

IN THE SUPREME COURT OF THE STATE OF NEVADA

DOUBLE PLAY ENTERPRISES, LLC, A
NEVADA LIMITED LIABILITY
COMPANY,
Appellant/Cross-Respondent,
vs.
CARMINE VENTO, TRUSTEE OF THE
CARMINE VENTO AND ANN M.
VENTO REVOCABLE FAMILY TRUST,
Respondents/Cross-Appellants.

No. 41673

FILED

MAY 26 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

Appeal and cross-appeal from a district court judgment in a real property purchase option case and a post-judgment order denying attorney fees. Eighth Judicial District Court, Clark County; Ronald D. Parraguirre, Judge.

This appeal involves a dispute concerning price and property description provisions in a real estate option purchase agreement. In summary, the parties litigated their disagreements over the dimensions of the parcel to be conveyed, whether certain improvements and fixtures on the premises were to be included in the purchase price, and whether appraisals used to determine the price properly complied with the agreement with regard to the dimensions, improvements and fixtures. Although we conclude that the district court properly used parol evidence to clarify, rather than create, the legal description of the subject property, we also conclude that the district court erred in some of its rulings concerning the appraisals and in the reasoning behind its refusal to award attorney fees. Accordingly, we affirm in part, reverse in part, and remand this matter for a new trial on limited issues.

FACTS AND PROCEDURAL HISTORY

The parties to this appeal are appellant/cross-respondent Double Play Enterprises, LLC, and respondent/cross-appellant Carmine Vento, as trustee for the Carmine Vento and Ann M. Vento Revocable Family Trust (Vento).

Vento owned approximately 4.6 acres of commercial real estate located in Las Vegas. He entered into an agreement concerning the property with Double Play's predecessor-in-interest, Frank P. Nold. The contract required Vento to construct a tavern on a portion of the parcel and lease the tavern property, described generally as "[t]hat certain real property located at 9495 Las Vegas Boulevard South, Las Vegas, Nevada," to Nold. The agreement also included an option for Nold to purchase "that portion of the Property upon which the Premises is located, as subdivided by Landlord and comprised of approximately 1 acre." (Emphasis added.) Upon exercise of the option, the sales price would be determined by the parties based upon a joint appraisal of fair market value or, if the parties could not agree, by the average of Member of the Appraisal Institute (MAI) appraisals submitted by each party.

Vento provided no further legal description of the tavern property in connection with the Nold transaction, largely because he had not yet subdivided the 4.6 acres. However, at the trial of this matter below, Nold alleged that Vento showed him a site plan and artist's rendering of the 4.6 acres as it was to appear following subdivision. The site plan identified only three lots, with the tavern property consisting of a 50,091 square foot rectangular plot, somewhat in excess of one acre on the southeast portion of the undivided parcel. The leased property became known as "tract three."

Vento eventually subdivided the entire parcel into the three lots in order to obtain approval to commence construction. Vento later discovered an abandoned easement running along the eastern boundary of the leased property, which he combined with a small "notch" from the southeast corner of the tavern property to create "tract four." He then leased this new lot to Reagan National Advertising, which erected a billboard upon it. Reagan constructed the billboard stanchion within the notch, and the billboard encumbers both the notch and the former easement.

Article 8 of the lease dealt with improvements to the property made by the respective parties, stating that "improvements made by Tenant shall at Landlord's option become the property of Landlord upon the expiration or sooner termination of the Lease." Article 6 of the lease further provided that "if Tenant has fully and faithfully performed all the terms . . . of this Lease [,]. . . Tenant shall, at its sole cost and expense, remove all personal property and trade fixtures which Tenant has installed or placed in or on the Premises (all of which are hereinafter referred to as 'Tenant's property')."

Vento and Nold also entered into a memorandum of understanding with I.R.-Still, Ltd., under which I.R.-Still sold Nold certain furniture, fixtures, and equipment to be constructed, installed, and thereafter used for the tavern's operation. Carmine Vento, as president of I.R.-Still, signed the memorandum of understanding. A bill of sale, signed by Carmine Vento on behalf of I.R.-Still, verified that I.R.-Still sold various equipment including exhaust hoods, walk-in coolers, and stoves to

Double Play.¹ Neither the lease-option agreement nor the memorandum of understanding addressed whether the parties were to include the value of these items in the MAI appraisals.

Nold transferred his interest in the tavern property to Double Play, and Double Play ultimately exercised the option to purchase. A dispute arose over the option price, and the parties obtained independent appraisals.

Double Play filed an action in district court seeking a declaration that its appraisal should govern the purchase price, alleging that, of the two appraisals, only its appraisal complied with the terms of the lease purchase agreement and the memorandum of understanding concerning the sale of trade fixtures. Double Play further sought specific performance of the option contract and damages for Vento's failure to close on the transaction. Vento counterclaimed for a declaration that its appraisal should be used to value the property and for breach of contract, breach of the implied covenant of good faith and fair dealing inherent in the contract, and fraud on the grounds that Double Play submitted an appraisal which purposefully undervalued the property. In short, the parties contested the validity of the appraisals and sought judicial intervention to determine the purchase price. At issue were the boundaries of the subject property, valuation of the notch, and whether trade fixtures purchased by Double Play should be included in the valuations.

¹Nold was a principal in Double Play. Double Play apparently acquired the equipment, later agreed to be trade fixtures, in anticipation of an assignment of Nold's interest in the property to Double Play.

The district court ruled that the option to purchase included the notch and that Vento's appraisal inflated the value of the property to the extent that it included trade fixtures in the valuation. Accordingly, the district court reduced the Vento appraisal by an amount representing the value of trade fixtures and, despite the fact that Double Play's appraisal did not value the notch under any appraisal method, averaged the adjusted Vento valuation with Double Play's appraisal figure.² Based upon its calculations, the district court then set the purchase price at \$2,178,000. It refused to award Double Play damages based upon Vento's failure to timely close the sales transaction. Thereafter, in a separate ruling, the district court denied Double Play's request for attorney fees as the prevailing party under the agreement.

On appeal, Vento challenges the inclusion of the notch in the transaction and the exclusion of the trade fixtures from his appraisal. In taking the latter position, Vento argues that the district court had no authority under the contract to adjust the appraisals. Double Play, in its cross-appeal, challenges the district court's refusal to award damages and denial of its application for attorney fees.

²The adjustment came from two rulings: a partial summary judgment ruling reducing the value by \$225,000; and a ruling at trial further reducing the value by \$49,000. At trial, Vento's appraiser acknowledged that, if the district court properly reduced the appraisal for the trade fixtures, then the court should also reduce the appraisal by an additional \$49,000.

DISCUSSION

The interpretation of a contract presents a question of law that this court reviews de novo.³ “[W]hen a contract is clear, . . . its terms must be given their plain meaning.”⁴ “[An ambiguous] contract should be construed, if logically and legally permissible, so as to effectuate valid contractual relations, rather than in a manner which would render the agreement invalid, or render performance impossible.”⁵ And, whether a property description contained in a written document, together with properly admitted parole evidence, meets the statute of frauds requirements, presents a mixed question of law and fact.⁶ A district court’s factual findings will not be set aside unless clearly erroneous and will be upheld when supported by substantial evidence.⁷

Parol evidence

Over Vento’s objection, the district court considered parol evidence, including the site plan, to identify the premises to be conveyed under the original option. Based upon this evidence, the district court found that the parties intended that the notch be included as part of the option purchase.

³NOLM, LLC v. County of Clark, 120 Nev. 736, 739, 100 P.3d 658, 661 (2004).

⁴Ringle v. Bruton, 120 Nev. 82, 93, 86 P.3d 1032, 1039 (2004).

⁵Mohr Park Manor, Inc. v. Mohr, 83 Nev. 107, 112, 424 P.2d 101, 105 (1967).

⁶See, e.g., Zapuchlak v. Hucal, 262 N.W.2d 514, 518 (Wis. 1978).

⁷Jordan v. Bailey, 113 Nev. 1038, 1044, 944 P.2d 828, 832 (1997).

On appeal, Vento argues that the district court impermissibly used Double Play's parol evidence to create a legal description of the property and, accordingly, to include the notch as part of the purchase. Double Play counters that the district court permissibly used the parol evidence, not to create a legal description, but to clarify the legal description. In De Remer v. Anderson, we explained that parol evidence may be used to clarify the description of land:

It is a doctrine well established with reference to the introduction of oral evidence explanatory of ambiguities in written instruments of a nature such as the one involved here that, where there is a description of some sort, which description may be made intelligibly definite by evidence *aliunde*, parol evidence may be introduced to identify the land or premises in the contemplation of the makers of the instrument. . . . But the entire absence of terms of description or definition will not be supplied by parol evidence.⁸

In De Remer, a lease authorized the lessee to purchase "any part" of the leased premises, and the lessee elected to purchase only a portion of the property.⁹ On those facts, we held that the lease lacked any description of the property, precluding the use of parol evidence on that question.¹⁰

Unlike the lease in De Remer, which authorized the lessee to purchase "any part" of the leased premises, the agreement between Double Play and Vento was more specific as to the property to be purchased. The lease-option agreement described the property's location as "9495 Las

⁸41 Nev. 287, 294-95, 169 P. 737, 739 (1918) (emphasis added).

⁹Id. at 294, 169 P. at 739.

¹⁰Id. at 296, 169 P. at 739.

Vegas Boulevard South,” and the size of the property as “approximately 1 acre.” The agreement also specified that the option applied to “that portion of the Property upon which the Premises is located.” We are satisfied that these provisions are sufficiently descriptive so as to permit clarification by parol evidence. Therefore, the district court properly used parol evidence to resolve the legal description of the property, rather than create it, in this instance.¹¹

Vento argues that the omission of a valuation of the notch from Double Play’s appraisal demonstrates that the parties did not originally intend to include the notch in the transaction, and that the agreement clearly provided that the premises to be conveyed was to be governed by his subsequent subdivision of the property. We disagree. First, the boundary issue, as resolved by the parol evidence, concerned the intent of the parties regarding the boundaries at the time the original contract was signed, not conflicting views over the subsequent creation of tract four. Second, while Vento’s appraisal clearly failed to value the notch based upon his contention that the option property did not include the notch, Double Play had other reasons, discussed below, for omitting a notch valuation from its appraisal. Third, the provision defining the conveyed parcel as that portion to be subdivided is inherently ambiguous. Fourth, the parol evidence properly resolved these ambiguities and provided a substantial basis for the district court’s award of the notch to Double Play.

¹¹Neither party has argued that the option provisions are unenforceable for failure to comply with the statute of frauds.

The appraisals

Vento notes that Double Play's appraisal failed to include the notch in its valuation, either by description or by capitalizing the income attributable to the portion of the billboard located within and over the notch. From this, Vento argues that an award of the notch to Double Play without the notch being considered by its appraiser erroneously gave Double Play the notch at no cost. In response, Double Play claims that it has title to the notch under the original option agreement; that it originally contracted to lease purchase a tavern and lot, not a tavern and lot with a billboard; that Vento created the notch and constructed the billboard without legal authority; and that it should not be required to purchase rights that were illegally created. Thus, while Double Play argues that it owns the billboard and the rights to the income from it, it also argues that inclusion of the billboard income in its capitalization approach to value the property was not required.

As noted, Vento further claims that the district court violated the option agreement by excluding the value of trade fixtures from Vento's appraisal. Double Play defends the district court's adjustments to Vento's appraisal, arguing that the appraisal impermissibly included fixtures that Double Play had purchased pursuant to the memorandum of understanding and bill of sale.

As explained below, we conclude that neither appraisal properly valued the tavern property under the lease-purchase arrangement. First, neither appraisal included a valuation of the notch. Thus, both appraisals resulted in Double Play's receipt of the notch at no cost. Second, the Vento appraisal improperly included the value of trade fixtures in violation of the option agreement, resulting in a purchase of

items already owned by Double Play. Accordingly, we remand this case to the district court for the parties to submit new appraisals that comport to the terms of the contract as we now construe it. In this we conclude that the district court on remand must, in its resolution of the valuation issues under these option purchase agreements, reject any portion of the appraisals that fail to comport with the contract in its resolution of the valuation issues.

The notch

As noted, the district court, based upon parol evidence, included the notch as part of the option sales transaction. Certainly, the notch generates income over and above that generated from the tavern, and the billboard has made the notch portion, and therefore tract three as a whole, more valuable. In this, we note that Double Play never objected to the billboard's placement before exercising the option. Thus, while Nold and Double Play had no intention of lease-purchasing "tavern/billboard" property, assuming their intent to purchase the notch along with the remainder of tract three, the exercise of the option agreement after construction of the billboard demonstrates intent to acquire the billboard as well. Because the lease-option agreement contemplated the use of appraisals upon the exercise of the option, we conclude that the agreement contemplates that the purchase price should be based upon the value of the property at that time. Thus, the appraisals must include the notch, along with its income-generating billboard.

Double Play's appraiser valued the tavern property at \$2,060,000, based solely upon the income stream generated from the tavern, without accounting for the income stream generated by the billboard. We therefore agree with Vento that the district court's reliance upon the Double Play appraisal resulted in an undervaluation of the

property, and that the Double Play appraisal failed to conform to the terms of the agreement requiring an appraisal value as of the exercise of the option. Accordingly, we conclude that the district court erred in its ultimate use of Double Play's appraisal.

Going further, Vento's appraisal likewise failed to evaluate the notch. This failure obviously stemmed from his basic position that the notch was not part of the property to be conveyed under the lease-option agreement. Given the district court's decision to include the notch in the transaction, and our agreement on that point, the district court further erred in considering the Vento appraisal valuation as stated in its calculation of value.

We note that Vento's appraisal failed to value the notch portion of the subject parcel under any appraisal theory. While Double Play does not assert this as error because the error inured to its benefit, and while Vento relied upon this appraisal at trial under its claim that the notch was not included, given our affirmation of the district court's inclusion of the notch as part of the transaction, we will allow Vento to submit a new appraisal upon remand.

Trade fixtures

Vento's appraiser valued the tavern property at \$2,570,000. In arriving at this figure, his appraiser excluded any value for certain furniture, fixtures, and equipment, reasoning that these items were Double Play's personal property. Vento's appraiser, however, included the value of other trade fixtures, such as vent hoods, stoves, and walk-in-coolers. The district court found that Double Play had already purchased the items listed in its appraisal pursuant to the memorandum of understanding. Vento argues that the district court erred in crediting Double Play for the items already purchased because the lease provided

that "improvements made by Tenant shall at Landlord's option become the property of Landlord upon the expiration or sooner termination of the Lease." However, as stated above, the lease also provided that "if Tenant has fully and faithfully performed all the terms . . . of this Lease . . . Tenant shall, at its sole cost and expense, remove all personal property and trade fixtures which Tenant has installed or placed in or on the Premises (all of which are hereinafter referred to as 'Tenant's property')." To the extent that these provisions create an ambiguity, a reasonable interpretation of the provisions is that the trade fixtures included in Vento's appraisal were the property of Double Play. Thus, we discern no error in the district court's reduction of Vento's appraisal by \$274,000, the value of the trade fixtures.¹²

Attorney fees

In its appeal, Double Play contends that the district court erred by not awarding it attorney fees under the lease-option agreement as the prevailing party. The district court denied the award based upon its conclusion that the dispute was reasonable and legitimate. We conclude that the district court erred in this regard. Attorney fees are available when authorized by rule, statute, or contract.¹³ Here, the lease provided for an award of attorney fees and costs to the prevailing party in an action to enforce the lease. The lease does not limit an award of attorney fees to frivolous or unreasonable disputes. Had the parties

¹²We conclude that the parties agreed to modify their legal rights concerning trade fixtures by structuring the agreement in this way.

¹³Flamingo Realty v. Midwest Development, 110 Nev. 984, 991, 879 P.2d 69, 73 (1994).

wished for such a limitation, they could have provided it in the agreement. Therefore, on remand, assuming the parties proceed to have the district court finally resolve this matter, the district court must award attorney fees to whomever it determines to be the “prevailing party” as provided for in the agreement, regardless of the reasonableness or legitimacy of the dispute. It is possible, however, that neither party will qualify for such an award.¹⁴

Remedy on remand

As noted, the purchase price of the property was to be the average of the two appraisals. As also noted, neither appraisal properly valued the tavern property. Accordingly, we remand this case for the parties to submit new appraisals comporting with the terms of the contract, which can then be averaged to determine the purchase price. In this, we direct the district court to consider only the portions of the new appraisals that comport with the option contract as construed in this order.

CONCLUSION

We conclude that the district court’s use of parol evidence to determine the legal description of the tavern property was proper under De Remer. We also conclude that the district court properly adjusted the Vento appraisal based upon its improper consideration of the value of trade fixtures purchased by Double Play. Thus, we reverse the district court’s judgment and order and remand the matter for a new trial utilizing new appraisals evaluating the notch as part of the purchase, deleting the

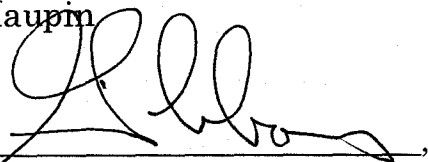
¹⁴We note that properly drawn appraisals will themselves resolve the only real question in this dispute, the purchase price.

trade fixtures from the valuations and, possibly, for an award of attorneys' fees to the prevailing party.¹⁵ Accordingly, we

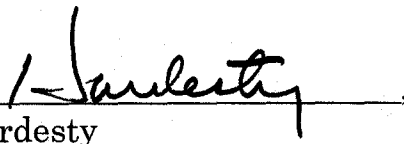
ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.


_____ J.

Maupin


_____ J.

Gibbons


_____ J.

Hardesty

cc: Eighth Judicial District Court Dept. 3, District Judge
Lester H. Berkson, Settlement Judge
Beckley Singleton, Chtd./Las Vegas
Gordon & Silver, Ltd.
Lionel Sawyer & Collins/Las Vegas
Clark County Clerk

¹⁵We have considered the other assignments of error raised in these appeal proceedings and find them without merit. In particular, we note that the ambiguities in the agreement resulted in good-faith errors in the appraisals. These errors and ambiguities justified Vento's refusal to close the transaction on Double Play's terms. Thus, the district court committed no abuse of discretion in its refusal to award damages to Double Play. We also conclude that the district court committed no abuse of discretion in finding Double Play's proofs insufficient to justify an award of damages.