Nebraska Supreme Court Online Library
www.nebraska.gov/apps-courts-epub/
11/02/2026 09:39 AM CST

and, therefore, were not reviewable in the instant appeal. Thus, we affirm the juvenile court's order of adjudication in its entirety.

AFFIRMED.

The remainder of the opinion shall remain unmodified.

FORMER OPINION MODIFIED.

MOTION FOR REHEARING OVERRULED.

E & E PROPERTY HOLDINGS, LLC, FORMERLY KNOWN AS ACCOMMODATION TITLEHOLDER TWENTY-ONE, LLC, APPELLEE AND CROSS-APPELLANT, V. UNIVERSAL COMPANIES, LLC, APPELLANT AND CROSS-APPELLEE.

788 N.W.2d 571

Filed August 17, 2010. No. A-09-940.

1. **Declaratory Judgments.** An action for declaratory judgment is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute.
2. **Declaratory Judgments: Appeal and Error.** In an appeal from a declaratory judgment, an appellate court, regarding questions of law, has an obligation to reach its conclusion independently of the conclusion reached by the trial court.
3. ____: ____. Determinations of factual issues in a declaratory judgment action treated as an action at law will not be disturbed on appeal unless they are clearly wrong.
4. **Contracts: Declaratory Judgments.** When a dispute sounds in contract, the action for a declaratory judgment is to be treated as one at law.
5. **Contracts.** The meaning of a contract and whether a contract is ambiguous are questions of law.
6. **Contracts: Appeal and Error.** The interpretation of a contract involves a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below.
7. **Breach of Contract: Damages.** A suit for damages arising from breach of a contract presents an action at law.
8. **Contracts.** A court interpreting a contract must first determine as a matter of law whether the contract is ambiguous.
9. **Contracts: Words and Phrases.** A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.
10. **Contracts: Evidence.** If a contract is ambiguous, the meaning of the contract is a question of fact, and a court may consider extrinsic evidence to determine the meaning of the contract.

11. **Contracts.** A contract must receive a reasonable construction and must be construed as a whole, and if possible, effect must be given to every part of the contract.
12. **Contracts: Liability.** Two conditions must be met in order for an agreement to constitute a novation: (1) The agreement must completely extinguish the existing liability, and (2) a new liability must be substituted in its place.
13. **Breach of Contract: Damages.** In a breach of contract case, the ultimate objective of a damages award is to put the injured party in the same position the injured party would have occupied if the contract had been performed, that is, to make the injured party whole.

Appeal from the District Court for Lancaster County: ROBERT R. OTTE, Judge. Affirmed.

John M. Guthery and Derek A. Aldridge, of Perry, Guthery, Haase & Gessford, P.C., L.L.O., for appellant.

Craig C. Dirrim, of Woods & Aitken, L.L.P., for appellee.

MOORE and CASSEL, Judges.

PER CURIAM.

I. INTRODUCTION

Universal Companies, LLC (Universal), appeals the order of the Lancaster County District Court awarding E & E Property Holdings, LLC (E & E), a judgment in the amount of $100,000 pursuant to an escrow agreement between the parties. For the following reasons, we affirm.

II. STATEMENT OF FACTS

The dispute in this case arises from the purchase of a large cold-storage facility by Lincoln Poultry & Egg Company (Lincoln Poultry), a wholesale food service distributor, from Universal. Lincoln Poultry eventually assigned its rights to E & E Family Limited Partnership and then to Accommodation Titleholder Twenty-One, LLC, which was then renamed "E & E Property Holdings, LLC." The parties entered into a purchase agreement, which was a cooperative accumulation of the parties' discussions and negotiations regarding the sale of the facility. Included in the purchase agreement is section 3.D., which relates to possible repairs needed for the facility and provides:

i. Roof. In the event any work is required with respect to the roofing system including, but not limited to, the air/vapor barrier system, Buyer shall obtain a cost estimate for such work. Buyer shall be responsible for the first Twenty Five Thousand and No/100ths Dollars ($25,000.00) incurred in connection with such work and Seller shall be responsible for the next Fifty Thousand and No/100ths Dollars ($50,000.00) incurred in connection with such work. In the event the estimated cost of such work exceeds Fifty Thousand and No/100ths Dollars ($50,000.00), Buyer may, in its sole discretion, elect to terminate this Agreement in which event, the Earnest Money Deposit shall be promptly returned to Buyer, and neither Buyer nor Seller shall have any further obligation or liability to each other under this Agreement.

ii. Sprinkler System. In the event any work is required with respect to the sprinkler system, which work shall not include the installation or modification of in-rack sprinklers, Buyer shall obtain a cost estimate for such work. Buyer shall be responsible for the first Twenty Five Thousand and No/100ths Dollars ($25,000.00) incurred in connection with such work and Seller shall be responsible for the next Seventy Five Thousand and No/100ths Dollars ($75,000.00) incurred in connection with such work. In the event the estimated cost of such work exceeds Seventy Five Thousand and No/100ths Dollars ($75,000.00), Buyer may, in its sole discretion, elect to terminate this Agreement in which event, the Earnest Money Deposit shall be promptly returned to Buyer, and neither Buyer nor Seller shall have any further obligation or liability to each other under this Agreement.

iii. Sub-Floor. In the event any work is required with respect to any system protecting the sub-floor under the freezers, Buyer shall obtain a cost estimate for such work. Buyer shall be responsible for the first Twenty Five Thousand and No/100ths Dollars ($25,000.00) incurred in connection with such work and Seller shall be responsible for the next Twenty Five Thousand and No/100ths Dollars ($25,000.00) incurred in connection with such work. In

> the event the estimated cost of such work exceeds Twenty Five Thousand and No/100ths Dollars ($25,000.00), Buyer may, in its sole discretion, elect to terminate this Agreement in which event, the Earnest Money Deposit shall be promptly returned to Buyer, and neither Buyer nor Seller shall have any further obligation or liability to each other under this Agreement.
>
> In the event any work described in subsections (i), (ii) and/or (iii) is required, an amount equal to Seller's maximum liability with respect to such work (the "Escrowed Funds") shall be retained by the Title Company in escrow at Closing. The Escrowed Funds shall be disbursed to Buyer and/or its designee(s) from time to time by the Title Company upon receipt of invoices with respect to such work, in accordance with the allocation of costs set forth above. Upon completion of such work[, t]he Title Company shall release the remaining balance of the Escrowed Funds, if any, to Seller.

This purchase agreement was signed by representatives of both parties on May 5, 2006.

E & E purchased the facility for $5,850,000, and on August 1, 2006, in conjunction with the closing, the parties signed an escrow agreement which, in pertinent part, included the exact terms as set forth in section 3.D. of the purchase agreement above. However, unlike the purchase agreement, the escrow agreement contains an additional subsection, which provides:

> Upon the earlier of (i) receipt of written confirmation from Buyer that the roof, sprinkler and sub-floor repairs described in Section 3(D) of the Purchase Agreement have been completed or (ii) January 31, 2007, the Escrow Agent shall promptly deliver the remaining balance of the Escrowed Funds, if any, and all interest earned with respect thereto to Seller.

The escrow agreement also contains additional sections which indicated that the parties have agreed that, in the event of a conflict between provisions of the two agreements, the provisions of the escrow agreement shall prevail, and that time is of the essence in the performance of each party's obligations.

On January 31, 2007, Lincoln Poultry sent a letter via telecopy to the escrow agent, requesting disbursement from the escrow fund for repairs to the facility. The request includes disbursements of $48,480 for the roofing system, $75,000 for the sprinkler system, and $25,000 for the subfloor; attached to the request were the corresponding documents and invoices detailing the repairs and modifications to the facility. On the same day, Universal contacted the escrow agent and directed that no funds were to be released, because E & E had missed the deadline to submit any claim for release of the funds.

On July 6, 2007, E & E filed a complaint in Lancaster County District Court and alleged that Universal had breached the purchase agreement by failing to remit payment for the agreed-upon facility repairs. E & E requested that the court award a judgment for those costs and an award of not less than $100,000 in damages. E & E alleged that repairs and modifications for the sprinkler system totaled $111,778.30, repairs for the subfloor totaled $98,400, and the necessary repairs for the roof would cost $73,480.

Universal filed an answer and counterclaim which generally denied the allegations set forth in E & E's complaint and, further, alleged that E & E had not incurred any expenses for the roof and that the expenses which were incurred for the sprinkler system and subfloor were not covered by either the purchase or escrow agreement. Universal also alleged that the claim for those funds in escrow was untimely and requested a declaratory judgment for those funds, plus interest.

Trial was held on the matter, and Richard Evnen, the chief executive officer of Lincoln Poultry, testified that the escrow agreement was drafted jointly by representatives from both parties, such that E & E's counsel drafted the original draft and submitted it to Universal, which in turn made changes pursuant to negotiations and conversations with both parties. Evnen testified that the subfloor repairs were completed in 2006 and that the sprinkler repairs were completed in early 2007. Evnen explained that the repairs to the sprinkler system and cost associated with those repairs did not include the installation or modification of in-rack sprinklers as required in both agreements. Evnen testified that a cost estimate was obtained

for the roof system but that, at the time of trial, the repairs had not been made. Evnen testified that it was his understanding the claims had to be submitted to the escrow agent by January 31, 2007, not before, and that had he believed the claims had to be submitted before January 31, the invoices would have been submitted before that date. On cross-examination, Evnen explained that he had sent an e-mail which indicated that the roofing proposals needed to be presented before January 31, but that he wanted some additional time for the attorney to look at the submissions before they were given to the escrow agent.

John Jacobson, owner-manager of Universal, testified that he was the owner of the facility before it was sold to Lincoln Poultry and was the main person involved in the negotiations for the sale with Evnen and Lincoln Poultry. Jacobson explained that Evnen had some concerns with necessary repairs for the facility and that through the purchase agreement, Jacobson agreed to the dollar amounts indicated in section 3.D. of the purchase agreement. Jacobson indicated that, before closing on the facility, Evnen had a preliminary draft of the escrow agreement sent to Jacobson, but that the preliminary draft did not have a "sunset," or a date which repairs would be completed. Jacobson indicated it was his position that any repairs to the facility were required to be completed and invoiced before January 31, 2007, or the escrow funds were to be immediately returned to Universal. Jacobson testified that he believed Universal's obligation was extinguished at midnight on January 30, 2007.

The district court first determined that Universal's obligations to share in the costs of repairs and modifications necessary were governed by the escrow agreement and that the language of the escrow agreement regarding the January 31, 2007, deadline to submit invoices was ambiguous. The court found that the "language as to this deadline is awkward and capable of creating confusion . . . . If that ambiguity is not resolved in favor of [E & E, it] will have lost substantial rights that it bargained for." The court determined that Universal was aware the facility was in need of repairs and that those repairs were considered in the original negotiations.

The court found that to find the language was not ambiguous would have been clearly inequitable and that therefore, E & E's submission of invoices and demand for payment on January 31 were timely.

The district court next determined that the roof repairs were not completed and had not even been started and that thus, under the escrow agreement, E & E was not entitled to any payment for estimated repairs to the roof. However, the district court did determine that the repairs to the sprinklers and subfloor were completed and that thus, E & E was entitled to $75,000 and $25,000 from Universal per the escrow agreement.

Finally, the district court found that both parties were "sophisticated businesses with competent representation and counsel . . . and the Purchase Agreement . . . states that no inference in favor of any party should be drawn." The court concluded that, while there was no similar clause in the escrow agreement, the parties intended to close the multimillion-dollar transaction as contemplated in the purchase agreement, and that therefore, no inference would be drawn in favor of either party. The court also ordered that any funds remaining in the escrow account after payment of the judgment to E & E be disbursed to Universal. It is from this order that Universal has appealed and E & E has cross-appealed.

III. ASSIGNMENTS OF ERROR

Universal assigns, rephrased and consolidated, that the district court erred by (1) determining that the escrow agreement was ambiguous, (2) interpreting and constructing the alleged ambiguous portion of the escrow agreement, (3) finding that E & E was entitled to $75,000 from the escrowed funds for the sprinkler system and $25,000 for the subfloor, and (4) finding that no adverse inference should be drawn against E & E as drafter of the contract documents.

E & E has cross-appealed and assigns that the district court erred by concluding that the escrow agreement modified and replaced the purchase agreement and in failing to award damages for breach of the purchase agreement.

IV. STANDARD OF REVIEW

[1-3] An action for declaratory judgment is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute. *State Farm Mut. Auto. Ins. Co. v. Allstate Ins. Co.*, 268 Neb. 439, 684 N.W.2d 14 (2004). In an appeal from a declaratory judgment, an appellate court, regarding questions of law, has an obligation to reach its conclusion independently of the conclusion reached by the trial court. *Id.* Determinations of factual issues in a declaratory judgment action treated as an action at law will not be disturbed on appeal unless they are clearly wrong. *Id.*

[4,5] When a dispute sounds in contract, the action for a declaratory judgment is to be treated as one at law. See *Spanish Oaks v. Hy-Vee*, 265 Neb. 133, 655 N.W.2d 390 (2003). The meaning of a contract and whether a contract is ambiguous are questions of law. *Pavers, Inc. v. Board of Regents*, 276 Neb. 559, 755 N.W.2d 400 (2008); *Kluver v. Deaver*, 271 Neb. 595, 714 N.W.2d 1 (2006).

[6] The interpretation of a contract involves a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below. *Albert v. Heritage Admin. Servs.*, 277 Neb. 404, 763 N.W.2d 373 (2009).

[7] A suit for damages arising from breach of a contract presents an action at law. *Id.*

V. ANALYSIS

1. Universal's Appeal

(a) Contract Ambiguity

[8] Universal's first two assignments of error involve ambiguity and interpretation of the escrow agreement. A court interpreting a contract must first determine as a matter of law whether the contract is ambiguous. *State ex rel. Bruning v. R.J. Reynolds Tobacco Co.*, 275 Neb. 310, 746 N.W.2d 672 (2008); *Kluver v. Deaver, supra*. Thus, we first address Universal's contention that the district court erred in its determination

that the escrow agreement, specifically subsection 3.d., was ambiguous.

[9,10] A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. *Kluver v. Deaver, supra*. If a contract is ambiguous, the meaning of the contract is a question of fact, and a court may consider extrinsic evidence to determine the meaning of the contract. *Eagle Run Square II v. Lamar's Donuts Internat.*, 15 Neb. App. 972, 740 N.W.2d 43 (2007).

Subsection 3.d. of the escrow agreement requires that, upon the earlier occurrence of two events, the escrow agent shall promptly deliver the remaining balance of the escrow funds, with interest, to Universal. The two triggering events are "(i) receipt of written confirmation from [E & E] that the roof, sprinkler and sub-floor repairs described in Section 3(D) of the Purchase Agreement have been completed or (ii) January 31, 2007." Part (ii), setting forth the date of January 31, 2007, with no specific time requirement, creates an ambiguity as to whether E & E has to submit the required documents prior to January 31 or whether E & E has until the end of the day on January 31 to submit the required documents.

This subsection's ambiguity is further illustrated by both parties' interpretation of this section of the escrow agreement. At trial, Jacobson testified that it was Universal's position that the inclusion of January 31, 2007, required document submission before that date, whereas Evnen testified that E & E interpreted the same terms to mean that the document had to be submitted by that date, not before. Thus, clearly the inclusion in the escrow agreement of only the date "January 31, 2007," with no time-specific deadline is susceptible of at least two reasonable but conflicting interpretations.

[11] Next, Universal argues that the district court's interpretation and construction of the date in the agreement were erroneous. A contract must receive a reasonable construction and must be construed as a whole, and if possible, effect must be given to every part of the contract. *Kluver v. Deaver*, 271 Neb. 595, 714 N.W.2d 1 (2006).

Upon our review of the record, it is clear that the parties entered into a multimillion-dollar agreement for the purchase of this facility. The evidence in the record is undisputed that Universal knew repairs to the facility it was selling were necessary, and Universal assumed liability for the amounts for repairs as set forth in the purchase and escrow agreements. In sum, we find no error in the district court's determination that the language contained in subsection 3.d. of the escrow agreement was ambiguous and in its determination that the terms of the escrow agreement required submission of documents by the end of the day on January 31, 2007.

(b) E & E's Entitlement to $100,000 Escrow Funds

Universal contends that the district court erred by finding that E & E was entitled to $100,000 of the escrowed funds for sprinkler system and subfloor repairs, because E & E's submission of costs to the escrow agent was untimely and, further, because Universal was not obligated to pay $75,000 for the sprinkler work completed. Having determined above that the escrow agreement allowed for submission of the documents on January 31, 2007, as submitted by E & E, we need not further address Universal's contention that the district court erred in awarding a judgment due to untimely submission.

Therefore, the remaining issue is whether Universal was obligated to pay $75,000 for the sprinkler system repairs. Keeping in mind that the agreement between these parties must receive a reasonable construction and must be construed as a whole, and that, if possible, effect must be given to every part of the contract, the language of the purchase agreement provides that, regarding repairs to the sprinkler system, E & E was responsible for the first $25,000 of repairs and Universal was responsible for the next $75,000 "[i]n the event any work is required with respect to the sprinkler system, which work shall not include the installation or modification of in-rack sprinklers . . . ." The escrow agreement contains identical provisions. The record contains a cost estimate for sprinkler system repairs in the amount of $360,000 and an invoice dated January 9, 2007, for $111,778.30. A representative for the company in charge

of the repairs testified that those repairs invoiced had been finished in January and that the repairs did not include or involve in-rack sprinklers. In reviewing this evidence, we find there is nothing in the record to substantiate Universal's contention that it was not obligated to pay $75,000 to E & E for those repairs. Therefore, the district court did not err in awarding E & E judgment for said repairs and Universal's assignment of error is without merit.

(c) Adverse Inference

Universal also argues that the district court erred in finding that no adverse inference should be drawn against E & E as the drafter of the contract documents. In support of this contention, Universal cites to the case of *Lexington Ins. Co. v. Entrex Comm. Servs.*, 275 Neb. 702, 749 N.W.2d 124 (2008). Universal argues that *Lexington Ins. Co.* stands for the proposition that "Nebraska courts apply the general rule that when there is a question about the meaning of the contract's language, the contract will be construed against the party preparing it." Brief for appellant at 26-27. While we agree with this statement of the law, we find the facts of this case do not fall within the premise of many cases in which a contract is construed against the party preparing it. See, *Artex, Inc. v. Omaha Edible Oils, Inc.*, 231 Neb. 281, 436 N.W.2d 146 (1989); *Gard v. Pelican Publishing Co.*, 230 Neb. 656, 433 N.W.2d 175 (1988). We come to this conclusion based upon the record and testimony given that both parties were involved in the negotiation of the agreement terms, in addition to any changes or modifications necessary. In fact, a close review of the testimony given by Jacobson indicates that the first draft of the escrow agreement did not contain a date requirement in subsection 3.d. and that it was only upon his insistence that the January 31, 2007, date was added to the agreement at all. Thus, if this court were to apply the principles as Universal argues, the general rule would require us to construe the very terms of the agreement against Universal. The district court did not err by failing to draw an adverse inference against either party, and as such, we find that Universal's assignment of error is without merit.

2. E & E's Cross-Appeal

(a) Novation

On cross-appeal, E & E argues that the district court erred by concluding that the escrow agreement modified and replaced the purchase agreement, claiming that this resulted in novation.

[12] Two conditions must be met in order for an agreement to constitute a novation: (1) The agreement must completely extinguish the existing liability, and (2) a new liability must be substituted in its place. See, *Mackiewicz v. J.J. & Associates*, 245 Neb. 568, 514 N.W.2d 613 (1994); *Wheat Belt Pub. Power Dist. v. Batterman*, 234 Neb. 589, 452 N.W.2d 49 (1990); *Thomas v. George*, 105 Neb. 44, 178 N.W. 922 (1920), *modified* 105 Neb. 51, 181 N.W. 646 (1921).

A close review of the record indicates that the district court did not make any determination that a novation had occurred, and in fact, novation was neither pled nor presented to the trial court. Throughout the proceedings, E & E has maintained that the purchase agreement and the escrow agreement provided independent and separate obligations regarding the repairs to the facility, not that a novation had occurred. The district court determined that the escrow agreement modified the terms of the purchase agreement, but did not create a second separate and independent obligation.

Upon our review of the record, the testimony from both parties indicates that section 3.D. of the purchase agreement was drafted to indicate both parties were aware of necessary repairs to the facility and that, through negotiations, dollar amounts were placed concerning each party's liability as to those repairs. It is also clear from the testimony and evidence in the record that the escrow agreement was drafted in order to more clearly specify the terms of the anticipated repairs to the facility. The terms in both section 3 of the escrow agreement and section 3.D. of the purchase agreement are identical, except that there is no fourth subsection in the purchase agreement regarding the deadline for E & E to submit the required documents to the escrow agent in order to receive reimbursement for those repair costs. No determination was made that the purchase agreement

was extinguished or that new liability was created, and accordingly, E & E's claim that the district court erred in finding a novation had occurred is without merit.

(b) Damages

E & E also contends on cross-appeal that the district court erred by failing to award $148,480 in damages for Universal's breach of the purchase agreement, in addition to the $100,000 judgment awarded pursuant to the escrow agreement.

[13] In a breach of contract case, the ultimate objective of a damages award is to put the injured party in the same position the injured party would have occupied if the contract had been performed, that is, to make the injured party whole. *Aon Consulting v. Midlands Fin. Benefits*, 275 Neb. 642, 748 N.W.2d 626 (2008). To award E & E damages for breach of the purchase agreement, as suggested, would essentially be to allow E & E to collect double damages arising from one set of obligations. The district court did not err by declining to award E & E additional damages.

VI. CONCLUSION

In conclusion, we find that the district court did not err in determining that the escrow agreement was ambiguous and in its interpretation and construction that E & E's submission of the required documents to the escrow agent was timely. We further find that the district court did not err in awarding E & E a judgment of $25,000 for facility repairs to the subfloor and $75,000 for the sprinkler system and, additionally, by determining that no adverse inference be drawn against either party. Finally, we find that the issues raised by E & E on cross-appeal are without merit. Therefore, the judgment of the district court is affirmed in its entirety.

AFFIRMED.

INBODY, Chief Judge, participating on briefs.