IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CITY OF HENDERSON,
Appellant,
vs.
THE GUARANTEE COMPANY OF NORTH AMERICA USA, AN UNKNOWN ENTITY,
Respondent.

No. 73299

ORDER OF REVERSAL AND REMAND

The City of Henderson appeals from an order denying its motion to stay and compel arbitration. Eighth Judicial District Court, Clark County; Jerry A. Wiese, Judge.

The City of Henderson and Construction Services Unlimited, Inc. (CSU) entered into a contract for a landscaping project, which contained an arbitration provision. CSU obtained three surety bonds for the sum of the contract from The Guarantee Company of North America USA (GCNA). CSU's subcontractors completed the project, but were not paid in full, thus initiating a bond claim and subsequent litigation against CSU and GCNA. Two years later, GCNA filed a third-party complaint against the City asserting breach of contract claims based on the contract between CSU and the City.

The City moved to dismiss the third-party complaint, or in the alternative, to stay and compel arbitration. The district court denied the motions without prejudice, finding in pertinent part, "insufficient evidence has been demonstrated for the Court to determine as a matter of law that GCNA is a direct beneficiary of the [ ][C]ontract" to compel arbitration. The City appeals the district court's denial of its motion to compel arbitration,

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arguing that the district court erred by finding that GCNA was not bound to the arbitration provision in the Contract between CSU and the City.[1]

To begin, the parties dispute which standard of review should apply. The City argues that this court should review this issue de novo because it is a dispute concerning whether a contract is arbitrable, under *Tallman v. Eighth Judicial District Court*, 131 Nev. 713, 359 P.3d 113 (2015). GCNA counters that this court should review the district court's decision for an abuse of discretion because (1) the issue is whether an agreement to arbitrate exists is one of fact, under *Truck Insurance Exchange v. Palmer J. Swanson, Inc.*, 124 Nev. 629, 189 P.3d 656 (2008); and/or (2) the district court's denial of arbitration was based in equity. However, we need not determine which standard of review is appropriate because the district court committed legal error by denying the City's motion to compel arbitration, thus abusing its discretion. *See Staccato v. Valley Hosp.*, 123 Nev. 526, 530, 170 P.3d 503, 506 (2007) (stating that "the district court abuses its discretion if it applies an incorrect legal standard").

The City argues that although GCNA was a non-signatory to the contract, it is bound by the arbitration provision because it assumed CSU's legal position and asserted claims under the contract, therefore receiving a direct benefit. GCNA counters that it is not bound by any contract that requires it to submit to arbitration. It also argues that it does not stand to make a profit on its claims because the City is primarily liable for the work performed instead of GCNA.

Because arbitration is a matter of contract, "a party cannot be required to submit to arbitration any dispute which he has not agreed so to

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[1]We do not recount the facts except as necessary to our disposition.

submit." *Truck Ins. Exch.*, 124 Nev. at 634, 189 P.3d at 660 (citation omitted). But a nonsignatory may be subject to the obligation to arbitrate if dictated by the ordinary principles of contract and agency: "1) incorporation by reference; 2) assumption; 3) agency; 4) veil-piercing/alter ego; and 5) estoppel." *Id.* at 634-35, 189 P.3d at 660 (citation omitted).

Below, the district court determined that there was insufficient evidence to demonstrate that GCNA directly benefitted from the Contract under a theory of estoppel.[2] Under an estoppel theory, "[a] nonsignatory is estopped from refusing to comply with an arbitration clause when it receives a 'direct benefit' from a contract containing an arbitration clause." *Id.* at 636, 189 P.3d at 661 (internal quotation marks and citation omitted). A non-signatory receives a direct benefit when it asserts claims under a contract. *See, e.g., R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n*, 384 F.3d 157, 160-61 (4th Cir. 2004) ("In the context of arbitration, the doctrine [of equitable estoppel] applies when one party attempts 'to hold [another party] to the terms of [an] agreement' while simultaneously trying to avoid the agreement's arbitration clause." (citation omitted)); *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 417-18 (4th Cir. 2000) (internal quotation mark and citation omitted) (holding that a non-signatory customer was equitably estopped from refusing to comply with an arbitration provision in a contract between the distributor and manufacturer in its suit based on that contract because the contract provided "part of the factual foundation for every claim asserted by" the

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[2]Because the face of the complaint supports the conclusion that the district court erred in denying the City's motion to compel arbitration, we need not address whether non-signatory GCNA could have been compelled to arbitrate under additional theories, such as incorporation by reference or assumption.

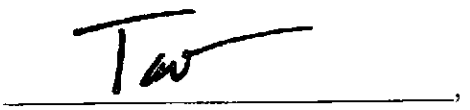
non-signatory and therefore "it cannot seek to enforce those contractual rights and avoid the contract's requirement that "any dispute arising out of the contract be arbitrated"); *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 739-40 (Tex. 2005) (discussing that "if a non-signatory's breach-of-warranty and breach-of-contract claims are based on certain terms of a written contract, then the non-signatory cannot avoid an arbitration provision within that contract . . . . If, however, a non-signatory's claims can stand independently of the underlying contract, then arbitration generally should not be compelled under this theory.").

Here, GCNA asserted claims wholly based on the contract between CSU and the City, including breach of contract, breach of implied covenant of good faith and fair dealing, unjust enrichment/quantum meruit, and indemnity and contribution. Thus, the face of the third-party complaint supported a conclusion that GCNA was receiving a direct benefit by asserting claims on the Contract between CSU and the City. Specifically, GCNA alleged that it "is entitled to assert any claims that its principal on the Bond may have[,]" that it had "been damaged as a result of the City's breach[,]" and that the City "intended to deny intended benefits of the contract to CSU and GCNA." Therefore, because GCNA asserted claims under the Contract against the City, it was estopped from denying the arbitration requirement in the Contract. And because on its face the third-party complaint established that GNCA received a direct benefit, the district court erred in denying the City's motion to compel arbitration.[3]

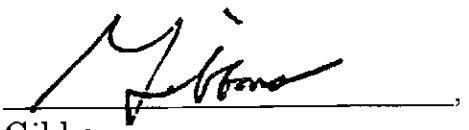
[3]In its answering brief, GCNA argues that the City waived its right to compel arbitration by moving to dismiss its claims below. A party waives the right to demand arbitration when it "(1) knew of [its] right to arbitrate, (2) acted inconsistently with that right, and (3) prejudiced the other party

Accordingly, we

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



_____, J.
Tao



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Gibbons

SILVER, C.J., dissenting:

Unlike the non-signatory in International Paper Co., GCNA did not receive a direct benefit from the underlying contract between the City of Henderson and the landscaping company. GCNA is a bond company that now has to pay out subcontractors for the alleged wrongful work/payment, which the landscaping company should have paid for as the contractor on the job. Arguably, the City of Henderson received a benefit or may have been unjustly enriched by all of the work. GCNA, a non-signatory to the

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by [its] inconsistent acts." *Nev. Gold & Casinos, Inc. v. Am. Heritage, Inc.*, 121 Nev. 84, 90, 110 P.3d 481, 485 (2005). Here, the City did not act inconsistently with its right to arbitrate by moving to dismiss on a statute-of-limitations-type issue while simultaneously moving to compel arbitration. *See, e.g., Van Ness Townhouses v. Mar Indus. Corp.*, 862 F.2d 754, 759 (9th Cir. 1988) (holding that defendant waived arbitration clause when it chose "to litigate actively the entire matter—including pleadings, motions, and approving a pretrial conference order—and did not move to compel arbitration until more than two years after [plaintiffs] brought the action"). Therefore, the City did not waive its right to arbitrate.

underlying contract, is simply not a party to the contract for arbitration, nor did it receive a benefit for the underlying contract. *See Truck Ins. Exch. v. Palmer J. Swanson, Inc.*, 124 Nev. 629, 634-35 189 P.3d 656, 659-60 (2008) (addressing the non-signatory rule). Accordingly, I respectfully dissent.

Silver, C.J.
Silver

cc: Hon. Jerry A. Wiese, District Judge
Thomas J. Tanksley, Settlement Judge
Henderson City Attorney
The Faux Law Group
Eighth District Court Clerk