IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID STODDART; AND JENCAR DEVELOPMENT CORPORATION, A NEVADA CORPORATION,
Appellants,
vs.
LARRY MILLER, EXECUTOR OF THE ESTATE OF WILLIAM PECCOLE; AND THE WILLIAM PECCOLE 1982 TRUST,
Respondents.

No. 42133

THE WILLIAM PECCOLE 1982 TRUST; LARRY MILLER, EXECUTOR OF THE ESTATE OF WILLIAM PECCOLE; WANDA PECCOLE; LAURIE P. BAYNE; LAURIE PECCOLE 1976 TRUST; LISA PECCOLE; AND LISA PECCOLE 1976 TRUST,
Appellants,
vs.
DAVID STODDART AND JENCAR DEVELOPMENT CORPORATION,
Respondents.

No. 42234

ORDER OF REVERSAL

These are consolidated appeals from a district court judgment entered pursuant to a jury verdict in a torts, contract, and civil RICO action. Eighth Judicial District Court, Clark County; Michael A. Cherry, Judge.

These consolidated appeals originated from a dispute, initially between David Stoddart and Larry Miller, executor of the estate of William Peccole. In 1992, Stoddart, William Peccole, and Miller, who is Peccole's son-in-law, met for lunch, apparently to discuss, at least during part of the meeting, an unrelated lawsuit. Although the parties differ as

to the exact content of the remainder of their discussion, they agree that they talked about jointly developing land owned by Peccole.

Stoddart contended that Peccole proposed that they enter into a joint venture to develop and sell approximately 2700 acres of land, known as the Peccole Ranch, Phase II. Under the proposal, Stoddart claimed, Peccole would be paid $45,000 per acre of land, Stoddart would provide his development expertise, and they would split the future profits evenly.

According to Miller the only discussion for a possible joint venture concerned 32 acres of the Peccole Ranch Phase II property. The parties did not reach an agreement, however, regarding the amount Peccole would be paid for the land because Peccole wanted $70,000 to 80,000 per acre, and Peccole never formally made an offer to enter into a joint venture with Stoddart.

The parties admittedly met several times after the lunch meeting to discuss the terms of the project under contemplation. While negotiating terms, they made interlineations to a form joint venture agreement. The parties did not, however, ever complete or sign a final written document. Specifically, the draft agreement was left unfinished with respect to the land's cost and the conditions under which the joint venture was to terminate.

Stoddart's and Peccole's consulting services agreement

About eight months later, in 1993, Stoddart drafted a consulting services agreement. The agreement, which was later signed by both Stoddart and Peccole, stated that Stoddart was to be paid $20,000 per month to provide consulting services for the development of Peccole Ranch Phase II. Under the consulting services agreement, Stoddart's duties

included development feasibility review, financing, management, administration, and marketing and merchandising. Stoddart was paid the monthly compensation for approximately two and one-half years.

The line of credit

About one year into the consulting services agreement, Stoddart sought to obtain financing to purchase a home in Las Vegas. Peccole and his wife co-signed with Stoddart on a $500,000 line of credit. The parties agree that Stoddart made payments on the loan for a short period and that, thereafter, Peccole paid the balance of the loan. They disagree, however, as to why: while Stoddart asserted that Peccole voluntarily assumed responsibility for the debt, that assertion is contested.

Procedural history

Stoddart and his company, Jencar Development Corporation (collectively, Stoddart), brought suit against the William Peccole 1982 Trust and its executor, Miller, alleging claims arising out of the purported 1992 oral joint venture agreement for breach of contract, unjust enrichment, promissory estoppel/detrimental reliance, and fraud. The trust and Miller, who was also the executor of Peccole's estate, counterclaimed for breach of fiduciary duty/detrimental reliance, fraudulent misrepresentation, theft and embezzlement, abuse of process, and violation of Nevada's Racketeer Influenced and Corrupt Organization (RICO) statutes. In the counterclaims, Miller asserted that Stoddart exaggerated his land development credentials when they were discussing possible business engagements, falsely representing on his resume that he was an architect with a graduate degree from York University in environmental studies, was vice-president of Karma Development in Edmonton, Canada, and had completed numerous residential land

development projects. Miller also maintained that Peccole agreed to co-sign for the line of credit as a result of Stoddart gaining his trust with Stoddart's false representations about his land development expertise. Laurie Peccole Bayne and Lisa Peccole Miller, Peccole's daughters and beneficiaries of the 1982 Trust, the Laurie Peccole 1976 Trust, and the Lisa Peccole 1976 Trust, intervened as defendants in the action. Miller, the trusts, and the Peccole family are collectively referred to in this order as "Miller."

The district court dismissed Stoddart's fraud, theft and embezzlement, and abuse of process claims. The district court also bifurcated the trial, so that Miller's civil RICO counterclaim was tried separately. Thus, in the first trial, the jury considered Stoddart's claims for breach of an oral joint venture contract, unjust enrichment, and promissory estoppel/detrimental reliance and Miller's claims for breach of fiduciary duty/detrimental reliance and fraudulent misrepresentation. In addition to the disputed facts noted above, the jury was presented with a letter, dated shortly after the 1992 lunch meeting, authored and sent by Stoddart to Peccole, regarding their discussion. The letter provided, in pertinent part,

> I would like to . . . thank you for initiating Wednesday's lunch meeting, and for recommending a joint venture development proposal between our respective companies.
>
> After careful consideration of your verbal proposal, I believe that we can both fairly and equitably settle the [unrelated lawsuit].
>
> As discussed on Wednesday, I have undertaken a preliminary analysis of the block 32, Phase Two site and after further review, believe that together we can develop and market a quality project with a very strong bottom line. . . .

> [Paragraphs proposing the terms of a financial settlement in the preexisting litigation.]
>
> [A]s a gesture of good faith, I propose that you be reimbursed the full $250,000 out of the initial profits from the joint venture development of Block 32.
>
> I look forward to a successful resolution to this matter and a profitable future.
>
> Yours Truly,
>
> /signed/
>
> Wm. David Stoddart

The jury in trial one returned a general verdict for Stoddart, awarded him $33,000,000, and rejected Miller's counterclaims. Miller did not challenge the jury's rejection of his counterclaims, but moved for judgment notwithstanding the verdict (JNOV), a new trial, and remittitur with respect to the judgment against him. The district court denied the motions for JNOV and a new trial, but remitted the verdict to $5,040,000, determining that the jury verdict was excessive, shocked the conscience, and appeared to have been awarded under the influence of passion and prejudice. Stoddart rejected the remittitur, and the district court ordered a new trial on damages only.

The district court submitted Miller's RICO counterclaim to a second jury in trial two. At the close of Miller's case, Stoddart moved to dismiss the action under NRCP 41(b). The district court rejected his motion. The jury in trial two returned a verdict in favor of Miller and against Stoddart in the amount of $501,083.34. The district court trebled these damages pursuant to statute for a total damages award of $1,503,250.02. Both Miller and Stoddart have appealed.

DISCUSSION

On appeal, Miller challenges the district court's denial of his motion for JNOV. Stoddart challenges, among other things, the district court's denial of his motion to dismiss the case under NRCP 41(b).

Miller's challenge

Miller argues that the district court erred by denying his motion for JNOV because the evidence was insufficient, as a matter of law, to support the jury's verdict on either of the theories on which it was instructed: breach of a joint venture agreement and unjust enrichment. We agree.

We review a district court's order denying a motion for JNOV according to the same standards used by the district court in resolving a motion for JNOV: "'the trial court must view the evidence and all inferences most favorably to the party against whom the motion is made.'"[1] If the facts are disputed or could lead to differing reasonable inferences, the matter must be submitted to the jury.[2] But, "when all reasonable inferences from the facts presented to the jury favor the moving party," JNOV is warranted.[3]

The evidence and all reasonable inferences therefrom favor Miller as to whether an enforceable oral joint venture agreement existed

Stoddart sought damages in trial one for breach of an oral agreement to form a joint venture. "'A joint venture is a contractual

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[1]Sheeketski v. Bortoli, 86 Nev. 704, 706, 475 P.2d 675, 676 (1970) (quoting Bliss v. DePrang, 81 Nev. 599, 601, 407 P.2d 726, 727 (1965)).

[2]Id.

[3]Id.

relationship in the nature of an informal partnership wherein two or more persons conduct some business enterprise, agreeing to share jointly, or in proportion to capital contributed, in profits and losses.'"[4] Whether a joint venture exists is a question of fact to be determined through general principles of contract interpretation and "consideration of the actions and conduct of the parties."[5]

A contract exists only when the parties have agreed to all material terms.[6] Thus, agreements containing incomplete or unascertainable terms cannot be enforced, since such agreements render impossible the court's determination of the parties' intentions thereunder and leave nothing for the court to enforce.[7] When evidence shows that, after a contract was purportedly formed, the parties continued to negotiate the agreement's essential terms, it is clear that there has been no meeting of the parties' minds, and consequently, that no binding contract exists as a matter of law.[8]

Here, all reasonable inferences from the evidence presented to the jury favor Miller. The parties' lack of agreement on material terms leaves nothing for the law to enforce and demonstrates that the parties

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[4]Radaker v. Scott, 109 Nev. 653, 658, 855 P.2d 1037, 1040 (1993) (quoting Bruttomesso v. Las Vegas Met. Police, 95 Nev. 151, 154, 591 P.2d 254, 256 (1979)).

[5]Id.

[6]May v. Anderson, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005).

[7]Burns v. Dees, 557 S.E.2d 32, 35-36 (Ga. Ct. App. 2001).

[8]Louis Lesser Enterprises, Ltd. v. Roeder, 25 Cal. Rptr. 917, 919 (Ct. App. 1962).

had "contracted," at most, to agree to form a joint venture in the future. According to Stoddart, at the 1992 lunch, Peccole offered to enter into a joint venture with him, in which Peccole would provide 2700 acres of land for $45,000 per acre, Stoddart would provide development services, and profits would be split evenly. Stoddart asserts that he accepted Peccole's proposal in the letter sent shortly following the lunch meeting, but even if that letter implies acceptance to negotiate, nothing in it suggests that the parties had agreed on the terms essential for the court to enforce their agreement. For instance, Stoddart repeatedly stated that he was considering Peccole's proposal. Stoddart also made a new proposal—that Peccole receive the first $250,000 in profits to settle his outstanding debt in the unrelated litigation. Stoddart admits that the parties never agreed on the price per acre of land that Peccole would receive for the land used in the joint venture. Further, the incomplete draft joint venture agreement shows that the parties never agreed as to whether the cost for the land, once agreed-upon, was to apply to gross or net acreage.[9] That incomplete draft agreement also shows the parties' failure to agree on the project's total acreage and the terms of the project's termination and dissolution. Moreover, the fact that the parties continued to negotiate after Stoddart sent his letter and even drafted, but failed to complete, the written joint venture contract precludes as a matter of law a conclusion that the parties entered into an enforceable agreement.

While a court may supply certain details for an otherwise substantially complete contract, it cannot enforce a contract that is

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[9]Net acreage refers generally to the usable portion of the total acreage.

missing terms essential to its interpretation, such as where the proposed development is to occur, how costs are to be allocated, and how proceeds would be calculated[10] or how losses will be dealt with.[11] Accordingly, as Stoddart failed to provide evidence even inferentially demonstrating the existence of an enforceable contract, the court erred in failing to grant Miller judgment as a matter of law on this issue.[12]

Stoddart's unjust enrichment claim failed as a matter of law

In trial one, Stoddart alternatively sought damages for unjust enrichment, based on his argument that Peccole failed to justly compensate him for the services that he performed. This court has stated that "[a]n action based on a theory of unjust enrichment is not available

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[10]See Lemming v. Morgan, 492 S.E.2d 742, 744 (Ga. Ct. App. 1997) (declaring an alleged oral agreement to purchase, develop, and resell property unenforceable when it failed to detail "when transfer of title, division of proceeds, or sale of the properties was to take place; how or when development was to take place on any of the properties; how development or other costs of the ventures were to be allocated; how, when or by whom it would be decided whether the properties would be sold . . . [,] or how proceeds would be calculated"); Cherokee Falls Investments v. Smith, 445 S.E.2d 572, 574 (Ga. Ct. App. 1994) (declaring an alleged land development contract unenforceable when it did not contain terms detailing "how or when the development was to occur, the allocation of costs and profits between the parties, the proposed completion date for the development project, or whether the joint venture was limited to development within the Cherokee Falls subdivision").

[11]Burns, 557 S.E.2d at 37 (declaring an alleged contract to share profits from the sale of property unenforceable for failure to detail myriad essential terms, including the parties' respective rights and responsibilities in the event the company incurred losses).

[12]See May v. Anderson, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005).

when there is an express, written contract, because no agreement can be implied when there is an express agreement."[13] Indeed, "[t]o permit recovery by quasi-contract where a written agreement exists would constitute a subversion of contractual principles."[14]

The record reflects that Peccole and Stoddart entered into an express, written contract, referred to as the consulting services agreement. Both parties signed this agreement, under which Stoddart was to receive a monthly salary of $20,000 for providing consulting services such as development feasibility review, financing, management, administration, and marketing and merchandising. The existence of this express, written contract prevents recovery under a theory of unjust enrichment for the commission of services covered by that contract.

Stoddart argues that the existence of the consulting services agreement does not preclude recovery under a theory of unjust enrichment because it did not encompass the parties' entire agreement. But, to the extent he argues that he performed additional services, no evidence in the record, even inferentially, supports such a conclusion, and we therefore conclude that Stoddart's claim for unjust enrichment failed as a matter of law.

Because we conclude that both of Stoddart's claims failed as a matter of law, we conclude that the district court erred by denying

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[13]LeasePartners Corp. v. Brooks Trust, 113 Nev. 747, 755, 942 P.2d 182, 187 (1997).

[14]Lipshie v. Tracy Investment Co., 93 Nev. 370, 379, 566 P.2d 819, 824 (1977).

Peccole's motion for JNOV. We next address the parties' assignments of error in trial two.[15]

Stoddart's challenge

As stated above, the jury in trial two returned a verdict in favor of Miller, finding that Stoddart had committed a violation of Nevada's civil RICO statutes. Stoddart challenges the district court's order denying his motion to dismiss under NRCP 41(b). Stoddart argues that the civil RICO claim failed as a matter of law because Miller did not prove the existence of two predicate acts as is required by statute.

Because trial took place in 2003, we look to the version of NRCP 41(b) in effect at that time. That rule provided, in pertinent part,

> [a]fter the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has failed to prove a sufficient case for the court or jury.[16]

By moving for dismissal, the movant "'admits the truth of a plaintiff's evidence and all inferences that reasonably can be drawn therefrom, and the evidence must be interpreted in the light most favorable to the plaintiff.'"[17]

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[15]In light of our disposition, we decline to reach the merits of either Miller's or Stoddart's other arguments with respect to the first trial.

[16]NRCP 41(b) (2001).

[17]Fennell v. Miller, 94 Nev. 528, 529, 583 P.2d 455, 456 (1978) (quoting Gunlock v. New Frontier Hotel, 78 Nev. 182, 183-84, 370 P.2d 682, 683 (1962)).

Miller failed to demonstrate the existence of two predicate acts as required to prove a civil RICO claim

Nevada's racketeering statutes provide a private right of action for treble damages to "[a]ny person who is injured in his business or property by reason of any violation of NRS 207.400."[18] NRS 207.400, in turn, sets forth a list of unlawful acts, which includes using funds derived from racketeering activity to gain an interest in real property. NRS 207.400 provides, in pertinent part,

> 1. It is unlawful for a person:
>
> (a) Who has with criminal intent received any proceeds derived, directly or indirectly, from racketeering activity to use or invest, whether directly or indirectly, any part of the proceeds, or the proceeds derived from the investment or use thereof, in the acquisition of:
>
> (1) Any title to or any right, interest or equity in real property.

"Racketeering activity" is defined as

> engaging in at least two crimes related to racketeering that have the same or similar pattern, intents, results, accomplices, victims or methods of commission, or are otherwise interrelated by distinguishing characteristics and are not isolated incidents, if at least one of the incidents occurred after July 1, 1983, and the last of the incidents occurred within 5 years after a prior commission of a crime related to racketeering.[19]

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[18]NRS 207.470.

[19]NRS 207.390.

"Crimes related to racketeering" are enumerated in NRS 207.360 and include the predicate act alleged to have been committed by Stoddart: "[o]btaining possession of money or property valued at $250 or more, or obtaining a signature by means of false pretenses."[20]

We have previously explained that to recover damages under Nevada's RICO statutes, a plaintiff must satisfy three elements: "(1) the plaintiff's injury must flow from the defendant's violation of a predicate Nevada RICO act; (2) the injury must be proximately caused by the defendant's violation of the predicate act; and (3) the plaintiff must not have participated in the commission of the predicate act."[21]

Miller alleged that Stoddart committed the predicate act of obtaining money, property, or a signature by false pretenses at least three times.[22] However, Peccole was the alleged victim in only one of the three instances, and that instance suffers from deficiencies relating to causation and lack of written evidence. Stoddart argues that Miller's Nevada RICO claim therefore failed as a matter of law. We agree.

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[20]NRS 207.360(26).

[21]Allum v. Valley Bank of Nevada, 109 Nev. 280, 283, 849 P.2d 297, 299 (1993).

[22]Miller also alleged in his counterclaim that Stoddart committed the predicate acts of "[t]aking property from another under circumstances not amounting to robbery" and "[e]mbezzlement of money or property valued at $250 or more." NRS 207.360(9), (25). The jury in trial two was instructed on these and all of the other predicate acts in Nevada's civil RICO scheme, but based on the evidence Miller presented at trial and his closing arguments, it is clear that his claim against Stoddart focused on allegations that Stoddart obtained money by false pretenses.

The elements of the crime of obtaining something of value by false pretenses are: "(1) intent to defraud; (2) a false representation; (3) reliance on the false representation; and (4) that the victim be defrauded."[23] Further, the false pretense, or a note or memorandum thereof, must be in writing and either written or subscribed by the defendant:

> [T]he defendant shall not be convicted if the false pretense shall have been expressed in language, unaccompanied by a false token or writing, unless the pretense or some note or memorandum thereof be in writing, subscribed by or in the handwriting of the defendant, or unless the pretense be proved by the testimony of two witnesses, or that of one witness and corroborating circumstances.[24]

At trial, Miller introduced evidence that Stoddart obtained Peccole's signature on the $500,000 line of credit by false pretenses. Specifically, Laurie Bayne, Peccole's daughter, testified that Stoddart presented a resume to her, Peccole, and others at a meeting in late 1992, indicating that Stoddart was a land planner and an architect. Stoddart conceded at trial that he was neither a land planner nor an architect. According to Miller, Peccole hired Stoddart based on these misrepresentations and Stoddart gained his trust such that two years later, in April 1994, Peccole co-signed on the $500,000 line of credit. This evidence is insufficient as a matter of law to establish a false pretenses claim for two reasons.

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[23]Hale v. Burkhardt, 104 Nev. 632, 639, 764 P.2d 866, 870 (1988).

[24]NRS 175.261.

First, Stoddart's falsified resume cannot reasonably be declared the proximate cause of Peccole's damages in being forced to repay the line of credit.[25] The resume was allegedly presented by Stoddart two years before Peccole agreed to co-sign on the line of credit. Although Stoddart's misrepresentations may have lead Peccole to hire him as a consultant, it cannot be concluded that the same misrepresentations lead Peccole to co-sign on the line of credit two years later. The fact that Stoddart remained employed by Peccole during the two years strongly suggests that Stoddart's performance as an employee formed the basis for Peccole's decision to co-sign on the line of credit.

Second, Miller was unable to satisfy the requirements of NRS 175.261 by producing written proof of the false pretense. Specifically, Peccole could not produce a copy of Stoddart's falsified resume at trial. The only resume produced at trial was conceded by Miller to be different from the one allegedly presented by Stoddart to Peccole and Bayne. Additionally, Miller was unable to satisfy NRS 175.261's alternative requirements for establishing a false pretense: testimony from two witnesses or one witness and corroborating circumstances.

Based on this analysis, we conclude that the Nevada RICO claim failed as a matter of law and the district court erred by denying Stoddart's motion to dismiss the action under NRCP 41(b).[26]

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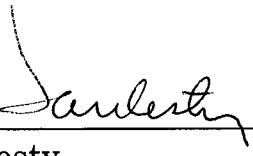
[25]See Allum, 109 Nev. at 286, 849 P.2d at 301.

[26]In light of our conclusion, we decline to reach the merits of Stoddart's other arguments with respect to the second trial.

CONCLUSION

We conclude that the district court erred by denying the motion for JNOV in the first trial. With respect to the second trial, we further conclude that the civil RICO claim failed as a matter of law. Accordingly, we reverse the district court's judgment on the jury verdict in the first trial, the order entered after the first trial insofar as it denied the motion for JNOV, and the judgment on the jury verdict in the second trial.

It is so ORDERED.



_____, J.
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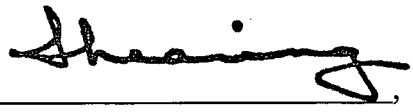

_____, Sr.J.
Shearing

cc: Eighth Judicial District Court Dept. 17, District Judge
Howard Roitman, Settlement Judge
Bailus Cook & Kelesis
Robert A. Kelley
Law Offices of Richard McKnight, P.C.
Lewis & Roca, LLP/Las Vegas
Lionel Sawyer & Collins/Las Vegas
Dominic Campisi
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