IN THE SUPREME COURT OF THE STATE OF NEVADA

RHODES DESIGN & DEVELOPMENT CORPORATION, A NEVADA CORPORATION, AS MANAGING MEMBER OF RAINBOW CANYON LIMITED LIABILITY COMPANY, IN RECEIVERSHIP; AND JAMES RHODES, AN INDIVIDUAL,
Appellants,
vs.
RAINBOW DEVELOPMENT CORPORATION, A NEVADA CORPORATION, INDIVIDUALLY AND AS A MEMBER OF RAINBOW CANYON LIMITED LIABILITY COMPANY,
Respondent.

No. 37704

FILED

OCT 22 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from an order denying Rhodes's motion to compel arbitration,[1] in which the district court found that Rhodes had waived its right to arbitrate despite the existence of a nonwaiver clause in the parties' contract. Because our review of the record reveals no evidence to support a finding of prejudice to Rainbow, we reverse and remand for the district court to enter evidentiary findings on the issue of prejudice.

FACTS

Rainbow Canyon LLC ("LLC"), consisting of respondent Rainbow Development Corporation ("Rainbow"), appellant Rhodes Design and Development Corporation ("Rhodes"), and the James Michael Rhodes

[1]This order is appealable pursuant to NRS 38.205(1)(a).

Irrevocable Children's Education Trust, was formed to develop property in Henderson. The LLC members executed an Operating Agreement in 1993 which provided for arbitration of all disputes. The Operating Agreement also contained a non-waiver of arbitration provision.

In 1998, Rainbow filed a complaint against Rhodes for damages arising from Rhodes's alleged negligent and intentional mismanagement of the development project. In its answer and counterclaim Rhodes included Rainbow's "failure to submit [the matter] to arbitration of disputes" as an affirmative defense. Rainbow also asserted failure to arbitrate as an affirmative defense to Rhodes's counterclaims.

Rainbow sought a preliminary injunction to remove Rhodes as the managing member of the LLC. At a September 1998 hearing on this motion, Rhodes stipulated to an expedited trial on the matter. The district court denied the motion for a preliminary injunction in an order dated September 24, 1998.

Rhodes subsequently moved for appointment of a receiver for LLC. The district court granted this motion and appointed a in November 1998. At a hearing in January 1999, the district court advised the parties that any dispute concerning arbitration should be addressed by appropriate motion.

Rainbow filed an amended complaint on August 30, 2000, naming James Rhodes as an additional defendant. On September 20, 2000, Rhodes filed a motion to continue the trial date. Rhodes stipulated to continue the trial date until June 5, 2001. Rhodes answered the amended complaint and filed its counterclaim on September 26, 2000, again asserting Rainbow's failure to arbitrate among its affirmative

defenses. Likewise, Rainbow also asserted failure to arbitrate as a defense to Rhodes's counterclaims.

Rhodes filed a motion to compel arbitration on February 23, 2001. The district court denied Rhodes's motion, concluding that Rhodes's delay in demanding arbitration eliminated any potential benefit to the parties in arbitrating the matter. The court noted the differences between preparing for arbitration and trial, and stated that demanding arbitration sixty days before trial would simply delay the resolution of the case. The court also found that Rainbow suffered prejudice from the delay in demanding arbitration and that Rhodes had waived its right to arbitrate.

The district court subsequently denied Rhodes's motion to stay the trial pending appeal; however, this court did grant a stay pending Rhodes's appeal of the district court's order denying its motion to compel arbitration.

DISCUSSION

We recognize the strong policy favoring arbitration when the parties have previously agreed to it, and we support the view that waiver should "'not . . . be lightly inferred.'"[2] We have previously concluded in County of Clark v. Blanchard Construction Co., that the overriding inquiry in determining waiver is whether the party opposing arbitration would suffer prejudice.[3] We also noted in Blanchard that participation in

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[2]Carcich v. Rederi A/B Nordie, 389 F.2d 692, 696 (2d. Cir. 1968) (quoted in County of Clark v. Blanchard Constr. Co., 98 Nev. 488, 491, 653 P.2d 1217, 1219 (1982)).

[3]See Blanchard, 98 Nev. at 491, 653 P.2d at 1220.

litigation is not tantamount to waiver.[4] Blanchard rightfully did not indicate or outline the degree of litigation activity necessary to constitute prejudice to an opposing party. Nor did Blanchard present an instance where, as here, the parties' agreement included both an arbitration provision and an express agreement that delay in exercising any right or remedy would not constitute a waiver.

Although several considerations, such as agreeing to continuances and stipulating to trial dates, are relevant to a determination of prejudice, the presence or absence of any specific conduct by a party is not determinative. The specific circumstances of each case preclude the promulgation of any definitive litmus test for prejudice.[5] To demonstrate prejudice below, Rainbow relied heavily upon the argument that its litigation costs totaled approximately $300,000.00. However, Rainbow never presented the district court with evidence quantifying its litigation costs or demonstrating how it was prejudiced by these costs, i.e., how transfer of the case into arbitration would cause losses attendant to duplicate preparation or how costs sustained in formal court proceedings were substantially increased over those that would have been encountered in arbitration.[6] Given the contract language concerning delay, the parties'

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[4]Id. at 491, 653 P.2d at 1219.

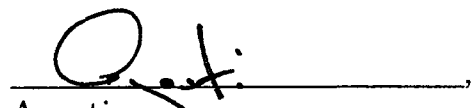
[5]We reject any interpretation of language in Blanchard that would require a court to determine that a party acted in bad faith before finding waiver. See id. at 491, 653 P.2d at 1220. Thus, bad faith is not a prerequisite to a finding of waiver, but rather one of many relevant factors that may demonstrate waiver.

[6]We recognize Rainbow's assertion that by participating in discovery, Rhodes availed itself of procedures which would be unavailable to it in the arbitration process.

conduct, the parties' acknowledgement of the arbitration clause in their pleadings and evidence submitted in this case, we are unable to conclude that the district court, in relying almost exclusively upon the expenses incurred by Rainbow, properly determined that Rainbow would suffer prejudice by submitting the matter to arbitration at this juncture.

Having carefully considered the parties' arguments, we

ORDER the district court's order denying Rhodes's motion to compel arbitration REVERSED and REMAND for findings by the district court relative to the issue of prejudice.



_____, J.
Agosti

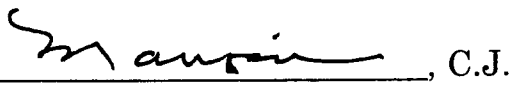
_____, J.
Leavitt

cc: District Judge, Department 12
Lionel Sawyer & Collins
Harrison Kemp & Jones, Chtd.
Clark County Clerk

MAUPIN, C.J., dissenting:

The non-waiver provision relating to the arbitration of disputes in the contract in this case was itself subject to waiver.[1] Thus, the analysis below properly shifted to the district court's factual findings, which are reviewed for an abuse of discretion, or substantial evidence.[2] As noted by the majority, the overriding inquiry in determining waiver is whether the party opposing arbitration would suffer prejudice,[3] and the fact-specific circumstances of each case preclude the promulgation of any definitive litmus test for prejudice.

Because I am of the opinion that the record as summarized by my colleagues clearly supports the district court's finding of waiver and prejudice, I would affirm the district court's order.

 , C.J.
Maupin

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[1]Although non-waiver clauses in written contracts are enforceable, they themselves are subject to the rules of contract interpretation, including notions of waiver. Otherwise, an agreement could, by its terms, effectively divest the district court of authority to apply legal and/or equitable principles to any dispute concerning it.

[2]I recognize the strong policy favoring arbitration and support the view that waiver should "'not be lightly inferred.'" However, I believe that the abuse of discretion standard appropriately acknowledges the importance of the policy favoring arbitration while affording deference to the district court's case-specific factual findings. County of Clark v. Blanchard Constr. Co., 98 Nev. 488, 491, 653 P.2d 1217, 1219 (1982) (quoting Carcich v. Rederi A/B Nordie, 389 F.2d 692, 696 (2d Cir. 1968)).

[3]See Blanchard, 98 Nev. at 491, 653 P.2d at 1220.