IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ILAN RAITER,
Appellant,
vs.
ANDREI KHOSH,
Respondent.

No. 81132-COA

ORDER OF AFFIRMANCE

Ilan Raiter appeals from a final judgment, pursuant to a bench trial, in a contract action. Eighth Judicial District Court, Clark County; Trevor L. Atkin, Judge.

In 2017, Raiter and Andrei Khosh founded a business called Project Overstock, LLC, for the purpose of selling surplus building materials, such as tile and other flooring materials.[1] Each partner held a 50-percent ownership interest in the business, with Khosh providing the capital and Raiter the "sweat equity." Khosh invested roughly $113,000 in the partnership, and Raiter provided the partnership with his expertise in the construction industry.

Approximately six months later, Khosh and Raiter agreed to dissolve the partnership and executed a partnership dissolution agreement (PDA). Pursuant to the PDA, Khosh would convey his 50-percent interest in the partnership to Raiter in exchange for 8,800 square feet of limestone tile and $60,000, which Raiter was required to pay within one year. In turn, Raiter would retain control over Project Overstock and its assets, including its website. The PDA also contained a noncompete clause that prohibited Khosh from competing directly or indirectly with Project Overstock.

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

At the time the parties executed the PDA, the 8,800 square feet of tile that Khosh had acquired per the agreement was being stored on Raiter's property. Khosh removed roughly half of the tiles and sold them to a friend. The unsold tiles, however, remained on Raiter's property. Khosh also attempted to sell the remaining tiles via peer-to-peer sales on the internet. Raiter never paid Khosh the $60,000 due under the PDA.

Khosh sued Raiter alleging, among other things, breach of contract and breach of the implied covenant of good faith and fair dealing. Raiter answered, asserting various defenses, but he did not plead any counterclaims. After a bench trial, the district court concluded that Raiter materially breached the PDA and awarded Khosh $60,000 in damages. This appeal followed.

Raiter first contends that he was relieved of his obligation to pay Khosh the $60,000 due under the PDA when Khosh breached the PDA by failing to "take possession of the tiles and make the website available [to him] in a reasonable time." In essence, Raiter's argument is that Khosh materially breached the contract, therefore discharging him of his duty to perform under the same.

A district court's interpretation of a contract presents a question of law that we review de novo. *Nev. State Educ. Ass'n v. Clark Cty. Educ. Ass'n*, 137 Nev., Adv. Op. 8, 482 P.3d 665, 671 (2021). "The objective of interpreting contracts 'is to discern the intent of the contracting parties. Traditional rules of contract interpretation are employed to accomplish that result.'" *Am. First Fed. Credit Union v. Soro*, 131 Nev. 737, 739, 359 P.3d 105, 106 (2015) (quoting *Davis v. Beling*, 128 Nev. 301, 321, 278 P.3d 501, 515 (2012)). However, if the contract's language is clear and unambiguous, it "will be enforced as written." *Id.*

"When parties exchange promises to perform, one party's material breach of its promise discharges the non-breaching party's duty to perform." *Cain v. Price*, 134 Nev. 193, 196, 415 P.3d 25, 29 (2018) (citing Restatement (Second) of Contracts § 237 (Am. Law Inst. 1981)). Although defined in various ways, material breach has been expressed as "a failure to do something that is so fundamental to a contract that the failure to perform that obligation defeats the essential purpose of the contract or makes it impossible for the other party to perform under the contract." 23 Richard A. Lord, *Williston on Contracts* § 63:3 (4th ed. 2021) (footnote omitted). Ordinarily, "in the absence of a clause making time of the essence, a party's failure to perform within a reasonable time generally does not constitute a material breach of the agreement." *Mayfield v. Koroghli*, 124 Nev. 343, 349, 184 P.3d 362, 366 (2008).

Here, the relevant portions of the PDA state that "Andrei Khosh will acquire 8,300 square feet of 24x24 Cream Limestone Tile as well as 500 square feet of 18x36 [cream limestone]," and that "Raiter agrees to buy out [Khosh's] percentage of the business for the amount of $60,000 to be paid in full within one year from [the] signing date of this contract." In exchange for the limestone tile and $60,000, "Raiter will hold 100% ownership of Project Overstock and all of its assets to include all remaining funds, bank accounts, retail location, material, websites, and/or any other social media accounts used by Project Overstock." Thus, the essence of the deal was that Khosh would surrender his 50-percent interest in Project Overstock in exchange for 8,800 square feet of limestone tile and $60,000, which Raiter was to pay within one year of executing the agreement.[2]

[2]Similarly, the district court noted that the "essential term of the contract was for Defendant to pay Plaintiff the sum of $60,000 in exchange for Plaintiff's 50% ownership of the company."

Raiter admits that he did not perform pursuant to the terms of the agreement, but argues that Khosh breached first, thus excusing his performance. In particular, Raiter avers that Khosh materially breached the agreement when he (1) failed to remove the limestone tiles from Raiter's property, and (2) failed to give Raiter access to the Project Overstock website. We disagree.

First, as the district court noted, the PDA does not indicate that Khosh was required to remove the limestone tiles from Raiter's property. Rather, the PDA states that Khosh would "acquire" 8,800 square feet of limestone tile as part of his compensation for his 50-percent interest in the business. Although the word "acquire" may imply that Khosh would ultimately take possession of the limestone, *see, e.g.*, *Acquire*, *Black's Law Dictionary* (11th ed. 2019) ("To gain possession or control of; to get or obtain."), nothing in the contract indicates that doing so was of the essence or material in any way. *See* Lord, *supra*, § 63:3 (providing that "if a breach is relatively minor and not of the essence," the nonbreaching party is still required to perform). Thus, pursuant to the express terms of the contract, Khosh was not required to remove the limestone from Raiter's property; therefore, Khosh's failure to do so did not discharge Raiter's obligations under the PDA.

Even assuming that Khosh was required to remove the tiles from Raiter's property, the PDA does not contain a time-is-of-the-essence clause. Despite this, Raiter contends that he was discharged from his duty to perform when Khosh failed to remove the tile within a reasonable time. This argument, however, is inconsistent with our jurisprudence, which counsels that absent a time-is-of-the-essence clause, "a party's failure to perform within a reasonable time generally *does not constitute a material breach of the agreement*." *Mayfield*, 124 Nev. at 349, 184 P.3d at 366

(emphasis added). Although a party may subsequently make time of the essence "by demanding performance by a certain date or time," *id.*, nothing in the record indicates that Raiter demanded that Khosh remove the tiles by a certain date or time.[3] Thus, even if Khosh was required to remove the tiles from Raiter's property, his failure to do so was not a material breach that discharged Raiter of his obligation to perform in accordance with the agreement.

Second, we are also unpersuaded by Raiter's claim that he was discharged of his contractual obligations because Khosh failed to give him access to the Project Overstock website. According to the PDA, "Raiter will hold 100% ownership of Project Overstock and all of its assets to include . . . websites, and/or any other social media accounts used by Project Overstock."

At trial, Raiter testified that while the partnership was still intact, Khosh hired a web designer to build and maintain a website for Project Overstock. Raiter testified further that after the dissolution agreement was executed, he could not access the website and was unable to contact the web designers. As a result, according to his testimony, he asked Khosh to help him gain access to the website and contact the web designers, but that ultimately he "never heard . . . from them." On appeal, Raiter suggests that, under the PDA, Khosh was required to "assure [that] access [to the website] was turned over to Raiter" and that Khosh's alleged failure to do so relieved him of having to pay the $60,000 due pursuant to the PDA.

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[3]Raiter testified that at some point he asked Khosh to pick up the tiles because he was apparently in violation of zoning restrictions. Nevertheless, Raiter never made a formal demand insisting that time was of the essence and that performance was required by a certain date or time.

Although the PDA clearly vested Raiter with complete ownership of Project Overstock, including the website, nothing in the agreement states or implies that Khosh was required to facilitate Raiter's access to the website. In other words, while Khosh was obligated to relinquish his ownership interest in the business and its assets, he was not obligated to actively assist Raiter with accessing and managing Project Overstock's website. Indeed, Raiter could have hired his own people to maintain and manage Project Overstock's website at any time after the PDA was signed. And given his exclusive ownership of Project Overstock, it seems most reasonable that the parties would have assumed that Raiter would do just that (i.e., hire his own team to access, manage, and maintain the company's website), rather than relying on his former partner for such support. *See Dickenson v. State, Dep't of Wildlife*, 110 Nev. 934, 937, 877 P.2d 1059, 1061 (1994) (providing that a "fair and reasonable" interpretation of a contract is preferred).

Moreover, nothing in the record indicates that Khosh improperly retained control over the website after the PDA was executed, or that he prevented or hindered Raiter from accessing Project Overstock's website in anyway. Nor does the record support the conclusion that Raiter believed Khosh's assistance with the website access was an essential element of the contract. In fact, Raiter's testimony suggests the opposite, as it reveals that he made no formal request or demand for Khosh's compliance with this alleged contractual requirement and apparently asked for his assistance regarding the matter on only one occasion. Thus, neither the contract's text nor Raiter's conduct permit the inference that Khosh's assistance accessing the website was essential to the agreement or that any failure to assist in that regard would constitute a material breach of the PDA. *See* Lord, *supra*, § 63:3 (citing *Panhandle Rehab. Ctr., Inc. v. Larson*,

288 N.W.2d 743 (Neb. 1980)) (explaining "that the best indication of the true intent of the parties as to the materiality of a breach is their treatment of it"). Accordingly, we hold that the district court did not err in concluding that Raiter, not Khosh, materially breached the PDA.[4]

Finally, Raiter posits that Khosh's prior breach of the PDA's noncompete covenant discharged him of his duty to pay the $60,000 owed to Khosh. Specifically, Raiter claims that Khosh violated the noncompete clause when he sold roughly half the limestone tiles to a third party.

Generally, noncompete clauses that are unreasonable as to duration and geographic scope are unenforceable. *See Golden Rd. Motor Inn, Inc. v. Islam*, 132 Nev. 476, 482, 376 P.3d 151, 155 (2016) (recognizing time and territory as important factors in determining whether an employer-employee noncompete clause is enforceable); *see also Camco, Inc. v. Baker*, 113 Nev. 512, 520, 936 P.2d 829, 834 (1997) (holding that "[t]o be reasonable, the territorial restriction should be limited to the territory in which appellants [(former employers)] established customer contacts and good will" (alterations in original) (quoting *Snelling & Snelling, Inc. v. Dupay Enters., Inc.*, 609 P.2d 1062, 1064 (Ariz. Ct. App. 1980)). Similarly, a partner's promise not to compete with his or her former partner "must be reasonable in its limits as to time and area." 6 Richard A. Lord, *Williston on Contracts* § 13:18 (4th ed. 2021) (collecting cases).

Although not argued in the briefing, we note that the noncompete clause at issue in this case does not appear to be enforceable

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[4]Raiter also argues that Khosh did not provide access to the website in a reasonable time, constituting a material breach of the PDA. Given our conclusion that Khosh was not required to provide or assist Raiter with access to the website, and the contract did not include a provision regarding time, we conclude that this argument is without merit.

because it is limitless as to time and geographic scope and would therefore prohibit Khosh from competing with Raiter anywhere in the world, in perpetuity.[5] The district court made nearly the same observation, twice, in its written order, alluding to the provision's unenforceability. Specifically, the district court noted that "[t]he 'non-compete' portion of the PDA is silent as to duration and geographical scope" and that it failed to "provide a timeframe as to when [Khosh] was not to engage in any business [offering] similar goods or services."

Nevertheless, assuming arguendo that the covenant not to compete is enforceable, we conclude that it is inapplicable here because Khosh's activities did not fall within the scope of the provision. As stated above, unambiguous contracts are enforced as written. *Am. First Fed. Credit Union v. Soro*, 131 Nev. 737, 739, 359 P.3d 105, 106 (2015). Further, this court interprets contractual terms according to their plain and ordinary meaning. *Traffic Control Servs., Inc. v. United Rentals Nw., Inc.*, 120 Nev. 168, 174, 87 P.3d 1054, 1058 (2004).

The noncompete clause in this case prohibits Khosh from "engag[ing] in any *business* which offers similar goods or services to Project Overstock LLC or to take part in any *business* that competes with Project Overstock . . . ." (Emphases added.) Black's Law Dictionary defines business as "[a] commercial enterprise carried on for profit; a particular occupation or employment habitually engaged in for livelihood or gain." *Business, Black's Law Dictionary* (11th ed. 2019). Likewise, the Oxford Dictionary defines business as "a person's regular occupation, profession, or

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[5]The noncompete provision states: "Andrei Khosh agrees not to directly or indirectly engage in any business which offers similar goods or services to Project Overstock LLC or to take part in any business that competes with Project Overstock LLC in any way."

trade" or "the practice of making one's living by engaging in commerce." *Business, New Oxford American Dictionary* (3d ed. 2010). In other words, business, in this context, is a person's primary profession.

Here, Khosh's activities cannot be reasonably construed as falling within the scope of the noncompete provision, as the record demonstrates merely that he sold the tiles informally to a friend and attempted to liquidate the remaining tiles (of limited number) in other nonprofessional, peer-to-peer sales via smart phone applications and/or the internet on limited occasions. It is unreasonable to construe his conduct as being in the business of selling tiles. Indeed, the district court impliedly hinted at the same conclusion, finding that "it is not logical that [Raiter] would expect [Khosh] to remove the tile and then do nothing with it." Thus, Khosh was not involved in a commercial enterprise that was designed to compete with Project Overstock, as his sales and attempted sales were limited and casual in nature, and therefore not within the scope or contemplation of the noncompete clause. Stated simply, Khosh was not operating a *business* that was competing with Project Overstock.

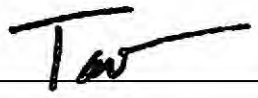
Raiter's preferred reading of the noncompete provision is also unreasonable. This is so because the limestone tile was plainly a component of Khosh's compensation related to the sale of his interest in Project Overstock. If the noncompete is read so broadly as to completely prevent Khosh from selling the limestone, even as a casual seller, in order to realize its cash value as compensation for relinquishing his ownership in Project Overstock, then Khosh would be substantially deprived of the benefit of the bargain, which would be an unreasonable interpretation of the contract. *Dickenson*, 110 Nev. at 937, 877 P.2d at 1061. Accordingly, we conclude that Raiter's interpretation of the noncompete provision is untenable and that Khosh did not violate the provision when he sold and attempted to sell the

limestone tiles awarded to him under the PDA in a nonprofessional capacity so as to realize the full monetary compensation of relinquishing his ownership interest in Project Overstock. Therefore, the district court did not err when it ruled in Khosh's favor on his breach of contract claims.

In sum, we conclude that the district court correctly determined that Raiter materially breached the PDA and that Khosh was therefore entitled to expectation damages in the amount of $60,000. Furthermore, we hold that Raiter's interpretation of the PDA is inconsistent with a reasonable interpretation of the text of the agreement and that Khosh's breaches, if any, were immaterial. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Gibbons



_____, J.
Tao

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