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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Case No.: 3:18-cv-00028-WGC

Order

Re: ECF No. 102

DANIEL HARRINGTON, an individual,
PAMELLA HARRINGTON, an individual,
NIGHTWATCH MARINE, LLC, a Nevada
limited liability company,

Plaintiffs

v.

DAVID TACKETT,
an individual,

Defendant

Before the court is Plaintiffs' Motion for Partial Summary Judgment. (ECF Nos. 102, 102-1 to 102-15.) The court entered a separate order striking defendant David Tackett's belated response (ECF No. 104). (Order at ECF No. 118.) For the reasons discussed below, Plaintiffs' motion is granted with respect to their breach of contract claim, but denied as to their fraud claim.

I. BACKGROUND

A. The Harrington Action

The second amended complaint (SAC) is the operative complaint in this action, which will frequently be referred to as the Harrington action. (ECF No. 100.) Plaintiffs' claims arise from an alleged contract the parties entered into for Tackett to purchase approximately 130,000 pounds of turquoise ore from the Harringtons, who subsequently assigned their rights to their wholly-owned limited liability company, Nightwatch Marine. The Harringtons had previously acquired the 130,000 pounds of turquoise ore under an agreement with the Ward Family Trust.

1 They assert claims for breach of contract, unjust enrichment (in the alternative), conversion and
2 fraud/intentional misrepresentation against Tackett. Plaintiffs now seek partial summary
3 judgment as to the first cause of action for breach of contract and the fourth cause of action for
4 fraud/intentional misrepresentation. They seek rescission of the contract under either theory. As
5 was referenced above, defendant Tackett's belated response to the motion has been stricken.
6 (ECF No. 118.)

7 The court will now discuss some additional background information that is relevant to the
8 court's determination of this motion.

9 **B. The Jennings/Fournier Action**

10 In 2009, Elven Jennings and Richard Fournier filed an action against Fay Ward, as an
11 individual and as trustee of the Ward Family Trust, Bryan S. Mason, L. Jane Mason, Silver &
12 NV Stones, LLC, and others, in case 3:07-cv-00230-LRH-RAM (the Jennings/Fournier action).
13 Jennings and Fournier alleged that they entered into a contract with Ward in 2005 whereby she
14 sold them 400 tons of chalk turquoise that originated from the No. 8 Mine, and Ward agreed not
15 to sell any turquoise from the No. 8 Mine to any purchaser other than Jennings and Fournier.

16 In their lawsuit, Jennings and Fournier claimed that the defendants unreasonably
17 restricted access to the turquoise, and removed turquoise that had been sold to them from
18 warehouses and allowed it to be sold to others.

19 Fay Ward was eventually dismissed with prejudice pursuant to stipulation. (ECF No. 166
20 in 3:07-cv-00230-LRH-RAM.) In addition, a permanent injunction was entered by consent
21 whereby the Masons, Silver & NV Stones, LLC, and all persons or entities acting in concert with
22 them, agreed that they would not transact in turquoise from the No. 8 mine. (ECF No. 170 in
23 3:07-cv-00230-LRH-RAM.)

1 **C. The No. 8 Mine Action**

2 The Harringtons filed this action against Tackett on January 17, 2018. Shortly after the
3 Harringtons filed their action, No. 8 Mine, LLC, which is a limited liability company owned by
4 Tackett, filed a complaint in State court on February 2, 2018, which was then removed to this
5 court on March 6, 2018 (the No. 8 Mine action). (ECF Nos. 1, 1-1 at 3:18-cv-00104-WGC.)

6 No. 8 Mine, LLC, sued the Eljen Group, LLC, Elven Jennings, Jack Elkins, Frank Lente
7 and Steve Harper (subsequently referred to as the Eljen parties), alleging that on May 17, 2017,
8 the Eljen parties entered into an agreement with No. 8 Mine to purchase approximately 280,000
9 pounds of No. 8 turquoise (which refers to turquoise mined from the No. 8 Mine). No. 8 Mine,
10 LLC, contends that it took possession of the turquoise and moved it to a facility in Flagstaff,
11 Arizona, with the exception of 64,000 pounds of the turquoise, which the parties agreed would
12 be held at a storage facility in Winnemucca, Nevada. No. 8 Mine, LLC, claims that the Eljen
13 parties acted to convert the 64,000 pounds of turquoise stored in Winnemucca through an
14 agreement whereby Eljen/Jennings purported to sell that turquoise to Elkins, Lente and Harper,
15 and Elkins, Lente and Harper subsequently sold 10,000 of the 64,000 pounds to a buyer in
16 Arizona. No. 8 Mine, LLC, avers that the 10,000 pounds of turquoise was sold at twenty percent
17 of market price, undercutting the market for No. 8 Mine's sale of the remaining turquoise.

18 (ECF No. 1-1 in 3:18-cv-00104-WGC.)

19 The Eljen parties filed counterclaims against No. 8 Mine, as well as third party claims
20 against Tackett and others. The Eljen parties allegations pertain to: (1) the 280,000 pounds of
21 turquoise ore discussed in No. 8 Mine's complaint; and (2) an additional 130,000 pounds of
22 turquoise ore that Jennings claims was sold to him and his then-partner, Fournier, by Fay Ward
23 (and was part of the deal between Jennings and Fournier and Ward discussed above).

1 As to the latter category of turquoise, the Eljen parties allege that the agreement between
2 Jennings/Fournier and Ward provided that Jennings and Fournier purchased all useable, treatable
3 No. 8 mine chalk turquoise in burlap bags located in warehouse buildings B and C for
4 \$2,000,000 to be paid in installments over eight years. There was an amendment to the
5 agreement in 2006, stating that Jennings/Fournier could remove all the turquoise they wanted
6 from the warehouses at \$5,000 per pound, provided they continued to pay a minimum of \$10,000
7 per month. They contend that they were allowed to sort through the turquoise, take what they
8 wanted, and discard the unsuitable materials which would revert to the sellers. While they were
9 sorting through the turquoise, Jennings and Fournier discovered that several tons of turquoise in
10 burlap sacks had been unlawfully removed from the warehouse buildings. They suspected the
11 Masons and others were taking sacks of turquoise and hiding them. As was referenced above,
12 Jennings and Fournier filed a lawsuit against Ward, the Ward Family Trust, the Masons and
13 others, and an injunction issued in that case which precluding the Masons and persons acting in
14 concert with them from selling or otherwise transacting in No. 8 turquoise. Jennings assigned his
15 rights in that litigation to himself, and Elkins, Lente and Harper. According to the Eljen parties,
16 Fay Ward testified in her deposition that all of the No. 8 turquoise mined by her deceased
17 husband was in warehouses B and C, and Jennings and Fournier had the exclusive rights to
18 purchase it.

19 The Eljen parties contend that contrary to representations made in the Jennings/Fournier
20 case, some of the defendants in that case retained control over turquoise that was stolen from
21 Jennings and Fournier, and then marketed and sold it to third parties, including Tackett/No. 8
22 Mine, LLC. Specifically, they allege that the 130,000 pounds of turquoise that Tackett bought
23 from the Harringtons was part of the turquoise stolen from Jennings/Fournier.

1 **D. Limited Consolidation of the Harrington and No. 8 Mine Actions**

2 The Harrington and No. 8 Mine actions were consolidated briefly for the limited purpose
3 of taking discovery and filing dispositive motions on the issue of ownership of the 130,000
4 pounds of turquoise when it was acquired by the Harringtons from the Ward Family Trust. (ECF
5 No. 70 in 3:18-cv-00028-WGC; ECF No. 95 in 3:18-cv-00104-WGC.)

6 On October 16, 2019, a stipulation was filed by the Harringtons/Nightwatch, and the
7 Eljen parties, concerning the limited issue of consolidation: the disputed ownership of the
8 130,000 pounds of turquoise. The stipulation references an affidavit that Jennings filed in
9 support of a motion for preliminary injunction. In that affidavit, Jennings said that he was
10 "certain that the No. 8 turquoise that David Tackett claims to have purchased from the
11 Harringtons is turquoise that is subject to the Injunction entered in Cause No. 3:07-cv-230-LRH-
12 RAM" and that Jennings knew this because he "purchased all of the No. 8 turquoise, and the
13 only thing left in Fay Ward's warehouse after [his] purchase was low quality, non-marketable
14 rock[.]" The affidavit also said that Tackett represented to Jennings that the Harringtons had
15 purchased Fay Ward's warehouse and No. 8 turquoise in the warehouse. Jennings stated that this
16 could not be because Fay Ward testified in a deposition in case 3:07-cv-230-LRH-RAM, that she
17 did not possess any No. 8 turquoise beyond what she sold to Jennings (and Fournier). Jennings
18 went on to state that no one else could have lawfully possessed the No. 8 turquoise because the
19 Masons and persons acting in concern them were subject to the injunction that prohibited them
20 from selling or otherwise transacting in the No. 8 turquoise. (ECF No. 86 at 5 in 3:18-cv-00028-
21 WGC; ECF No. 126 at 5 in 3:18-cv-00104-WGC.)

22 Despite Jennings' statements, the Harringtons and Eljen parties stated in the stipulation
23 that as part of the consolidated discovery process, they reviewed documents and evidence related

1 to the disputed ownership and based on that evidence and their discussions concerning the issue,
2 they stipulated that the Eljen parties would withdraw their claims of ownership of the Harrington
3 turquoise, and conceded that it was not subject to the injunction entered in the Jennings/Fournier
4 action. They further stipulated that the Ward Family Trust owned the Harringtons' turquoise
5 when it was conveyed to the Harringtons. (ECF Nos. 86, 87 in 3:18-cv-00028-WGC; ECF Nos.
6 126, 127 in 3:18-cv-00104-WGC.)

7 **E. Stipulated Preliminary Injunction in the Harrington and No. 8 Mine Actions**

8 The parties in the Harrington and No. 8 Mine actions stipulated to a global preliminary
9 injunction that: No. 8 Mine, LLC, Tackett, the Eljen parties, as well as the Harringtons and
10 Nightwatch, would not dispossess any of the No. 8 turquoise or silver bars in dispute in the two
11 cases pending further order of the court. (*See* ECF Nos. 76, 77 in 3:18-cv-00028-WGC; ECF
12 Nos. 104 and 105, in 3:18-cv-00104-WGC.)

13 **II. LEGAL STANDARD**

14 The legal standard governing this motion is well settled: a party is entitled to summary
15 judgment when “the movant shows that there is no genuine issue as to any material fact and the
16 movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *see also Celotex Corp.*
17 *v. Cartrett*, 477 U.S. 317, 330 (1986) (citing Fed. R. Civ. P. 56(c)). An issue is “genuine” if the
18 evidence would permit a reasonable jury to return a verdict for the nonmoving party. *Anderson v.*
19 *Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). A fact is “material” if it could affect the outcome
20 of the case. *Id.* at 248 (disputes over facts that might affect the outcome will preclude summary
21 judgment, but factual disputes which are irrelevant or unnecessary are not considered). On the
22 other hand, where reasonable minds could differ on the material facts at issue, summary
23 judgment is not appropriate. *Anderson*, 477 U.S. at 250.

1 “The purpose of summary judgment is to avoid unnecessary trials when there is no
2 dispute as to the facts before the court.” *Northwest Motorcycle Ass’n v. U.S. Dep’t of Agric.*, 18
3 F.3d 1468, 1471 (9th Cir. 1994) (citation omitted); *see also Celotex*, 477 U.S. at 323-24 (purpose
4 of summary judgment is "to isolate and dispose of factually unsupported claims"); *Anderson*, 477
5 U.S. at 252 (purpose of summary judgment is to determine whether a case "is so one-sided that
6 one party must prevail as a matter of law"). In considering a motion for summary judgment, all
7 reasonable inferences are drawn in the light most favorable to the non-moving party. *In re*
8 *Slatkin*, 525 F.3d 805, 810 (9th Cir. 2008) (citation omitted); *Kaiser Cement Corp. v. Fischbach*
9 *& Moore Inc.*, 793 F.2d 1100, 1103 (9th Cir. 1986). That being said, "if the evidence of the
10 nonmoving party "is not significantly probative, summary judgment may be granted." *Anderson*,
11 477 U.S. at 249-250 (citations omitted). The court's function is not to weigh the evidence and
12 determine the truth or to make credibility determinations. *Celotex*, 477 U.S. at 249, 255;
13 *Anderson*, 477 U.S. at 249.

14 In deciding a motion for summary judgment, the court applies a burden-shifting analysis.
15 “When the party moving for summary judgment would bear the burden of proof at trial, ‘it must
16 come forward with evidence which would entitle it to a directed verdict if the evidence went
17 uncontroverted at trial.’... In such a case, the moving party has the initial burden of establishing
18 the absence of a genuine [dispute] of fact on each issue material to its case.” *C.A.R. Transp.*
19 *Brokerage Co. v. Darden Rest., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (internal citations
20 omitted). In contrast, when the nonmoving party bears the burden of proving the claim or
21 defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate
22 an essential element of the nonmoving party’s case; or (2) by demonstrating that the nonmoving
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1 party cannot establish an element essential to that party’s case on which that party will have the
2 burden of proof at trial. *See Celotex Corp. v. Cartrett*, 477 U.S. 317, 323-25 (1986).

3 If the moving party satisfies its initial burden, the burden shifts to the opposing party to
4 establish that a genuine dispute exists as to a material fact. *See Matsushita Elec. Indus. Co. v.*
5 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The opposing party need not establish a genuine
6 dispute of material fact conclusively in its favor. It is sufficient that “the claimed factual dispute
7 be shown to require a jury or judge to resolve the parties’ differing versions of truth at trial.”
8 *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987)
9 (quotation marks and citation omitted). The nonmoving party cannot avoid summary judgment
10 by relying solely on conclusory allegations that are unsupported by factual data. *Matsushita*, 475
11 U.S. at 587. Instead, the opposition must go beyond the assertions and allegations of the
12 pleadings and set forth specific facts by producing competent evidence that shows a genuine
13 dispute of material fact for trial. *Celotex*, 477 U.S. at 324.

14 III. DISCUSSION

15 **A. Facts**

16 Plaintiffs set forth the following statement of undisputed facts:

17 The Harringtons are husband and wife and Nightwatch Marine, LLC, is their wholly-
18 owned limited liability company. On October 30, 2015, they entered into an agreement to
19 purchase real and personal property in Crescent Valley, Nevada, from the Ward Family Trust.
20 (Daniel Harrington Decl. at ECF No. 102-3 ¶ 2; ECF No. 102-4.) This included the purchase of
21 warehouse buildings located on the real property, and approximately 130,000 pounds of
22 turquoise ore that was located in the warehouse buildings. (Daniel Harrington Decl., ECF No.
23 102-3 ¶¶ 3-4.) In an addendum, the Harringtons assigned their rights under the agreement to

1 Nightwatch. (Daniel Harrington Decl., ECF No. 102-3 ¶ 5.) The sale closed on or before October
2 31, 2016. (*Id.* ¶ 6.)

3 On or about January 10, 2017, the Harringtons told an individual named Bill Cook about
4 the turquoise ore. (Pamella Harrington Decl., ECF No. 102-2 at 1 ¶ 2; Daniel Harrington Decl.,
5 ECF No. 102-3 ¶ 8; Answer to SAC., ECF 101 ¶ 8.) The Harringtons and Mr. Cook
6 contemplated entering into a partnership to sell the turquoise ore. (Pamella Harrington Decl.,
7 ECF No. 102-2 at 1 ¶ 3; Daniel Harrington Decl., ECF No. 102-3 ¶ 9.) The partnership was
8 never formed, but Mr. Cook took it upon himself to contact potential buyers who might be
9 interested in purchasing the turquoise ore, including Tackett in July of 2017. (Daniel Harrington
10 Decl., ECF No. 102-3 ¶ 10; SAC, ECF No. 100 ¶ 15; ECF No. 101 ¶ 8 (admitting the allegations
11 of the SAC in ¶ 15).) Tackett paid \$36,200 for one sack of the turquoise ore. (Daniel Harrington
12 Decl., ECF No. 102-3 ¶ 11.)

13 On August 24, 2017, David Tackett contacted the Harringtons to inquire about
14 purchasing the turquoise ore, and Tackett came to the Harringtons' home with his father, Steven
15 Tackett, the next day. (*Id.* ¶¶ 12-14.) For the first time, Tackett claimed to the Harringtons that
16 he actually owned the turquoise ore they had purchased from the Ward Family Trust. (*Id.* ¶ 16,
17 ECF No. 102-12 at 32:7-10; ECF No. 102-13 at 7:22-24 8:5-6, 30:16-19, 36:21-25- 39:21.)¹ The
18 Harringtons told Tackett this was incorrect, and that they were the rightful owners of the
19 turquoise ore pursuant to their agreement with the Ward Family Trust. (Daniel Harrington Decl.,
20 ECF No. 102-3 ¶ 17; ECF No. 102-13 at 36:21-24.) Tackett told the Harringtons he had
21 purchased the turquoise ore from the "Eljen Estate." (Daniel Harrington Decl., ECF No. 102-3

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23 ¹ The page number reference is to the ECF page number and not the transcript page number;
however, the line numbers correspond with the line numbers on the transcript of the ECF page
number cited.

1 ¶ 18(1); ECF No. 102-13 at 46.) The Eljen parties, however, have stipulated that the Ward
2 Family Trust owned the turquoise ore at the time it was conveyed to the Harringtons. (ECF No.
3 87 at 4.)²

4 Tackett also represented to the Harringtons he "owned" a federal injunction pertaining to
5 the turquoise ore, and represented he could produce documents to the Harringtons proving his
6 title or ownership in the turquoise ore. (Daniel Harrington Decl., ECF No. 102-3 ¶ 18(2), (3).) In
7 addition, Tackett threatened the Harringtons that they would end up in court if they did not sell
8 the turquoise ore to Tackett. (Daniel Harrington Decl., ECF No. 102-3 ¶¶ 19-20.)

9 Based on these representations, on August 25, 2017, the Harringtons orally offered to sell
10 Tackett all of the turquoise ore in exchange for payment of \$300,000, and future payments of
11 \$20 per pound of any of the Harringtons' turquoise ore that Tackett sold. (Pamella Harrington
12 Decl., ECF No. 102-2 at 4 ¶ 12; Daniel Harrington Decl., ECF No. 102-3 ¶ 21.)³ The
13 Harringtons and Tackett prepared and signed a written agreement memorializing their oral
14 agreement. (Daniel Harrington Decl., ECF No. 102-3 ¶ 24; ECF No. 102-5.)

15 The Harringtons relied on Tackett's promise to pay the \$300,000 when they agreed to let
16 Tackett take possession of the 48 sacks of turquoise ore. (Pamella Harrington Decl., ECF No.
17 102-2 at 4 ¶ 13; Daniel Harrington Decl., ECF No. 102-3 ¶ 22.)

18 Immediately after the written agreement was signed, Tackett called three semi-trucks to
19 pick up the turquoise ore at the Harringtons' home. (Pamella Harrington Decl., ECF No. 102-2 at
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21 ² This refers to the stipulation entered into by the Eljen Parties and the Harringtons/Nightwatch
22 following the limited consolidation of the Harrington and No. 8 Mine actions to conduct
23 discovery and file dispositive motions related to the ownership of the 130,000 pounds of
turquoise the Harringtons acquired from the Ward Family Trust.

³ It appears according to the transcripts and written agreement that the Harringtons' turquoise
was estimated to be 10 percent of the total No. 8 turquoise Tackett possessed.

1 4 ¶ 14; Daniel Harrington Decl., ECF No. 102-3 ¶ 23, CF No. 102-6, Tackett's amended response
2 to Plaintiffs' first set of interrogatories, Nos. 2, 4.)

3 Later that day, after he had taken possession of the turquoise ore, Tackett claimed he
4 could not pay the Harringtons the \$300,000 he owed them because the banks were closed.
5 (Daniel Harrington Decl., ECF No. 102-3 ¶ 26.) He told the Harringtons to meet him at a Wells
6 Fargo bank the next day. (*Id.* ¶ 27.) The Harringtons agreed to do so; however, Tackett did not
7 show up to meet the Harringtons the next day. (*Id.* ¶¶ 28-29). Tackett has not paid the
8 Harringtons the agreed upon \$300,000. (*Id.* ¶ 30; ECF No. 102-8 at 2.) He has only paid the
9 Harringtons \$20,000, which the Harringtons state was their cost of bagging and sorting the
10 turquoise ore. (Daniel Harrington Decl., ECF No. 102-3 ¶ 31.)⁴

11 **B. Breach of Contract**

12 "Under Nevada law, 'the plaintiff in a breach of contract action [must] show (1) the
13 existence of a valid contract, (2) a breach by the defendant, (3) and damage as a result of the
14 breach.'" *Rivera v. Peri & Sons Farms, Inc.*, 735 F.3d 892, 899 (9th Cir. 2013) (quoting *Saini v.*
15 *Int'l Game Tech.*, 434 F.Supp.2d 913, 919-20 (D. Nev. 2006)). For an enforceable contract to
16 exist, there must be an offer and acceptance, meeting of the minds and consideration. *May v.*
17 *Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005). "A meeting of the minds exists when
18 the parties have agreed upon the contract's essential terms." *Certified Fire Prot., Inc. v. Precision*
19 *Constr., Inc.*, 128 Nev. 371, 283 P.3d 250, 255 (2012). Consideration requires something that is
20 "bargained for and given in exchange for an act or promise." *Zhang v. Eighth Judicial Dist. Ct.*,

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23 ⁴ As will be discussed below, other evidence submitted by Plaintiffs indicate that the \$20,000
paid by Tackett was a down payment toward the \$300,000 he promised to pay for the turquoise
ore.

1 120 Nev. 1037, 103 P.3d 20, 24 n. 11 (2004), *abrogated on other grounds by Buzz Stew, LLC v.*
2 *City of North Las Vegas*, 124 Nev. 224, 181 P.3d 679 (2008).

3 A "[b]reach of contract is the material failure to perform 'a duty arising under or imposed
4 by [an] agreement.'" *State of Nevada Dep't of Trans. v. Eighth Judicial Dist. Ct.*, 133 Nev. 549,
5 554, 402 P.3d 677 (2017) (quoting *Bernard v. Rockhill Dev. Co.*, 103 Nev. 132, 135, 734 P.2d
6 1238, 1240 (1987)).

7 Plaintiffs have presented evidence that they entered into a valid contract with Tackett:
8 they offered to sell Tackett all the turquoise in their possession (approximately 48 sacks of
9 130,000 pounds of turquoise, plus two additional sacks at a different location and turquoise ore
10 needing to be collected from the ground) in exchange for Tackett's payment of \$300,000 as well
11 as future payments at \$20 per pound for sales of the Harringtons' turquoise until the turquoise is
12 exhausted. In addition, they have presented evidence that Tackett materially breached the
13 agreement: Tackett took possession of the turquoise ore, but failed to pay Plaintiffs as agreed
14 (other than \$20,000 that Plaintiffs state was the cost of sorting and bagging the turquoise ore).
15 Finally, Plaintiffs have presented evidence that they were damaged as a result of the breach: they
16 were dispossessed of the turquoise ore without receiving the agreed upon payment.

17 Plaintiffs anticipated that Tackett would argue that he believed he did not have to pay
18 Plaintiffs until he began to sell the turquoise ore. Tackett's response has been stricken, and no
19 such argument is before the court. In any event, if the contract's terms do not make time for
20 performance of the essence, and the contract does not set a time for performance, "a contract
21 must be performed within a reasonable time" which is "determined based on the nature of the
22 contract and the circumstances surrounding its making." *Mayfield v. Koroghli*, 124 Nev. 343,
23 346, 349, 184 P.3d 362 (2008) (citations omitted). "[W]hen a contract does not make time of the

1 essence, one party to the contract may make it so by demanding performance by a certain date or
2 time, so long as the party fixe[es] a reasonable time for the completion of the contract and giv[es]
3 notice to the other party of an intention to abandon the contract unless it is completed within the
4 specified time." *Id.* at 349 (citations and internal quotation marks omitted, alteration original).
5 "In so doing, the time for a party's performance becomes a material term of the contract, so that
6 the failure to perform by the time specified usually constitutes and has the legal effect of a
7 material breach." *Id.* (citations omitted).

8 Here, the evidence demonstrates that the parties had agreed that Tackett was going to pay
9 Plaintiffs the day they entered into the contract, but he then represented he was unable to do so
10 because by the time they had entered into the agreement, the bank was closed. Then, Tackett
11 agreed to meet the Harringtons the following day at the Wells Fargo bank in Winnemucca,
12 Nevada, in order to effectuate the payment; however, Tackett never did so. Then, Tackett was
13 apparently sued and convinced the Harringtons that they needed to "lay low" to see how the new
14 litigation played out and whether the Harringtons would be brought into the lawsuit. (*See* ECF
15 Nos. 102-8, 102-9.)

16 On October 26, 2017, however, Daniel Harrington sent Tackett a text message stating
17 they "would like to wrap this up. It has been two months since you took possession of the ore. I
18 have attached bank wire information." (ECF No. 102-8 at 2.) Tackett responded: "Yes thank
19 you." (*Id.*) On November 2, 2017, Daniel Harrington texted Tackett: "Hello David, we have not
20 received any funds for the turquoise into our account yet. We are in need of it for our house. Can
21 you confirm wire date. Thanks, Dan." (ECF No. 102-8 at 2.)

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1 Apparently Tackett did not respond, and on December 7, 2017, Daniel Harrington sent
2 Tackett a letter that offered Tackett one last chance to pay them for the turquoise ore within
3 fourteen days or the Harringtons would institute legal proceedings. (ECF No. 102-9.)

4 On December 28, 2017, Daniel Harrington sent Tackett another text:

5 Per demand letter, if no payment or return of ore by Jan 3 confirms
6 intent to defraud. All evidence we have amassed will be turned
7 over to law enforcement for investigation of theft, fraud, extortion,
8 and possibly racketeering. All with mandatory jail time if
9 convicted. The choose [sic] is yours. Let us know if you need
10 account wire information again. Happy new year.

11 (ECF No. 102-8 at 2.)

12 On January 3, 2018, Tackett sent Daniel Harrington a text:

13 I will have an answer to you shortly things have not been easy to
14 work on this end either. We are doing the best we can to work
15 through everything we appreciate your patience. It is never as
16 much fun to pursue things legally as it is to work things out if you
17 wish to pursue things legally I will ask that you send the
18 paperwork to the [Eljen] group the rightful owners of the sone as
19 well as me the buyer of the [Eljen] estate, thank you again for your
20 patience as soon as we know anything we will keep you informed.

21 (*Id.*)

22 As of the time the motion for partial summary judgment was filed, Tackett had not paid
23 Plaintiffs for the turquoise ore, other than the \$20,000. (Pamella Harrington Decl., ECF No. 102-
24 ¶¶ 21-22; Daniel Harrington Decl., ECF No. 102-3 ¶¶ 30, 31.)

25 Tackett did not pay the remaining \$280,000 within a reasonable period of time after
26 entering into the agreement and taking possession of the turquoise. Nor did Tackett pay by the
27 deadline imposed by Daniel Harrington under the December 7, 2017 letter. Therefore, Tackett
28 materially breached the agreement.

29 As a result, summary judgment will be granted in Plaintiffs' favor and against Tackett on
30 the breach of contract claim. The court will address the requested remedy of rescission, *infra*.

1 **C. Fraudulent Inducement**

2 **1. Legal Standard**

3 To prevail on a claim for fraudulent inducement a plaintiff must demonstrate by clear and
4 convincing evidence: (1) a false representation made by the defendant; (2) the defendant's
5 knowledge or belief that the representation was false, or knowledge that there was an insufficient
6 basis for making the representation; (3) the defendant's intention to induce the plaintiff to
7 consent to formation of the contract; (4) the plaintiff's justifiable reliance on the
8 misrepresentation; and (5) damage to the plaintiff resulting from such reliance.

9 *A. Jones Constr. Co. v. Lehrer McGovern Bovis, Inc.*, 89 P.3d 1009, 120 Nev. 277, 290 (2004).

10 There is never a presumption of fraud, and it must be "clearly and satisfactorily proved." *Id.*

11 (citation omitted).

12 **2. Plaintiffs' Argument**

13 Plaintiffs contend that Tackett represented to them that: (a) he had an ownership interest
14 in the turquoise ore that he could prove with documentation; (b) he would pay Plaintiffs
15 \$300,000 after he took possession of the turquoise; and (c) that Plaintiffs would end up in
16 litigation with third parties unless they sold Tackett the turquoise.

17 They assert that Tackett knew these representations were false when made, and that he
18 intended to induce Plaintiffs to rely on these misrepresentations. First, they contend that his bank
19 accounts demonstrate he did not have sufficient funds to comply with his representations, and
20 argue this is probative of his intent to never pay for the turquoise. Second, Plaintiffs assert that
21 the Eljen parties conceded that the Ward Family Trust owned the turquoise ore when it was
22 conveyed to Plaintiffs, and the Eljen parties never purported to sell an interest in the turquoise

1 ore to Tackett. Third, they assert that if Tackett genuinely believed he owned the turquoise ore,
2 he would not have contracted to pay Plaintiffs for it.

3 Next, Plaintiffs claim that they relied on Tackett's misrepresentations and provided him
4 with the turquoise based on these representations. They maintain the reliance was justified
5 because Tackett had previously paid \$36,200 for a single sack of turquoise.

6 Finally, they contend they suffered damages as a result of their reliance because Tackett
7 is in possession of the turquoise ore and has not paid Plaintiffs.

8 As with the breach of contract claim, Plaintiffs request the remedy of rescission, and
9 assert that Tackett must bear the costs of returning the turquoise to Plaintiffs in Crescent Valley,
10 Nevada, and argue that he not recover the shipping costs he previously incurred when he took the
11 turquoise from Plaintiffs via semi-trucks.

12 **3. Analysis**

13 **a. Tackett's Representation that he Owned the Turquoise**

14 First, it is undisputed that Tackett represented he had an ownership interest in the
15 turquoise that he could prove with documentation, as this representation appears in the written
16 agreement itself: "David Tackett will be providing documentation from the courts that he is
17 rightful owner of rock & this agreement will provide amnesty to any claims against
18 Harringtons." (ECF No. 102-5.) Plaintiffs also provide transcripts of conversations with Tackett,
19 where he also made this representation several times. (*See* ECF No. 102-11 at 65:5-16;
20 ECF No. 102-12 at 28:7-17, 30:18-21, 32:6-11, 34:7-25, 35:1-5; ECF No. 102-13:7:17-10:12;
21 29:16-30:21, 36:17-39:21, 45:24-51:9, 55:1-6.)

22 The question is whether Plaintiffs have submitted clear and convincing evidence to
23 demonstrate Tackett knew this representation was false when he made it or that there was an

1 insufficient basis for making the representation, and that by making the representation he
2 intended to induce Plaintiffs into entering into the agreement with him.

3 To support their argument that Tackett knew this was false, Plaintiffs point to the fact that
4 the Eljen parties conceded that the Ward Family Trust owned the turquoise ore when it was
5 conveyed to Plaintiffs. They also assert that the Eljen parties never purported to sell their
6 interests to Tackett. Plaintiffs rely on the stipulation into with the Eljen parties following the
7 limited consolidation of the Harrington and No. 8 Mine actions, discussed *supra*.

8 To reiterate, the Eljen parties alleged in the No. 8 Mine case that they owned the
9 turquoise ore at issue in the Harrington case. Following the limited consolidation of the two
10 actions, the Eljen parties stipulated to withdraw their claim of ownership of the Harrington
11 turquoise ore, conceding that the Ward Family Trust owned the approximately 130,000 pounds
12 of turquoise ore that the Harringtons purchased. The Eljen parties further stipulated that the
13 turquoise the Harringtons purchased from the Ward Family Trust was not subject to the
14 injunction entered in case 3:07-cv-00230-LRH-RAM. (ECF No. 87.)

15 The fact that the Eljen parties entered into a stipulation in October of 2019 with the
16 Harringtons about the turquoise ore that the Harringtons purchased from the Ward Family Trust
17 does *not* demonstrate what *Tackett* knew about the source of the Harringtons' turquoise when he
18 agreed to purchase it in 2017. In fact, the stipulation confirms that the Eljen parties initially
19 claimed they were the rightful owners of the Harringtons' turquoise. (ECF No. 87 at 4-5.)
20 Moreover, the stipulation acknowledges that Jennings testified in an affidavit that he was certain
21 that the turquoise Tackett claimed to have purchased from the Harringtons was turquoise subject
22 to the injunction in the Jennings/Fournier action. (*Id.* at 5.) The stipulation says nothing about
23

1 Tackett's claim of an ownership interest in the turquoise when he negotiated to purchase it from
2 the Harringtons in August of 2017.

3 Instead, Tackett consistently said in the transcript of the conversations between the
4 parties leading up to the agreement that he owned the turquoise because he had purchased the
5 turquoise from the Eljen parties, as well as any rights they had under the injunction in the
6 Jennings/Fournier action.

7 Plaintiffs also argue that common sense dictates that Tackett would not contract to
8 purchase something he did not own. While one would think that would be the case, Tackett
9 explained that he was paying the Plaintiffs so he did not have to take them to court to determine
10 he was the rightful owner of the turquoise ore the Harringtons possessed. (*See* ECF No. 102-13
11 at 7:17-10:12, 45:24-51:9; ECF No. 102-8 at 2.)

12 Other evidence submitted by Plaintiffs also reflects Tackett's position that he was the
13 owner of the turquoise ore. Plaintiffs provide Tackett's amended responses to their first set of
14 interrogatories, where Tackett explained his position: he asserted that Faye Ward testified in her
15 deposition in 3:07-cv-00230-LRH-RAM, that all of the No. 8 rough turquoise mined by her late
16 husband was in warehouses B and C, and that she had given the Masons authority to sell it on her
17 behalf, and Jennings and Fournier had the exclusive right to purchase the No. 8 turquoise. He
18 went on to state that the Harringtons claim to have acquired property from the Ward Family
19 Trust, including warehouses containing the 130,000 pounds of No. 8 turquoise. Tackett
20 maintained that whether the Plaintiffs' No. 8 turquoise came from the warehouses or from burlap
21 sacks buried on the property, Jennings had examined the turquoise Tackett obtained from the
22 Harringtons and Jennings had determined it was part of the No. 8 turquoise that he and Fournier
23 had acquired from the Ward Family Trust. Tackett went on to explain that he and his company,

1 No. 8 Mine, LLC, entered into a purchase agreement with Jennings and the Eljen parties on June
2 16, 2017, roughly two months before the encounter with the Harringtons, where Tackett/No. 8
3 Mine purchased all the turquoise that Jennings/Eljen parties had purchased from the Ward
4 Family Trust. In addition, Tackett states that Jennings/Eljen parties assigned him and No. 8
5 Mine, LLC, all rights arising in the litigation initiated by Jennings and Fournier against Ward
6 and the Masons in case 3:07-cv-00230-LRH-RAM, including all rights they had under the
7 injunction dated June 23, 2009, which encompasses the right to enforce the injunction or bring a
8 claim for damages. (ECF No. 102-6 at 9.)

9 This is consistent with the statements Tackett made on the date he entered into the
10 agreement with the Harringtons. While the Eljen parties subsequently disavowed any ownership
11 interest in the turquoise that the Harringtons acquired from the Ward trust, this does not
12 demonstrate that Tackett knew in August of 2017 when he was negotiating with the Harringtons
13 that he did not own or have rights to the Harringtons' turquoise. Moreover, while Plaintiffs state
14 that the Eljen parties claim they never purported to sell any interest to Tackett, that is not
15 contained within the stipulation. Nor have Plaintiffs submitted any other evidence that reflects
16 this position.

17 In sum, Plaintiffs have not presented clear and convincing evidence that Tackett knew his
18 representation that he owned the turquoise was false or that there was an insufficient basis for
19 making the representation.

20 **b. Tackett's Representation that He Could Pay Plaintiffs**

21 Second, the Plaintiffs contend that Tackett represented he would pay Plaintiffs \$300,000
22 after he took possession of the turquoise, but he did not in fact have the means to pay the
23

1 \$300,000. To support this argument, Plaintiffs point to bank account statements produced in
2 discovery.

3 Mr. and Mrs. Harrington both state in their declarations that Tackett represented he
4 would pay \$300,000 (plus some future payments based on sales) in exchange for the turquoise,
5 and that he would go to the Wells Fargo bank the next day because the banks were closed that
6 day, but he did not do so. (Pamella Harrington Decl., ECF No. 102-2 ¶¶ 12-20; Daniel
7 Harrington Decl., ECF No. 102-3 ¶¶ 22-29.) That Tackett said he would go to the Wells Fargo
8 the next day is also reflected in the transcript of the conversation between the parties. Mrs.
9 Harrington asked, "So, we're gonna go with you to Wells Fargo tomorrow?" Tackett responded:
10 "Uh-hmm. I hope, unless you just want to give me an account number." Mrs. Harrington replied,
11 "No. We'll go. ... We'll go to Wells Fargo with you. Wow, so the trucks are, like, gonna be here
12 anytime. I don't even know what time it is." (ECF No. 102-12 at 37:24-25, 38:1-3, 38:19-21.)
13 Daniel Harrington also sent a text message to Tackett the morning of August 26, 2017, asking
14 about going to Winnemucca. Tackett responded that "yesterday was hard on [him]" and to give
15 him some time; however, there was no further real discussion from Tackett about meeting up,
16 and the next message was not until Tackett sent a message checking in on September 15, 2017.
17 (ECF No. 102-8.)

18 The question is whether Tackett knew his representation that he would pay \$300,000 was
19 false. Plaintiffs point to his bank statements as demonstrating an inability to pay the \$300,000.
20 Tackett produced bank statements from a Wells Fargo business checking account for American
21 Bullion & Coin, LLC, dba A.B.C., from July 2017 to October 2017. (ECF Nos. 102-7, 102-10.)
22 The records reflect that in August of 2017, when the agreement was made, there was a beginning
23 balance of \$65,887.92. Then, there were deposits and credits putting the account balance at

1 \$321,757.55; however, withdrawals were made such that the ending balance at the end of the
2 month was \$1,198.54.

3 At one point, there was in excess of \$300,000 in the account in August. It is unclear what
4 withdrawals were made for. Nor is it clear whether Tackett had any other sources from which he
5 had intended to pay the Plaintiffs. The court does not find there is clear and convincing evidence
6 in the record that Tackett knew he could not pay the \$300,000 based on these bank records alone.

7 **c. Tackett's Representation that Plaintiffs Would End Up in**
8 **Litigation if they Did not Sell him the Turquoise**

9 Finally, Plaintiffs assert that Tackett represented that they would end up in litigation with
10 third parties if they did not sell him the turquoise.

11 The evidence suggests that Tackett represented, or at the very least implied, that Plaintiffs
12 may end up in litigation if they did not enter into an agreement with him for the sale of the
13 turquoise. It appears, however, that he represented that the alternative was for Tackett himself to
14 sue them (as opposed to third parties) as he claimed ownership over the turquoise, and that even
15 though he owned the turquoise, he was paying them so he did not have to take them to court.
16 (*See* ECF No. 102-13 at 7:17-10:12.) Tackett's father said that if they went through the courts
17 they could obtain a "stay" "on the material that basically prevents [the Plaintiffs] from selling it,
18 it prevents [the Plaintiffs] from destroying it, prevents [the Plaintiffs] from doing anything with it
19 until it's settled in court." Tackett said this could be years. Tackett's father went on to state that
20 they did not want to "go down that kinda direction" and instead it was better for them to work
21 together rather than paying lawyers. (ECF No. 102-13 at 16:14-17:7; *see also* ECF No. 102-13 at
22 22:9-24, 29:16-30:21.)

1 The recording transcripts submitted by Plaintiffs reflect that Tackett said: "I wouldn't
2 give you money if I thought, you know, going to court would be easy." (ECF No. 102-11 at 5:8-
3 10.) "It's horrible for everybody. And it's just better for me to play nice, come here -- ...write a
4 contract for you guys to get paid for helping me load up my turquoise and prove to you it's mine,
5 and then everybody's happy." (*Id.* at 5:14-19.) His father said: "You know, the cheapest thing
6 realistically -- just so you know the absolute truth, the cheapest thing is to not take you to court.
7 The cheapest thing is to tie up the material legally for as long as we can and that doesn't take
8 very much money. Going to court, actual court --...is expensive. But you know, there's five, ten
9 years of manipulation that is just filing papers and whatnot--" (ECF No. 102-11 at 11.)

10 Plaintiffs do not point to any specific evidence which reflects that Tackett knew his
11 representation about litigation was false or without sufficient basis. Instead, the evidence reflects
12 that Tackett maintained that he had purchased the rights to the turquoise from the Eljen parties
13 and that he was approaching Plaintiffs about the No. 8 turquoise they possessed so that he did not
14 have to take them to court to make that determination.

15 While there might be some dispute over whether the Eljen parties did actually enter into
16 an agreement with Tackett/No. 8 Mine, LLC, or as to the validity or scope of such an agreement,
17 the Plaintiffs have not presented evidence of that here so as to constitute clear and convincing
18 evidence of Tackett's knowledge of falsity of his representation or intent to fraudulently induce
19 them into the agreement.

20 **4. Conclusion**

21 In conclusion, Plaintiffs' motion for partial summary judgment as to the fraud claim is
22 denied. The court will now address the requested remedy of rescission for the breach of contract
23 claim.

1 **D. Rescission**

2 Plaintiffs assert that as a result of the breach of contract by Tackett, they are entitled to
3 rescind the contract and be placed in their pre-contract position.

4 Under Nevada law, rescission based on a contractual breach "is an equitable remedy
5 which totally abrogates a contract and which seeks to place the parties in the position they
6 occupied prior to executing the contract." *Bergstrom v. Estate of DeVoe*, 109 Nev. 575, 854 P.2d
7 860, 861 (1993)). If a contract is rescinded, the contract no longer is enforceable. *See Awada v.*
8 *Shuffle Master, Inc.*, 123 Nev. 613, 173 P.3d 707, 713 (Nev. 2007)). Whether to rescind the
9 contract lies within the Court's discretion. *See Canepa v. Durham*, 65 Nev. 428, 198 P.2d 290,
10 294 (Nev. 1948)).

11 "A partial failure of performance of a contract will not give ground for its rescission
12 unless it defeats the very object of the contract or renders that object impossible of attainment, or
13 unless it concerns a matter of such prime importance that the contract would not have been made
14 if default in that particular had been expected or contemplated." *Canepa*, 62 Nev. at 427, 153
15 P.2d at 903 (quotation marks and citation omitted).

16 Here, to the extent the payment of \$20,000 by Tackett can render the failure to pay the
17 remainder due as a partial failure of performance, the court finds that the partial failure was so
18 substantial so as to defeat the object of the contract, and that rescission is an appropriate remedy
19 for Tackett's breach of the agreement.

20 "Upon rescission, the parties should [be] returned as closely as possible to their
21 respective positions prior to entering into the contract." *Bergstrom*, 854 P.2d at 862. When a
22 party elects to rescind the contract, he must "return whatever value he has received under it[.]"
23 *Id.* (citation and quotation marks omitted). "He cannot at the same time affirm the contract by

1 retaining its benefits and rescind by repudiating its burdens." *Id.* (citation and quotation marks
2 omitted).

3 Here, the remedy of rescission would require the return of the turquoise ore taken by
4 Tackett from the Harringtons. In addition, it requires that Plaintiffs' return the \$20,000 payment
5 made to them by Tackett. While Plaintiffs' now characterize the \$20,000 payment made by
6 Tackett as a sum for sorting and bagging the turquoise, as was noted above, Mr. Harrington's
7 own communications to Tackett contradict that characterization and describe that as a down
8 payment toward the \$300,000 owed by Tackett.

9 Finally, Plaintiffs request that Tackett be responsible for any shipping costs incurred in
10 returning the turquoise ore in connection with their *fraud* claim, but not the breach of contract
11 claim. Therefore, the court will not address this request in the context of the breach of contract
12 claim.

13 In conclusion, the court finds the Plaintiffs are entitled to rescind the contract. Tackett is
14 required to return the turquoise ore taken from the Plaintiffs, and Plaintiffs are required to refund
15 the 20,000 paid by Tackett.

16 **IV. CONCLUSION**


17 Plaintiffs' motion for partial summary judgment (ECF No. 102) is **GRANTED** with
18 respect to the breach of contract claim, and **DENIED** with respect to the fraud claim. Plaintiffs
19 are entitled to rescind the contract as a remedy for Tackett's breach of the contract. Tackett is
20 ordered to make arrangements to return the turquoise ore that is the subject of this action within
21 **30 days** of the date of this Order. Plaintiffs similarly have **30 days** to return the \$20,000 payment
22 made to them by Tackett.

23

1 Within **14 days** of the date of this Order, Plaintiffs shall file a notice indicating the
2 impact of this Order on their remaining claims for unjust enrichment and conversion. Plaintiffs
3 shall also address the impact this Order has on the stipulated preliminary injunction. If it is
4 Plaintiffs' conclusion that this Order renders the remaining claims moot, the court will enter
5 judgment accordingly.

6 **IT IS SO ORDERED.**

7 Dated: September 24, 2020

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9 _____
10 William G. Cobb
11 United States Magistrate Judge
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