

Case No. 84699

IN THE SUPREME COURT FOR THE STATE OF NEVADA

**PHILLIP J. FAGAN, JR. AN INDIVIDUAL AND AS TRUSTEE OF THE
PHILLIP J. FAGAN, JR. 2001 TRUST**

Appellant,

vs.

AAL-JAY, INC., A NEVADA CORPORATION

Respondent.

Petition from the Eighth Judicial District Court, Clark County, Nevada
District Court Case No. A-21-832379-C

The Honorable Erika Ballou

**RESPONDENT AAL-JAY, INC.'S OPPOSITION TO APPELLANTS'
MOTION PURSUANT TO NRAP 27 TO REQUIRE BOND**

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Respondent AAL-JAY, INC. (“Respondent” or “AAL-JAY”), by and through its attorneys, Ogonna M. Brown, Esq. and Adrienne Brantley-Lomeli, Esq. of the law firm Lewis Roca Rothgerber Christie LLP, hereby files this Opposition to Appellants’ Motion Pursuant to NRAP 27 to Require Bond (“Opposition”).¹

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The Parties Engaged in Ten Years of Business Relations and Contractual Dealings, Resulting in the Final Purchase Agreement

Respondent first leased the at-issue property (“Property”) from Appellants in November 2011. Then, on December 8, 2016, the parties entered into a Contract for Deed (“Contract”), under which Appellants agreed to sell the Property to Respondent for \$1,050,000. The terms of the Contract were later amended by Addendum No. 1 (“Addendum”). Since the Addendum was entered into by the parties, Appellants unilaterally decided to increase the interest rate on the purchase price despite no terms in the contractual documents allowing for such a change. Further, Respondent has

¹ Respondent filed its response of August 1, 2022. The Notice of Rejection was inadvertently missed and accordingly Respondent’s believed the response had been accepted.

made dozens of payments towards the principal of the underlying Promissory Note, including a \$30,000 payment on or about January 22, 2019.

Then, in the latter part of 2020, the parties engaged in additional negotiations regarding the existing terms of the purchase of the Property. As a result of the conversations—which occurred between Respondent’s Corporate Director and Appellants’ attorney, Richard Scott—First American Title Insurance Company (“First American”) sent a Residential Purchase Agreement (“Purchase Agreement”) to Respondent on January 6, 2021. The Purchase Agreement was prepared by Appellants’ attorneys. Under the Purchase Agreement, the new purchase price for the Property was \$800,000 (“Purchase Price”), with a stipulation for \$5,000 to be placed in escrow as an earnest money deposit (“EMD”). The Purchase Price reflected the thirty-five (35) prior payments made under the terms of the original Contract and Addendum. Respondent executed the Purchase Agreement on January 11, 2021, and returned it to First American.

The very next day, Appellants thereafter attempted to renege on the new Purchase Price, seeking to increase it to \$895,000—nearly a hundred thousand dollars more.

To allow for time for a potential revision to the Purchase Agreement be

negotiated, Respondent agreed to sign a Residential Lease Agreement dated January 22, 2021 (“Lease Agreement”) for the term of February 2021. Given their nearly ten-year relationship, Respondent trusted Appellants’ representations that the Lease Agreement served only to allow for additional time for the negotiations regarding the potential revision to occur. Respondent was deceived.

Despite Respondent being compliant with the governing terms and Appellants’ Amortization Schedule dated February 23, 2021, Appellants filed a 5-Day Notice to Quit for Tenancy At Will (“Five-Day Notice”) in an attempt to evict Respondent from the Property on March 12, 2021. Based on Appellants’ representations and the ten-year relationship between the parties, Respondent agreed to execute the second lease agreement dated March 2, 2021 (“Second Lease Agreement”) as drafted and presented by Appellants. Appellants included the language that “all other agreements are terminated and of no further force or effect” in an accompanying, unexecuted Letter of Agreement. Appellants presented this Second Lease Agreement through counsel to Lail Leonard, the president of Respondent – she is an elderly woman who did not have the benefit of counsel to represent her, and the attorney tricked her into signing the Second Lease Agreement.

Pursuant to the agreed-upon terms of the Second Lease Agreement, Respondent made two additional monthly payments of \$6,800 each for March and April 2021, of which \$3,000 of the payment amount would be applied to a modified purchase price. Appellants pursued eviction efforts under the Five-Day Notice only after Respondent made the two additional payments and executed the Second Lease Agreement.

Further, only after Respondent executed the Second Lease Agreement and remitted the additional payments, Appellants informed Respondent that a revised purchase agreement would not be executed until the end of the lease term and then ceased all negotiations regarding the parties' outstanding disputes as to the itemization and reconciliation for the purchase of the Property.

B. Respondent Sues to Protect the Thousands of Dollars in Payments Already Remitted and Moves to Enforce the Purchase Agreement

In response to Appellants' bad faith efforts and to protect Respondent's numerous payments remitted for the purchase of the Property, Respondent initiated the instant lawsuit on April 6, 2021. *See* Verified Compl., filed Apr. 6, 2021. Respondent subsequently filed its Emergency Motion for Specific Performance of Purchase Agreement, on an

Order Shortening Time (“Motion for Specific Performance”) on May 18, 2021, in an effort to obtain an adjudication for specific performance of the Purchase Agreement from the district court before Appellants pursued further eviction efforts after Appellants’ first request for summary eviction was denied. *See* Mot. for Specific Performance, filed May 18, 2021. A hearing was set for 9:00 am on June 1, 2021. *See id.* Appellants opposed the Motion for Specific Performance, and Respondent replied. *See* Opp’n to Mot. for Specific Performance, filed June 8, 2021; *see also* Reply in support of Mot. for Specific Performance, filed June 15, 2021.

C. The District Court Grants Respondent’s Motion for Specific Performance and Orders Sale of the Property

The Motion for Specific Performance was fully briefed, and the court held oral arguments on June 22, 2021, and concluded that the Appellants suffered from “seller’s remorse” and ordered specific performance of the Purchase Agreement for \$800,000. On August 26, 2021, the district court entered its formal Order to grant the Motion for Specific Performance. Appellants filed their Second Stay Motion on August 30, 2021, to challenge the Order.

D. LEGAL ARGUMENT

Nevada Rule of Civil Procedure 65 provides the court with the

authority to issue a preliminary injunction. *See* NEV. REV. STAT. § 33.010. Applying this statute, the Nevada Supreme Court has held that a preliminary injunction should issue “upon a showing that the party seeking it enjoys a reasonable probability of success on the merits and that the defendant’s conduct, if allowed to continue, will result in irreparable harm for which compensatory damage is an inadequate remedy.” *Dixon v. Thatcher*, 103 Nev. 414, 415, 742 P.2d 1029, 1029 (1987) (citing *Number One Rent-A-Car v. Ramada Inns*, 94 Nev. 779, 780, 587 P.2d 1329 (1978)); *Dangberg Holdings Nevada, L.L.C. v. Douglas Cnty. & Bd of Cnty. Comm’rs*, 115 Nev. 129, 142, 978 P.2d 311, 319 (1999). In considering preliminary injunctions, courts may also weigh the potential hardships to the relative parties and others, and the public interest. *University and Community College System of Nevada v. Nevadans for Sound Government*, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004).

Here, Appellants contend that Respondents should be required to post a bond in the amount of \$800,000. Appellants theory is that he has been divested of property rights by a “de facto injunction” that the district court issued. Appellants seek to continue to hold title to the Property against the terms of the Purchase Agreement as drafted by Appellants’ agents and

attorneys, offered by Appellants to Respondent on January 6, 2021, and accepted by Respondent on January 11, 2021. The district court did not issue a de facto injunction. Rather, it entered a Specific Performance Order after the matter was fully briefed and oral argument heard. Appellants equitable arguments that it bears the financial burden is disingenuous. Indeed, the district court noted in its Specific Performance Order that Buyer submitted checks dated March 15, 2021, to Seller in the amount of \$6,800 consisting of check number 3276 and 3277 representing March and April 2021 rental payments for the property and only stopped payment on the checks after Appellants refusal to proceed in good faith with the Purchase Agreement. Additionally, the Court found that on April 23, 2021, the Buyer delivered a cashier's check in the amount of \$17,575 to the Seller representing payment for the March and April 2021, inclusive of late fees in accordance with the Second Lease Agreement making the payments under reservation of rights to avoid further eviction proceedings while Buyer pursued its rights under the Purchase Agreement for \$800,000.

Further, at the hearing on the Motion for Turnover and Order to Show Cause, Appellants argued their countermotion for injunctive relief, which was denied. The district court expressly denied Appellants' request for

Respondent to make monthly payments to cover Appellants' monthly mortgage payments of \$6,800.00. The district court rejected this request on the basis that Appellants refused to comply with the Sale Order, and had they complied, they would have received the full purchase price they initially offered and would have been paid \$800,000 as previously agreed.

The district court held that any delays that Appellants have experienced in the receipt of rental payments are due to their lack of good faith and cooperation pursuant to the Purchase Agreement and failure to comply with the district court's Sale Order.

III. CONCLUSION

Based upon the foregoing, Respondent respectfully requests that this Court deny Appellants' Motion Pursuant to NRAP 27.

Dated this 26th day of August, 2022.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: /s/ Ogonna M. Brown
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CERTIFICATE OF SERVICE

I certify that on August 26, 2022, I submitted the foregoing
“**RESPONDENT AAL-JAY, INC.’S OPPOSITION TO APPELLANTS’
MOTION PURSUANT TO NRAP 27 TO REQUIRE BOND**” for filing *via*
the Court’s eFlex electronic filing system. Electronic notification will be
sent to the following:

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Dated: August 26, 2022.

/s/ Gabriela Mercado
An Employee of
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