IN THE COURT OF APPEALS FOR THE STATE OF NEW MEXICO

THOMAS L. STROMEI and STROMEI REALTY, LLC, a New Mexico Limited Liability Company,

Plaintiffs-Appellees/Cross-Appellants,

vs. **No. 30,499**

RAYELLEN RESOURCES, INC., a New Mexico Corporation, LIONEL BURNS, an individual, JANE BURNS, a/k/a JANE MCVEY an individual, KENYON BURNS, et al.

Defendants-Appellants/Cross-Appellees.

Appeal from the District Court, Sandoval County
Before the Honorable George P. Eichwald, Thirteenth Judicial District

ANSWER BRIEF OF PLAINTIFFS-APPELLEES

Oral Argument Is Requested

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STATEMENT OF COMPLIANCE

This brief was prepared using a proportionally-spaced type style or typeface, Times New Roman, and the body of the brief contains 10,956 words, as indicated by Microsoft Office Word version 2007.

TABLE OF AUTHORITIES

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Appellees (Plaintiffs below) Thomas L Stromei ("Stromei") and Stromei Realty, LLC ("Stromei Realty") (collectively "Plaintiffs") file this Answer Brief in Response to Appellants' Rayellen Resources, Inc. ("Rayellen"), Lionel Burns ("Burns"), Jane McVey ("McVey") and Kenyon Burns ("Kenyon") (collectively "Defendants") Brief in Chief.

SUMMARY OF PROCEEDINGS

A. NATURE OF THE CASE, COURSE OF PROCEEDINGS AND DISPOSITION BELOW.

This case arises from Rayellen's bad faith breach of two contracts with Plaintiffs and the individual defendants' tortious interference with the performance of those contracts in 2006. The first contract was an oral agreement between Stromei and Rayellen dating back to 1989 in which Stromei was to receive a percentage of the net profit from the sale of the L Bar Ranch in return for 17 years of hard work managing and improving the ranch. The second contract was a written Exclusive Right to Sell Listing Agreement between Rayellen and Stromei Realty for the sale of the L Bar Ranch in 2005-2006.

The case was tried to a twelve person jury commencing October 20, 2009. On November 12, 2009, the jury returned a verdict in favor of Stromei and Stromei Realty finding a bad faith breach of both the oral agreement and the listing agreement on the part of Rayellen and tortious interference with contract on the

part of Burns, McVey and Kenyon. [RP 2900-2907]. The jury awarded compensatory damages of $4.5 million to Stromei and $2.9 million to Stromei Realty. [RP 2965]. Having found tortious interference by the individual defendants, the jury then allocated those compensatory damages between Rayellen and each of the individual defendants. [RP 2907; 2965].

The Court denied Defendants' motions for judgment as a matter of law at the close of Plaintiffs' case on all claims except the claim for punitive damages against Kenyon [Tr. 11:224-25][1]. The Court expressly found that there was legally sufficient evidence to allow the jury to decide the remaining claims. *Id.* Defendants renewed their motions for directed verdict on all remaining claims at the close of the evidence [Tr. 13:151] and again, the Court denied those motions. [Tr. 13:152]. The Court also denied Defendants' post-trial motion for judgment as a matter of law or to alter or amend the judgment. [RP 3752]. At the close of the evidence, the Court granted Plaintiffs' motion for judgment as a matter of law on Defendants' Statute of Frauds affirmative defense. [Tr. 13:149].

Defendants timely filed a notice of appeal on May 20, 2010 [RP 3750] and Plaintiffs timely filed a notice of cross-appeal on June 28, 2010. [RP 3891-92].

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[1] The transcript of proceedings consists of 15 volumes. References will be to Tr. followed by the volume and page number. References to hearings will be by date of the hearing and the time stamp from the audio log.

B. SUMMARY OF MATERIAL FACTS

In the first half of 1988, Stromei showed the 117,000 acre L Bar Ranch to Burns. [Tr. 9:161, 164-165]. In March of 1989, Stromei, doing business as Stromei Realty, closed the sale of the L Bar Ranch (the "L Bar") to Rayellen at a price of $3.5 million dollars.[2] [Tr. 5:127]. At the time of the sale, Burns, as president of Rayellen, proposed that Stromei become the resident manager of the L Bar and work with Burns to develop and increase the value of the L Bar going forward. [Tr. 9:175, 183]. As consideration, Burns offered Stromei a fifteen percent (15%) share of the net profit from the future sale of the L Bar. [Tr. 10:29]. The terms of the oral agreement were: 1) Stromei would become the resident manager of the L Bar and work the first six months without compensation; 2) Rayellen would finance the purchase, operations and improvements on the L Bar; 3) Upon the sale of the L Bar, Rayellen would be reimbursed for all expenditures on the ranch and Rayellen and Stromei would then share in the net profit; and 4) Stromei d/b/a Stromei Realty would be the broker for future sales of the all or part of the L Bar. [Tr. 10:28-29].

[2] Rayellen was formerly known as Caprock Pipe & Supply Company. Caprock changed its name to Rayellen in December, 2003. Plaintiffs will refer to Caprock as Rayellen in this brief.

In 1999, Burns increased Stromei's net profit share percentage to 25% in recognition of Stromei's excellent performance and as an incentive for Stromei to continue his duties as Ranch Manager. [Tr. 10:31-33].

In December, 2005, Rayellen entered a Purchase and Sale Agreement ("PSA") to sell the L Bar to Triple Bar S. Ranch, LLC ("Triple Bar") for Rayellen's asking price of $43 million dollars. [Ex. E7]. Under the terms of the contract, the sale was contingent upon Triple Bar providing Rayellen with financial assurance that Triple Bar could complete the sale, "subject to the approval of Seller in its sole and absolute discretion." [Ex. E-7 at p. 2 ¶ 3.1.1]. On December 28, 2005, Triple Bar forwarded to Rayellen a financial assurance letter from Karen Blandini at American Mortgage Group, Inc. [Ex. W-8]. Initially, Rayellen was not satisfied with the letter, and its attorney Jim Maddox contacted Ms. Blandini to request that additional language be inserted in the body of the letter. [Tr. 3:112-114]. Ms. Blandini agreed to include the additional language [Ex. C7] and Rayellen agreed to accept the letter with the additional language. [Tr. 3:114-115].

The PSA was also contingent upon the property satisfying Triple Bar's due diligence tests. [Ex. E-7 at p. 5-6]. Triple Bar had the right to terminate the contract if it determined, in its sole and absolute discretion, that the property was not acceptable and provided written notice to Rayellen on or before 5:00 p.m. of the last day of the due diligence period. [Ex. E-7, at p. 6, ¶ 5.1.3]. The due

diligence period ended on March 20, 2006. [Tr. 3:123-124]. Failure to timely provide the required notice was deemed an unconditional waiver of the Triple Bar's termination right. [Ex. E-7, at p. 6, ¶5.1.3]. Triple Bar also expressly waived all due diligence contingencies when it executed a first amendment to the PSA. [Ex. E-3 at p. 2, ¶4].

On March 13, 2006, McVey filed her Petition for Dissolution of Marriage and Enforcement of Marital Settlement Agreement. [Ex. J-7]. On April 3, 2006, McVey and Kenyon held a special meeting of the Rayellen board of directors and voted to remove Burns as president of Rayellen and to install Kenyon as president. [Ex. N-7 at p. 2, ¶¶ V-VI]. Burns took the position that the board action was invalid, insisted that he was still president of Rayellen, and that any action taken by Kenyon as president was null and void. [Ex. I-3]. On April 6, 2006, McVey and Kenyon met with Stromei in Ruidoso and assured him that Rayellen would honor the net profit share agreement on the condition that Stromei reveal to McVey the names of other women that Lionel had taken up to the L Bar. [Tr. 10:88]. McVey later testified under oath that she had no intention of honoring the net profit share agreement with Stromei. [Tr. 6:127-128].

On April 10, 2006, Kenyon executed a first amendment to the PSA with Triple Bar extending the closing on the sale from April 20, 2006 to May 5, 2006 in consideration for Triple Bar's payment of an additional $100,000 into escrow and

releasing its $400,000 earnest money deposit to Rayellen. [Ex. E-3]. On April 13, 2006, Burns wrote Stromei advising that Burns was still president of Rayellen, that Burns was terminating Stromei's employment effective April 20, 2006 and was withdrawing the "offer I made to you regarding deferred compensation", i.e. the net profit share agreement. [Ex. H-3]. Kenyon then wrote Stromei advising that Burns lacked authority to terminate Stromei and expressing that Rayellen was "satisfied and appreciative of the services you have provided, not only recently, but throughout your tenure as the manager of the L Bar Ranch." [Ex. L-3].

On April 18, 2006, Burns' attorney advised Triple Bar's attorney that Burns was still president of Rayellen; that the amendment to the PSA was invalid; that Burns would not agree to the extension; and that if closing did not occur on April 20, 2006, Rayellen would begin marketing the Ranch to other parties. [Ex. M-3]. On April 19, 2006, First American Title Company advised the parties that First American was not in a position to close and insure the sale of the L Bar due to its inability to determine who had authority to act for the seller. [Ex. M-6]. On April 21, 2006, Triple Bar filed suit against Rayellen, Burns, McVey and Kenyon in the United States District Court for the District of New Mexico for specific performance, breach of contract, tortious interference and declaratory and injunctive relief. [Ex. Q-6]. On or about April 28, 2006 Triple Bar deposited the

additional $100,000 with First American Title pursuant to the first amendment to the PSA. [Tr.3:189-190, Ex. U-6].

On April 26, 2006, Stromei faxed to Kenyon documents downloaded from the Colorado Secretary of State website concerning Triple Bar. [Ex. I-1]. Those documents reflected that Triple Bar did not file its articles of organization until January 25, 2006. [Ex I-1, p. 6]. At trial, Kenyon acknowledged receiving the fax and acknowledged that the documents would put him on notice that Triple Bar did not have articles of organization on file when it executed the PSA in December, 2005. [Tr. 9: 40-42]. On May 3, 2006, Rayellen's attorney, David Stevens ("Stevens") referred to these same documents from the Colorado Secretary of State in a letter to Triple Bar's attorney, but did not declare a breach of any warranties in the PSA and instead demanded that Triple Bar close on the transaction on May 5, 2006. [Ex. Z-8, p. 2]. The PSA gave Rayellen the option to terminate the agreement or waive the breach and proceed to consummate the transaction. [Ex. E-7, p. 16, ¶10.1.2]. Rayellen chose not to terminate the agreement but instead attempted a closing on May 5, 2006 [Tr. 9:43-44].

As of May 5, 2006, the dispute over who had authority to act on behalf of Rayellen had not been resolved. [Tr. 3:191-192]. Even so, McVey, Kenyon through their attorney, Stevens, insisted on holding a "closing" at Fidelity National Title Company. [Tr. 10:104-105]. However, Fidelity could not close or insure the

sale of the L Bar Ranch for the same reason that First American could not close or insure the sale: the ongoing unresolved dispute over who had authority to act for Rayellen. [Ex. X-6, p. 12; Tr. 2:104-107].

During the summer of 2006, Burns undertook the following measures designed to force Stromei to leave the L Bar: 1) cutting off phone service to the Ranch [Tr. 5:14-15]; 2) cutting off propane deliveries to the Ranch [Tr. 5:16]; 3) forced Stromei and Stromei's son, Tommy, off the road with his pickup truck [Tr. 2:138-140]; 4) was belligerent and falsely accused Stromei of stealing equipment [Tr. 10:126-127]; and 5) changed the locks on the gate to the L Bar to keep Stromei off the Ranch. [Tr. 10:125-126].

After the purported "closing" at Fidelity National Title Company, Stromei continued to try to market the L Bar. [Tr. 10:127-128]. When he presented letters of intent from interested purchasers to Rayellen in late August, 2006, McVey, Kenyon and Stevens, told Stromei they were not interested in any backup offers and to cease marketing efforts. [Tr. 10:128-129]. However, on October 3, 2006, Burns' attorney, Frank Bond, wrote Stevens complaining that Stromei was "making no efforts to find any alternative purchaser" and proposing that the Stromei listing agreement be terminated [Ex. L-4, p. 2]. When Burns locked Stromei out of the Ranch in early October, 2006, Stromei was effectively

prevented from marketing the Ranch during the remaining term of his listing agreement, which did not expire until December 31, 2006. [Tr. 10:136; Ex. X-7].

ARGUMENT

POINT 1

THERE WAS SUBSTANTIAL EVIDENCE THAT RAYELLEN HAD ACCEPTED TRIPLE BAR AS READY, WILLING AND ABLE AND THAT STROMEI REALTY HAD NOT MISREPRESENTED TRIPLE BAR'S STATUS.

A. Standard of Review

Plaintiffs agree that the directed verdict standard of review applies and therefore the court is to view the evidence in the light most favorable to the prevailing party.

B. Preservation

Plaintiffs do not dispute that Defendants preserved this issue for appeal

C. Argument

Prior to jury deliberations, the trial court gave the jurors the following instruction no. 28:

> A real estate broker has earned his agreed commission when he produces a prospect who is ready, willing and able to purchase on terms agreeable to the seller. When seller accepts the prospect produced by the broker as a purchaser, the broker's right to a commission becomes fixed. The seller relieves the broker of any further duty when he accepts the purchaser as satisfactory and a binding contract is made. The question of the purchaser's readiness, willingness and ability to buy are factors no longer to be considered once the broker turns over his prospect to the owner, who accepts the prospect as purchaser by entering a binding contract.

[Tr. 14:30; RP 2941]. The elements of instruction are taken virtually verbatim from the New Mexico Supreme Court's holding in *Simmons v. Libby*, 53 N.M. 362, 365-67, 208 P.2d 1070, 1072-73 (1949). Defendants do not contend that the instruction is an incorrect statement of New Mexico law. Instead, Defendants first argue that Triple Bar cannot be considered ready, willing and able because Triple Bar was not officially formed until approximately five weeks after the PSA was signed and thus, there could never have been a binding contract. [BIC 15-16]. Second, Defendants argue that there were certain contingencies in the PSA that were never removed. [BIC 18-19]. Third, Defendants argue that Triple Bar was not ready, willing and able because it breached an agreement to release certain funds held in escrow and because two of its principals got cold feet and withdrew from the transaction prior to closing. [BIC 19-20]. Lastly, Defendants argue that Stromei Realty made misrepresentations to Rayellen that preclude it from collecting a commission. For the reasons that follow, none of Defendants' arguments have merit.

1. Triple Bar Adopted And Ratified The PSA.

A corporation becomes legally bound by the terms of a pre-incorporation contract if it expressly or impliedly adopts or ratifies the contract after becoming formally organized. *See Moriarty v. Meyer*, 21 N.M. 521, 157 P. 652 (1916]. The

trial court gave the following jury instruction no. 39 without objection from Defendants. [Tr. 13:155]:

> If you find that Triple Bar S Ranch was not legally formed as a limited liability company at the time individuals associated with Triple Bar S Ranch signed the Purchase and Sale Agreement, Triple Bar S is nonetheless bound by the terms of the purchase and sale agreement if it expressly or impliedly adopted or ratified the Purchase and Sale Agreement after it was formally organized as a limited liability company. An entity impliedly adopts or ratifies a contract if it receives benefits from such contract, or takes any other action showing an intention to adopt and be bound by the contract.

[RP 2952].

The jury heard substantial evidence that Triple Bar had both expressly and impliedly adopted and ratified the PSA after it was formally organized. Triple Bar's attorney, David Paltzik, continued to work toward preparing the L Bar transaction for closing both before and after the January 25, 2006 date when Triple Bar filed its articles of organization. [Tr. 3:119]. Triple Bar expressly ratified the PSA when, on April 11, 2006, it signed the First Amendment to the PSA. [Ex. E-3]. Triple Bar also brought suit to specifically enforce the PSA. [Ex. Q-6]. These actions were evidence that Triple Bar believed it was a party to the PSA after Triple Bar came into existence. [Tr. 3: 180-181]. Thus, the jury could reasonably conclude that the PSA was binding on Triple Bar despite the fact that Triple Bar was not officially formed at the time the PSA was first executed.

2. Rayellen Waived Any Right To Contest The Validity of the PSA.

Rayellen first received notice that Triple Bar had technically breached warranties under paragraph 8.2 of the PSA on or about April 26, 2006 when Stromei faxed documents from the Colorado Secretary of State website to Kenyon. [Ex. I-1; Tr. 9:40-42]. Those documents confirmed that Triple Bar did not file its articles of organization with the Colorado Secretary of State until January 25, 2006. *Id.* Thus, when Triple Bar signed the PSA, it was technically in violation of the warranty that it be "duly organized, validly existing, and in good standing with the State of Colorado . . ." [Ex. E-7, p. 14 ¶ 8.1].

However, by filing its articles of organization on January 25, 2006, Triple Bar effectively cured the breach. [Ex. I-1]. In the event of a breach, Rayellen's options under the "Remedies" section of the PSA were to give Triple Bar written notice of the breach and five days to cure. [Ex. E-7, p. 16, ¶10.1.2]. Rayellen did not provide Triple Bar with any such notice. [Tr. 9:43-44]. Even if Rayellen had provided written notice and Triple Bar had failed to cure the breach to Rayellen's satisfaction, Rayellen's options were to either waive the breach and proceed to closing or to terminate the agreement. [Ex. E-7, p. 16, ¶ 10.1.2]. By proceeding to attempt to close the transaction, Rayellen quite clearly waived the right to terminate the agreement.

Defendants further argue that because Triple Bar did not formally exist on the date the PSA was signed, the contract became impossible to perform. Defendants' analysis is flawed.

First, the PSA was not impossible to perform because it expressly anticipated that Buyer or Seller might breach obligations under the Agreement and expressly provided for notice and an opportunity to cure any such breach [Ex. E-7, p. 16, ¶ 10.1.2]. Triple Bar cured the alleged breach three months before Rayellen even became aware it.

Second, Defendants' reliance on *Sanders v. Freeland*, 64 N.M. 149, 325 P.2d 923 (1958) is misplaced. In *Sanders*, at issue were two contracts for the purchase of real estate. One contract required completion by June 10, 1954, but was conditioned on completion of a second contract that by its express terms, could not be completed before July 1, 1954. *Id.* at 152, 325 P.2d at 924-25. Unlike *Sanders*, the notice and cure provisions in the PSA allowed Triple Bar to perform despite its technical breach of one of the warranties in the agreement.

Third, the jury heard testimony from Plaintiffs' real estate expert that in the real world of real estate transactions, it is very common for parties to form a limited liability company to take title to real estate and that it was almost as common in his experience that the filing of organizational papers sometimes lagged behind the signing of the purchase contract. [Tr. 7:61-63]. This was a "no

harm, no foul" situation as long as the paperwork is filed prior to closing. [Tr. 7:62]. Triple Bar filed its articles of organization well before the agreed closing date.

3. All Contingencies To the PSA Were Satisfied.

Defendants fail to acknowledge the difference between conditions in the PSA that were prerequisites to the formation of a binding contract, and other contract terms, which if not performed, might support a claim for breach of contract. Under paragraph 3.1.1 of the PSA, Triple Bar was required to provide a financial assurance letter to Rayellen. [Ex. E-7, p. 2 ¶ 3.1.1]. If Rayellen, in its sole and absolute discretion, was not satisfied with the financial assurance letter, it could send written notice to Triple Bar within ten days terminating the PSA, and thereby rendering the agreement "null, void and of no force and effect." *Id.* Likewise, if Triple Bar, in its sole and absolute discretion, did not find the L Bar Ranch acceptable, it could terminate the PSA by sending written notice to Rayellen by 5 p.m. on the last day of the due diligence period, and thereby render the PSA of no further force or effect. [Ex. E-7, p. 6, ¶ 5.1.3].

The above contingencies would allow either Rayellen or Triple Bar to terminate the PSA without breaching the PSA. [Tr. 7:53-54]. Both the buyer's and seller's contingencies in the PSA had been removed prior to closing and thus, there

was a binding contract and Stromei Realty had earned its commission. [Tr. 7:56-60].

Defendants' expert opined that Triple Bar was not a "ready, willing and able" buyer because Triple Bar did not formally exist when Ms. Blandini wrote the financial assurance letter [Ex. C-7], and because the "principals" referred to by Ms. Blandini allegedly were not members of Triple Bar. [Tr. 11:162]. It is well settled that the jury is not required to accept expert opinion evidence offered by a party. *See Lopez v. Heesen,* 69 N.M. 206, 215, 365 P.2d 448, 454 (1961); *Teal v. Potash Co. of Am.*, 60 N.M. 409, 413-14, 292 P.2d 99, 102-03 (1956), *superseded by statute*, § 7, Ch. 67, N.M.S.L. 1959 (§ 59-10-13.3, N.M.S.A. 1953). The jury was so instructed during trial. [Tr. 7:38-39; UJI 13-213, NMRA].

Defendants now argue, without citation to any legal authority in New Mexico or elsewhere,[3] that this Court should adopt as the law in New Mexico their expert's hypertechnical and formalistic opinions on the subject of "ready, willing and able." The jury did not accept those opinions as sound or logical, and neither should this Court.

Defendants' also argue that Triple Bar was not ready, willing and able because it did not release its $400,000 escrow deposit to Rayellen pursuant to the

[3] Appellants also did not even submit a proposed jury instruction on the issue of "ready, willing and able" (RP 2834-2863].

First Amendment to the PSA and because, two years after the fact, Defendants learned that Messrs. Gullion and Thoeny got cold feet and pulled out of the deal just prior to the closing. [BIC 19]. However, as previously discussed, the PSA was already a binding contract prior to that time, such that the readiness, willingness and ability of the purchaser were no longer factors to consider in determining Stromei Realty's right to a commission. *Simmons v. Libby*, 53 N.M. 362, 365-67, 208 P.2d 1070 (1949).

4. Stromei Timely And Fully Disclosed Information Regarding Triple Bar.

Defendants cite *Canfield v. With*, 35 N.M. 420, 299 P. 351 (1931) for the proposition that a real estate broker is not entitled to a commission if he induces his principal to contract for the sale of lands through misrepresentations or deception. Defendants then point to a fax that Stromei sent to Kenyon on April 26, 2006 as evidence of an alleged misrepresentation by Stromei, to wit, a statement on the fax cover sheet that Triple Bar "was formed on Nov. 2, 05" [Ex. I-1]. Appellant's argument fails for several reasons.

First, Kenyon acknowledged that the documents behind the fax cover sheet demonstrated that the name "Triple Bar S Ranch LLC" was reserved on November 2, 2005 and that the articles of organization for Triple Bar were filed on January 25, 2006. [Tr. 9: 40-42]. While Kenyon testified that he doubted he looked at the documents and relied on the statement on the fax cover sheet [Tr. 9: 41], the jury

was not obligated to accept his testimony as credible. Furthermore, Rayellen's attorney, Stevens, also must have read the faxed documents because he specifically refers to them in a letter to Triple Bar's attorney on May 3, 2006. [Ex. Z-8, p. 2].

Second, per the language Defendants quote from *Canfield v. With*, 35 N.M. 420, 299 P. 351 (1931) the alleged misrepresentation or deception must induce the principal to contract for the sale of lands. *Id.* at 424, 299 P.2d at 352. Defendants have not cited to any evidence in the record to establish that Stromei's comment on a fax cover sheet on April 26, 2006 somehow induced Rayellen to enter a contract for the sale of the L Bar Ranch that was executed on December 16, 2005.

Third, Stromei's son, Tommy, testified that April 25, 2006 is when he first discovered the information about Triple Bar's date of formation on the Colorado Secretary of State website and that he promptly faxed that information to Stromei, who promptly faxed it to Kenyon. [Tr. 2:132-135]. Thus, the evidence at trial demonstrated that, rather than breaching any duty of disclosure, Stromei promptly disclosed the information about Triple Bar to Rayellen as soon as it came to his attention.

In sum, there is substantial evidence in the record from which the jury could conclude that Rayellen had accepted Triple Bar as a ready, willing and able buyer by entering into a binding contract for the purchase and sale of the L Bar, thereby entitling Stromei Realty to its commission on the aborted sale of the L Bar. The

district court was therefore correct in denying Defendants' motions for directed verdict and for judgment as a matter of law on the issue of Stromei Realty's entitlement to a commission.

POINT 2

THERE WAS SUBSTANTIAL EVIDENCE OF A MEETING OF THE MINDS AS TO THE MATERIAL TERMS OF THE ORAL AGREEMENT.

A. Standard of Review.

Plaintiffs agree that the directed verdict standard of review applies and therefore the Court is to view the evidence in the light most favorable to the prevailing party.

B. Preservation.

Plaintiffs do not dispute that Defendants preserved this issue for appeal.

C. Argument.

The jury ultimately determined that there was mutual assent that Rayellen would receive reasonable interest and further determined that the appropriate interest rate was the prime rate to be compounded annually. [RP 2902]. There was substantial evidence to support the jury's finding on the interest issue.

Stromei testified that the material terms of the oral agreement were: 1) Stromei would become the resident manager of the L Bar and work the first six months without compensation; 2) Rayellen would finance the purchase, operations and improvements on the L Bar; 3) Upon the sale of the L Bar, Rayellen would be

reimbursed for all expenditures on the ranch and Rayellen and Stromei would then share in the net profit; and 4) Stromei d/b/a Stromei Realty would be the broker for future sales of the all or part of the L Bar. [Tr. 10:28-29]. Stromei also testified that August of 2002, Net Profit Sharing Agreement prepared by Frank Bond (the "Bond Agreement") contained the material terms of the oral agreement. [Tr. 10:71-72; Ex. F-7]. The Bond Agreement provided that the net profit share would be calculated as follows:

> **Determination of Net Profit Share.** Any net profit attributable to a sale of any or all of the L Bar shall be computed by adding the original purchase price paid by Caprock plus expenses attributable to the purchase, plus all operating expenses and costs of all kinds, plus expenses related to sale of any or all of the L Bar minus recovery of costs attributable to all previous sales of the L Bar property and recovery of other expenses, more particularly described by example in Exhibit A, attached hereto. Any brokerage fee paid, or to be paid in future sale, by Caprock to Stromei or to any other broker for the sale or exchange of any or all of the L Bar shall be considered an expense in the Net Profit Share computation.

[Ex. F-7, p. 5 ¶ 2].

Rayellen took the position that reference to "costs of all kinds" in the Bond Agreement would include interest on Rayellen's investment in the L Bar. [Tr. 12:61-62]. Rayellen's accountant, Jimmy Waechter ("Waechter"), testified from his experience as a CPA, the term "costs" would include interest. [Tr. 12:86-89]. Rayellen further contended that a September 2, 2003 letter from Stromei to Burns [Ex. R-1] was Stromei's recognition that interest should be included in the net

profit calculation. [Tr. 12:63-64]. Rayellen further contended that interest on Rayellen's investment in the L Bar was part of the original agreement between Rayellen and Stromei. [Tr. 4:35-36].

Rayellen also pointed out that Stromei's original verified complaint [Ex. 185, ¶ 9], his first amended complaint [Ex. 189, ¶ 15] and his second amended complaint [Ex. 190] alleged that Rayellen would receive interest on its investment. [Tr. 11:6-9; 11:15-18; 11:26, 30]. In short, there was substantial evidence from which jurors could conclude that there was mutual assent between Stromei and Rayellen to include reasonable interest in the net profit share calculation.

There was also substantial evidence that there was mutual assent to calculating interest at the "prime rate", compounded annually. Stromei's September 2, 2003 letter to Burns [Ex R-1] stated that "all sums advanced by Rayellen Resources, Inc., on behalf of Stromei **plus reasonable interest** will be subtracted from Stromei's gross distributable sale proceeds . . .." [Ex. R-1, emphasis added] Rayellen's accountant, Waechter, understood "reasonable interest" to mean a reasonable interest rate, which in his opinion would be the prime rate. [Tr. 12:118]. Waechter further explained that he was compounding the interest calculation in the same manner as a bank would calculate the interest. [Tr. 12:104-105].

When a contract is silent as to a particular term, a standard of reasonableness is implied. *See Beaver v. Brumlow*, 2010-NMCA-033, ¶ 27, 148 N.M. 172, 231 P.3d 628 (where oral contract was silent as to price, the court would imply a reasonable price); *see also Castle v. McKnight*, 116 N.M. 595, 598, 866 P.2d 323, 326 (1993). Here, there was substantial evidence of mutual assent to Rayellen receiving "reasonable interest" on its investment in the L Bar Ranch. The jury was entitled to accept the testimony of Waechter, an experienced certified public accountant, as to what would constitute reasonable interest under the circumstances. [Tr. 15:9-13].

Moreover, during closing arguments, defense counsel marshaled all of the above-referenced evidence and argued that it shows that interest was agreed to and that the most reasonable interpretation of interest on the expenses was that it be calculated at the prime rate and compounded annually. [Tr. 14:94-97]. In effect, Defendants conceded that there was substantial evidence from which the jury could conclude that there was mutual assent on the interest issue.

POINT 3

IT WAS UNDISPUTED THAT THE ORAL AGREEMENT WAS FOR A NET PROFIT SHARE AND NOT AN INTEREST IN LAND.

A. Standard of Review

Plaintiffs agree that the standard of review for directed verdict/judgment as a matter of law under Rule 1-050(A), NMRA applies, with the caveat that

Defendants bore the burden of pleading and proving the affirmative defense of the statute of frauds, and as a general rule, determination of the applicability of the defense of the statute of frauds is a question of law for the court, not the jury. *See Kestenbaum v. Pennzoil Co.*, 108 N.M. 20, 24, 766 P.2d 280, 284 (1988).

B. Preservation

Plaintiffs do not dispute that Defendants preserved this issue for appellate review.

C. Argument

Plaintiffs moved for judgment as a matter of law on Defendants' affirmative defense of the statute of frauds at the close of all of the evidence. [Tr. 13:141-42]. The motion was argued on two grounds: 1) both Plaintiffs and Defendants agreed that the oral agreement under which Stromei would receive a percentage of the net profit from the sale or other disposition of the L Bar Ranch was not for an interest in real property [Tr. 142-43]; and 2) even assuming for the sake of argument that the oral agreement was for an interest in real property, it was undisputed that Stromei had substantially performed his obligations under the oral agreement so as to take outside the statute of frauds. [Tr. 13:143-144].

In granting Plaintiffs' motion, the district court based its ruling on the fact that the testimony and evidence presented to the jury at trial did not establish that Stromei was seeking an interest in real property, but rather was seeking net profit

after the sale of the L Bar Ranch. [Tr. 13:149]. Having determined that the statute of frauds did not apply, the district court did not reach the issue of whether the substantial performance exception to the statute of frauds applied.

Contrary to the assertion at page 28 of their brief in chief, Defendants did not contend that the oral agreement between Stromei and Rayellen concerned an interest in land. Burns testified under oath that the 2002 "L Bar Ranch Net Profit Sharing Agreement" drafted by Mr. Bond [Ex. F-7] reflected Burns' understanding of the oral agreement Rayellen had with Stromei. [Tr. 4:50, 52-53]. Exhibit F-7 clearly reflects that the agreement was for a net profit share, not a property interest. Burns also testified that his original oral agreement with Stromei in 1989 was for a net profit interest in the proceeds of the L-Bar Ranch. [Tr. 4:54]. Burns adamantly denied that there was ever an agreement to give Stromei a property interest in the L Bar Ranch. [Tr. 5:100].

Like Burns, Stromei also testified that the Bond Agreement reflected his understanding of the oral agreement he had with Rayellen. [Tr. 10:72-73]. Stromei explained that when he used the word "equity" in relation to the L Bar Ranch, he was referring to the "value remaining in a piece of property after you deduct what is owed against it or the liens against it or whatever else you might have spent on it." [Tr. 10:78]. Stromei denied that he used the word "equity" to indicate an interest in property. [Tr. 10:79-80].

Furthermore, it is clear in the record that Stromei was not seeking a property interest at trial. The amended final pre-trial order does not include any claim by Plaintiffs for an interest in real property. [RP 1976-2023]. Indeed, the question of whether the oral agreement between Stromei and Rayellen was for an interest in real property was not included in the section of the final pre-trial order addressing contested issues of fact. [RP 1994-95]. A pretrial order narrows the issues for trial, reveals the parties' real contentions, and eliminates unfair surprise. *State ex rel. State Highway Dep't v. Branchau*, 90 N.M. 496, 497, 565 P.2d 1013, 1014 (1977). Ordinarily, only those theories of liability contained in the pretrial order will be considered at trial. *Fahrbach v. Diamond Shamrock*, 122 N.M. 543, 550, 928 P.2d 269, 276 (1996).

At the beginning of trial, the court read to the jury the parties' theories of recovery and affirmative defenses as set forth in their respective portions of UJI 13-302, NMRA. [Tr. 1:86-96]. Stromei's claim for breach of the verbal contract was "for a share of the net profits from the sale of the L-Bar Ranch." [Tr. 1:87]. Nowhere does Stromei make a claim for an interest in real property nor does he ask the jury or the court to compel the conveyance of some portion of the L Bar Ranch to Stromei. The special verdict form submitted to the jury does not include an option to award Stromei a property interest in the L Bar Ranch or to compel Rayellen to convey a property interest to Stromei. [RP 2900-2907].

In short, Defendants were asking the district court to instruct the jury on the affirmative defense of the Statute of Frauds when Plaintiffs were not making a claim for which the Statute of Frauds would constitute an affirmative defense. Assuming, for the sake of argument only, that Stromei ever thought about seeking a property interest in the L Bar Ranch, any such thoughts or claims clearly had been abandoned by the time this case came to trial.

Moreover, the district court's decision to grant judgment as a matter of law on the Statute of Frauds was correct because to do otherwise would have allowed the Defendants to use the Statute of Frauds to perpetrate a fraud. *See Herrera v. Herrera*, 1999-NMCA-034, ¶ 13, 126 N.M. 705, 974 P.2d 675 (noting that the purpose of the statute of frauds is to prevent fraud and perjury, not to prevent the performance or enforcement of oral contracts that have been made or to create a loophole of escape for a person who seeks to repudiate a contract he admits was made). Burns admitted he made an oral agreement with Stromei for a net profit share from the sale of the L Bar Ranch. [Tr. 4:54]. Burns admitted that, by 2002, Stromei had substantially performed his obligations under the oral agreement. [Tr. 4:88-95]. The district court was correct in exercising its equitable powers to prevent misuse of the Statute of Frauds.

POINT 4

STROMEI CAN RECOVER HIS NET PROFIT SHARE UNDER THE ORAL AGREEMENT BECAUSE OF DEFENDANTS' ANTICIPATORY BREACH OF THE ORAL AGREEMENT.

A. Standard of Review.

Plaintiffs agree that the directed verdict standard of review applies and therefore the Court is to view the evidence in the light most favorable to the prevailing party.

B. Preservation.

Plaintiffs do not dispute that Defendants preserved this issue.

C. Argument

Defendants argue that the actual sale of the L Bar Ranch was a condition precedent to their obligation to pay Stromei his 25% net profit share from the proceeds of sale. Defendants assert that Stromei cannot recover for breach of the oral agreement because the sale of the L Bar Ranch did not occur. [BIC 29-30].

Defendants overlook the well settled law in New Mexico that a party can breach a contract by announcing ahead of time that it will not perform a contractual obligation when performance comes due. [UJI 13-822, 13-824 NMRA]. Likewise, where a party to a contract prevents the fulfillment of a condition precedent to its performance under the contract, the party cannot raise non-performance of the condition when the party's own actions and inactions are the cause of the non-performance. *See Gibbs v. Whelan*, 56 N.M. 38, 239 P.2d 727

(1952). When Rayellen unequivocally demonstrated the intent not to perform its obligations under its oral agreement with Stromei, Stromei became entitled to recover for breach of the oral contract. *See Gilmore v. Duderstadt*, 1998-NMCA-086, ¶¶ 15, 22, 125 N.M. 330, 961 P.2d 175.

The court instructed the jury on each of the above points of New Mexico law, without objection from Defendants. [RP 2934, 2936-38]. There was substantial evidence presented at trial from which the jury could conclude that Rayellen had repudiated the oral agreement with Stromei by announcing that it would not pay Stromei his net profit share if and when the L Bar Ranch was sold. [Ex. H-3; Tr. 6:153-54]. There was substantial evidence that the power struggle over control of Rayellen prevented closing on the sale to Triple Bar. [Ex. M-6, Tr. 3:188-89]. Furthermore, the jury specifically found that Rayellen breached the oral agreement with Stromei and breached the duty of good faith and fair dealing inherent in that contract. [RP 2901-02].

In sum, because there was an anticipatory breach of the oral agreement by Rayellen, and because Rayellen prevented the sale of the L Bar Ranch, Stromei was entitled to damages for breach of the oral agreement regardless of whether the Ranch had sold.

POINT 5

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING LIMITED EVIDENCE CONCERNING BURNS' EXTRAMARITAL AFFAIRS.

A. Standard of Review

This Court reviews the district court's decision to admit evidence for abuse of discretion. *Ruiz v. Vigil-Giron*, 2008 NMSC-063, ¶ 7, 145 N.M. 280, 196 P.3d 1286. A ruling admitting evidence does not amount to an abuse of discretion unless it is "clearly untenable or not justified by reason." *Id.*

B. Preservation

Plaintiffs do not dispute that Defendants preserved this issue for appellate review.

C. Argument

The district court admitted two exhibits suggesting that Burns had engaged in extramarital affairs: McVey's Petition for Dissolution of Marriage (which mentions Burns' infidelity); and a handwritten document in which Burns promised McVey that he would not engage in extramarital affairs, and would convey to McVey 75% of the marital assets in the event he broke that promise. [*See* Exs. J-7, K-7]. Defendants assert that these exhibits were not relevant, or alternatively, were unduly prejudicial.

These exhibits were, however, highly relevant, and were not admitted for an improper purpose. The divorce of Burns and McVey, and the events leading up to

it, were directly pertinent to matters at issue at trial. In December 2005, Burns and McVey separated due to Burns' extramarital affairs, after Burns had signed the handwritten agreement promising not to engage in such affairs. [Ex. J-7, p. 2 ¶4, Ex. K-7]. McVey filed for divorce in March, 2006, citing Burns' infidelity, and attempting to enforce the handwritten agreement to obtain 75% of the marital assets. [*See* Ex. J-7].

By all accounts, the divorce caused a great deal of turmoil. Kenyon sided with McVey. [Tr. 5:22-23]. Soon after McVey filed her Petition for Dissolution of Marriage, McVey and Kenyon held a special meeting of the Rayellen board of directors and voted to remove Burns as president of Rayellen and to elect Kenyon as president. [Ex. N-7 at p. 2, ¶¶ V-VI]. Burns took the position that the board action was invalid, and insisted that he was still president of Rayellen. [Ex. I-3]. The struggle for control over Rayellen directly interfered with the sale of the L Bar Ranch to Triple Bar. [*See, e.g.* Ex. M-3] (letter from Burns' attorney to counsel for Triple Bar, advising that he was still the president of Rayellen); [Ex. M-6] (letter from First American Title advising the parties that First American was not in a position to close and insure the sale of the L Bar Ranch due to its inability to determine who had authority to act for the seller).

The divorce proceeding and handwritten agreement are also relevant to Burns' motive in attempting to terminate the net profit sharing agreement with

Stromei, and to prevent the sale of the L Bar Ranch, which would cause 25% of the net profits from the sale to be due to Stromei. On April 13, 2006—shortly after McVey filed for divorce—Burns sent Stromei a letter in which he purported to terminate the net profit sharing agreement. [Ex. H-3]. A few days later, Burns took action to stymie the sale of the L Bar Ranch. [*See* Ex. M-3] (letter from counsel for Burns indicating that he would not consent to an extension intended to facilitate closing of the sale, and that the signature of Kenyon on the extension was void). Given the timing of these actions, it may be inferred that Burns was seeking to avoid his agreement with Stromei, and the transaction that would make Stromei's net profit share due, because he was already concerned about having to transfer 75% of the marital estate to McVey as a result of his breach of the handwritten agreement.

The tumultuous divorce and the handwritten agreement consequently had direct bearing on the failure of the transaction at the heart of this action. In order to provide the jury with context concerning the actions of Defendants, Plaintiffs were entitled to present evidence of the divorce, the basis for the divorce, and the attendant hostility between Burns and McVey.

Furthermore, while Defendants argue that the "intimate details of extramarital affairs" are not relevant, [BIC 34], such intimate details were not admitted by the district court. Quite the contrary, the district court carefully

limited the evidence to ensure details of the extramarital affairs were not admitted. [*See, e.g.* Tr. 4:116, 120, 6:140-41, 6:147-49]. Indeed, the Court can easily discern from the portions of the trial transcript cited by Defendants in an attempt to establish repeated questioning about the extramarital affairs, that this topic was not discussed extensively at trial. [*See* BIC 33]. Moreover, the district court expressly held that the handwritten agreement could not be used to suggest that Burns tended to breach agreements. [*See* Tr. 4:124].

The district court also gave a limiting instruction. That instruction specifically informed the jury that it was only to consider exhibits J-7 and K-7 as bearing on the circumstances surrounding the divorce of Burns and McVey, and their motives. [RP 2962]. The instruction also expressly precluded the jury from considering these exhibits as suggesting that Burns has a tendency to breach agreements, or has bad character. *Id.* And, contrary to Defendants' contention, there is no reason to believe that this clear instruction did not effectively limit the jury's consideration of this evidence. The only authority cited by Defendants to argue that the limiting instruction was not adequate is clearly distinguishable. *See State v. Crislip*, 109 N.M. 351, 354-55, 785 P.2d 262, 265-66 (Ct. App. 1989) (admission of statement of co-defendant implicating criminal defendant, and violating her confrontation rights was not cured by limiting instruction given at the

end of trial). In light of the limited evidence admitted on this subject, the limiting instruction was plainly adequate to eliminate any possible prejudice to Defendants.

In sum, although the court has discretion to exclude evidence of this nature in certain circumstances, *see Bourgeous v. Horizon Healthcare*, 117 N.M. 434, 872 P.2d 852 (1994), the district court was well within its discretion in admitting the evidence here. Given the clear relevance of the exhibits, and the limitations the district court placed on this sensitive information, it is clear that the district court did not improperly admit this evidence or abuse its discretion. *See Ruiz v. Vigil-Giron*, 2008-NMSC-063, ¶ 7, 145 N.M. 280, 196 P.3d 1286.

POINT 6

THE JUDGMENT IS NOT BASED ON CLAIMS ON WHICH THE JURY DID NOT AWARD DAMAGES.

A. Standard of Review

Defendants apparently contend that the district court should have used their proposed special verdict form rather than Plaintiffs' special verdict form because Defendants' verdict form would have required the jury to break down the damages by count. A trial court's decision not to submit a requested instruction to the jury is reviewed for an abuse of discretion. *Sonntag v. Shaw*, 2001-NMSC-015, ¶15, 130 N.M. 238, 22 P.3d 1188.

B. Preservation

Defendants failed to preserve this issue in the district court. Defendants' mere submission of alternative special verdict forms did not preserve their argument that the judgment cannot be based on interference with contract or breach of the implied covenant of good faith and fair dealing. [*See* BIC 36-37]; *Azar v. Prudential Ins. Co.*, 2003-NMCA-062, ¶ 25, 133 N.M. 669, 679, 68 P.3d 909, 919 ("The rules of preservation clearly require that the party claiming error must have raised the issue below clearly.") (internal quotation marks omitted).

Plaintiffs' verdict form allowed the jury to first determine total compensatory damages and then allocate those damages among all of the Defendants if the jury also found that the individual defendants tortiously interfered with the contracts at issue. [RP 2907]. Defendants did not argue that the special verdict form was defective on that basis or seek a ruling from the trial court prior to jury deliberations. [Tr. 13:155, 188-202; Tr. 14:3-4]; *See Woolwine v. Furr's, Inc.*, 106 N.M. 492, 496, 745 P.2d 717, 721 (Ct. App. 1987) ("To preserve an issue for review on appeal, it must appear that appellant fairly invoked a ruling of the trial court on the same grounds argued in the appellate court."); *see also Sturgeon v. Clark*, 69 N.M. 132, 139, 364 P.2d 757, 761 (1961) (holding that in order to preserve error in jury instruction, objection cannot be made in mere general terms). Defendants also failed to raise this issue through their post-trial

motion for judgment as a matter of law or to alter or amend the judgment. [*See* RP 3476-3490].

Contrary to Defendants' contention, this is not an issue of fundamental error that should be reviewed despite Defendants' failure to preserve this issue. "The fundamental error doctrine generally does not apply in civil cases." *Chavez v. Bd. of County Comm'rs*, 2001-NMCA-065, ¶ 41, 130 N.M. 753, 765, 31 P.3d 1027, 1039. The doctrine "applies only in exceptional circumstances, such as when substantial justice was not done, the court was deprived of jurisdiction to hear the case, the issue was one of general public interest that would impact a large number of litigants, or, there was a total absence of anything in the record of the case showing a right to relief." *Chavez*, 2001-NMCA-065, ¶ 41 (internal quotation marks and brackets omitted). In relying on the doctrine of fundamental error, Defendants assert only that there is "a total absence of anything in the record of the case showing a right to relief." [*See* BIC 37]. Yet, that assertion is belied by the fact that Defendants do not even challenge the jury's determinations that the individual defendants committed tortious interference with contract and Rayellen breached the duty of good faith and fair dealing. This is clearly not a case for exceptional fundamental-error review.

C. Argument

1. The Jury Awarded Damages for Tortious Interference With Contract.

The measure of damages for Plaintiffs' breach of contract claims was the same as for Plaintiffs' claims against the individual defendants for tortious interference with contract, i.e., benefit of the bargain damages. Accordingly, Plaintiffs' special verdict form was designed to guard against double recovery by allowing the jury to first determine total compensatory damages. The jury could then award damages against the individual defendants for their tortious interference by allocating from the compensatory damage total. [RP 2907]. The notion that the jury did not award damages for tortious interference with contract is clearly contradicted by the special verdict form, which instructed jurors that they "may allocate compensatory damages . . . among the responsible individual defendants and Rayellen" if they answered yes to interrogatory number 8, concerning tortious interference. [RP 2904, 2907, 2965].

2. The Judgment is Supported By Breach Of The Implied Covenant Of Good Faith And Fair Dealing.

The Court also should reject Defendants' argument that the judgment cannot be based on the jury's findings that Rayellen breached the implied covenant of good faith and fair dealing. Defendants acknowledge that the jury concluded Rayellen breached the duties of good faith and fair dealing contained in both the

net profit sharing agreement and the listing agreement, but contend that the judgment cannot be supported by those findings because "Plaintiffs did not ask the jury to award damages on those claims." [BIC 39-40]. Defendants have not cited any applicable authority supporting their contention that the jury's unequivocal determinations that Rayellen breached the duties of good faith and fair dealing are somehow invalid. Rather, Rayellen only cites to authority indicating that an appellate court need not reach arguments that will not affect the result on appeal. *See H.T. Coker Constr. Co. v. Whitfield Transp. Inc.*, 85 N.M. 802, 805, 518 P.2d 782, 785 (Ct. App. 1974) ("The assumed erroneous conclusion does not require a reversal because the refusal to find damage to the merchandise when delivered, and the findings to the effect that damage when delivered was not proved, are legally correct."); *Fontana v. Zymol Enterprises, Inc.*, 897 A.2d 694, 700 (Conn. 2006) ("Although the jury ruled in favor of the plaintiff on the second count, it awarded the plaintiff zero damages. The defendant has failed to present any evidence indicating that it has been harmed by the jury's verdict on this count. . . . Accordingly, we decline to address the defendant's claim."); *Whitehall Co. v. Arletta*, 536 N.E.2d 333, 338 (Mass. 1989) ("Even if the instruction was erroneous, [counter-defendant] was not prejudiced, since the jury awarded [counterclaimant] no damages."). Such authority does not support Defendants' position that some of

the jury's findings must be disregarded simply because there was not a separate award of damages specifically referable to those findings.

Furthermore, the jury's findings of breach of the duties of good faith and fair dealing are not rendered meaningless simply because the jury was not asked to arbitrarily separate its award of compensatory damages based on legal theory. The jury expressly determined that Rayellen breached the implied covenants of good faith and fair dealing contained in the two contracts at issue, [RP 2902, 2904], and given the jury instruction on the required elements for breach of the duty of good faith and fair dealing [RP 2912], it must be assumed that the jury found that the breach was a cause of Plaintiffs' damages and that the award of compensatory damages against Rayellen was based in part on those determinations.

Point 7

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN AWARDING PRE-JUDGMENT INTEREST.

A. Standard of Review

The district court's decision awarding prejudgment interest is reviewed for abuse of discretion. *See Sunwest Bank v. Colucci*, 117 N.M. 373, 379, 872 P.2d 346, 352 (1994).

B. Preservation

Plaintiffs do not dispute that Defendants preserved this issue for appellate review.

C. Argument

1. The District Court Properly Awarded Prejudgment Interest Under NMSA 1978 § 56-8-3.

The district court awarded prejudgment interest under, NMSA 1978 § 56-8-4(B) (2004), which provides:

> The court in its discretion may allow interest of up to ten percent from the date the complaint is served upon the defendant after considering, among other things:
>
> (1) if the plaintiff was the cause of unreasonable delay in the adjudication of the plaintiff's claims; and
>
> (2) if the defendant had previously made a reasonable and timely offer of settlement to the plaintiff.

NMSA 1978 § 56-8-4(B). "Section 56-8-4(B) allows prejudgment interest . . . in the discretion of the court after the court considers, among other things, whether the plaintiff was the cause of an unreasonable delay in the adjudication of his or her claims and whether the defendant had previously made a reasonably and timely offer of settlement." *State ex rel. Bob Davis Masonry, Inc. v. Safeco Ins. Co. of Am.*, 118 N.M. 558, 561, 883 P.2d 144, 147 (1994) (internal quotation marks omitted).

Defendants do not argue that Plaintiffs caused unreasonable delay, but contend that the district court improperly awarded prejudgment interest because they allegedly made reasonable and timely offers of settlement. [BIC 40]. In support of this argument, Defendants note that, in the context of ruling on an issue

other than interest, the court found that Defendants made a settlement offer before the action was filed, and participated in a mediation in good faith. [*See* BIC 41]. Defendants seek to apply those findings to the issue of interest, arguing that the court must have found that they made a reasonable and timely offer of settlement. *See id.* But of course, the district court did not conclude that the pre-litigation offer constituted a reasonable and timely settlement offer. Quite the opposite, in awarding prejudgment interest under § 56-8-4, the district court concluded that Defendants did not make a reasonable and timely settlement offer. [January 7, 2010 hearing, 5:06:19 – 5:08:51]. Defendants' reliance on determinations the court made in the context of ruling on a different motion is therefore misplaced.

Defendants also rely on a settlement offer they made eleven days before trial. [*See* RP 3034]. Because their offer of settlement was timely under Rule 1-068 NMRA, Defendants contend the offer should be considered a timely settlement offer within the meaning of § 56-8-4. [*See* BIC 42-43]. Defendants cite no authority for this proposition and Plaintiffs are unable to find any.

Furthermore, a settlement offer made just eleven days before a complex trial at the close of lengthy proceedings can hardly be considered timely. Defendants' construction of § 56-8-4 would mean that prejudgment interest would not be awardable if a defendant refused to make any offer of settlement throughout the litigation, as long as it managed to transmit a settlement offer more than ten days

before trial. Surely this is not the intent behind 56-8-4. *See Bird v. State Farm Mutual Auto Ins. Co.*, 2007-NMCA-088, ¶ 33, 142 N.M. 346, 165 P.3d 343 ("Section 56-8-4(B) is a tool whereby the trial court may ensure that the compensation due to a plaintiff is not unduly delayed by a defendant's dilatory practices." (internal quotation marks and brackets omitted); *Gonzales v. Surgidev*, 120 N.M. 133, 150, 899 P.2d 576, 593 (1995) ("the purpose of Section 56-8-4(B) is to foster settlement and *prevent delay*") (internal quotation marks omitted, emphasis in original).

Moreover, the offer was not in any event reasonable within the meaning of § 56-8-4. Defendants' offer largely consisted of real property purportedly worth approximately $3 million. Plaintiffs believed that the actual value of the property made the offer worth about $1 million. And even if the offer was worth $3 million, that is not even half of the amount awarded by the jury. The offer was, quite simply, not reasonable.

Accordingly, the district court's decision to award prejudgment interest under § 56-8-4 was plainly within its discretion, and should not be reversed by this Court. Defendants never made a settlement offer even approaching the amount awarded to Plaintiffs by the jury, and their settlement offer just days before trial cannot be considered timely.

2. The Award Of Prejudgment Interest May Be Affirmed Under NMSA 1978 § 56-8-3.

In the event the Court concludes that prejudgment interest should not have been awarded under NMSA 1978 § 56-8-4, the district court's award of prejudgment interest may be affirmed on alternative grounds. Although the decision below to award prejudgment interest was based on § 56-8-4, Plaintiffs also requested prejudgment interest under NMSA 1978 § 56-8-3. [RP 2984-2986]. Because the parties briefed and argued that issue, the Court may affirm the award of prejudgment interest if it concludes that such interest could properly have been awarded under § 56-8-3. *See Rosette, Inc. v. U.S. Dept. of Interior*, 2007-NMCA-136, ¶ 30, 142 N.M. 717, 726, 169 P.3d 704, 713 ("An appellate court may affirm a district court ruling on a ground not relied upon by the district court if reliance on the new ground would not be unfair to the appellant."); *State v. Torres*, 1999-NMSC-010, ¶ 22, 127 N.M. 20, 27, 976 P.2d 20, 27 ("[W]e may affirm on grounds upon which the trial court did not rely unless those grounds depend on facts that Torres did not have a fair opportunity to address in the proceedings below.").

Section 56-8-3 provides for prejudgment interest at the rate of up to fifteen percent annually "on money due by contract." NMSA 1978 § 56-8-3. Furthermore, [a]n injured party is entitled to prejudgment interest as a matter of right when the amount due under the contract can be ascertained with reasonable certainty by a mathematical standard feed in the contract or by established market

prices." *Kueffer v. Kueffer*, 110 N.M. 10, 13, 791 P.2d 461, 463 (1990); *see also State ex rel. Bob Davis Masonry, Inc.*, 118 N.M. 558, 560-61, 883 P.2d 144, 146-47 (1994) ("Section 56-8-3 allows prejudgment interest in cases proving money due by contract. Under this statute, the obligation to pay prejudgment interest arises by operation of law and constitutes an obligation to pay damages to compensate a claimant for the lost opportunity to use money owed the claimant and retained by the obligor between the time the claimant's claim accrues and the time of judgment[.]") (internal quotation marks omitted); *Grynberg v. Roberts*, 102 N.M. 560, 562, 698 P.2d 430, 432 (1985) ("where the amount of indebtedness under contract is ascertainable by the breaching party, the injured party is entitled to interest as a matter of right on those monies at the legal rate"). Such interest begins to accrue once the amount becomes due under the contract. *Grynberg*, 102 N.M. at 563; *Bob Davis Masonry*, 118 N.M. at 560-61.

The amounts due to Plaintiffs under the contracts breached by Defendants were easily ascertainable at the time of the breaches. Both the net profit sharing agreement and the listing agreement set forth a percentage to be applied to the purchase price of the L Bar Ranch to determine the amounts due to Plaintiffs. Under the listing agreement, Stromei Realty is entitled to 6% of the purchase price, and under the net profit sharing agreement, Stromei is entitled to 25% of the net profits from the sale of the L Bar Ranch. [*See* RP 2900-2901, 2904]. The sale

price of the ranch and expenses were undisputed such that Defendants even stipulated to those amounts at trial--$43 million and $10.4 million, respectively. [Tr. 14:41-42]. All Defendants had to do to determine the amounts due was to calculate 6% of $43 million, and 25% of $43 million less expenses and interest.

In these circumstances, the amounts due under the contracts were reasonably ascertainable, entitling Plaintiffs to prejudgment interest from the dates of the breaches at a rate of up to 15% per year. In fact, in *Kueffer*, the New Mexico Supreme Court found amounts due based on a "mathematical standard defining the 'net proceeds'" due to one of the parties satisfied this standard. *See Kueffer*, 110 N.M. at 13 ("In this case the Kueffer contract contained a mathematical standard defining the 'net proceeds' due Ms. Kueffer. There is no question that the amount owed was ascertainable by using this standard and subtracting the appropriate costs from the sale proceeds.").

Because the amounts due under both the net profit share agreement and the Listing Contract were readily determinable through mathematical calculation, Plaintiffs are entitled, under § 56-8-3, to prejudgment interest. *See* NMSA 1978 § 56-8-3; *Kueffer*, 110 N.M. at 13; *Grynberg*, 102 N.M. at 563. To the extent the Court concludes that the district court's award of prejudgment interest was not appropriate under § 56-8-4, it should affirm the award of interest under § 56-8-3.

Point 8

THE COURT DID NOT ERR IN AWARDING POST-JUDGMENT INTEREST AT A RATE OF 15%

A. Standard of Review

The Court should review the district court's decisions concerning post-judgment interest *de novo*. *See* NMSA 1978 § 56-8-4; *State v. Gallegos*, 2007-NMSC-007, ¶17, 141 N.M. 185, 190, 152 P.3d 828, 833 (application of mandatory rule is a question of law to be reviewed *de novo*).

B. Preservation

Plaintiffs do not dispute that Defendants preserved this issue for appellate review.

C. Argument

The district court awarded post-judgment interest at the rate of 8.75% on 61% of the judgment and at the rate of 15% on 39% of the judgment. [RP 3452]. Defendants contend that a rate of 8.75% should have applied to the entire judgment. [*See* BIC 43]. But the district court's decision to award post-judgment interest at a rate of 15% was proper (indeed, as discussed in Plaintiff's Brief in Chief concerning their cross appeal, the 15% rate should have been applied to the entire judgment).

New Mexico Statute Section 56-8-4 requires post-judgment interest. NMSA 1978 § 56-8-4(A) ("[I]nterest shall be allowed on judgments and decrees for the

payment of money from entry."); *Westar Mortgage Corp. v. Jackson*, 2002-NMCA-009, ¶ 55, 131 N.M. 493, 509, 39 P.3d 710, 726 ("In 1983 . . . post-judgment interest under Section 56-8-4(A) became mandatory.").

Section 56-8-4 also sets forth the applicable rate of interest. Defendants base their argument concerning the appropriate rate of post-judgment interest on § 56-8-4(A)(1), which indicates that interest should generally be calculated at the rate of 8.75%. [BIC 45]; NMSA 1978 § 56-8-4(A). Importantly, however, § 56-8-4 provides that post-judgment interest "shall be computed at the rate of fifteen percent" when "the judgment is based on tortious conduct, bad faith or intentional or willful acts." NMSA 1978 § 56-8-4(A)(2).

The jury specifically found that Defendants acted tortiously, intentionally, and/or in bad faith. In particular, the jury found that each of the individual Defendants committed the tort of intentional interference with contract, and that Rayellen breached the duties of good faith and fair dealing included in both the verbal net profit sharing agreement and the listing agreement. [RP 2902, 2904]. And to find such breaches of the duties of good faith and fair dealing, the jury was required to find that Rayellen engaged in bad faith, intentional, and/or willful conduct. [*See* Jury Instruction No. 30, RP 2943] (to establish breach of the duty of good faith and fair dealing, Plaintiffs must establish that "Rayellen wrongfully, intentionally, or in bad faith sought to prevent the performance of a contract; or

sought to withhold the benefits of the contract from plaintiffs; or interfered with the performance of the contracts; or took any other action aimed at depriving plaintiffs of the benefits of their contracts with Rayellen").

Defendants argue that damages were only awarded for breach of contract, and that the appropriate post-judgment interest rate is 8.75%. [BIC 44]. Defendants' strained interpretation of § 56-8-4 is entirely lacking in merit. The jury was not asked through the special verdict form to make extraneous determinations—the judgment is undoubtedly "based on tortious conduct, bad faith or intentional or willful acts." *See* NMSA 1978 § 56-8-4(A)(2).

Furthermore, Defendants' suggestion that damages were only awarded for breach of contract is belied by the Special Verdict Form. As discussed above, the Special Verdict Form did not ask the jury to award separate damages as to each cause of action, but instead, factually separated the damages award based on the two transactions at issue—the oral net profit sharing agreement and the listing agreement. The jury specifically found that Rayellen breached the duty of good faith and fair dealing with respect to the oral agreement and the listing agreement [RP 2902, 2904]. The jury specifically found that each of the individual Defendants tortiously interfered with the Purchase and Sale Agreement. [RP 2904].

Because the judgment was undoubtedly based on tortious, bad faith, intentional, and/or willful conduct, the district court did not err in awarding post-

judgment interest at a rate of 15%, but rather, was required to award interest at that rate on the entire judgment. *See Pub. Serv. Co. of N.M. v. Diamond D Constr. Co.*, 2001-NMCA-082, ¶ 54, 131 N.M. 100, 33 P.3d 651.

CONCLUSION

For all of the foregoing reasons, Plaintiffs request the Court to affirm the judgment below on all counts, except that post-judgment interest should be 15% on the entire judgment amount.

STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs concur that oral argument would assist the Court in deciding this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Appellees/cross-appellants' Answer Brief was sent via United States mail, first class, postage pre-paid, on April 27, 2011 to:

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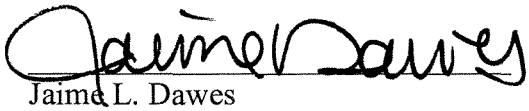

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