IN THE SUPREME COURT OF THE STATE OF NEVADA

RAINBOW DEVELOPMENT CORPORATION, A NEVADA CORPORATION, INDIVIDUALLY AND AS A MEMBER OF RAINBOW CANYON LIMITED LIABILITY COMPANY,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE MICHELLE LEAVITT, DISTRICT JUDGE,
Respondents,
and
RHODES DESIGN & DEVELOPMENT CORPORATION, A NEVADA CORPORATION, AND MANAGING MEMBER OF RAINBOW CANYON LIMITED LIABILITY COMPANY; JAMES RHODES, AN INDIVIDUAL; AND RAINBOW CANYON LIMITED LIABILITY COMPANY, A NEVADA LIMITED LIABILITY COMPANY,
Real Parties in Interest.

No. 41426

FILED

MAR 04 2004

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

ORDER DENYING PETITION FOR WRIT OF MANDAMUS

This is a petition for a writ of mandamus challenging a district court order compelling arbitration. The district court ordered the parties to arbitrate their dispute according to the operating agreement of Rainbow Canyon Limited Liability Company (the LLC). We deny Rainbow Development Corporation's petition because it failed to show sufficient evidence of prejudice on remand.

FACTUAL BACKGROUND

On January 29, 1993, petitioner Rainbow Development Corporation (RDC), the James Michael Rhodes Irrevocable Children's Education Trust (the Trust), and real party in interest Rhodes Design and Development Corporation (RD&D) formed the LLC. The purpose of the LLC was to develop 150 acres of property into a residential housing tract in Henderson, Nevada. On February 8, 1993, the parties signed an operating agreement containing a mandatory arbitration clause.

On August 25, 1998, RDC sued RD&D for, among other things, alleged mismanagement of the LLC. RD&D's answer contained the affirmative defense that RDC failed to arbitrate the case. Approximately three months before trial, RD&D moved the district court to compel arbitration of the dispute. The district court found that arbitration would prejudice RDC and denied RD&D's motion to compel arbitration. RD&D appealed the order denying arbitration. This court remanded the case to the district court for an evidentiary hearing. Subsequently, the district court found that arbitration would not prejudice RDC and ordered the parties to arbitrate. RDC petitions for a writ of mandamus directing the district court to vacate its order compelling arbitration.

DISCUSSION

Mandamus relief

RD&D argues that a writ of mandamus is inappropriate in this case because RDC agreed to arbitrate any dispute by entering into the LLC's operating agreement. We previously determined whether mandamus relief is appropriate to vacate an order compelling arbitration

in Kindred v. District Court.[1] In Kindred, the parties disputed the validity of an arbitration clause.[2] We held that a mandamus petition is proper when reviewing an order compelling arbitration.[3] RD&D distinguishes this case from Kindred, asserting that Kindred disputed whether a valid arbitration agreement existed, whereas the case at bar involves no arbitration clause dispute. We disagree.

Kindred is analogous to the instant case because both cases involved a petition for a writ of mandamus seeking to vacate an order compelling arbitration. "An order compelling arbitration is not . . . appealable."[4] We have determined that a writ of mandamus is an appropriate remedy when disputing an order compelling arbitration.[5] A writ of mandamus is an extraordinary remedy for which there is no "plain, speedy and adequate remedy in the . . . law."[6]

A writ of mandamus is the only method to challenge the district court's order compelling arbitration. RDC petitions for a writ of mandamus to direct the district court to vacate its order. Although the validity of the arbitration clause is not an issue, waiver of that clause by

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[1]116 Nev. 405, 996 P.2d 903 (2000).

[2]Id. at 410, 996 P.2d at 906.

[3]Id. at 409, 996 P.2d at 906.

[4]NRS 38.205; Clark County v. Empire Electric, Inc., 96 Nev. 18, 19, 604 P.2d 352, 353 (1980).

[5]Kindred, 116 Nev. at 409, 996 P.2d at 906.

[6]NRS 34.170.

RD&D is at issue. Therefore, RDC has no remedy other than a writ of mandamus.[7] Accordingly, RDC's writ petition is appropriate.

Waiver of right to arbitrate

RDC argues that RD&D waived its right to arbitrate the dispute for six reasons. To determine whether RD&D waived its right to arbitrate, RDC must show that it would be prejudiced by arbitration.[8] RDC states that it was prejudiced by (1) expending hundreds of thousands of dollars in preparation for litigation; (2) losing evidence due to the death of certain expert witnesses; (3) RD&D's use of discovery procedures unavailable in arbitration; (4) lack of benefit from arbitration because years have passed since the dispute initiated; (5) the stipulation to try the case; and (6) if the parties were to arbitrate, RD&D chose one of its attorneys as the arbitrator.

We review the district court's order compelling arbitration for an abuse of discretion.[9] When reviewing arbitration agreements, we resolve "'all doubts concerning the arbitrability of the subject matter of a dispute in favor of arbitration.'"[10] We construe arbitration clauses liberally in favor of arbitration.[11] Because RDC has raised numerous reasons why it has been prejudiced, we will review each in turn.

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[7]Kindred, 116 Nev. at 409, 996 P.2d at 906.

[8]County of Clark v. Blanchard Constr. Co., 98 Nev. 488, 491, 653 P.2d 1217, 1220 (1982).

[9]Kindred, 116 Nev. at 415, 996 P.2d at 910.

[10]Id. at 411, 996 P.2d at 907 (quoting Int'l Assoc. Firefighters v. City of Las Vegas, 104 Nev. 615, 618, 764 P.2d 478, 480 (1988)).

[11]Id.

Expenditure of hundreds of thousands of dollars

RDC argues that the $717,287.95 it incurred in fees and costs to prepare for a trial in this case is prejudicial. We have held that the expenditures by RDC alone were not sufficient to demonstrate prejudice.[12] Additionally, RD&D states that the reason it delayed in bringing an arbitration demand is because it was waiting for the receivership to end. Absent a showing of bad faith or willful misconduct, the expenditure of thousands of dollars does not constitute prejudice. Therefore, the district court did not abuse its discretion by ordering the parties to arbitrate.

Loss of evidence

RDC argues that RD&D's delay in seeking arbitration has caused RDC to lose evidence. In the instant case, two RDC experts died while the parties were preparing for trial. RDC argues that but for RD&D's delay in seeking arbitration, James Cedarquist and Robert Apfelberg would have testified on RDC's behalf. We disagree.

The death of these two individuals did not result from RD&D's delay in requesting arbitration. The personal knowledge lost by the deaths of Cedarquist and Apfelberg could not have been foreseen by either party, and the deaths cannot be a direct consequence of RD&D's delay in demanding arbitration. Therefore, RDC has failed to show that the district court abused its discretion in this argument.

Use of judicial discovery procedures

RDC argues that RD&D prejudiced it by taking advantage of judicial discovery procedures that are not available in arbitration. We have previously held that "[w]e . . . reject the view that any participation

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[12]Rhodes v. Rainbow, Docket No. 37704 (Order of Reversal and Remand, October 22, 2002).

in litigation is inconsistent with arbitration and therefore tantamount to waiver."[13] Under this rule, any participation in the litigation process would not be sufficient prejudice to support a waiver of arbitration. This includes the discovery process as well as pretrial motions and hearings. Additionally, RDC failed to show that the discovery obtained will not be used in arbitration. RDC has also failed to show that the district court abused its discretion. Therefore, RDC's argument is wholly without merit.

Delay in arbitration demand

RDC contends that arbitration benefits no longer exist because arbitration aims to resolve disputes quickly and cost effectively. RDC argues that RD&D's delay in demanding arbitration caused RDC prejudice due to the passing of time. County of Clark v. Blanchard Construction Co.[14] is relevant to this argument.

Blanchard involved a dispute regarding a contract to build a fire station.[15] The contract contained an arbitration clause.[16] Nine months after the county filed suit, Blanchard moved to compel arbitration.[17] The district court granted Blanchard's motion. After arbitration, the county appealed the district court's order confirming the arbitration award, claiming that Blanchard waived its right to arbitrate

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[13]Blanchard, 98 Nev. at 491, 653 P.2d at 1219.

[14]98 Nev. 488, 653 P.2d 1217 (1982).

[15]Id. at 489-90, 653 P.2d at 1219.

[16]Id. at 490, 653 P.2d at 1219.

[17]Id.

by waiting nine months and participating in the litigation process.[18] We held that the county was "unable to establish that the delay in seeking arbitration was unreasonable or that Blanchard in any way engaged in wilful misconduct or acted in bad faith."[19]

The instant case is similar to Blanchard. In Blanchard, there was a nine-month delay from when the county filed the complaint and when Blanchard demanded arbitration.[20] In this case, RD&D waited over four years before bringing the arbitration demand. "Where an arbitration agreement does not specify the time within which arbitration must be demanded, a reasonable time is allowed, and the factors in determining the reasonableness of the delay are the situation of the parties, the nature of the transaction, and the facts of the particular case."[21]

The arbitration clause in the operating agreement does not specify a time limit to bring arbitration; however, the operating agreement does contain a clause stating: "No failure or delay of a Member in the exercise or [sic] any rights given to such Member . . . shall constitute a waiver thereof." There is no evidence as to any willful misconduct by RD&D, nor is there any evidence of bad faith because RD&D was waiting for the receivership to end before pursuing arbitration. There is also no evidence that the district court abused its discretion by ordering the

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[18]Id. at 490-91, 653 P.2d at 1219.

[19]Id. at 491, 653 P.2d at 1220.

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

[21]4 Am. Jur. 2d Alternative Dispute Resolution § 131 (1995).

parties to arbitrate. Therefore, under the operating agreement, there is no waiver for delay in demanding arbitration.

Stipulation to trial

RDC contends that it suffered prejudice because RD&D orally stipulated to a trial in court and continuances of the trial date. RDC provided evidence of four separate occasions where RD&D stipulated to a trial or a continuance of the trial date. We previously held that "the presence or absence of any specific conduct by a party is not determinative."[22] Therefore, we decline to address this issue.

Appointment of partial arbitrator

RDC argues that a partial arbitrator was appointed. It argues that any result from a partial arbitrator will be prejudicial. RDC moved the district court to disqualify RD&D's selected arbitrator, Corby Arnold. The district court denied RDC's motion to disqualify Arnold.

The arbitration clause in the operating agreement provides the method for selecting an arbitrator when a dispute arises. The clause specifically provides a remedy in the event one of the parties does not accept the other's choice of arbitrator. Therefore, even if Arnold was partial, the arbitration clause provides an appropriate remedy. RDC can select its own arbitrator, and if both arbitrators cannot agree on the solution, they will select a third arbitrator. This results in an impartial decision by the arbitration panel.

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[22]Rhodes v. Rainbow, Docket No. 37704 (Order of Reversal and Remand, October 22, 2002).

An arbitration conducted in this manner is a tripartite arbitration.[23] As we stated in United Ass'n Journeymen v. District Court, "[i]f the parties to a collective agreement provide for a tripartite arbitration board, a court is powerless to substitute a tribunal of different character."[24] In the case at bar, the operating agreement provides that each party may appoint an arbitrator; and if the two arbitrators cannot agree, the arbitrators appoint a third. RDC's argument that Arnold is a partial arbitrator lacks merit, especially since RDC has already proposed Albert Marquis to act as arbitrator. According to the agreement, Arnold and Marquis will be the arbitrators and they will appoint the third neutral arbitrator if they cannot agree on the outcome of the dispute. Therefore, RDC has failed to show that the district court abused its discretion by the arbitrator's appointment.

Accordingly, we deny the petition for a writ of mandamus.

It is so ORDERED.

Becker, J.
Becker

Agosti, J.
Agosti

Gibbons, J.
Gibbons

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[23]United Ass'n Journeymen v. Dist. Ct., 82 Nev. 103, 106, 412 P.2d 352, 353-54 (1966).

[24]82 Nev. at 107, 412 P.2d at 354.

cc: Hon. Michelle Leavitt, District Judge
Harrison Kemp & Jones, LLP
Lionel Sawyer & Collins/Las Vegas
Clark County Clerk