IN THE SUPREME COURT OF THE STATE OF NEVADA

JUDY GIRTON, AN INDIVIDUAL; DEBORAH BOWDEN, AN INDIVIDUAL; CHUCK REEVES, AN INDIVIDUAL; EDWARD AND PAULINE MCCAIN, INDIVIDUALS; AND LUCIE CECHOVA-HODGSON, AN INDIVIDUAL,
Petitioners,
vs.
THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE, AND THE HONORABLE JANET J. BERRY, DISTRICT JUDGE,
Respondents,
and
SILVERWING DEVELOPMENT INCORPORATED, A NEVADA CORPORATION,
Real Party in Interest.

No. 48332

FILED

JUL 20 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER GRANTING PETITION FOR WRIT OF MANDAMUS

This original petition for a writ of mandamus challenges district court orders compelling arbitration and denying petitioners' motion to amend the order compelling arbitration. Second Judicial District Court, Washoe County; Janet J. Berry, Judge.

Petitioners, six homeowners, filed a complaint alleging various constructional defects against the builder of their homes, real party in interest Silverwing Development Inc. Silverwing then filed a motion to compel arbitration under section 18 of the five purchase agreements between it and the homeowners. Section 18 provides, in relevant part,

> **MEDIATION, ARBITRATION & ATTORNEY'S FEES**
>
> A. BUYER AND SELLER AGREE TO MEDIATE ALL CLAIMS, DISPUTES AND MATTERS IN QUESTION ARISING OUT OF, OR RELATING TO, THIS AGREEMENT OR THE BREACH HEREOF, OR ANY RESULTING TRANSACTION, BEFORE

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> RESORTING TO ARBITRATION PURSUANT TO THIS SECTION 18. . . . IF EITHER PARTY COMMENCES AN ACTION BASED ON A DISPUTE OR CLAIM TO WHICH THIS SECTION APPLIES, WITHOUT FIRST ATTEMPTING TO RESOLVE THE MATTER THROUGH MEDIATION, THEN THAT PARTY SHALL NOT BE ENTITLED TO RECOVER ATTORNEY'S FEES EVEN IF THEY WOULD OTHERWISE BE AVAILABLE TO THAT PARTY IN ANY SUCH ACTION.
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> B. IN THE EVENT ARBITRATION IS NECESSARY, ARBITRATION WILL BE IN ACCORDANCE WITH THE COMMERCIAL ARBITRATION RULES OF AMERICAN ARBITRATION ASSOCIATION THEN IN EFFECT UNLESS THE PARTIES MUTUALLY AGREE OTHERWISE. . . . THE AWARD RENDERED BY THE ARBITRATOR(S) SHALL BE FINAL AND NON-APPEALABLE UPON BOTH PARTIES; JUDGMENT MAY BE ENFORCED BY EITHER PARTY IN A COURT OF COMPETENT JURISDICTION.
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> C. SHOULD EITHER PARTY EMPLOY AN ATTORNEY TO DEMAND ARBITRATION TO ENFORCE ANY OF THE PROVISIONS HEREOF, THE PREVAILING PARTY SHALL BE ENTITLED TO RECOVER REASONABLE ATTORNEY'S FEES, COSTS, CHARGES AND EXPENSES EXPENDED OR INCURRED THEREIN.
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> ACKNOWLEDGEMENT: "NOTICE BY INTIALING [SIC] IN THE SPACE BELOW, YOU ARE AGREEING TO HAVE ANY DISPUTE ARISING OUT OF THE MATTERS INCLUDED IN THE MEDIATION OR ARBITRATION OF DISPUTES, AND YOU ARE GIVING UP ANY RIGHTS YOU MIGHT POSSESS TO HAVE THE DISPUTE LITIGATED IN A COURT OR JURY TRAIL [SIC]. YOUR AGREEMENT TO THIS SECTION 18 IS VOLUNTARY."
>
> WE HAVE READ AND UNDERSTAND THE FOREGOING AND AGREE TO SUBMIT DISPUTES ARISING OUT OF THE MATTERS INCLUDED IN THIS SECTION TO NEUTRAL MEDIATION AND ARBITRATION.

The homeowners opposed the motion to compel arbitration, arguing, among other things, that section 18 failed to fully inform them of the mandatory nature of the arbitration and was, therefore, unconscionable. Nevertheless, the district court granted Silverwing's motion to compel arbitration, finding that the clause was enforceable, as it was neither procedurally nor substantively unconscionable.

The homeowners then filed a motion to amend the court's order compelling arbitration. In their motion, which we construe as a motion for reconsideration, the homeowners argued that the district court erred in compelling arbitration, as section 18 required only mediation and did not mandate arbitration. The district court denied the motion to amend, concluding that arbitration was mandatory under section 18.

The homeowners have filed the instant petition for mandamus relief, arguing that because section 18 is unclear as to whether arbitration is mandatory or voluntary, there was never an agreement to submit all claims to arbitration and, therefore, the district court erred in compelling arbitration. As directed, Silverwing timely filed an answer to the petition.

When there is no plain, speedy, and adequate remedy at law, mandamus relief is available to compel the district court to perform a required act, or to control an arbitrary or capricious abuse of discretion.[1] Here, the homeowners appropriately seek writ relief from this court, as an order compelling arbitration is not appealable.[2] We conclude, under the circumstances of this case, that there was never an agreement between the homeowners and Silverwing to arbitrate all claims. Thus, the district court should not have compelled arbitration under section 18.

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[1]See NRS 34.160; NRS 34.170; see also Burch v. Dist. Ct., 118 Nev. 438, 441, 49 P.3d 647, 649 (2002).

[2]See NRS 38.247 (providing for no independent appeal from an order granting motion to compel arbitration); Burch 118 Nev. at 441, 49 P.3d at 649 (recognizing that mandamus is an appropriate method to challenge an order compelling arbitration); Clark Co. Public Employees v. Pearson, 106 Nev. 587, 590, 798 P.2d 136, 137 (1990) (acknowledging that whether a dispute is arbitrable is essentially a question of contract construction and thus, this court is obligated to make its own independent determination on this issue, not deferring to the district court's determination).

When the parties have agreed to arbitrate, public policy favors arbitration for the purpose of avoiding the unnecessary expense and delay of litigation.[3] In this case, however, because section 18 did not clearly state that arbitration was mandatory, there was no meeting of the minds as to the nature of the arbitration. The homeowners argue that, while section 18 explicitly declares that mediation is mandatory, its failure to similarly state that arbitration is mandatory renders the arbitration voluntary. Silverwing contends that mandatory "arbitration is the natural progression of the mandatory mediation." We disagree.

As the Third Circuit Court of Appeals has recognized, "[b]efore a party to a lawsuit can be ordered to arbitrate and thus be deprived of a day in court, there should be an express, unequivocal agreement to that effect."[4] The language of section 18, however, does not clearly mandate arbitration. Paragraph (A) provides that the "buyer and seller agree to mediate all claims . . . before resorting to arbitration." Paragraph (A) also sets forth a penalty should a party commence an action without first attempting to resolve the matter through mediation, but it does not provide a similar penalty for commencing an action without first attempting arbitration. Paragraph (B) begins with the language, "[i]n the event arbitration is necessary." Paragraph (C) states, "[s]hould either party employ an attorney to demand arbitration." Lastly, the acknowledgement appears to offer a choice, "You are agreeing to have any dispute arising out of the matters included in the mediation or arbitration of disputes."

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[3]Burch, 118 Nev. at 442, 49 P.3d at 650 (citing Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 270-71 (1995)).

[4]Par-Knit Mills v. Stockbridge Fabrics, 636 F.2d 51, 54 (3rd Cir. 1980).

Although the language of section 18 clearly mandates mediation, it does not set forth the nature of the arbitration with similar clarity. Silverwing's contention that mandatory arbitration is the "natural progression" of mandatory mediation does not satisfy the contractual requirement that there be an express, unequivocal agreement to arbitrate in order to compel arbitration.

In D.R. Horton, Inc. v. Green, we held that "to be enforceable, an arbitration clause must at least be conspicuous and clearly put a purchaser on notice that he or she is waiving important rights under Nevada law."[5] Section 18 is neither conspicuous in mandating arbitration, nor puts the homeowners on notice that they are agreeing to forgo important rights under state law.[6]

While we have previously held that all doubts of arbitrability must be resolved in favor of arbitration,[7] this holds true only when the parties have first bargained for the benefit of arbitration.[8] Under the language of section 18, the homeowners did not bargain for mandatory arbitration, as the purchase agreement did not clearly define the nature of the arbitration. Accordingly, the homeowners are not bound by the

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[5]120 Nev. 549, 557, 96 P.3d 1159, 1164 (2004).

[6]Section 18 merely states that the buyer is "giving up any rights [he] might possess" and does not mention that in addition to the right to a jury trial, the buyer is waiving important statutory rights under NRS 40.655. Because section 18 failed to provide proper notice, Silverwing's argument regarding the failure of the homeowners to read the purchase agreement is irrelevant.

[7]Pearson, 106 Nev. at 589, 798 P.2d at 137.

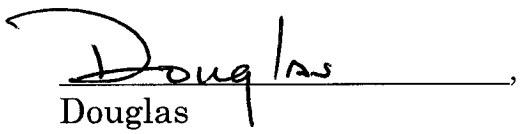
[8]See Kindred v. Dist. Ct., 116 Nev. 405, 996 P.2d 903 (2000); Phillips v. Parker, 106 Nev. 415, 794 P.2d 716 (1990).

alleged intended consequences of section 18 and cannot be compelled to arbitrate their claims.

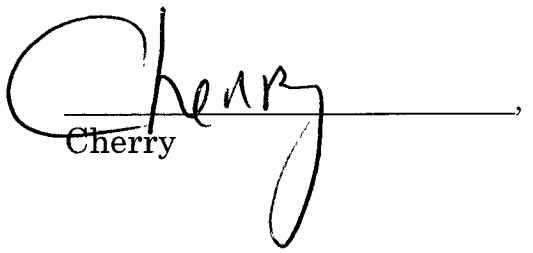
We, therefore, grant the petition and direct the clerk of this court to issue a writ of mandamus directing the district court to vacate its orders compelling.[9]

It is so ORDERED.

_____, J.
Gibbons



_____, J.
Douglas



_____, J.
Cherry

cc: Hon. Janet J. Berry, District Judge
Robert C. Maddox & Associates/Reno
Armstrong Teasdale, LLP/Reno
Washoe District Court Clerk

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[9]See NRS 34.160; see also Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981).