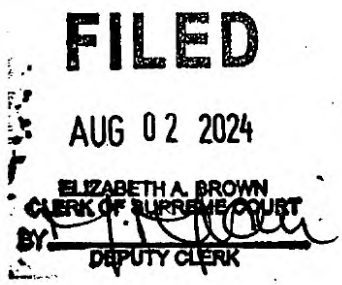
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

IN THE MATTER OF THE MERCURY REVOCABLE TRUST, DATED JUNE 9, 2010, A NON-TESTAMENTARY TRUST.

MADELINE MORRISON,
Appellant,
vs.
STEVEN S. STREGER, TRUSTEE OF THE MERCURY REVOCABLE TRUST; HILLSDALE COLLEGE; FISHER HOUSE FOUNDATION; AND SOUTHWESTERN LAW SCHOOL,
Respondents.

No. 85727-COA



ORDER OF AFFIRMANCE

Madeline Morrison appeals from a final order in a trust administration matter awarding damages. Eighth Judicial District Court, Clark County; Gloria Sturman, Judge.

Valerie Shiela Berg Zucker executed the Mercury Revocable Trust (Mercury) and, after Zucker died, litigation ensued concerning the distribution of the trust's assets, including whether Morrison had been granted a life estate in Zucker's real property. Morrison and Mercury, through respondent Steven S. Streger as trustee of Mercury, thereafter reached an agreement to resolve Morrison's claim. Those parties also executed a written settlement agreement containing the terms of their agreement.

Streger, on behalf of Mercury, subsequently petitioned the district court to enforce the settlement agreement and to award Mercury damages based on Morrison's breach of the settlement agreement. Streger

contended that, as part of the settlement agreement, Mercury agreed to pay Morrison $200,000 in two installments in exchange for Morrison's agreement to settle all claims against Mercury and for Morrison to surrender possession of the relevant real property within 60 days of her receipt of the first installment payment. Streger further alleged that Mercury paid Morrison the first installment of $175,000 and that she had thereafter failed to surrender the property. Streger also contended that the settlement agreement provided for an award of $10,000 in liquidated damages for breaching the agreement. In addition, Streger noted the agreement provided for a $75 hold-over rate for each day Morrison overstayed on the property, and he urged the district court to award Mercury damages based on that rate. Finally, Streger argued for the district court to award Mercury attorney fees as provided for in the settlement agreement.

Morrison opposed the petition and argued that the settlement agreement should not be enforced because both parties made a mutual mistake when they made the agreement. Morrison asserted that she had been unable to find a suitable residence to move to and she was therefore unable to vacate the property, and she argued that both parties misunderstood the difficulties Morrison would face when looking for a new residence.

The district court conducted a hearing concerning the petition and subsequently entered a written order granting respondents' request to enforce the settlement agreement. The court reviewed the written settlement agreement, noted it required Morrison to surrender the property to Mercury, and found that it made no reference to the relative ease or difficulty Morrison would have in finding alternate housing. The court

therefore concluded that the parties did not make a mutual mistake with respect to their agreement. The court therefore concluded that the written settlement was an enforceable contract. The court also found that Morrison's failure to surrender the property to Mercury constituted a material breach of the settlement agreement and that she was liable for $10,000 in liquidated damages based on that breach as provided for in the written settlement agreement.

In light of the written settlement agreement's provision in which Morrison agreed to surrender the property to Mercury, the district court ordered Morrison to vacate the property by October 31, 2022. The district court also noted the written settlement agreement required Morrison to pay a $75 daily hold-over rate for the period in which she overstayed on the property and the court found Mercury was entitled to that amount for each day of Morrison's hold-over period. The court accordingly directed Mercury to calculate that amount after Morrison vacated the property and surrendered its possession and deduct that amount from the final payment to be made to Morrison. The court also found the written settlement agreement permitted an award of attorney fees to Mercury but the court found such fees would be waived if Morrison vacated the property by October 31, 2022. This appeal followed.

First, Morrison argues the district court erred by enforcing the settlement agreement. Morrison asserts that the parties had a mutual mistake concerning Morrison's ability to quickly secure alternative housing as the Las Vegas rental market was more volatile than they expected, and she contends that issue was a key factor in the settlement agreement. Morrison further contends that the district court erred by ordering her to

vacate the property as she asserts the agreement allows her to remain in the residence so long as she paid the $75 daily hold-over rate.

"In general, the enforceability of contracts involves mixed questions of law and fact." *Picardi v. Eighth Jud. Dist. Ct.*, 127 Nev. 106, 110, 251 P.3d 723, 725 (2011), *abrogated on other grounds as recognized by Tallman v. Eighth Jud. Dist. Ct.*, 131 Nev. 713, 723, 359 P.3d 113, 120 (2015). "Questions of law are reviewed de novo, but deference is given to a district court's factual findings so long as they are supported by substantial evidence." *Id.*

"A mutual mistake may be grounds to equitably rescind a contract or to render a contract void." *Anderson v. Sanchez*, 132 Nev. 357, 360, 373 P.3d 860, 863 (2016). "Mutual mistake occurs when both parties, at the time of contracting, share a misconception about a vital fact on which they based their bargain." *Gen. Motors v. Jackson*, 111 Nev. 1026, 1032, 900 P.2d 345, 349 (1995). However, "mutual mistake is not grounds for rescission when the party bears the risk of mistake." *Anderson*, 132 Nev. at 361, 373 P.3d at 863 (citing *Land Baron Inv., Inc. v. Bonnie Springs Family LP*, 131 Nev. 686, 694, 356 P.3d 511, 517 (2005)).

"If the party is aware at the time he enters into the contract that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, that party will bear the risk." *Land Baron*, 131 Nev. at 694, 356 P.3d at 517 (internal quotation marks omitted). Further, "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." *Id.*

In the written settlement agreement, the parties agreed to cease litigation concerning Morrison's claim to the property. In exchange

for her agreement to settle her claim to the property, Morrison accepted a payment of $200,000 to be paid in two installments. Morrison further agreed to surrender possession of the property within 60 days of receiving the first installment of $175,000. Morrison was to receive the second installment of $25,000 after she surrendered possession of the property and entry of an order approving the parties' joint petition to approve the settlement agreement.

Both parties also acknowledged that the written settlement agreement represented "the full, complete, and entire agreement between the [p]arties" and that "[a]ll other agreements, negotiations, and representations" made by the parties were void and had no force or effect. Both parties acknowledged in the written settlement agreement that they might sustain unknown future losses but both parties explicitly agreed to waive any right concerning such future losses. In addition, Morrison expressly agreed that the written settlement agreement was the full and final resolution of all claims she held or might later acquire concerning her claims against the property, and she expressly released Mercury from any and all past and future "loss, demands, damages, actions, causes of action or suits at law or equity of any kind or nature" related to the events addressed by the written settlement agreement.

In this case, there is nothing in the parties' agreement or the record before us on appeal indicating that the ease in which Morrison could obtain alternative housing was a vital fact on which they based their agreement. *See Gen. Motors*, 111 Nev. at 1032, 900 P.2d at 349; *see also Ringle v. Bruton*, 120 Nev. 82, 93, 86 P.3d 1032, 1039 (2004) (stating "when a contract is clear, unambiguous, and complete, its terms must be given their plain meaning and the contract must be enforced as written"). The

plain language of the agreement provides that Morrison would surrender the property to Mercury within 60 days of her acceptance of the first installment payment with no mention of Morrison's ability to secure alternate housing. The agreement also expressly states that the parties agreed to waive any future claims, losses, or damages that either party may encounter as a result of the agreement, including issues unknown to them at that time. In addition, the agreement provided that the written settlement agreement contained the entire agreement between the parties. To the extent that Morrison misunderstood the difficulty she would face in finding alternative housing, she bore the risk related to that issue. *See Land Baron*, 131 Nev. at 694, 356 P.3d at 517. Under these circumstances, we conclude that Morrison fails to demonstrate that the district court erred by concluding that there was no mutual mistake regarding Morrison's ability to seek alternate housing when they entered into the written settlement agreement.

Turning to Morrison's contention that she should not have been ordered to vacate the property and could instead remain there so long as she paid the $75 hold-over rate, as stated previously, the district court found that Morrison had not yet vacated the property or paid the $75 daily hold-over rate as required by the written settlement agreement. The district court also found that Mercury paid the first installment to Morrison and Morrison was therefore required to surrender the property to Mercury within 60 days as provided by the written settlement agreement. The district court further concluded that Morrison's failure to timely surrender the property constituted a material breach of the settlement agreement. *See Goldston v. AMI Invs., Inc.*, 98 Nev. 567, 569, 655 P.2d 521, 523 (1982) ("Failure to tender timely performance can constitute a material breach of

contract."). In light of the provision in the written settlement agreement requiring Morrison to surrender the property, the district court ordered Morrison to vacate the property by October 31, 2022.

The district court's findings that Morrison did not timely surrender the property or pay the $75 daily hold-over rate are supported by substantial evidence. *See Williams v. Williams*, 120 Nev. 559, 566, 97 P.3d 1124, 1129 (2004) (explaining that appellate courts will not disturb the district court's decisions on appeal when they are supported by substantial evidence, which is evidence that "a sensible person may accept as adequate to sustain a judgment"). Because the plain language of the written settlement agreement required Morrison to surrender possession of the property to Mercury, we conclude the district court did not err by enforcing the agreement and ordering Morrison to vacate the property. *See Picardi*, 127 Nev. at 110, 251 P.3d at 725.

Second, Morrison argues the district court erred by awarding Mercury $10,000 in liquidated damages. Morrison contends those damages were unwarranted and not equitable in light of her misunderstanding concerning the difficulties she would face in finding alternative housing, and she asserts she should only be responsible for payment of the $75 daily hold-over rate.

"Whether a party is entitled to a particular measure of damages is a question of law reviewed de novo." *Dynalectric Co. of Nev. v. Clark & Sullivan Constructors, Inc.*, 127 Nev. 480, 483, 255 P.3d 286, 288 (2011) (internal quotation marks omitted). Liquidated damages are the amount "a party to a contract agrees to pay if [it] fails to perform, and which, having been arrived at by a good faith effort to estimate the actual damages that will probably ensue from a breach, is recoverable as agreed-upon damages

should a breach occur." *Mason v. Fakhimi*, 109 Nev. 1153, 1156, 865 P.2d 333, 335 (1993). "[L]iquidated damages provisions are generally prima facie valid, and the party challenging the provision must establish that the provision amounts to a penalty." *Id.* "In order to prove that such a provision constitutes a penalty, the challenging party must persuade the court that the liquidated damages are disproportionate to the actual damages sustained by the injured party." *Id.* at 1156-57, 865 P.2d at 335.

As reflected in the written settlement agreement, if either party committed a material breach of that agreement, the breaching party owed the non-breaching party liquidated damages in the amount of $10,000. Morrison thereafter committed a material breach of the written settlement agreement by failing to timely surrender the property to Mercury. *See Goldston*, 98 Nev. at 569, 655 P.2d at 523. Morrison's material breach thus activated the liquidated damages provision of the written settlement agreement.

As liquidated damages are generally prima facie valid, in challenging the liquidated damages provision in this matter, Morrison had to establish that the $10,000 amount constituted an impermissible penalty. *See Mason*, 109 Nev. at 1156, 865 P.2d at 335. However, she does not argue that the $10,000 in liquidated damages were disproportionate to the actual damages incurred by Mercury. Morrison does not provide relevant authority in support of her assertion that the award of liquidated damages in this matter was improper or inequitable. In light of Morrison's failure to cogently argue that the liquidated damages provision amounted to an impermissible penalty and her failure to provide relevant authority in support of her contentions, we need not consider this issue. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38

(2006) (providing that the appellate courts need not consider claims unsupported by cogent argument and relevant authority).

Based on the foregoing analysis, we conclude Morrison has failed to demonstrate that the district court erred in upholding and enforcing the parties' settlement agreement, ordering her to pay liquidated damages, and directing her to vacate the property. Accordingly, we

ORDER the judgment of the district court AFFIRMED.[1]

_____, C.J.
Gibbons

_____, J.
Bulla

_____, J.
Westbrook

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[1]To the extent Morrison purports to challenge the district court's post-judgment order awarding respondents attorney fees, that issue is not properly before us. An order granting attorney fees and costs is independently appealable as a special order after final judgment. *See* NRAP 3A(b)(8) (providing for appeals from special orders entered after a final judgment); *Smith v. Crown Fin. Servs.*, 111 Nev. 277, 280 n.2, 890 P.2d 769, 771 n.2 (1995). The record indicates that the order awarding attorney fees was entered after Morrison initiated this appeal. Thus, in order to challenge that award, Morrison was required to file a separate appeal challenging that decision following the entry of the order awarding attorney fees.

cc: Hon. Gloria Sturman, District Judge
Israel Kunin, Settlement Judge
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Michaelson Law
Eighth District Court Clerk