IN THE SUPREME COURT OF THE STATE OF NEVADA

CLUB VISTA FINANCIAL SERVICES, L.L.C., A NEVADA LIMITED LIABILITY COMPANY; THARALDSON MOTELS II, INC., A NORTH DAKOTA CORPORATION; AND GARY D. THARALDSON,
Petitioners,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE MARK R. DENTON, DISTRICT JUDGE,
Respondents,
and
SCOTT FINANCIAL CORPORATION, A NORTH DAKOTA CORPORATION; BRADLEY J. SCOTT; BANK OF OKLAHOMA, N.A., A NATIONAL BANK; GEMSTONE DEVELOPMENT WEST, INC., A NEVADA CORPORATION; AND ASPHALT PRODUCTS CORP. D/B/A APCO CONSTRUCTION, A NEVADA CORPORATION,
Real Parties in Interest.

No. 57784

FILED

FEB 27 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER DENYING PETITION

This is an original petition for a writ of mandamus or prohibition challenging a district court order enforcing a jury-trial waiver and bifurcating claims for bench and jury trials.[1]

[1]The Honorable Ron Parraguirre, Justice, voluntarily recused himself from participation in the decision of this matter.

12-06107

Petitioners Club Vista Financial Services, LLC; Gary Tharaldson; and Tharaldson Motels II, Inc. (TM2),[2] and real parties in interest Scott Financial Corporation; Brad Scott; Bank of Oklahoma, N.A.; Gemstone Development West, Inc.; and Asphalt Products Corporation, d.b.a. APCO Construction, are involved in a failed mixed-use real estate development project in Las Vegas, Nevada, known as the Manhattan West project. Club Vista, Scott Financial, Bank of Oklahoma, and 26 participating lenders agreed to finance the Manhattan West project. Tharaldson and TM2 guaranteed the loan in separate agreements. Both guaranty agreements contain jury-trial waiver provisions directly above the signature line in bold and capital letters. The Tharaldson guaranty agreement includes a Nevada choice-of-law provision, whereas the TM2 guaranty agreement includes a North Dakota choice-of-law provision. During the construction phase of the project, the loan went into default.

Thereafter, petitioners filed a complaint in the district court against the real parties in interest alleging fraud, constructive fraud, and breach of fiduciary duty, among other claims for relief. Petitioners also filed a demand for a jury trial and a motion for an advisory jury on all nonjury claims. Subsequently, Bank of Oklahoma, Scott Financial, and APCO Construction filed a motion to strike the jury demand and a motion to bifurcate the trial. The district court granted the motion to strike the jury demand, concluding that the conspicuous jury waivers above the signature lines were valid and enforceable, and noting that it was not directed to any North Dakota caselaw that held that the right to a jury trial cannot be waived. The district court also granted the motion to

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[2]Tharaldson owns 100 percent of the membership interest in Club Vista and is also a minority owner in TM2.

bifurcate the trial, determining that the guaranty issues involving Tharaldson and TM2 would be heard first in a bench trial, and that the issues surrounding Club Vista as a participating lender would be subsequently heard by a jury. In doing so, the district court noted that confusion and prejudice would best be avoided by bifurcation, and that the issues would likely be narrowed, with concomitant judicial economy. In addition, the district court denied petitioners' motion for an advisory jury.[3]

In their petition, petitioners argue that the district court erred in enforcing the jury-trial waivers and ordering bifurcation of the trial. Petitioners further argue that even if the jury-trial waivers in the guaranty agreements were enforceable, the district court should have granted their request to submit the nonjury claims to an advisory jury. For the reasons discussed below, we conclude that extraordinary relief is not warranted in this matter, and we therefore deny the petition.

Standard of review

An extraordinary writ will not issue if the petitioner has "a plain, speedy and adequate remedy in the ordinary course of law." NRS 34.170 (mandamus); NRS 34.330 (prohibition). Petitioners bear the burden to demonstrate that extraordinary relief is warranted. Pan v. Dist. Ct., 120 Nev. 222, 228, 88 P.3d 840, 844 (2004). When considering a writ petition, this court reviews legal questions de novo and gives deference to the district court's findings of fact. Williams v. Dist. Ct., 127 Nev. ___, ___, 262 P.3d 360, 365 (2011).

[3]The parties are familiar with the facts, and we do not recount them further except as necessary to our disposition.

The district court properly enforced the jury-trial waivers

Petitioners contend that the district court erred in enforcing the jury-trial waivers contained in the guaranty agreements because they did not enter into the contractual waiver of the right to a jury trial knowingly and voluntarily.

In Nevada, contractual jury-trial waivers are valid and enforceable. Lowe Enterprises v. Dist. Ct., 118 Nev. 92, 100, 40 P.3d 405, 410 (2002).[4] Such waivers are "presumptively valid unless the challenging party can demonstrate that the waiver was not entered into knowingly, voluntarily or intentionally." Id. When determining whether a party voluntarily waived the right to a jury trial, we consider the following factors: "'(1) the parties' negotiations concerning the waiver provision, if

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[4]A majority of courts addressing this issue have found no bar to the enforcement of predispute jury-trial waiver provisions. Poole v. Union Planters Bank, N.A., 337 S.W.3d 771, 778 (Tenn. Ct. App. 2010); see, e.g., Telum, Inc. v. E.F. Hutton Credit Corp., 859 F.2d 835, 837 (10th Cir. 1988); K.M.C. Co., Inc. v. Irving Trust Co., 757 F.2d 752, 755 (6th Cir. 1985); Efficient Solutions, Inc. v. Meiners' Country Mart, 56 F. Supp. 2d 982, 984 (W.D. Tenn. 1999); L & R Realty v. Connecticut Nat. Bank, 715 A.2d 748, 755 (Conn. 1998); In re Prudential Ins. Co. of America, 148 S.W.3d 124, 132-33 (Tex. 2004); Azalea Drive-in Theatre v. Sargoy, 214 S.E.2d 131, 136 (Va. 1975).

Regarding TM2's guaranty agreement, however, petitioners argue that prelitigation jury-trial waivers are not valid or enforceable in North Dakota. Based on the majority view and limited guidance by the North Dakota courts, we conclude that this argument lacks merit. See generally State v. Kranz, 353 N.W.2d 748, 751 (N.D. 1984) (providing that "[d]espite the fundamental nature of the right to trial by jury, it is a right which may be waived by a defendant under certain conditions"); County 20 Storage & Transfer Inc. v. Wells Fargo Bank, NA, No. 3:09-cv-104, 2011 WL 826349, at *10 (D.N.D. March 3, 2011) (holding that a party may contractually waive its Seventh Amendment right to a jury trial).

any, (2) the conspicuousness of the provision, (3) the relative bargaining power of the parties and (4) whether the waiving party's counsel had an opportunity to review the agreement.'" Id. at 101, 40 P.3d at 410-11 (quoting Whirlpool Financial Corp. v. Sevaux, 866 F. Supp. 1102, 1105 (N.D. Ill. 1994)).

The court determined that the conspicuous upper case jury waivers above the signature lines were valid and enforceable. We agree. Here, the jury-trial waivers are conspicuous, in bold and uppercase letters, directly above the signature line, located in a concise agreement, and titled "WAIVER OF JURY TRIAL." See Mall, Inc. v. Robbins, 412 So. 2d 1197, 1199 (Ala. 1982) (noting that the jury-trial waiver was conspicuous because it was titled as such). Also relevant to our consideration is the fact that Tharaldson is a sophisticated businessman with experience in real estate prior to the Manhattan West project, and he was represented by counsel and had substantial bargaining power as he had complete control over whether he guaranteed the Manhattan West project. Therefore, we conclude that the district court properly enforced the jury-trial waivers contained in the guaranty agreements. See Lowe, 118 Nev. at 102, 102 n.36, 40 P.3d at 411, 411 n.36 (finding knowledge, volition, and intent when the parties to a contract were sophisticated, experienced in real estate, and represented by counsel); see generally Yee v. Weiss, 110 Nev. 657, 662, 877 P.2d 510, 513 (1994) (stating that ignorance of a contractual provision is not a defense to its enforceability).

We also reject petitioners' challenge to the district court's order striking the jury demand because they did not explicitly assert fraud in the inducement of the jury-trial waiver. Merrill Lynch & Co. Inc. v. Allegheny Energy, Inc., 500 F.3d 171, 188 (2d Cir. 2007) (stating that

"unless a party alleges that its agreement to waive its right to a jury trial was itself induced by fraud, the party's contractual waiver is enforceable vis-à-vis an allegation of fraudulent inducement relating to the contract as a whole"); see also Telum, Inc. v. E.F. Hutton Credit Corp., 859 F.2d 835, 837-38 (10th Cir. 1988); Chesterfield Exchange v. Sportsman's Warehouse, 528 F. Supp. 2d 710, 715 (E.D. Mich. 2007); In re Prudential Ins. Co. of America, 148 S.W.3d 124, 134-35 (Tex. 2004). Accordingly, the district court properly found that the jury-trial waivers were valid and enforceable, and we conclude that extraordinary relief is not warranted with regard to this issue.

The district court properly bifurcated the trial

Petitioners also contend that the district court abused its discretion in ordering bifurcation of the jury trial and nonjury trial claims. Specifically, petitioners argue that the issues are interrelated and cannot be tried separately without prejudice, and that the claims triable by a jury should be heard first.

The decision whether to bifurcate a trial rests in the district court's sound discretion. Awada v. Shuffle Master, Inc., 123 Nev. 613, 621, 173 P.3d 707, 712 (2007). The right to a jury trial "does not require the district court always to proceed first with any legal issues," because bifurcation may be appropriate when considerations of convenience, judicial economy, and the avoidance of prejudice would be served. Id.; see NRCP 42(b). District courts may not bifurcate a trial if the claims are "inextricably interrelated." Verner v. Nevada Power Co., 101 Nev. 551, 554, 706 P.2d 147, 150 (1985).

We conclude that the district court did not abuse its discretion in bifurcating the trial. Bifurcation will allow for a more streamlined and

judicially economical evidence presentation, as the claims and issues heard by the jury will be greatly simplified by having the guaranty claims already tried by the bench. This will lead to less confusion among the jury on Club Vista's claims. See NRCP 42(b). While some of the witnesses may need to testify in both the bench and jury portions of the trial, we conclude that the subject matter will be vastly different. We further conclude that the specific issues surrounding the Tharaldson and TM2 guaranty agreements and the issues surrounding Club Vista's role as a participating lender are not inextricably interrelated, as their respective issues are separate and distinct from one another. See Verner, 101 Nev. at 554, 706 P.2d at 150. Accordingly, we conclude that extraordinary relief is not warranted regarding bifurcation of the trial.

The district court properly denied petitioners' request to submit the nonjury claims to an advisory jury

Lastly, petitioners contend that the district court abused its discretion by denying their request to impanel an advisory jury, under NRCP 39(c), to assist the district court in its determination of the nonjury claims. We disagree.

The decision whether to grant a request for an advisory jury is within the district court's discretion. Harmon v. Tanner Motor Tours, 79 Nev. 4, 20, 377 P.2d 622, 630-31 (1963). "NRCP 39(c) provides that in any action not triable of right by a jury, the court may order the issue tried by an advisory jury, or, with the consent of all the parties, may order a trial by a jury having the same effect as if there had been a right to trial by jury." Close v. Isbell Construction Co., 86 Nev. 524, 529, 471 P.2d 257, 261 (1970).

Petitioners have already waived their right to a jury and offer no reason why the district court's decision not to impanel an advisory jury

was arbitrary, capricious, or exceeds the bounds of law and reason. See American Sterling Bank v. Johnny Mgmt. LV, 126 Nev. ___, ___, 245 P.3d 535, 538-39 (2010). Accordingly, extraordinary relief is not warranted with respect to impaneling an advisory jury.

Having considered petitioners' arguments, we conclude that extraordinary relief is not warranted and we

ORDER the petition DENIED.[5]

_____, C.J.
Saitta

_____, J.
Douglas

_____, J.
Cherry

_____, J.
Gibbons

_____, J.
Pickering

_____, J.
Hardesty

[5]In light of this order, we vacate our June 28, 2011, order granting a stay.

cc: Hon. Mark R. Denton, District Judge
Marquis Aurbach Coffing
Greenberg Traurig, LLP/Las Vegas
Cooksey, Toolen, Gage, Duffy & Woog
Morrill & Aronson, P.L.C.
Lemons, Grundy & Eisenberg
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Eighth District Court Clerk