

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DAVID BIONDO,
Appellant,
vs.
SEAN TYLER HADLEY; AND STACEE
MARIE HADLEY,
Respondents.

DAVID BIONDO,
Appellant,
vs.
SEAN TYLER HADLEY; AND STACEE
MARIE HADLEY,
Respondents.

No. 81111-COA

FILED

JUN 16 2021

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

No. 81565-COA

ORDER REVERSING, VACATING, AND REMANDING

David Biondo appeals from an order granting summary judgment and an order awarding attorney fees and costs. Eighth Judicial District Court, Clark County; Ronald J. Israel, Judge.

In June 2016, Biondo executed a residential purchase agreement (RPA) to purchase Sean and Stacey Hadleys' (the Hadleys) home located in Henderson.¹ The RPA contained a "disclosures" section obligating the Hadleys to submit a "Real Property Disclosure Form" to Biondo pursuant to NRS 113.130.² The RPA also contained a mediation clause providing that, "[b]efore any legal action is taken to enforce any term

¹We only recount the facts as necessary for our disposition.

²NRS 113.130(1)(a) provides, "At least 10 days before residential property is conveyed to a purchaser: (1) the seller shall complete a disclosure form regarding the residential property; and (2) the seller or seller's agent shall serve the purchaser or purchaser's agent with the completed disclosure form." A purchaser cannot waive section (1). NRS 113.130(3).

or condition under this Agreement, the parties agree to engage in mediation, a dispute resolution process, through GLVAR.”

The Hadleys furnished a completed disclosure form to Biondo in which they declared the lot was not prone to flooding. The transaction closed and the Hadleys conveyed the property to Biondo via a Grant, Bargain, and Sale deed.

The first rain following the close of escrow resulted in flooding on the property. Biondo hired Linda K. Hoy, a construction expert, to inspect the property following the flooding. Hoy prepared a report in which she opined that the drainage problems existed when the Hadleys owned the home, and that the Hadleys likely knew of and should have disclosed the problems. Biondo suffered damages and paid to cure the drainage defects in the property, and Hoy opined that Biondo’s repairs were necessary.

In May 2018, Biondo sent a demand letter to the Hadleys’ address that they provided in the Grant, Bargain, and Sale Deed. The letter claimed the Hadleys were aware of the drainage issues and failed to disclose them, and demanded the Hadleys pay Biondo for damages associated with the drainage issues, the cost of curing the issues, and his attorney fees. Biondo never received a response. Five days later, Biondo submitted a request for mediation with a filing fee to the Greater Las Vegas Association of Realtors (GLVAR), the mediator named in the RPA. Biondo listed the Hadleys’ address from the Grant, Bargain, and Sale Deed in the application. GLVAR delivered a request for mediation to this address, but never received a response from the Hadleys. In June 2018, GLVAR sent a letter to Biondo informing him that it never received a response from the Hadleys, that it was closing Biondo’s case, and that Biondo was free to pursue other remedies.

Biondo filed a complaint against the Hadleys alleging they

violated NRS Chapter 113, negligence, breach of contract, and breach of the implied covenant of good faith and fair dealing. Biondo eventually served the Hadleys via publication. The Hadleys filed their answer in April 2019. The answer did not assert that Biondo failed to comply with the mediation provision. At the close of discovery, the Hadleys moved for summary judgment, arguing for the first time that Biondo failed to comply with the mediation provision. The district court granted the Hadleys' motion. The court concluded that the plain language of the mediation provision required Biondo to "engage in" mediation before taking legal action, and Biondo's failed attempt to serve a request for mediation did not constitute engaging in mediation. The court ruled, without citing any authority, that Biondo "was required to conduct a reasonable search to locate the Hadleys in order to demand mediation."³ The district court did not address whether a genuine dispute of material fact existed as to Biondo's claims for relief.

Following the district court's summary adjudication, the Hadleys moved to recover attorney fees and costs. The Hadleys requested \$48,288.43. The district court granted the Hadleys' motion, but awarded the Hadleys \$21,329.43 in total. The district court reasoned that the Hadleys' delay in raising the mediation provision warranted a reduction in the requested attorney fees. Biondo appealed following the district court's entry of summary judgment, and later appealed the district court's award of attorney fees and costs. Biondo's appeals were consolidated.

³The district court refused to consider Biondo's waiver argument when he raised it at the hearing. Because Biondo nevertheless urged this argument below, he did not waive it. *See generally Schuck v. Signature Flight Support of Nev., Inc.*, 126 Nev. 434, 436, 245 P.3d 542, 544 (2010) ("[A] point not urged in the trial court . . . is deemed to have been waived and will not be considered on appeal." (quoting *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981))).

On appeal, Biondo challenges the district court's summary adjudication on four grounds: (1) the Hadleys are estopped from, or waived enforcement of, the mediation provision; (2) the mediation provision did not apply to Biondo's claims for negligence and breach of statutory disclosures; (3) Biondo sufficiently complied with the mediation provision; and (4) the district court should not have dismissed Biondo's claims with prejudice. We conclude the Hadleys impliedly waived the mediation provision by litigating their case and delaying their assertion of Biondo's noncompliance until their motion for summary judgment. Accordingly, we reverse the district court's order granting summary judgment, need not reach Biondo's other arguments, and vacate the district court's order awarding attorney fees and costs.⁴

A district court's decision to grant summary judgment is reviewed de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005); *see also Costello v. Casler*, 127 Nev. 436, 439, 254 P.3d 631, 634 (2011). Summary judgment is proper if the pleadings and all other evidence on file demonstrate that no genuine dispute of material fact exists and that the moving party is entitled to judgment as a matter of law. NRCP 56(a); *Wood*, 121 Nev. at 729, 121 P.3d at 1029. All evidence must be viewed in a light most favorable to the nonmoving party. *Wood*, 121 Nev. at 729, 121 P.3d at 1029. A provision in a contract requiring mediation prior to litigation creates a condition precedent to litigation; accordingly, summary judgment is proper where a party subject to the provision fails to mediate

⁴*See Bower v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 494, 215 P.3d 709, 726 (2009) ("[I]f we reverse the underlying decision of the district court that made the recipient of the [fees and] costs the prevailing party, we will also [vacate] the [fees and] costs award.").

before initiating litigation. *MB Am., Inc. v. Alaska Pac. Leasing*, 132 Nev. 78, 84, 367 P.3d 1286, 1290 (2016).

Biondo argues the Hadleys impliedly waived the mediation provision, and therefore, it was error for the district court to grant the Hadleys' motion for summary judgment on the basis of his noncompliance. Biondo explains that the Hadleys' delay led him to reasonably believe he either satisfied the mediation clause or that the Hadleys waived mediation. The Hadleys counter that they preserved their ability to raise Biondo's non-compliance in their motion for summary judgment insofar as they alleged "failure to state a claim" and "lack of subject matter jurisdiction" in their answer. The Hadleys add that any delay was reasonable because they did not "actively litigate the case," having only answered the complaint, complied with mandatory disclosure requirements, and requested prior pleadings and discovery before moving for summary judgment.

"Waiver is generally a question of fact. But when the determination rests on the legal implications of essentially uncontested facts, then it may be determined as a matter of law." *Nev. Gold & Casinos, Inc. v. Am. Heritage, Inc.*, 121 Nev. 84, 89, 110 P.3d 481, 484 (2005). "Waiver may be implied through conduct evidencing an intent to waive a [known] right, or conduct that is inconsistent with any other intention than waiver." *Gramanz v. T-shirts & Souvenirs, Inc.*, 111 Nev. 478, 483, 894 P.2d 342, 346 (1995). The conduct should be "so inconsistent with an intent to enforce the right as to induce a reasonable belief that the right has been relinquished." *Nev. Yellow Cab Corp. v. Eighth Judicial Dist. Court*, 123 Nev. 44, 49, 152 P.3d 737, 740 (2007). "However, delay alone is insufficient to establish waiver." *Id.*

The Hadleys' undisputed conduct—never demanding mediation, failing to file a motion to dismiss that raised Biondo's failure to

mediate, answering the complaint but not asserting the affirmative defense of mediation as a condition precedent to litigation,⁵ failing to identify the defense in their NRCP 16.1 case conference report, engaging in discovery, and filing a motion for summary judgment on multiple grounds when discovery closed—clearly belies their right to enforce the mediation provision. The mediation provision provides, “before *any* legal action is taken to enforce any term or condition under this agreement, *the parties* agree to engage in mediation” (Emphasis added.) Thus, the Hadleys’ acquiescence in litigation was inconsistent with the mediation provision and, accordingly, induced Biondo to reasonably believe they relinquished their right to mediation.

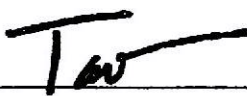
The Hadleys’ argument that they raised Biondo’s failure to comply with the mediation provision by asserting “lack of subject matter jurisdiction” in their answer to the complaint is unpersuasive. NRCP 9(c) provides that, “when denying that a condition precedent has occurred or been performed, a party must do so with particularity.” Thus, neither the Hadleys’ general assertion of “lack of subject matter jurisdiction” nor “failure to state a claim” alleged Biondo’s noncompliance with sufficient particularity. *See MB Am.*, 132 Nev. at 84, 367 P.3d at 1290 (ruling that a mandatory mediation provision creates a condition precedent to litigation).


⁵We note that NRCP 8(c)(1) provides, “[i]n responding to a pleading, a party must state any avoidance or affirmative defense, including . . .” and provides a list of defenses and avoidances. Failure to “fulfill conditions precedent[,]” while not listed under 8(c)(1), is an “NRCP 8(c) affirmative defense[,]” which must be pleaded affirmatively. *Clark Cty. Sch. Dist. v. Richardson Constr., Inc.*, 123 Nev. 382, 394, 168 P.3d 87, 95 (2007). Thus, the Hadleys were required to affirmatively plead Biondo’s noncompliance in their answer as an affirmative defense or else waive the argument. *See MB Am.*, 132 Nev. at 82, 367 P.3d at 1288 (“[A] mediation provision in [a] contract is an enforceable condition precedent to litigation.”).

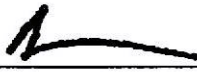
We also note the Hadleys did not file a motion to dismiss pursuant to NRCP 12(b)(1) and (5) asserting these grounds.

Although the district court did not comment on whether the evidence in the record created a genuine dispute of material fact as to Biondo's claims, we conclude that there is. In particular, Hoy's expert report, which foreshadows the testimony she would provide if called at trial, indicates that the Hadleys were likely aware that the property was prone to flooding and failed to disclose this defect to Biondo. This failure to disclose is the basis of all four of Biondo's claims. Moreover, Biondo disclosed Hoy in his expert witness disclosures and the Hadleys did not object to the admissibility of her testimony. Thus, a dispute of material fact is present. Accordingly, we

REVERSE the order of the district court granting summary judgment and VACATE the district court's award of attorney fees and costs, and REMAND the case for further proceedings consistent with this order.


_____, J.
Tao


_____, C.J.
Gibbons


_____, J.
Bulla

cc: Hon. Ronald J. Israel, District Judge
Judd J. Balmer, Esq., Ltd.
Kaempfer Crowell/Las Vegas
Eighth District Court Clerk