IN THE COURT OF APPEALS OF THE STATE OF NEVADA

YETI OF NEVADA, INC., A NEVADA CORPORATION; AND SHANE ZACK, AN INDIVIDUAL,
Appellants,
vs.
TWAIN TAVERN HOLDINGS, LLC, A NEVADA LIMITED LIABILITY COMPANY,
Respondent.

No. 84626-COA

ORDER AFFIRMING IN PART AND VACATING IN PART

Yeti of Nevada, Inc. and Shane Zack (appellants) appeal from a final judgment following a bench trial in a contract action. Eighth Judicial District Court, Clark County; Mark R. Denton, Judge.

Respondent Twain Tavern Holdings, LLC (Twain) filed a complaint alleging that appellants were liable for money damages based upon breach of contract and breach of guaranty for their failure to maintain and/or repair a parking lot as provided for in a commercial lease agreement. Appellants filed an answer, cross complaint, and third-party complaint. In their cross complaint, appellants sought a declaratory judgment in their favor and also alleged that Twain was liable for money damages based upon a breach of the implied covenant of good faith and fair dealing. In their third-party complaint, appellants alleged that the relevant property had a co-tenant, Fun Hog Ranch, that Fun Hog Ranch had also entered into a

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lease agreement with Twain which required Fun Hog Ranch to maintain and/or repair the parking lot, and that Fun Hog Ranch should be required to pay an equitable share of any damages related to any failure to maintain and/or repair the parking lot.

This matter proceeded to a bench trial. Prior to the trial, appellants filed a notice of voluntary dismissal without prejudice regarding the third-party complaint against Fun Hog Ranch. And, at the start of trial, appellants also orally informed the district court of their intention to abandon their third-party complaint.

During trial, Twain presented evidence concerning the provisions of the lease agreement, the condition of the parking lot prior to appellants' tenancy on the premises, the condition of the parking lot during appellants' tenancy, and estimated costs to repair the parking lot. Appellants presented testimony concerning their belief that they were not responsible for repairing the parking lot and that the lot only had normal wear and tear. Appellants also presented testimony concerning their efforts to maintain the parking lot and stated that they kept records detailing such expenses. However, appellants acknowledged that they had not disclosed such records and were unable to produce them due to an issue with their information technology department.

Following the presentation of evidence, Twain informed the district court of its intention to seek the application of the rebuttable presumption "[t]hat evidence willfully suppressed would be adverse if produced" set forth in NRS 47.250(3) in light of appellants' failure to produce records related to repairs they purportedly made to the parking lot.

Appellants indicated their intention to oppose that request, and the court directed the parties to address this issue in their written closing arguments. The record indicates that the parties subsequently filed written closing arguments, but the record before this court does not contain those documents.

The district court subsequently entered a written judgment in favor of Twain. The court found that the lease agreement required appellants to maintain and repair the parking lot. The court also found that the parking lot was in good working order when appellants assumed the lease, but under appellants' tenancy, the parking lot had since fallen into such a state of disrepair that it needed repair work totaling $64,390. In addition, the court applied NRS 47.250(3) and found that any documentary evidence that appellants failed to produce would have shown a lack of significant expenditure on parking lot repair. The court therefore found that appellants breached the lease agreement with Twain. The court also found that appellants were not entitled to relief based upon any of their counterclaims. Finally, despite appellants' prior filing of the notice of dismissal regarding their third-party complaint, the district court purported to dismiss the third-party complaint with prejudice. This appeal followed.

Failure to maintain and repair the parking lot

First, appellants argue that the district court erred by finding that the parking lot was not maintained or in better condition than when they started to lease the premises. Appellants also contend that the court failed to consider their argument that any damages to the parking lot

stemmed from normal wear and tear and were thus not required to be repaired by appellants. In addition, appellants assert that the court should not have believed a prior tenant's testimony concerning the condition of the parking lot as it lacked specificity.

"[T]he district court's determination that the contract was or was not breached will be affirmed unless clearly erroneous, but the district court's interpretation of the meaning of contractual terms is subject to independent appellate review." *See Sheehan & Sheehan v. Nelson Malley & Co.*, 121 Nev. 481, 486, 117 P.3d 219, 223 (2005). "A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Unionamerica Mortg. & Equity Tr. v. McDonald*, 97 Nev. 210, 211-12, 626 P.2d 1272, 1273 (1981) (internal quotation marks omitted). Moreover, this court "will not weigh the credibility of witnesses because that duty rests with the trier of fact." *Krause Inc. v. Little*, 117 Nev. 929, 933, 34 P.3d 566, 569 (2001).

At trial, Twain presented evidence concerning the lease agreement and its terms regarding repairs for the relevant property. The agreement provided that appellants, as the lessees, were required to "bear any and all costs, expenses and obligations of every kind and nature whatsoever related to . . . the use, occupancy, maintenance, and operation" of the relevant property, including all improvements contained thereon. The agreement also provided that appellants, as the lessees, were required to "keep, maintain and repair [the property]" at their "sole cost and expense."

Twain also presented evidence concerning the past and current condition of the parking lot. The prior tenant testified that he paid for repairs to the parking lot in 2000 and that it was in serviceable condition when appellants assumed the lease in 2007. However, beginning in 2014, Twain sent multiple notices to appellants concerning their failure to maintain and repair the parking lot, but appellants did not repair or replace the parking lot prior to vacating the property.

Anthony Blake, a contractor with a concrete and asphalt maintenance business, testified that he examined the parking lot and concluded that it was in a state of disrepair. Blake expressed the opinion that little maintenance work had been performed on the parking lot in the prior 5 to 10 years and that the parking lot needed extensive work to bring it to good condition. He provided two options to repair the parking lot, either an overlay of the existing parking lot with a cost of $64,390, or a total removal and replacement with a cost of $93,390.

Following trial, the district court entered an order finding that appellants were obligated under the lease agreement to maintain and repair the parking lot. The court's order demonstrates that the court determined that appellants were not responsible for ordinary wear and tear under the agreement and concluded that the preponderance of the evidence demonstrated that the condition of the parking lot was poor and that it required significant repairs. The court did not accept appellants' contention that the parking lot had been maintained in good working order but instead concluded that appellants failed to perform their obligations to maintain the parking lot, and that the evidence presented did not demonstrate that

appellants had made any significant repairs to the parking lot. Based on the evidence presented, the district court awarded Twain Tavern $64,390, which represented the cost of the overlay repair option.

We conclude that the record supports the district court's findings. As the fact-finder, the district court was responsible for assessing witness credibility and resolving evidentiary conflicts, and although appellants challenge the court's credibility and evidentiary rulings, the evidence presented at trial was legally sufficient to support the court's finding that appellants failed to meet their obligations under the lease agreement to maintain and repair the parking lot. *See Fox v. First W. Sav. & Loan Ass'n*, 86 Nev. 469, 472-73, 470 P.2d 424, 426 (1970) (acknowledging that the appellate courts extend substantial deference to the district court's witness credibility and weight of evidence determinations); *see also Keystone Realty v. Osterhus*, 107 Nev. 173, 176, 807 P.2d 1385, 1387 (1991) ("In general, the findings of the trier of fact will be affirmed on appeal if the findings are based upon substantial evidence in the record." (citing NRCP 52(a))). Therefore, appellants are not entitled to relief based on these claims.

NRS 47.250(3) presumption

Next, appellants argue that the district court abused its discretion by applying NRS 47.250(3)'s rebuttable presumption[1] "[t]hat

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[1]We note that the district court's order cited to the presumption under NRS 47.250(3) but stated it was an adverse inference. Based on our resolution of this issue as to a rebuttable presumption, we need not address

evidence willfully suppressed would be adverse if produced" based upon their failure to produce records concerning repairs to the parking lot. We review a trial court's decision regarding sanctions for the destruction or spoilation of evidence for an abuse of discretion. *Bass-Davis v. Davis*, 122 Nev. 442, 447, 134 P.3d 103, 106 (2006). "When evidence is willfully suppressed, NRS 47.250(3) creates a rebuttable presumption that the evidence would be adverse if produced." *Id.* at 448, 134 P.3d at 106. "[W]illful or intentional spoliation of evidence requires the intent to harm another party through the destruction and not simply the intent to destroy evidence." *Id.* "As the rebuttable presumption in NRS 47.250(3) applies only when evidence is willfully suppressed, it should not be applied when evidence is negligently lost or destroyed, without the intent to harm another party." *Id.* at 449, 134 P.3d at 107.

During trial, Shane Zack testified that he paid for repairs to the parking lot, that his business records would reflect those expenses, and that he was unable to access or disclose those records due to problems with his information technology department. The district court's written order found that appellants admitted they had custody of records of relevant repairs to the parking lot and that they failed to disclose those records to Twain. And the court concluded that the failure of appellants to disclose those records warranted the application of NRS 47.250(3)'s presumption.

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the issue of whether an adverse inference, which is a lower sanction than a rebuttable presumption, had been applied instead.

However, in applying this presumption, the district court did not find that appellants willfully or intentionally destroyed evidence with the intent to harm respondents or otherwise address whether such willful suppression occurred. And because this presumption only applies in these circumstances, the district court abused its discretion by applying NRS 47.250(3)'s presumption in the absence of such a finding. *Bass-Davis*, 122 Nev. at 447, 449, 134 P.3d at 106, 107.

Nevertheless, we conclude that this error was harmless because it did not affect appellants' substantial rights and they did not establish that but for that error, "a different result might reasonably have been reached." *Wyeth v. Rowatt*, 126 Nev. 446, 465, 244 P.3d 765, 778 (2010); *cf.* NRCP 61 ("At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights."). As discussed above, the evidence produced at trial demonstrated that the parking lot was in a state of disrepair and that a substantial amount of work was necessary to bring the parking lot to good condition. Thus, even without the application of NRS 47.250(3)'s presumption, there was substantial evidence in the record demonstrating that appellants failed to meet their contractual obligation to maintain and repair the parking lot. *See Keystone Realty*, 107 Nev. at 176, 807 P.2d at 1387. Therefore, we conclude that appellants are not entitled to relief based on this claim.

Breach of implied covenant of good faith and fair dealing

Next, appellants contend that the district court erred by rejecting its counterclaim that Twain breached the implied covenant of good faith and fair dealing. Appellants appear to assert that Twain was liable

for breach of the implied covenant of good faith and fair dealing because it failed to seek payment for the parking lot repair from Fun Hog Ranch. Appellants also argue that the damages should have been apportioned between themselves and Fun Hog Ranch.

"Even if a defendant does not breach the express terms of a contract, a plaintiff may still be able to recover damages for breach of the implied covenant of good faith and fair dealing." *State, Dep't of Transp. v. Eighth Judicial Dist. Court*, 133 Nev. 549, 555, 402 P.3d 677, 683 (2017) (internal quotation marks omitted). A party to a contract breaches the implied covenant of good faith and fair dealing where it performs "in a manner that is unfaithful to the purpose of the contract and the justified expectations of the other party are thus denied." *Hilton Hotels Corp. v. Butch Lewis Prods., Inc.*, 107 Nev. 226, 234, 808 P.2d 919, 923 (1991). Whether a party's performance denies another of their reasonable expectations under a contract "is determined by the various factors and special circumstances that shape these expectations." *See id.* at 234, 808 P.2d at 923-24.

Preliminarily, appellants dismissed their third-party claims against Fun Hog Ranch, and therefore, they cannot demonstrate that Fun Hog Ranch should have been required to pay a portion of the damages. And, as explained previously, the lease agreement between Twain and appellants required appellants to pay for the maintenance and repair costs of the parking lot. Moreover, there was nothing in the agreement between Twain and appellants requiring Twain to also request that Fun Hog Ranch pay for the parking lot maintenance and repair. Accordingly, the evidence

presented at trial supports the district court's decision to reject this claim. *See Fox*, 86 Nev. at 472-73, 470 P.2d at 426; *Keystone Realty*, 107 Nev. at 176, 807 P.2d at 1387. Therefore, we conclude that appellants are not entitled to relief based on this claim.

Voluntary dismissal of third-party complaint

Finally, appellants argue that the district court erred by dismissing its third-party complaint with prejudice. NRCP 41(a)(1)(A) governs voluntary dismissal by right, rather than by court order, and provides, in relevant part, that "the plaintiff may dismiss an action without a court order by filing: (i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment." "Unless the notice . . . states otherwise, the dismissal is without prejudice." NRCP 41(a)(1)(B).

Here, appellants filed a notice of dismissal without prejudice of their third-party complaint before Fun Hog Ranch had filed an answer or a motion for summary judgment. Subsequently, appellants orally informed the court of the voluntary dismissal and explained that it did so without prejudice, and the court responded "Okay." However, in the order entered following the underlying trial, the district court purported to dismiss appellants' third-party complaint with prejudice.

Because appellants voluntarily dismissed the third-party complaint without prejudice pursuant to NRCP 41(a)(1)(A), the dismissal was effective upon the filing of the required notice. *See Harvey L. Lerer, Inc. v. Eighth Judicial Dist. Court*, 111 Nev. 1165, 1170, 901 P.2d 643, 646 (1995). Thus, to the extent that the district court subsequently purported

to dismiss the third-party complaint with prejudice, that was error. Therefore, we vacate the court's order dismissing the third-party complaint with prejudice. Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND VACATED IN PART.[2]


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

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[2]To the extent appellants purport to challenge the district court's post-judgment order awarding Twain attorney fees, that issue is not properly before us. An order granting attorney fees and costs is independently appealable as a special order after final judgment. *See* NRAP 3A(b)(8) (providing for appeals from special orders entered after a final judgment); *Smith v. Crown Fin. Servs.*, 111 Nev. 277, 280 n.2, 890 P.2d 769, 771 n.2 (1995). And the record indicates that the order awarding attorney fees was entered after appellants initiated this appeal.

Insofar as the parties raise arguments that are not specifically addressed in this order, we have considered the same and conclude that they do not present a basis for relief.

cc: Hon. Mark R. Denton, District Judge
Thomas J. Tanksley, Settlement Judge
Patricia A. Marr, Ltd.
The Siegel Group
Eighth District Court Clerk