TPC, INC. V. HEGARTY

TPC, INC., a New Mexico corporation, MULLINS ENERGY INC., a New Mexico corporation, GLEN O. PAPP, and THOMAS E. MULLINS,
Plaintiffs-Appellants/Cross-Appellees,
v.
PATRICK HEGARTY,
Defendant-Appellee/Cross-Appellant.

NOS. 32,165 & 32,492 (Consolidated)

COURT OF APPEALS OF NEW MEXICO

December 7, 2015

APPEAL FROM THE DISTRICT COURT OF SAN JUAN COUNTY, Karen L. Townsend, District Judge

COUNSEL

Briones Law Firm, P.A., B. Paul Briones, Farmington, NM, Rodey, Dickason, Sloan, Akin & Robb, P.A., Edward Ricco, Leslie McCarthy Apodaca, Albuquerque, NM, for Appellants/Cross-Appellees

Thomas E. Mullins, Farmington, NM, Pro Se Appellant/Cross Appellee, Atkinson, Thal & Baker PC, Clifford K. Atkinson, Justin D. Rodriguez, Albuquerque, NM, for Appellee/Cross-Appellant

JUDGES

J. MILES HANISEE, Judge. WE CONCUR: MICHAEL E. VIGIL, Chief Judge, MICHAEL D. BUSTAMANTE, Judge

AUTHOR: J. MILES HANISEE, Judge

MEMORANDUM OPINION

HANISEE, Judge.

{1} In Case No. 32,165, Plaintiffs appeal the district court's denial of their partial motion for summary judgment and a revised partial final judgment issued following a bench trial. Both rulings regarded the meaning of, and the parties' efforts to, invoke a buy-sell provision contained within a binding operating agreement between them. Separately, in Case No. 32,492, Defendant challenges the finality of the district court's revised judgment by way of cross-appeal. The cases were consolidated and assigned to this Court's general calendar. Applying Rule 1-054(B) NMRA, governing judgment upon multiple claims to the circumstances of this case, we conclude that the revised partial judgment is a final, appealable order. We further hold that the district court erred on the merits in Case No. 32,165. We reverse and remand for proceedings consistent with this memorandum opinion.

BACKGROUND

{2} TPC, Inc. (or its principal, Glen Papp) and Mullins Energy, Inc. (or its principal, Thomas Mullins), collectively Plaintiffs, and Patrick Hegarty (Hegarty) are members of Synergy Operating, LLC (Synergy), a limited liability company engaged in oil and gas operations.[1] The parties formed Synergy by executing an agreement (Operating Agreement) that defined the manner in which Synergy functioned and "govern[ed] the relationship among the [m]embers[.]" Within Article 16 of the Operating Agreement is a buy-sell provision that states:

> 16.1 A Member may notify any other Member in writing of the price at which the Electing Member would be willing to sell one hundred percent (100%) of the Electing Member's interest in the Company, which price shall also be deemed to be the price at which the Electing Member will purchase one hundred percent (100%) of the Non-Electing Member's interest in the company. In the event a Member gives such notice, the offer stating the highest price per percentage point of interest will prevail and such Member will be the Electing Member.
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> 16.2 The Non-Electing Member shall have thirty (30) days after receipt of such notice to notify the Electing Member in writing whether the Non-Electing Member chooses to sell one hundred percent (100%) of its interest to the Electing Member, or to purchase one hundred percent (100%) of the interest of the Electing Member, at the price and upon the terms and conditions set forth in the Electing Member's notice, if the Non-Electing Member shall be deemed to have chosen to sell its interest to the Electing Member.
>
> 16.3 If the Non-Electing Member chooses to sell its interest in the Company, then the Electing Member shall pay the Non-Electing Member in cash for such interest. If the Non-Electing Member chooses to purchase the interest of the Electing Member, then the parties shall negotiate in good faith the payment terms, but not the price which shall remain as set forth in the notice.

> 16.4 The purchase and sale of the interest hereunder shall close within thirty (30) days of the final notice or deemed notice required in Section 16.2 above.

{3} Following what started as a disagreement between the parties concerning whether to finance additional drilling operations, Hegarty mailed a letter to Plaintiffs on April 1, 2010, "propos[ing] to purchase Synergy for $6,300,000 . . . under Article 16 of Synergy's Operating Agreement." Pursuant to Hegarty's offer, adjusted to reflect Synergy's outstanding bank debt, each Plaintiff stood to receive $1,066,765.44 in exchange for their respective interests in Synergy. Had the transaction transpired, it would have left Hegarty as the sole owner of Synergy. Notably, the language employed by Hegarty in his April 1 letter did not directly offer to *sell* his own Synergy interest, but only to *buy* Plaintiffs'.

{4} Attached to Hegarty's April 1 letter was an email prepared and sent to all parties on January 29, 2010, by Synergy's attorney, Kyle Finch, in which he "explained the [buy-sell] process." Finch advised both Hegarty and Plaintiffs that Article 16 was a "compulsory buy-sell[,]" and to begin the process, Defendant "would send [Plaintiffs] a written notice with a price he would take for all of his shares." He further explained that the provision "allow[s] another member to also send a similar notice. Whoever has the highest price is the 'electing member.' " The explanation provided by Finch was prompted by an earlier email inquiry of him from Hegarty, seeking Finch's opinion concerning Hegarty's interpretation of Synergy's Buy-Sell provision. Hegarty copied Plaintiffs and another party with his email to Finch. Hegarty wrote:

> It appears that in order to begin the buy-sell process I must send [Plaintiffs] an offer. They will have [thirty] days to decide whether or not to accept the offer or buy it themselves. The terms and conditions of the sale, whoever is the buyer, can be mutually agreed to, but the bottom line is that [Plaintiffs] or I will either be a buyer or a seller once an offer is given? Is this a correct interpretation of our agreement? It is vital that I accurately represent this process.

{5} The parties met on April 6, 2010, regarding Hegarty's April 1 letter. The meeting minutes, signed by Hegarty, reflect that the "[buy-sell] status" was discussed, along with a "presentation of [Plaintiffs'] written proposals." Afterward, Plaintiffs responded to Hegarty's April 1 letter, asserting that under Article 16, Plaintiffs had elected to purchase 100% of Hegarty's interest for the per-share price identified by Hegarty in his letter. Plaintiffs also asserted that their letter served as "final notice" of their decision pursuant to Section 16.4 of the Operating Agreement. Plaintiffs' letter proposed a manner of payment and suggested mediation in the event terms of payment could not be agreed upon. The parties did attend a mediation, which proved to be unsuccessful.

{6} Hegarty retained private counsel, who informed Plaintiffs by letter dated May 20, 2010, that Hegarty had improperly initiated the buy-sell procedure because his April 1 letter did not state the price at which he would be willing to *sell* his interest, and was therefore inconsistent with Article 16.1. Hegarty's counsel further explained that Plaintiffs' responsive letter had also failed to properly initiate the buy-sell process as it

too stated only a purchase price for Hegarty's interest, and did not include a price at which Plaintiffs would be willing to *sell* their interest. In the same letter, Hegarty's attorney purported to properly initiate the buy-sell provision, this time solely as to Plaintiff Thomas Mullins. Specifically, Hegarty offered for the first time to *sell* 100% of his interest in Synergy to Plaintiff "Tom Mullins, only" at the price of $1,066,765.44 in cash.

{7} Plaintiffs then responded by letter disagreeing with Hegarty and arguing that Hegarty had directly manifested his intent to initiate the buy-sell provision by both his April 1 letter and his participation in a mediation "held for the exclusive purpose of trying to reach an agreement on payment terms." The letter went on to address Hegarty's second May 20 "[a]ttempted Article [16] [o]ffer," stating that in the event of a future legal determination that the April 1 and April 22 communications did not initiate Article 16 in a manner enforceable by Plaintiffs, Mullins was giving "notice of election to purchase 100% of [Hegarty's] interest in Synergy, LLC pursuant to Article [16] of the Operating Agreement for the price stated" in Hegarty's May 20 letter.

{8} That same day, June 18, 2010, Plaintiffs filed a lawsuit against Hegarty seeking to enforce the buy-sell provision of the Operating Agreement, which they contended Hegarty properly initiated by his April 1 letter. Count 1 of Plaintiffs' amended complaint[2] sought a declaratory judgment that Plaintiffs gained the contractual right to purchase 100% of Hegarty's interest for the price stated in his April 1 letter. Count 2 sought specific performance on the contract. Count 3 alleged that Hegarty's conduct during mediation and negotiations violated the "duty of good faith and fair dealing implied under the Operating Agreement[,]" entitling Plaintiffs to punitive damages. Count 4 sought a determination that Hegarty had voluntarily withdrawn his membership from Synergy. In the alternative, Count 5 sought a declaration that Hegarty's May 20 letter independently constituted an exercise of the buy-sell provision as to Plaintiff Thomas Mullins.

{9} Hegarty answered, contending that his May 20 letter became an "effective exercise of rights to *buy* Mullins' interest" (emphasis added) because "Mullins did not notify Hegarty of his acceptance of Hegarty's offer or of Mullins' election to sell." Hegarty disputed the complaint primarily on the basis that the "Operating Agreement speaks for itself." Hegarty also asserted his own counterclaims.[3] Counts 1 and 2 sought declaratory relief and an order requiring Mullins to sell 100% of his interest in Synergy to Hegarty. Count 3 sought judicial dissolution of Synergy due to the disagreements and disputes that had the company "deadlock[ed]," and Count 4 alleged that Mullins had violated his duty of good faith and fair dealing "implied under the Operating Agreement." As had Plaintiffs, Hegarty sought punitive damages.

{10} Plaintiffs moved for partial summary judgment on Counts 1 and 2 of their amended complaint, contending that Article 16 "gives any member the right to make an offer to either buy any 'non-electing' member's interest or to sell his own interest to the non-electing member." Plaintiffs argued there was no genuine dispute as to whether

Plaintiffs "properly and timely invoked their right to purchase" Hegarty's interest in Synergy after he invoked the buy-sell provision.[4]

{11} The district court agreed with Plaintiffs that "[t]here [was] no genuine issue as to any material fact[,]" but disagreed that this required partial summary judgment to be entered in Plaintiffs' favor. To the contrary, the district court concluded that the undisputed facts established that "Hegarty never triggered the buy-sell option." The district court's conclusion was apparently based on the premise that the buy-sell provision "should be strictly construed and an offer to *sell* must be made by one of the members" in order to invoke it. (Emphasis added.)

{12} Hegarty then filed a motion to dismiss Counts 1-4 of the amended complaint. Plaintiffs, in turn, moved for bifurcated trial settings on Counts 1, 2, 4, and 5 of the amended complaint, and Counts 1 and 2 of the counterclaim. The district court denied the motion to dismiss, granted Plaintiffs' motion to bifurcate, and held a bench trial at which the claims directly relating to the buy-sell provision were tried. The district court did not try the claims involving the parties' duties of good faith and fair dealing and Hegarty's request that Synergy be judicially dissolved.

{13} During trial, the district court excluded evidence related to the question of whether the buy-sell agreement had been triggered. It allowed only extrinsic evidence that pertained to the creation of the Operating Agreement in 1996. In other words, the district court limited the trial solely to the question of whether the buy-sell clause was ambiguous, not whether any party had successfully invoked the option. For example, the district court refused to admit the January 21 email Hegarty sent to Synergy's attorney, Plaintiffs, and a third party asking how to invoke the buy-sell provision, because in the court's view it was subject to the attorney-client privilege. The district court also rejected as irrelevant "evidence presented by . . . Plaintiffs ostensibly concerning the course of dealing and course of performance between [the] parties," including Hegarty's April 1 letter to Plaintiffs, his statements made upon delivery of the letter at a subsequent meeting between the parties, the meeting agenda entitled "Buy[-]Sell status," and Hegarty's attendance at a mediation aimed at resolving the dispute over the buy-sell provision.

{14} After the bench trial, the district court entered the amended partial final judgment, holding that Hegarty's April 1 letter was a "legal nullity[, and i]t did not invoke the Article 16 buy-sell provisions because it did not notify . . . Plaintiffs that . . . [Hegarty] was willing to sell his own interest." The district court also concluded that Hegarty's May 20 letter too was not a "legally effective invocation of the Article 16 buy-sell provision." The court determined that there was no reason to delay appellate review of its disposition of the claims tried in the first bifurcated trial, and ultimately entered an amended judgment, containing its findings of fact and conclusions of law, on those claims under Rule 1-054(B)(1). Plaintiffs appealed to this Court.

DISCUSSION

A. The September 14 Judgment is a Final Order for the Purposes of Appeal

{15} We first address Case No. 32,492, in which Hegarty argues only that the district court's amended judgment is not a final appealable judgment under Rule 1-054(B)(1).[5] Hegarty contends that because the adjudicated claims before us on appeal in Case No. 32,165 are factually and legally intertwined with unadjudicated claims still pending in the district court, the judgment is not final and the district court abused its discretion in declaring it so.

{16} In New Mexico, an "order must be final to be appealable[, and a]n order is not considered final unless all issues of law and fact have been determined and the case disposed of by the [district] court to the fullest extent possible." *Estate of Griego ex rel. Griego v. Reliance Standard Life Ins. Co.*, 2000-NMCA-022, ¶ 13, 128 N.M. 676, 997 P.2d 150 (citation omitted). However, our Supreme Court has stated that "this rule is neither absolute nor inflexible." *Exec. Sports Club, Inc. v. First Plaza Tr.*, 1998-NMSC-008, ¶ 5, 125 N.M. 78, 957 P.2d 63.

{17} New Mexico appellate courts approach a finality analysis "against the backdrop of New Mexico public policy, which disfavors piecemeal appeals." *Roark v. Farmers Grp., Inc.*, 2007-NMCA-074, ¶ 42, 142 N.M. 59, 162 P.3d 896 (alteration, internal quotation marks, and citation omitted). We consider both the underlying policies of judicial efficiency, including "the smooth functioning of [the] judicial system[,]" and the importance of facilitating meaningful appellate review. *Id*. ¶¶ 42, 45 (internal quotation marks and citation omitted). However, we also recognize that despite an appearance of inflexibility in the general rule, our consideration of the finality of an order is one of substance rather than form; in other words, we look at finality from a practical rather than a technical standpoint. *Kelly Inn No. 102, Inc. v. Kapnison*, 1992-NMSC-005, ¶ 15, 113 N.M. 231, 824 P.2d 1033; *Roark*, 2007-NMCA-074, ¶¶ 41-42. "The bottom line is that the considerations that determine finality are not abstractions but have reference to very real interests—not merely those of the immediate parties, but, more particularly, *those that pertain to the smooth functioning of [the] judicial system*." *Roark*, 2007-NMCA-074, ¶ 42 (alteration, internal quotation marks, and citation omitted).

{18} When multiple claims of relief are presented to a district court, our rules allow the district court to enter a final judgment on one or more, but fewer than all, of the claims when it makes an express determination that "there is no just reason for delay." Rule 1-054(B)(1). "The determination of whether there is no just reason for delay lies in the sound discretion of the [district] court, and the [district] court's determination will not be disturbed absent an abuse of discretion." *Navajo Ref. Co. v. S. Union Ref. Co.*, 1987-NMSC-033, ¶ 3, 105 N.M. 616, 735 P.2d 533. To determine whether the district court abused its discretion, we consider, among other factors, whether the adjudicated and unadjudicated claims are interrelated and "the possibility that if the judgment were made final we might be obliged to consider the same issues more than once[.]" *Id* ¶ 4. If claims adjudicated in the judgment are legally or factually intertwined with the unresolved claims, or if resolution of the remaining claims have the potential to alter the

original judgment, we will usually conclude that the district court abused its discretion in finding there to be no just reason for delay. *Id.* ¶¶ 5-6.

{19} Hegarty argues that the district court did not dispose of the claims between the parties to the fullest extent possible. He asserts that the adjudicated Counts 1 and 2 of Plaintiffs' first amended complaint are "intertwined, legally or factually, with the [unadjudicated Count 3], and resolution of [Count 3] . . . may alter or revise the judgment previously entered." (alteration omitted). *See Khalsa v. Levinson*, 1998-NMCA-110, ¶ 20, 125 N.M. 680, 964 P.2d 844 (noting that a district court abuses its discretion in certifying a judgment for immediate appeal "when the issues decided by the judgment are intertwined, legally or factually, with the issues not yet resolved, or when resolution of the remaining issues may alter or revise the judgment previously entered"). Hegarty makes the same argument as to Counts 1 and 2 and the unadjudicated Counts 3 and 4 of his counterclaim. Hegarty contends that if this Court addressed the merits of the September 14 judgment, we will "certainly be faced with the same issues on appeal a second time."

{20} We begin by comparing the pending claims with the claims on which the district court entered judgment.[6] Count 1 of Plaintiffs' complaint sought a declaratory judgment that Hegarty exercised the buy-sell option and that Plaintiffs effectively exercised their right to purchase his interest. Count 2 alleged a breach of contract and sought an order obliging Hegarty to sell his interest in Synergy to Plaintiffs, based on the same buy-sell provision. The district court resolved each of these claims in Hegarty's favor. Count 3, which remains pending, alleged that Hegarty violated the duty of good faith and fair dealing in refusing to sell his interest. With regard to the counterclaims, Count 1 sought specific performance obligating Plaintiff Mullins to sell his interest in Synergy, and Count 2 sought a declaratory judgment that Hegarty properly exercised the buy-sell provision with regard to Mullins and that Mullins failed to properly respond. The district court resolved each of these claims in favor of Mullins. However, it left Count 3, seeking judicial dissolution of Synergy, and Count 4, alleging that Mullins violated the duty of good faith and fair dealing in refusing to sell his interest, unresolved.

{21} For several reasons, we determine that the district court did not abuse its discretion in determining that there was a "final judgment as to one or more" claims and that there was "no just reason for delay[ing]" appellate review of its judgment. *Sundial Press v. City of Albuquerque*, 1992-NMCA-068, ¶ 12, 114 N.M. 236, 836 P.2d 1257. We do so despite Plaintiffs' acknowledgment that the adjudicated and unadjudicated claims are intertwined, and the parties' one-time agreement that the district court could not resolve the unadjudicated claims "during the pendency of the appeals, as the issues raised in those Counts are so intertwined, legally or factually, with the issues currently on appeal . . . [that further litigation] in the [d]istrict [c]ourt may alter or revise the judgment previously entered and currently on appeal or render it moot." Three circumstances ascertainable from the record lead us to this conclusion.

{22} First, we note that the district court fully decided the issues directly related to the buy-sell provision. It decided whether the buy-sell provision was triggered and whether

the parties had adhered to the requirements of Article 16 of the Operating Agreement. The district court's judgment covers the core of the parties' dispute. *See Graham v. Cocherell*, 1987-NMCA-013, ¶ 19, 105 N.M. 401, 733 P.2d 370 (declining jurisdiction on the basis that the district court ruled on an issue common to the claims, but neglected to dispose of those claims). While the unadjudicated claims relate to this core issue, their resolution would not alter or revise the judgment on appeal. Second, the unadjudicated claims are not so legally and factually intertwined that we are unable to decide Case No. 32,165 on the merits without also resolving the unadjudicated claims. The claims the district court tried and resolved regarded the operating agreement and the parties' actions in attempting to invoke the buy-sell provision; the unresolved counts primarily address duties owed by the parties to one another and what is to become of Synergy if Article 16 was not successfully invoked by any party. Third, *Kelly Inn No. 102*, 1992-NMSC-005, ¶ 15 allows us reasonable flexibility in deciding when a judgment is final enough to allow us to entertain an appeal from it. By presently, as opposed to after a seemingly inevitable future appeal, correcting the district court's flawed adjudication of the buy-sell agreement, we seek to eliminate the possibility that existing error might be needlessly perpetuated when the unadjudicated claims are litigated in district court. Moreover, a future and correctly decided disposition regarding the buy-sell provision bears some capacity to obviate the need for further proceedings on the parties' claims for breach of the duty of good faith and for judicial dissolution of Synergy. Accordingly, considerations of practicality and judicial economy counsel in favor of appellate review at this time.

B. The District Court Erred in Adjudicating the Buy-Sell Provision of the Operating Agreement

{23} Plaintiffs make two arguments. First, they argue that it was simply wrong for the district court to have denied their motion for partial summary judgment on Counts 1 and 2 of their amended complaint. Second, they contend that the district court improperly excluded relevant course of conduct evidence from the bench trial at which claims and counterclaims related to the buy-sell provision were resolved. In his answer brief, Hegarty argues that the district court's judgment should be affirmed because it "properly determined that . . . the buy-sell [provision] in Article 16 was unambiguous" and "could only be initiated by [an e]lecting [m]ember['s expression of a] 'willingness to sell.' "

{24} As to Plaintiffs' first assignment of error, we review orders denying summary judgment de novo. *Summers v. Ardent Health Servs., L.L.C.*, 2011-NMSC-017, ¶ 10, 150 N.M. 123, 257 P.3d 943. "Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." *Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶ 7, 148 N.M. 713, 242 P.3d 280 (internal quotation marks and citation omitted). "Where reasonable minds will not differ as to an issue of material fact, the court may properly grant summary judgment." *Montgomery v. Lomos Altos, Inc.*, 2007-NMSC-002, ¶ 16, 141 N.M. 21, 150 P.3d 971. The facts and all reasonable inferences are construed in favor of the non-moving party. *Id*.; *Summers*, 2011-NMSC-017, ¶ 10. The party moving for summary judgment "has the burden of producing such evidence as is sufficient in law to raise a presumption of fact

or establish the fact in question unless rebutted." *Summers*, 2011-NMSC-017, ¶ 10 (internal quotation marks and citation omitted). The burden then shifts to the non-moving party to present evidence that would justify a trial on the merits. *Romero*, 2010-NMSC-035, ¶ 10. "When disputed facts do not support reasonable inferences, they cannot serve as a basis for denying summary judgment." *Id*.

{25} We first observe that the manner in which the district court resolved Plaintiffs' motion for partial summary judgment is both puzzling and poorly conducive to appellate review. Despite there being no competing motion for summary judgment by Hegarty, and rather than simply denying Plaintiffs' motion, the district court ruled that "[t]here is no genuine issue as to any material fact" as to the meaning of Article 16, and held "[a]s a matter of law" that Hegarty's April letters "never triggered the buy-sell [provision]" because "an offer to *sell* must be made by one of the members." (Emphasis added.) In essence, by its statements the district court not only denied Plaintiffs' motion but *sua sponte* decided the predominant question of law in Hegarty's favor. Yet afterward, on Plaintiffs' request, the district court bifurcated Counts 1, 2, 4, and 5 of Plaintiffs' complaint, along with Counts 1 and 2 from Hegarty's counterclaim—all directly relating to application of the same buy-sell provision—and proceeded to conduct a six-day bench trial limited to evidence regarding the origin of the buy-sell provision.

{26} Plaintiffs ask that the district court's summary judgment ruling be reversed, and that we direct the district court to instead grant Plaintiffs' motion for partial summary judgment. They argue that the buy-sell provision at issue was triggered when Hegarty gave notice of a price, and that when the provision is analyzed in "its context within the contract as a whole so as to realize the intentions of the parties," Plaintiffs are entitled to prevail as a matter of law. *Crow v. Capitol Bankers Life Ins. Co.*, 1995-NMSC-018, ¶ 31, 119 N.M. 452, 891 P.2d 1206. They also argue that Hegarty's desire to invoke the buy-sell provision is plain on the face of his April 1 letter. In stark contrast, Hegarty argues that the buy-sell provision is simply an option within a binding contract, and that our caselaw uniformly requires that options be construed strictly upon the specific wording of the provision in question. *See Northcutt v. McPherson*, 1970-NMSC-099, ¶ 9, 81 N.M. 743, 473 P.2d 357 (holding that to exercise an option requires "affirmative performance of the expressed method" and that "[t]he language of the agreement itself controls as to what act or acts constitute an election to exercise an option"). Indeed, Article 16.1 of the Operating Agreement declares that to become an electing member under the buy-sell provision, Defendant must have notified Plaintiffs "in writing of the price at which the Electing Member would be willing to *sell* one hundred percent (100%) of the [Defendant's] interest in the [C]ompany." (Emphasis added.)

{27} While we agree with Plaintiffs that the irregular determinative process employed by the district court in denying their motion constituted error, the record before us does not compel the conclusion that Plaintiffs are entitled to summary judgment as to Counts 1 and 2 of the amended complaint. Plainly, Hegarty's April 1 letter did not employ the contractually specified language to invoke the buy-sell provision: the amount at which he would be "willing to *sell*" his interest to Plaintiffs. (Emphasis added.) Nonetheless, his letter expressly invoked "Article 16 of Synergy's Operating Agreement" (the buy-sell

provision), in a manner that a fact finder could determine utilized, relied upon, and accepted its application, given the language employed by Hegarty and his conduct during ensuing communications and interactions with Plaintiffs.

{28} We conclude that the April 1, 2010 letter and the parties conduct after the letter was sent raises questions of fact about Hegarty's intent. When answers to legal questions depend upon the resolution of disputed questions of fact—i.e., what was meant by the language Hegarty used to communicate his offer to buy Plaintiffs' shares in Synergy?—summary judgment is improper. *See Mark V, Inc. v. Mellekas*, 1993-NMSC-001, ¶ 12, 114 N.M. 778, 845 P.2d 1232 (determining that when a contract is reasonably and fairly open to multiple constructions, then an ambiguity exists, summary judgment should be denied, and the factfinder should resolve all factual issues presented by the ambiguity). *See also Benz v. Town Ctr. Land, LLC*, 2013-NMCA-111, ¶¶ 27-31, 314 P.3d 688 (describing procedures for determining when an ambiguity exits and how to resolve what that ambiguity means). Under these circumstances, Plaintiffs are not entitled to have the dispute resolved in their favor on appeal. *Vigil v. Sandoval*, 1987-NMCA-101, ¶ 15, 106 N.M. 233, 741 P.2d 836 ("On appeal, an appellate court will resolve all disputed facts in favor of the successful party[.]").

{29} As a final note regarding the summary judgment proceedings, we acknowledge that Hegarty's May 20, 2010 letter did identify the price for which he would *sell* his interest, albeit "only to [Plaintiff] Mullins." But the May 20 letter, pleaded alternatively as a basis to enforce the buy-sell provision in Count 5 of Plaintiffs' amended complaint, was not the subject of Plaintiffs' motion for summary judgment. Nor is it possible to discern whether the district court erred in finding against Plaintiff Mullins on Count 5 because it additionally entered judgment in Plaintiffs' favor on Hegarty's counterclaims for declaratory relief and specific performance. Those counts also related to Hegarty's May 20 letter, which he contended established his, not Plaintiff Mullins's, right to acquire the other's interest. Since it is difficult for this Court to understand with certainty the district court's judgment and the nature of the relief the prevailing party or parties are entitled, reversal and remand is the appropriate remedy. Upon return to district court, the parties may relitigate the issues, including those related to summary judgment, as they see fit in light of our holding today.

{30} Hegarty argues that the district court cured any error it committed in denying Plaintiffs' motion for summary judgment by holding a trial on the merits. But the flawed summary judgment proceedings greatly impacted the ensuing bench trial because the district court refused to consider evidence directly relevant to the buy-sell provision's meaning, its clarity, Hegarty's intent in his April 1 letter, or whether the parties in effect exercised the buy-sell provision by their course of conduct after the April 1 letter was sent. Instead, according to the district court, the trial was held to determine if "ambiguity [in the buy-sell provision] surfaced as a result of the evidence." It stated that "[t]o the extent Plaintiffs believe that . . . evidence produced at trial requires a [contrary] interpretation of Article 16, they are incorrect."

{31} Thus, the district court refused to consider Defendant's April 1 letter to Plaintiffs identified by subject line as "Exercising Buy[-]Sell Option Under Synergy Operating Agreement," which Plaintiffs maintain constitutes "course-of-performance evidence." The district court also refused to consider statements made by Hegarty upon delivery of the letter and at a subsequent meeting, the agenda at which was entitled "Buy[-]Sell status." Along with this evidence, Plaintiffs also contend that Defendant's attendance of, and the specifics of his participation in, a mediation aimed at resolving the dispute over the buy-sell provision was admissible, as was Defendant's initial January 21 email inquiry to Mr. Finch. We agree. Additionally, the district court erroneously held that this email was protected by the attorney-client privilege. *See* Rule 11-503(D)(5) NMRA ("There is no privilege under this rule . . . [f]or a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.").

{32} Determinations of relevancy and materiality regarding an item of evidence rests largely within the discretion of the district court. *Wilson v. Hayner*, 1982-NMCA-120, ¶ 5, 98 N.M. 514, 650 P.2d 36. And, a district court may consider extrinsic evidence in order to resolve the preliminary question of whether a contract is ambiguous, a pure question of law which we review *de novo*. *Mark V, Inc.,* 1993-NMSC-001, ¶¶ 12, 14. A district court can also consider "the parties' intentions, the purposes sought, trade custom, course of dealing, and course of performance[.]" *Allsup's Convenience Stores, Inc. v. N. River Ins. Co.*, 1999-NMSC-006, ¶ 31, 127 N.M. 1, 976 P.2d 1.

{33} Here, we are unable to meaningfully review the district court's determination that the buy-sell clause is unambiguous because the district court conducted a trial to ascertain whether the contract was ambiguous and used it to resolve the broader merits of the parties' claims related to the buy-sell provision. Indeed, after refusing to hear direct evidence regarding the purported initiation of the buy-sell provision and the course of conduct that ensued, it entered substantive findings not merely as to the ambiguity of the buy-sell provision, but on the parties' claims as well. The most basic problem in this case is that the district court refused to consider the parties' course-of-performance evidence. Such evidence could be relevant to determine whether the buy-sell provision was ambiguous and, if ambiguous, to resolve that ambiguity. *See Schultz & Lindsay Constr. Co. v. New Mexico*, 1972-NMSC-013, ¶ 5, 83 N.M. 534, 494 P.2d 612 (course of conduct evidence is relevant to the parties' understanding of the contract's meaning, and "to the resolution of ambiguities and uncertainties of meaning in the contract and especially so . . . if the conduct of the parties manifesting their construction of the contract occurred prior to the development of a controversy between them"). Such evidence could also be relevant to the issue of whether the parties thought their buy-sell provision was properly invoked by Hegarty's April 1 letter, whether they acted on that perception despite the letter's failure to match the requirements of Article 16, and whether their perception and course of conduct can act as a practical waiver of the strict requirements of Article 16. In the event the proceedings on remand again culminate in a trial, the district court is instructed to consider this evidence.

{34} One final matter. Plaintiff Mullins separately argues that the district court erred in resolving Count 5 of the complaint against him because Hegarty's May 20 letter unambiguously expressed an intent to sell his interest to Plaintiff Mullins. He asks that this Court direct that the alternatively asserted Count 5 be resolved in his favor. But we note again that no motion for summary judgment was filed by which Plaintiff Mullins' contention of law could have been resolved in district court. Regarding the trial's capacity to provide the result he seeks, the district court's erroneous exclusion of relevant evidence makes it impossible to evaluate the merits of the district court's decision as to Count 5, or the related Counts 1 and 2 of Hegarty's counterclaim. As set forth above, we agree that the district court's adjudication of the parties' claims was wrongly conducted and must be reversed.

CONCLUSION

{35} We reverse the district court's amended final judgment and remand for proceedings consistent with this Opinion. Upon remand the parties will have the same opportunities of litigation, including motion practice or requests that the court take additional evidence, as would any party in litigation prior to trial.

{36} IT IS SO ORDERED.

J. MILES HANISEE, Judge

WE CONCUR:

MICHAEL E. VIGIL, Chief Judge

MICHAEL D. BUSTAMANTE, Judge

1Although the parties dispute whether the corporations themselves, or their individual principals, are Synergy's members, we do not resolve this needless bone of contention as it is neither a point of appeal nor essential to our resolution of the issues briefed by the parties.

2Following Defendant's motion to dismiss Plaintiffs' original complaint due to its use of corporate entities that Defendant maintained lacked standing to sue, Plaintiffs amended their complaint to assert their cause of action in both their individual and corporate capacities. The substantive claims of the lawsuit, however, remained unchanged.

3Although Hegarty asserted ten counterclaims in his answer, only four of those claims are germane to this appeal. As such, we solely provide background as to those four counterclaims.

4Plaintiffs do not contend, nor does the record reveal, that they sought summary judgment as to Count 5 of their amended complaint, even though Hegarty's May 20 letter was the only communication in which Hegarty delineated the amount at which he would be willing to *sell* his interest in Synergy.

5We note that the parties dispute the procedural propriety of Hegarty filing a separate cross-appeal on the issue of finality in lieu of including the entire argument within his answer brief in Case No. 32,165. But this Court has already approved the filing of Hegarty's cross-appeal in a previous order, and we decline to further address this issue.

6While there appear to be seven unadjudicated counterclaims, Hegarty addresses Counts 3 and 4 of his counterclaim on appeal. Our review is likewise limited to those claims.