IN THE SUPREME COURT OF THE STATE OF NEVADA

L.A. PACIFIC CENTER, INC., A CALIFORNIA CORPORATION; AND RICHARD ALTER, A CALIFORNIA RESIDENT,
Appellants,
vs.
HOTELS NEVADA, LLC, A NEVADA LIMITED LIABILITY COMPANY; INNS NEVADA, LLC, A NEVADA LIMITED LIABILITY COMPANY; AND SILVERLEAF DEVELOPMENT, LLC, A CALIFORNIA LIMITED LIABILITY COMPANY,
Respondents.

No. 47979

FILED

OCT 22 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court order denying appellants' motion to compel arbitration. Eighth Judicial District Court, Clark County; Timothy C. Williams, Judge.

In 2004, respondent Hotels Nevada, LLC, owned the Alexis Park Hotel and the American Inn Apartments in Las Vegas, Nevada. At that time, Hotels Nevada and appellant L.A. Pacific Center, Inc., were engaged in negotiations for the sale of these properties.

After extensive negotiations, the parties agreed on a purchase price of $75 million for both properties. In order to facilitate the sale, Hotels Nevada alleges that it agreed to allow L.A. Pacific to hold back $5 million of the purchase price for 12 months. The parties prepared a written purchase and sales agreement, along with a memorandum of agreement. Several drafts of these agreements were exchanged and in March 2004, the parties signed the agreements. Hotels Nevada alleges

that it signed an agreement that contained a 12 month holdback provision. L.A. Pacific alleges that it signed an agreement with a 60-month holdback provision.

Under the terms of the written agreements, the parties consented to the "nonexclusive jurisdiction of any federal or state court located within Clark County, Nevada over any dispute arising out of" the agreements. In addition, the parties agreed to arbitrate each claim arising out of these agreements in Clark County, Nevada.

In April 2005, Hotels Nevada alleges that it learned for the first time that the agreements, which were filed with the Clark County Recorder, contained a 60 month holdback provision rather than a 12 month provision. Accordingly, in May 2005, Hotels Nevada filed a complaint against L.A. Pacific in California Superior Court, asserting claims for rescission based on fraud, cancellation of written instruments based on illegality, and conspiracy. L.A. Pacific responded by moving the court to compel arbitration. The court denied the motion, and L.A. Pacific appealed. Shortly thereafter, L.A. Pacific filed several counterclaims against Hotels Nevada for abuse of process, slander of title, intentional interference with contractual relations, and indemnity.

In November 2006, the California Court of Appeal reversed the lower court's order denying L.A. Pacific's motion to compel arbitration, concluding that the lower court should have held an evidentiary hearing before ruling on the petition.[1] The appeal court concluded that L.A. Pacific had "carried its burden of proving the existence of an arbitration

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[1]See Hotels Nevada v. L.A. Pacific, Inc., 50 Cal. Rptr. 3d 700, 708 (2006).

agreement between the parties by quoting pertinent portions of the arbitration clause in its motion to compel arbitration and referencing the arbitration clause in the Agreement attached to Hotels Nevada's complaint as exhibit A."[2] The court added that "Hotels Nevada never disputed that the Agreement—whether containing 12-month or a 60-month holdback—provided for arbitration."[3] Accordingly, the matter was remanded and an evidentiary hearing was scheduled.

Shortly before the evidentiary hearing, Hotels Nevada filed a request for the voluntary dismissal of its California complaint without prejudice. The court granted the request for voluntary dismissal and Hotels Nevada returned to Nevada where it filed suit against L.A. Pacific. Despite Hotels Nevada's having voluntarily dismissed its complaint, the California action was allowed to proceed. The court explained that the California action must proceed because L.A. Pacific filed a motion to compel arbitration, which survived independent of Hotels Nevada's cause of action.

At the final status conference held shortly before the evidentiary hearing in California, the parties agreed that the sole issue to be resolved, during the evidentiary hearing, was Hotels Nevada's affirmative defense to arbitration of fraud in the execution. The California court explained that, if Hotels Nevada could not sufficiently demonstrate evidence of fraud in the execution, the parties' dispute would be ordered to arbitration. Following the evidentiary hearing, the California Superior

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[2]Id.

[3]Id.

Court determined that Hotels Nevada failed to meet its burden of establishing fraud in the execution. Accordingly, on February 1, 2008, the court entered an order compelling arbitration.

"Under California law, an order compelling arbitration is the final order in a special proceeding."[4] "Once the order is made, the special proceeding is complete and the arbitration must proceed."[5] Despite California's clear mandate that an order compelling arbitration is a final order, Hotels Nevada sought to stay the enforcement of the order compelling arbitration. The California court denied Hotels Nevada's motion to stay and levied sanctions against Hotels Nevada's counsel for brining such a motion.

In January 2007, Hotels Nevada filed a special motion to strike L.A. Pacific's counterclaims under the state's "anti-SLAPP statute." Following a hearing, the trial court granted Hotels Nevada's motion to strike as to the first through third counterclaims and denied the motion as to the fourth counterclaim for indemnity. In an unpublished decision filed on June 10, 2008, the California Court of Appeal affirmed the lower court's order.[6] Consequently, the only issue that remains to be resolved in the California action, following arbitration, is L.A. Pacific's counterclaim for indemnity. The issues to be resolved during arbitration, however, include

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[4]Southeast Resource Recovery v. Montenay Intern., 973 F.2d 711, 713 (9th Cir. 1992).

[5]Id.

[6]We take judicial notice of the June 10, 2008, unpublished decision of the California Superior Court. See Hotels Nevada v. L.A. Pacific, Inc., 2008 WL 2342488 (June 10, 2008); Cal. Civ. Pro. Code § 425.16.

"any further disputes between the parties over the allegations, issues, and claims evidenced by the California Complaint and the response thereto."[7]

Turning to the Nevada action, Hotels Nevada's complaint against L.A. Pacific asserted claims for rescission based on fraud, cancellation of written instruments based on illegality and conspiracy, and intentional interference with prospective economic advantage. In addition, Hotels Nevada brought a quiet title action against L.A. Pacific and sought the appointment of receiver. At the same time, Hotels Nevada filed a notice of lis pendens against the real property.

L.A. Pacific responded first by filing a motion to dismiss, or in the alternative, motion to stay the Nevada proceedings. These motions were denied. Subsequently, L.A. Pacific answered and counterclaimed for slander of title, abuse of process, intentional interference with contractual relations, intentional interference with prospective economic advantage, and indemnity. Shortly thereafter, L.A. Pacific filed a motion to compel arbitration. The district court denied the motion and L.A. Pacific appealed.[8]

Under Nevada law, if a party requests a court to compel arbitration pursuant to a written agreement to arbitrate, and the opposing party denies the existence of such an agreement, the court shall proceed summarily to determine the issue.[9] "If the court finds that there is no

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[7]Id.

[8]See NRS 38.247(1)(a) (allowing an immediate appeal of an order denying a motion to compel arbitration).

[9]NRS 38.221.

enforceable agreement, it may not . . . order the parties to arbitrate."[10] The burden to show a binding agreement to arbitrate is upon the moving party in a motion to compel arbitration.[11] Accordingly, L.A. Pacific was required to show a binding arbitration agreement.

Initially, we note that the district court failed to enter findings of fact or conclusions of law.[12] Therefore, it is impossible for this court to know on what grounds the district court refused to enforce the arbitration agreement. However, "in the absence of express findings, this court will imply findings where the evidence clearly supports the judgment."[13]

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[10]NRS 38.221(3).

[11]Obstetrics and Gynecologists v. Pepper, 101 Nev. 105, 108, 693 P.2d 1259, 1261 (1985).

[12]The district court's order provides in pertinent part:

> Having read and considered the Motion and all the parties' written authorities and arguments submitted in support of and in opposition to the Motion; the multiple affidavits and declarations of the parties and witnesses attached thereto; the exhibits, deposition transcripts, and documents attached thereto; and the other evidence submitted by the parties; as well as the arguments of counsel and matters adduced at the hearing of this matter:
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> IT IS HEREBY ORDERED, ADJUDGED AND DECREED that pursuant to NRS Defendants' Motion to Compel Arbitration and Stay Proceedings is denied.

[13]IAMA Corp. v. Wham, 99 Nev. 730, 734, 669 P.2d 1076, 1078 (1983).

Our review of the record reveals that L.A. Pacific demonstrated the existence of an arbitration agreement between the parties by quoting the arbitration clause in its motion to compel arbitration and referencing the arbitration clause in the parties' agreements. In addition, Hotels Nevada has never disputed that the agreements provided for arbitration. Accordingly, we conclude that L.A. Pacific carried its burden of proving the existence of an arbitration agreement.

Having carried its burden of proving the existence of an arbitration agreement, the burden shifts to Hotels Nevada to present evidence showing at least an issue of fact as to whether the contract is enforceable.[14] Here, Hotels Nevada asserted an affirmative defense to arbitration, claiming that the agreements were void at their inception because there was no meeting of the minds as to the holdback provision and because there was fraud in the execution of the agreements. We conclude that there is insufficient evidence in the record to support Hotels Nevada's affirmative defenses to arbitration. Accordingly, we conclude that the evidence does not clearly support the district court's order denying arbitration.

Where, as here, the record does not clearly support the district court's judgment, "our usual practice is to remand the case for entry of findings of fact and conclusions of law."[15] In this case, however, we

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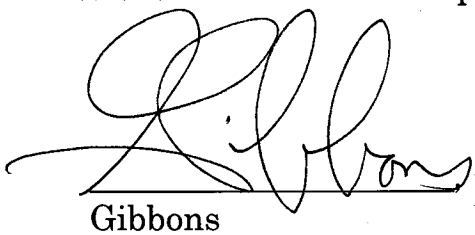
[14]Oppenheimer & Co., Inc. v. Neidhardt, 56 F.3d 352 (2d Cir. 1995); Aronson v. Dean Witter Reynolds, Inc., 675 F. Supp. 1324 (S.D. Fla. 1987).

[15]Luciano v. Diercks, 97 Nev. 637, 640, 637 P.2d 1219, 1220 (1981).

conclude that judicial economy will be best served by staying the Nevada action pending the resolution of the California action, which will bar relitigation of issues actually litigated in California under the doctrine of collateral estoppel.[16] Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.[17]



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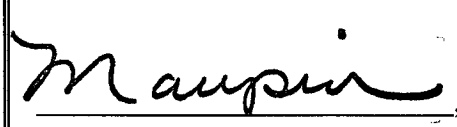

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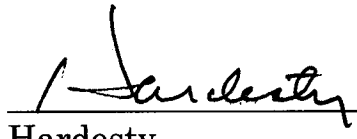

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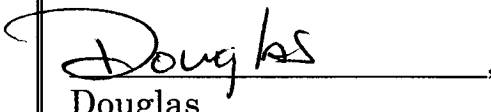

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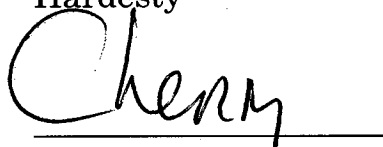

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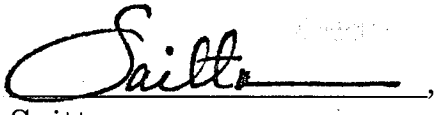

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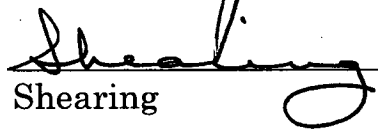

, S.J.
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[16]Reno v. Reno Police Protective Ass'n, 118 Nev. 889, 894, 59 P.3d 1212, 1216 (2002).

[17]L.A. Pacific additionally asserts that this court should give deference and respect to the California decision under principles of comity. We conclude that comity is inapplicable under the unique circumstances of this case. Therefore, we conclude that this argument lacks merit.

cc: Hon. Timothy C. Williams, District Judge
William C. Turner, Settlement Judge
Greenberg Traurig, LLP
Marquis & Aurbach
Bullivant Houser Bailey
Harrison, Kemp, Jones & Coulthard, LLP
Eighth District Court Clerk