whether it was a valid or invalid agreement pursuant to NRS 645.320. However, this agreement expired by the express terms of the agreement prior to the material events leading up to the renewal of TLBG's lease. After it expired, the parties did not enter into a new written listing agreement or execute an extension of the original agreement. Keyzers apparently attempted to renew the exclusive listing agreement numerous times, but Perrotta failed to cooperate, illustrating further that Keyzers did not believe he was subject to an exclusive listing agreement during the time he rendered broker services to secure the renewal of the TLBG lease. Perrotta fails to cite any authority or make any cogent argument as to why Keyzers would not be entitled to a commission or compensation for his services after an exclusive listing agreement has expired, even if the parties continued their relationship in some form. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (explaining that this court need not consider an appellant's argument that is not cogently argued or lacks the support of relevant authority).

Because NRS 645.320 does not apply to preclude Keyzers' recovery under a theory of quantum meruit, we next determine the application of quantum meruit in this case. *See Bangle*, 80 Nev. at 335-36, 393 P.2d at 140. Recovery under quantum meruit depends on (1) whether the parties had an implied employment contract, and (2) whether Keyzers was the procuring cause of the renewal of the TLBG lease. *Id.*

The requirement of an implied employment contract is satisfied where the circumstances surrounding the transaction indicate that the vendor and broker entered an "employment relationship." *Morrow*, 103 Nev. at 252-53, 737 P.2d at 1156; *Shell Oil Co. v. Ed Hoppe Realty Inc.*, 91 Nev. 576, 580, 540 P.2d 107, 109-10 (1975). "Implied employment contracts between sellers and brokers have been found to exist with only moderate factual support." *Atwell v. Sw. Secs.*, 107 Nev. 820, 823, 820 P.2d 766, 768 (1991). "Ordinarily, all that is necessary is that the broker act with the consent of his or her principal either by written instrument, orally, or by implication from the conduct of the parties." 49 Am. Jur. 3d *Proof of Facts* § 2 (1998); *see also Dickerson Realtors, Inc. v. Frewert*, 307 N.E.2d 445, 448 (Ill. App. Ct. 1974).

Here, the record reflects that there is a genuine issue of material fact as to whether the parties established an implied employment contract. In Perrotta's affidavit, he claims that he "believed [TLBG] must have engaged [Keyzers] to represent them in the lease renewal as [Perrotta] had never asked [Keyzers] to do any such lease renewals nor employed him in that capacity." Perrotta's affidavit purportedly negates the existence of an implied employment relationship between Perrotta and Keyzers. Perrotta's affidavit also calls into question whether Perrotta approved or consented to Keyzers' agency, and whether he knew that Keyzers was expecting payment from him for his broker services. Although there is evidence in the record contradicting Perrotta's affidavit, it was inappropriate for the district court to make a credibility determination at the summary judgment stage. *See Banks v. Sunrise Hosp.*, 120 Nev. 822, 839, 102 P.3d 52, 64 (2004) (holding that a district court is not allowed to weigh the credibility of witnesses or the weight of the evidence when

considering a motion for judgment as a matter of law). Taking the evidence in a light most favorable to Perrotta, there appears to be a genuine dispute of material fact regarding whether the parties were acting under an implied employment contract after the exclusive listing agreement expired.

In addition, to qualify for a sales commission under quantum meruit, the broker must prove the necessary causal connection between the sale and the broker's efforts. *Schneider v. Biglieri*, 94 Nev. 426, 427, 581 P.2d 8, 9 (1978). "To be the procuring cause of a sale, a broker must set in motion a chain of events which, without break in their continuity, cause the buyer and seller to come to terms as the proximate result of his or her peculiar activities." *Carrigan*, 109 Nev. at 801-02, 858 P.2d at 32 (internal quotation marks omitted). "[W]hether a broker's efforts constitute the procuring cause of a sale is a question of fact," *Focus Commercial Grp., Inc. v. Rebeil*, 114 Nev. 432, 440, 956 P.2d 123, 128 (1998) (internal quotation marks omitted), and an issue "not generally appropriate for summary judgment," *Atwell*, 107 Nev. at 825, 820 P.2d at 769.

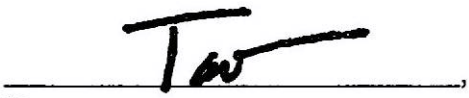
In this case, it is undisputed that the TLBG renewal process began when Roger White contacted Keyzers regarding the lease while Keyzers' exclusive listing agreement with Perrotta was still in effect. Furthermore, TLBG was already a tenant in the shopping center owned by Perrotta, and the record suggests that TLBG intended to remain a tenant in Perrotta's shopping center, regardless of which parties were involved in the lease renewal. This is further supported by the fact that TLBG continued to pay rent on a month-to-month basis for at least two years. Thus, there are genuine disputes of material fact as to whether Keyzers was

the procuring cause of the TLBG lease renewal or whether TLBG would have renewed its lease independent of Keyzers' efforts.[4]

Therefore, because genuine disputes of material fact remain as to whether Keyzers is entitled to recover under quantum meruit, we

ORDER the judgment of the district court REVERSED (Docket No. 80470-COA), VACATED (Docket No. 81174-COA), AND REMAND this matter to the district court for further proceedings consistent with this order.[5]


, C.J.
Gibbons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cc: Hon. Elliott A. Sattler, District Judge
Debbie Leonard, Settlement Judge
Kaempfer Crowell/Reno
Robertson, Johnson, Miller & Williamson
Washoe District Court Clerk

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[4]Insofar as appellants raise arguments that are not specifically addressed herein, we have considered the same and conclude that they do not provide a basis for relief.

[5]Because we reverse the district court's grant of summary judgment, we necessarily vacate the attorney fees awarded to Keyzers and need not address the issues related to the fee award on appeal and cross-appeal.