IN THE COURT OF APPEALS OF THE STATE OF NEVADA

A & A TOURISM, INC.; AND MOHAMMAD ALAM,
Appellants,
vs.
TANER KIRANBAY,
Respondent.

No. 83987-COA

FILED

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ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

A & A Tourism, Inc., and Mohammad Alam appeal from a final judgment in a contract action. Eighth Judicial District Court, Clark County; Adriana Escobar, Judge.

On August 10, 2015, respondent Taner Kiranbay entered into a written "Multi Unit Tenancy Contract" with appellants Mohammad Alam and his company, A & A Tourism, Inc., wherein Kiranbay agreed to lease seven condominium units to Alam for a term of two years—from September 5, 2015, to September 5, 2017—in exchange for monthly rent of $14,300. The contract further provided that it was "extendable for another term as per the same rent, terms and conditions" if Alam provided written notice of extension to Kiranbay four weeks prior to expiration of the tenancy. On the same day the parties executed the contract, they also signed a document entitled "Authorization Letter, Year (02) Two," which allowed Alam to sublet the seven units as "vacation/short term/long term rental[s]" and provided that "[t]his authorization letter supersedes the validity of [the] tenancy contract date" and "remains in effect till the [expiration] of this authorization letter," which was September 30, 2018.

Over the course of their contractual relationship, the parties deviated from the terms of their written agreement in various ways. For

example, although Kiranbay owned five of the seven units covered by the lease, he was himself renting the other two units from a third party, who at some point requested that Kiranbay surrender the units back to her. And when Kiranbay did so, Alam entered into separate agreements with the third party to continue renting and subletting those units. Additionally, upon request, Alam returned two of the remaining five units to Kiranbay, who purchased two other units and subsequently leased them to Alam. Throughout this time period, the amount of monthly rent Alam paid to Kiranbay fluctuated based upon the number of units Kiranbay made available to Alam.

The parties continued dealing in this fluid manner, largely without issue, until February 2017. At that time, the parties met to discuss the timing of Alam's rent payments and his ability to make them.[1] The parties present conflicting accounts of what occurred at this meeting and in other communications during that time period, with Alam alleging that Kiranbay unilaterally terminated their agreement without justification, and Kiranbay alleging that the parties mutually agreed to cease their contractual relations until Alam's financial outlook improved. In any event, by the end of February, Alam and Kiranbay were no longer conducting business with one another.

In December 2017, Alam filed the underlying action against Kiranbay. In the operative complaint, Alam set forth claims for breach of

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[1]We note that the 2015 contract did not set a specific due date for rent, but the record indicates that the parties had an understanding that rent for certain units was due between the 5th and 10th of every month, while rent for other units was due between the 10th and 15th. In light of how the district court resolved the underlying matter and how we resolve this appeal, we need not further address this point, but it may be relevant to how the matter proceeds on remand.

contract, breach of the implied covenant of good faith and fair dealing, and declaratory relief, alleging that Kiranbay violated the parties' agreement in various ways, most notably by depriving Alam of all access to the units covered by the lease in February 2017. The matter proceeded to a bench trial, which the district court bifurcated into separate liability and damages phases due to the unavailability of Alam's damages expert. Following Alam's case in chief on liability—during which both he and Kiranbay testified—Kiranbay orally moved for judgment as a matter of law, arguing essentially that Alam had agreed to all deviations from the original written agreement, including the purportedly mutual termination of the contract in February 2017, and that he did not suffer any damages as a result.

After hearing Alam's arguments in opposition and subsequently reviewing all of the admitted evidence in chambers, the district court granted Kiranbay's motion and issued oral findings of fact and conclusions of law on the record. The court concluded that Alam and Kiranbay did not have an enforceable contract, as Alam had failed to provide written notice of his intent to extend the lease 30 days prior to its expiration as required under a 2014 document entitled "Southern Nevada Multi Housing Rental Agreement"—an unsigned document that both predated and contained provisions materially different from the relevant 2015 "Multi Unit Tenancy Contract," the latter of which was the contract that formed the basis of Alam's complaint and explicitly "supersede[d] any agreement . . . prior to this multi unit tenancy contract for the said units."[2] Alternatively, the court concluded that, even if the parties had an

[2]When Alam's counsel attempted to bring this issue to the district court's attention and questioned whether the court was relying on the 2014 document or the 2015 contract, the court replied summarily that it was "referring to the 2014 contract and the 2015 contract."

enforceable agreement, a novation occurred when Alam voluntarily surrendered the relevant units back to Kiranbay in February 2017, thereby barring recovery. The court then directed Kiranbay's counsel to prepare and submit a proposed written judgment reflecting the court's decision.

In its subsequently entered findings of fact and conclusions of law, the district court granted judgment as a matter of law to Kiranbay under NRCP 50(a). The district court concluded that, because Alam "failed to extend the August 19, 2014 Lease Agreement . . . [,] there was no valid contract in existence between the parties." The court next concluded that "[t]he parties veered away from the August 10, 2015 Tenancy Contract and failed to follow the formalities of having a written contract as a result," such that "there was no enforceable contract between the parties" and Kiranbay could "do as he wishe[d] with his properties." Finally, the court concluded that "[Alam's] claims are barred by novation," and it found that Alam "agreed on February 8, 2017 to voluntarily surrender the Units back to [Kiranbay]." This appeal followed.

On appeal, Alam argues that the district court erred in concluding that no enforceable contract existed between the parties and that a novation occurred. He argues that these conclusions are not only incorrect in and of themselves, but also that they contradict one another. Kiranbay counters that the district court correctly concluded that a novation occurred. He further contends that, although he did not advance this theory before the district court, the court correctly determined on its own volition that the parties strayed so far from their 2015 agreement that it became unenforceable. Finally, Kiranbay argues that Alam voluntarily surrendered the relevant units back to Kiranbay in February 2017 and that this amounted to a repudiation of the parties' 2015 agreement, absolving Kiranbay from further compliance. For the reasons set forth herein, we

reverse the district court's judgment and remand for further proceedings consistent with this order.

As a preliminary matter, although Kiranbay moved for judgment as a matter of law under NRCP 50 to dispose of the underlying case, this rule only applies to jury trials. *See* NRCP 50(a) (providing that a district court may enter judgment as a matter of law when, among other things, "a party has been fully heard on an issue during *a jury trial*" (emphasis added)); 9B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2523 (3d ed. 2022 update) (providing that FRCP 50—which is identical to NRCP 50 in all relevant respects—applies to jury trials, not bench trials). Because the district court acted as both the factfinder and the judge in the trial below, Kiranbay should have moved for judgment on partial findings under NRCP 52, which explicitly applies to "nonjury trial[s]." NRCP 52(c); *see* 9C Wright & Miller, *supra*, § 2573.1 (noting that the identical FRCP 52(c) "applies in cases in which the court acts as both judge and jury"). However, because the district court entered findings of fact and conclusions of law after Alam was fully heard on the issue of liability as contemplated under NRCP 52(c), and because it does not appear that the court applied the NRCP 50(a) standard, we construe the court's decision as a judgment on partial findings.[3] *See Valley Bank of Nev. v. Ginsburg*, 110 Nev. 440, 445, 874 P.2d 729, 733 (1994) (noting that the

[3]Consequently, we need not consider Alam's appellate arguments to the extent he specifically frames them in terms of the NRCP 50(a) standard. *See D & D Tire, Inc. v. Ouellette*, 131 Nev. 462, 466, 352 P.3d 32, 35 (2015) (providing that, "[i]n deciding a motion for judgment as a matter of law [pursuant to NRCP 50(a)], the district court must view all evidence and inferences in favor of the nonmoving party" (alteration and internal quotation marks omitted)).

appellate courts will generally construe a district court's order in terms of what it "actually *does*, not what it is called").

Under NRCP 52(c), a district court presiding over a bench trial may "enter judgment on partial findings against a party when the party has been fully heard on an issue and judgment [for the party] cannot be maintained without a favorable finding on that issue." *Certified Fire Prot., Inc. v. Precision Constr., Inc.*, 128 Nev. 371, 377, 283 P.3d 250, 254 (2012). Such a judgment "must be supported by findings of fact and conclusions of law as required by Rule 52(a)." NRCP 52(c). When entering a judgment on partial findings, "the trial judge is not to draw any special inferences in the nonmovant's favor; since it is a nonjury trial, the court's task is to weigh the evidence." *Certified Fire Prot.*, 128 Nev. at 377, 283 P.3d at 254 (alteration and internal quotation marks omitted). This court will not disturb the district court's factual findings unless they are clearly erroneous or unsupported by substantial evidence, *id.*, but we review the district court's legal determinations de novo, *Wells Fargo Bank, N.A. v. Radecki*, 134 Nev. 619, 621, 426 P.3d 593, 596 (2018).

We initially note that there are differences between the district court's oral decision to grant judgment on partial findings and its subsequent written findings of fact and conclusions of law. And although a district court's written judgment prevails over any previous conflicting oral statements, to the extent the court made statements on the record that do not conflict with the written judgment, we may look to those statements in construing the judgment where, as here, it is ambiguous. *See Kirsch v. Traber*, 134 Nev. 163, 168 n.3, 414 P.3d 818, 822 n.3 (2018); *see also Mizrachi v. Mizrachi*, 132 Nev. 666, 674, 385 P.3d 982, 987 (Ct. App. 2016) (explaining that language is ambiguous when there is more than one way to reasonably interpret it).

The district court concluded in its written judgment—without any qualification—both that the parties lacked an enforceable contract and that Alam's claims are barred by novation, but—as argued by Alam—these conclusions legally contradict each other.[4] "A novation consists of four elements: (1) there must be an existing valid contract; (2) all parties must agree to a new contract; (3) the new contract must extinguish the old contract; and (4) the new contract must be valid." *United Fire Ins. Co. v. McClelland*, 105 Nev. 504, 508, 780 P.2d 193, 195 (1989). Thus, for a valid novation of the 2015 contract to have occurred, that contract would have first needed to be valid and the parties would have needed to replace it with another valid contract, which would foreclose any conclusion that the parties did not have an enforceable contract with the novation. Based on the district court's judgment as written, wherein the court found both that the 2015 contract was rendered unenforceable by the parties straying from its terms and that it was superseded by novation, it appears that the court may have misapplied this legal standard in such a way that would warrant reversal. *See In re Guardianship of B.A.A.R.*, 136 Nev. 494, 500, 474 P.3d

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[4]Alam also argues that, because Kiranbay failed to plead novation as an affirmative defense, the defense was waived and the district court improperly relied on it. *See* 66 C.J.S. *Novation* § 35 (2022 update) (providing that novation is an affirmative defense that is waived if not specially pleaded). But Alam failed to object on these grounds below, *see Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court . . . is deemed to have been waived and will not be considered on appeal."), and he was nevertheless able to respond to the defense before the trial court, as Kiranbay raised the issue in his pretrial brief, and Alam responded to it in his, *see Res. Grp., LLC v. Nev. Ass'n Servs., Inc.*, 135 Nev. 48, 53 n.5, 437 P.3d 154, 159 n.5 (2019) ("A party waives an affirmative defense where the party fails to raise the affirmative defense in any pleadings or *any other papers filed with the court*, including its answer, *pretrial statement, or post-trial brief*." (emphasis added) (internal quotation marks omitted)).

838, 844 (Ct. App. 2020) ("[B]ecause it is not clear that the district court would have reached the same conclusion . . . had it applied the correct [legal] standard . . . , we must reverse the district court's decision and remand for further proceedings.").

Alternatively, there is another reasonable interpretation of the district court's judgment, which is that the court was not concluding that there was *both* no enforceable contract and a novation, but rather that, assuming that the parties did have an enforceable contract, Alam's claims are nevertheless barred by novation. *See Allstate Ins. Co. v. Thorpe*, 123 Nev. 565, 570, 170 P.3d 989, 993 (2007) (providing that the interpretation of an unclear district court judgment is a question of law, that the judgment must be construed as a whole, and that, when ambiguous, "the interpretation that renders the judgment more reasonable and conclusive and brings the judgment into harmony with the facts and law of the case will be employed"); *Jones v. State*, 107 Nev. 632, 636, 817 P.2d 1179, 1181 (1991) ("[T]rial judges are presumed to know the law and to apply it in making their decisions."). This interpretation is supported by the district court's oral statements at trial, particularly where the court stated that "it seems that [Alam] assented to [returning the units in February 2017]" and that the court therefore believes "the elements are there for a novation," but only "if we get there," because "there may not be a tenancy here."[5]

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[5]In his answering brief, Kiranbay attempts to frame the district court's judgment as concluding that a novation occurred not when Alam returned the units to Kiranbay in February 2017, but rather when two new units were previously substituted for two of the original units identified in the 2015 contract. But the text of the written judgment does not strongly support this interpretation, as it simply concludes that Alam's claims are barred by novation and immediately thereafter finds that Alam voluntarily returned the units to Kiranbay in February 2017. Because the structure of the written judgment is consistent with the district court's oral statements

Construing the judgment in this manner, we turn to the parties' appellate arguments concerning novation. Alam argues that the district court failed to identify what new contract was created that supposedly extinguished the old one. He also argues that no enforceable novation could have occurred, as the 2015 contract was a two-year lease subject to the statute of frauds—which provides that no lease of real property for a term exceeding one year "shall be created, granted, assigned, *surrendered* or declared . . . unless by act or operation of law, or by deed or conveyance, in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same," NRS 111.205(1) (emphasis added)—and no such writing exists in this matter to supersede or otherwise nullify the 2015 contract. Although it does not appear from the record that Alam raised this statute-of-frauds argument below, which would normally result in a waiver, *see Old Aztec Mine*, 97 Nev. at 52, 623 P.2d at 983, it is notable that Kiranbay does not at all address the argument in his answering brief. *See Bank of N.Y. Mellon v. NV Eagles, LLC*, No. 73802, 2019 WL 1450250, at *1 n.5 (Nev. Mar. 29, 2019) (Order of Reversal and Remand) (citing *Bourne Valley Court Tr. v. Wells Fargo Bank, NA*, 832 F.3d 1154, 1158 n.3 (9th Cir. 2019), *abrogated on other grounds as recognized in Bank of America, N.A. v. Arlington W. Twilight Homeowners Ass'n*, 920 F.3d 620, 623-24 (9th Cir. 2019), in support of the notion that a respondent may waive waiver by failing to object to an appellant raising an issue for the first time on appeal). And because Kiranbay's interpretation of the district court's novation determination differs from our own, as explained *supra* note 5, he does not argue in support of or otherwise address that determination as it pertains to the events of February 2017.

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at trial linking the novation to the 2017 return of the units, we construe the judgment as doing the same.

This lack of explanation from Kiranbay is significant, as the judgment fails to set forth any reasoning in support of the notion that novation is even applicable when a contract is not so much replaced with another contract as it is rescinded, waived, cancelled, or otherwise terminated. And even assuming novation does apply, in finding simply that Alam voluntarily returned Kiranbay's units to him, the district court did not make any findings concerning whether Alam specifically intended not just to surrender the units without further incident, but instead to definitively disavow any and all rights he may have had under the 2015 contract.[6] *See United Fire Ins. Co.*, 105 Nev. at 508-09, 780 P.2d at 195-96 (providing that the proponent of a novation must prove by clear and convincing evidence that a new contract extinguishing the prior contract was intended by all parties); *see also* NRCP 52(a) (requiring the district court to "find the facts specially and state its conclusions of law separately"). Under these circumstances and on this record, we cannot affirm the district court's judgment insofar as it relied on the supposed occurrence of a

[6]Kiranbay argued extensively below that Alam's failure to actively express his disagreement with Kiranbay over the events of February 2017—such as by sending a demand letter or taking legal action—until he filed the underlying case in December 2017 shows that Alam assented to a mutual termination of the parties' agreement. And while the district court did not specifically rely on this argument in reaching its decision, it did make a standalone finding in its judgment that, between the time Kiranbay took back the units and the initiation of the underlying action, Alam did not take any legal action to regain access to the units. To the extent Alam's failure to take any action until ten months after he no longer had control of the units informed the district court's decision, we note that the limitations period for breach of a written contract is six years, NRS 11.190(1)(b), and Kiranbay has not set forth any authority in support of the notion that Alam should have acted sooner to enforce any rights he may have under the 2015 contract. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (noting that the appellate courts need not consider claims unsupported by cogent argument or relevant authority).

novation. *See In re Estate of Williams*, 109 Nev. 941, 943, 860 P.2d 166, 168 (1993) ("[T]he record must . . . indicate the support for the lower court's decision in order for this court to sustain the court's ruling on appeal.").

We turn now to the last remaining ground underlying the district court's judgment: its conclusion that "[t]he parties veered away from the August 10, 2015 Tenancy Contract and failed to follow the formalities of having a written contract as a result." The district court's written judgment does not elaborate on this point or explain why the parties' divergences from the written 2015 contract supposedly render their agreement wholly unenforceable. This may be due in part to the district court's oral decision at trial, which was not that the parties had veered so far away from their 2015 agreement as to render it unenforceable, but rather that Alam failed to comply with the formality of renewing the lease by providing Kiranbay with a notice of intent to renew it 30 days before its expiration. However, this renewal requirement is contained within the 2014 "Southern Nevada Multi Housing Rental Agreement," which the parties agreed below is not the contract at issue in this case. Unlike the 2014 document, which identified its expiration date as August 20, 2016, the 2015 contract identified its expiration date as September 5, 2017, and it required Alam to provide notice of his intent to renew four weeks prior to the expiration. Additionally, the authorization letter signed contemporaneously with the 2015 contract purported to supersede the contract's expiration date and extend it to September 30, 2018. Under both of the 2015 documents, the time at which Alam would have been required to submit the notice of renewal was long after the alleged breaches giving rise to this litigation and, therefore, untimely renewal of the controlling lease agreement is not at issue here.

Nevertheless, because the district court's written judgment controls, *see Kirsch*, 134 Nev. at 168 n.3, 414 P.3d at 822 n.3, we assume that the court ultimately determined that the 2015 contract was unenforceable because the parties "veered away" from the letter of the contract. But mere divergence from the terms of a written contract does not itself render the agreement unenforceable. For example, it is axiomatic that "an oral modification to a [written] contract may be enforceable so long as the modification reflects the parties' intent."[7] 17A Am. Jur. 2d *Contracts* § 502 (2022 update). While we take no position as to whether any enforceable modifications occurred in this matter, we note the possibility merely to illustrate that, without more, the district court's conclusion that the 2015 contract was unenforceable, simply due to the parties' alleged conduct in diverging from the terms of the written lease, amounted to legal error. *See Radecki*, 134 Nev. at 621, 426 P.3d at 596.

In conclusion, because the district court either insufficiently addressed or did not resolve possible substantive issues concerning the applicability of the statute of frauds, the enforceability of the parties' 2015 agreement (without considering the renewal issue), whether—if the 2015 agreement is enforceable—either of the parties' conduct amounted to a material breach of the contract, or whether any novation or other discharge of duties occurred during the contractual period, we necessarily reverse. And to the extent these issues require factual determinations, we decline to decide them on appeal. *See 9352 Cranesbill Tr. v. Wells Fargo Bank, N.A.*, 136 Nev. 76, 81-82, 459 P.3d 227, 232 (2020) (recognizing that it is the province of the district court to make factual determinations in the first instance and that "[the appellate] court[s] will not address issues that the

[7]Neither the 2015 contract nor the 2015 authorization letter provided that any modifications must be in writing.

district court did not directly resolve"). Instead, for the reasons set forth above, we reverse the district court's judgment on partial findings and remand this matter for further proceedings consistent with our disposition.

It is so ORDERED.[8]

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. Adriana Escobar, District Judge
Persi J. Mishel, Settlement Judge
The Feldman Firm, P.C.
Law Office of George E. Cromer
Law Office of Andrew H. Pastwick, LLC
Eighth District Court Clerk

[8]Insofar as the parties raise arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.