

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KATHLEEN HOLLINGER,
Appellant,
vs.
VOYAGER TRAILERS, INC.,
Respondent.

No. 76711-COA

FILED

FEB 27 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Kathleen Hollinger appeals from a district court judgment in a personal injury action. Eighth Judicial District Court, Clark County; Rob Bare, Judge.

Hollinger filed a complaint against respondent Voyager Trailers, Inc. (Voyager), for damages she allegedly incurred from an ATV rolling onto her when she was attempting to load the ATV into a trailer manufactured and distributed by Voyager. After settlement negotiations, Hollinger made Voyager an offer of judgment pursuant to NRCP 68¹ under which judgment would be taken against Voyager for \$100,000. After clarifying with Hollinger's counsel that the offer was inclusive of fees and costs, Voyager accepted the offer. Even though no judgment had been entered at the time, Hollinger, relying on NRCP 60(b)(3), moved to set aside the offer and acceptance on the basis of fraud, misrepresentation, or other

¹The Nevada Rules of Civil Procedure were amended effective March 1, 2019. See *In re Creating a Comm. to Update & Revise the Nev. Rules of Civil Procedure*, ADKT 0522 (Order Amending the Rules of Civil Procedure, the Rules of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules, December 31, 2018). We cite the prior versions of the applicable rules, as they were in effect at all relevant times herein.

misconduct because Voyager refused to tender payment. Voyager opposed the motion and filed a motion to enter judgment based on the accepted offer.

After a hearing, the district court denied Hollinger's motion and granted Voyager's. The court found that actual payment, immediate or otherwise, was not made a material term of the offer or acceptance and that Hollinger presented no evidence of an alleged misrepresentation. It further found that, under basic contract law, a valid and enforceable contract was formed, that there were no grounds for revocation, and that there were no grounds to set aside the acceptance. This appeal followed.

On appeal, Hollinger argues that the district court improperly refused to set aside the acceptance of the offer of judgment. We disagree.

As an initial matter, to the extent Hollinger sought relief from the offer and acceptance based on NRCP 60, any such relief was not available because her motion was filed before a final judgment or order was entered. *See Barry v. Lindner*, 119 Nev. 661, 669-70, 81 P.3d 537, 542-43 (2003) (providing that NRCP 60(b) relief is only available from a final judgment, order, or proceeding), *superseded by rule on other grounds as stated in LaBarbera v. Wynn Las Vegas, LLC*, 134 Nev. 393, 422 P.3d 138 (2018). We note that our supreme court has recognized that a party can seek relief from a judgment entered following acceptance of an offer of judgment through a request for NRCP 60(b) relief. *See Nava v. Second Judicial Dist. Court*, 118 Nev. 396, 398 & n.2, 46 P.3d 60, 61 & n.2 (2002) (granting writ relief from the denial of a motion to enter judgment on an accepted offer of judgment because such offers cannot be revoked during the 10-day acceptance period and noting that the real party in interest's remedy would be to file a motion for relief pursuant to NRCP 60(b)). But such NRCP 60(b) relief must be sought using the proper procedure—following the entry of the judgment—and not through a premature request for relief from the offer and acceptance before a judgment has been entered. *See Barry*, 119

Nev. at 669-70, 81 P.3d at 542-43. Therefore, we conclude the district court properly denied NRCP 60(b) relief under the circumstances presented here.

Nonetheless, because the district court addressed the merits of Hollinger's contract-based arguments in the course of granting Voyager's motion to enter judgment on its acceptance of the offer of judgment, we turn to consider these issues. And our review of Hollinger's arguments and the record on appeal reveals no impropriety in the district court's denial of relief on these contract-based assertions.

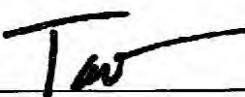
Here, the record supports the district court's determination that Hollinger failed to present evidence of an alleged misrepresentation or fraud. Therefore, we discern no abuse of discretion in the district court's rejection of Hollinger's request for rescission on the grounds of misrepresentation and/or fraud. *See Awada v. Shuffle Master, Inc.*, 123 Nev. 613, 622, 173 P.3d 707, 713 (2007) (providing that a district court's decision on rescission issues is reviewed for an abuse of discretion).

Further, to the extent that Hollinger argues that unilateral mistake provided a basis to rescind, this argument also fails. Notably, Hollinger bore the risk of any alleged mistake as to whether payment would be made or judgment entered because she controlled the terms of the offer. *See Home Savers, Inc. v. United Sec. Co.*, 103 Nev. 357, 358-59, 741 P.2d 1355, 1356-57 (1987) (providing that a unilateral mistake provides a basis to void a contract if the party making the mistake does not bear the risk of mistake and the other party had reason to know of the mistake or his fault caused the mistake); *see also Land Baron Invs., Inc. v. Bonnie Springs Family Ltd. P'ship*, 131 Nev. 686, 694, 356 P.3d 511, 517 (2015) (discussing when a party bears the risk of mistake and stating that "if the risk is reasonably foreseeable and yet the contract fails to account for that risk, a court may infer that the party assumed that risk"). Moreover, NRCP 68 specifically provides that it is the defendant's option as to whether to pay

the amount of the offer and obtain dismissal or have judgment entered. See NRCP 68(d) (providing that a defendant has the *option* to pay the amount of the offer in a reasonable time and have the claim dismissed rather than a judgment entered). And there is nothing in the offer or acceptance purporting to remove or otherwise alter this option, which by rule belonged to Voyager. See NRCP 68(a) (providing that a party may serve an offer allowing “judgment to be taken *in accordance with its terms and conditions*” (emphasis added)). Therefore, we discern no abuse of discretion in the district court’s determination that there were no grounds to provide relief through rescission.² See *Awada*, 123 Nev. at 622, 173 P.3d at 713. Accordingly, for the reasons set forth above, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Rob Bare, District Judge
Stovall & Associates
Voyager Trailers, Inc.
Eighth District Court Clerk

²To the extent Hollinger raised arguments that are not explicitly addressed herein, we have considered the same and conclude they do not provide a basis for relief or are moot given the disposition of this appeal.