



IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DEBORAH RICHARD,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK; AND THE HONORABLE
NADIA KRALL, DISTRICT JUDGE,
Respondents,
and
ALEXANDER MERRITT; TAB
MERRITT; AND YVONNE MERRITT,
Real Parties in Interest.

No. 91935-COA

*ORDER GRANTING IN PART AND
DENYING IN PART PETITION FOR WRIT OF MANDAMUS*

Deborah Richard petitions for a writ of mandamus, challenging a district court order denying a motion for summary judgment.

Real parties in interest, Alexander Merritt, Tab Merritt, and Yvonne Merritt filed a complaint alleging Richard sold them a home and despite knowing the sewer system was at immediate risk of failing, failed to disclose the condition. Richard filed an answer and asserted as an affirmative defense that the parties' sales contract required them to engage in mandatory pre-litigation mediation prior to any litigation. Richard subsequently filed a motion for summary judgment arguing summary judgment was warranted because the Merritts failed to comply with the pre-litigation mediation provision. The Merritts opposed arguing the motion was premature because discovery had yet to open, and they asserted there

were factual disputes which precluded enforcement of the provision. Specifically, the Merritts argued Richard may have waived the provision by failing to respond to their informal attempts at resolution and that the provision may be unenforceable as a matter of equity. The Merritts reasoned that because they alleged Richards had fraudulently induced them into signing the contract, the mediation provision could not be enforced against them. Richard replied and asserted there was no evidence of waiver and that allegations of fraud could not preclude the enforcement of the mediation provision.

Ultimately, the district court entered an order denying the motion for summary judgment. The court found that the motion was premature and there were genuine disputes of material fact as to the enforceability of the mediation provision. Further, the court found that even assuming the provision was enforceable, it would stay the proceedings instead of granting summary judgment. Richard then filed this petition for a writ of mandamus requesting this court direct the district court to enter summary judgment.

A writ of mandamus is available to compel the performance of an act that the law requires or to control an arbitrary or capricious exercise of discretion. *Int'l Game Tech., Inc. v. Second Jud. Dist. Ct.*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). The decision whether to entertain a petition for extraordinary writ relief is within our sole discretion, *Smith v. Eighth Jud. Dist. Ct.*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991), and the petitioner has the burden of demonstrating such relief is warranted, *Pan v. Eighth Jud. Dist. Ct.*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004). Writs of

mandamus are available when the petitioner has no “plain, speedy, and adequate remedy in the ordinary course of law.” NRS 34.170.

Richard maintains writ relief is warranted because she has no adequate remedy at law since the pre-litigation mediation provision is intended to prevent litigation altogether. Although the right to appeal a final judgment is generally an adequate legal remedy, *Pan*, 120, Nev. at 224, 88 P.3d at 841, an eventual appeal from the final judgment in the present case would be neither speedy nor adequate given that the pre-litigation mediation provision was designed to prevent litigation altogether. *See D.R. Horton, Inc. v. Eighth Jud. Dist. Ct.*, 123 Nev. 468, 475, 168 P.3d 731, 736 (2007) (holding the petitioner did not have an adequate or speedy remedy at law to challenge the district court’s order declining to enforce a pre-litigation notice provision). Accordingly, we exercise our discretion to consider this writ petition.

Richard argues the district court manifestly abused its discretion by finding there were factual disputes regarding waiver that precluded enforcement of the pre-litigation mediation provision. In response, the Merritts contend that prior to filing suit they emailed Richard’s agent and repeatedly requested Richard pay for the repairs or otherwise remedy the situation and that Richard failed to meaningfully respond. Further, the Merritts note they sent Richard’s agent a letter stating they would pursue legal action, including mediation, arbitration, or litigation and thus the court did not abuse its discretion finding there was a factual dispute as to waiver. And the Merritts contend that even assuming the provision is enforceable, the district court correctly found that a stay, rather than summary judgment, was warranted.

We conclude the district court manifestly abused its discretion by finding there were factual disputes as to whether Richard waived the pre-litigation mediation provision. Generally, waiver is a question of fact. *Nev. Gold & Casinos, Inc. v. Am. Heritage, Inc.*, 121 Nev. 84, 89, 110 P.3d 481, 484 (2005). However, “when the determination rests on the legal implications of essentially uncontested facts, then it may be determined as a matter of law.” *Id.* “A waiver may be implied from conduct which evidences an intention to waive a right, or by conduct which is inconsistent with any other intention than to waive the right.” *Id.*

Here, the facts are not contested and instead the parties dispute only the legal implication that should be drawn from those facts. Namely, the parties do not dispute that after the sewer line failed, the Merritts sent numerous emails to Richard’s agent requesting Richard pay for the repairs and that ultimately, they sent Richard’s agent a letter threatening potential legal action, including mediation, arbitration, or litigation. And it is undisputed that Richard, who was not included on these communications, did not respond to the informal requests for settlement. However, these facts do not demonstrate Richard intentionally relinquished her right to pre-litigation mediation. *Mill-Spex, Inc. v. Pyramid Precast Corp.*, 101 Nev. 820, 822, 710 P.2d 1387, 1388 (1985) (defining waiver as “the intentional relinquishment of a known right”).

Even when taking the evidence in the light most favorable to the Merritts, we conclude the undisputed facts do not demonstrate Richard intentionally relinquished her right to enforce the pre-litigation mediation

provision.¹ Assuming Richard was aware of the Merritts' informal requests for settlement, or the letter threatening subsequent legal action, her failure to substantively respond does not constitute waiver. *See MB Am., Inc. v. Alaska Pac. Leasing*, 132 Nev. 78, 86, 367 P.3d 1286, 1291 (2016) (concluding respondent did not waive mediation as appellant never explicitly requested mediation and respondent never categorically rejected the request). Notably, the Merritts' letter indicated they may pursue mediation or litigation, but it did not actually request mediation. *See id.* at 85, 367 P.3d at 1290. Nor did Richard waive mediation through her conduct as she asserted the lack of compliance with the pre-litigation mediation provision as an affirmative defense and promptly moved for summary judgment. Accordingly, we conclude Richard did not waive the pre-litigation mediation provision.

The Merritts contend that even assuming Richard did not waive the pre-litigation mediation provision, factual disputes remain regarding whether Richard fraudulently induced them into signing the sales agreement. Richard contends that the allegations of fraudulent inducement are irrelevant to the enforcement of the provision because there is no allegation that the fraud was used to secure the pre-litigation mediation provision.

In *Tuxedo International, Inc. v. Rosenberg*, the supreme court addressed whether an allegation of fraud was sufficient to preclude the enforcement of a forum selection provision contained within a contract. 127

¹There is no dispute that Richard did not expressly waive the mediation provision.

Nev. 11, 15, 251 P.3d 690, 692-93 (2011) (discussing the parties' positions on whether the forum selection provision was enforceable considering the fraud claim). After evaluating various approaches, the supreme court held it would apply a modified intent-of-the-parties approach to determine whether the forum selection provision would apply to a fraud claim. *Id.* at 24-25, 251 P.3d at 699. When applying this approach, a court must first determine whether the intent of the parties can be discerned through a "thorough and detailed review of the language of that provision." *Id.* at 22, 251 P.3d at 697. And if the dispute can be resolved through the plain language of the text, the analysis ends. *Id.* at 25, 251 P.3d at 699.

Here, a review of the plain language of the contract demonstrates the parties intended the pre-litigation mediation provision would encompass any allegations of fraud, including allegations that the contract was unenforceable due to fraud in the inducement.² The pre-litigation mediation provision reads "[b]efore *any legal action* is taken to enforce *any term or condition* . . . , the parties agree to engage in mediation." (Emphasis added.) And the provision has only a single exemption, stating the provision will not apply to claims for specific performance. In light of the broad language of the provision, we conclude the parties intended for the pre-litigation mediation provision to apply to all claims concerning enforcement of the sales agreement, including whether it was unenforceable

²We note that while the Merritts have consistently challenged the enforceability of the pre-litigation mediation provision on this basis, they have not sought to rescind the sales contract itself based on fraud in the inducement and instead brought claims for breach of contract during the underlying proceeding.

on grounds that Richard engaged in fraudulent inducement. Accordingly, we conclude the district court manifestly abused its discretion by failing to enforce the pre-litigation mediation provision.

However, we disagree with Richard that the district court was required to grant summary judgment and instead agree with the Merritts that a stay is appropriate. Richard maintains that pursuant to *MB America, Inc.*, the district court was required to grant summary judgment. 132 Nev. at 84, 367 P.3d at 1290. The Merritts contend that a stay is more appropriate. Richard's reliance on *MB America* is misplaced. The primary issue in *MB America* was "whether prelitigation mediation provisions in a contract can constitute a condition precedent to litigation." 132 Nev. at 81, 367 P.3d at 1288. After determining that they could, the supreme court affirmed the district court's grant of summary judgment as MB America did not comply with the pre-litigation mediation requirement. *Id.* at 83-86, 367 P.3d at 1289-91. Additionally, the supreme court held the court did not err when it denied MB America's request to stay the litigation. *Id.* at 88, 367 P.3d at 1292.

MB America does not stand for the proposition that a district court is *required* to immediately dismiss a complaint for noncompliance with a prelitigation mediation provision, nor does it stand for the proposition that a court *may not* grant a stay of litigation to allow the parties to mediate. The decision to grant or deny a stay is generally within the discretion of the trial court. *See Aspen Fin. Servs. v. Eighth Jud. Dist. Ct.*, 128 Nev. 635, 640, 289 P.3d 201, 205 (2012) (reviewing an order denying a motion to stay for an abuse of discretion). And Richard has not identified any legal authority showing that a district court abuses its discretion by

issuing a stay in lieu of dismissal. Thus, we grant the writ in part and direct the district court to stay the litigation in this matter to allow the parties to mediate in compliance with the pre-litigation mediation provision.³

Accordingly, we

ORDER the petition GRANTED IN PART AND DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF MANDAMUS instructing the district court to stay the matter pending mediation.



Bulla, C.J.



Gibbons, J.



Westbrook, J.

cc: Hon. Nadia Krall, District Judge
The Wright Law Group, P.C.
Hurtik Law & Associates
Eighth District Court Clerk

³Insofar as the parties raise additional arguments, we have considered them and conclude they do not provide a basis for relief.