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Direct Grading & Paving LLC v. Dist. Ct. (Century Cmty. of Nev., LLC), 137 Nev. Adv. Op. 31 (Jul. 8, 2021)¹

Authority to Intervene in an Arbitration

SUMMARY:

NRS 38.222 provides limited authority to intervene in an arbitration, specifically, only where the district court orders a provisional remedy.

FACTS AND PROCEDURAL HISTORY:

Direct Grading & Paving, LLC (Direct) and Century Communities of Nevada, LLC (Century) entered into a Master Subcontract Agreement (MSA) and Project Work Authorizations for four construction projects to be performed on Century's properties. The MSA included an arbitration clause that stated that "any disputed claim . . . shall [be] settled by arbitration" unless both parties agree otherwise. During construction, a dispute arose: Century fired Direct, claiming Direct failed to timely perform the work, and, in response, Direct recorded four mechanic's liens on the properties it worked on. The parties agreed to settle the dispute by arbitration and agreed to Direct filing a complaint in district court to (i) stay the action, (ii) select an arbitrator, and (iii) allow the case to proceed through arbitration.

In the discovery phase of the arbitration, Century hired an expert accountant to examine documents. The accountant uncovered alleged alterations in Direct's documents that covered up an approximate \$550,000 overcharge for dirt delivery to one of Century's properties. Further, Century also learned that it had a potential conflict of interest with Direct because Century's former land development manager worked for a company owned by Direct. This former land development manager had the authority to approve Direct's invoices on Century's behalf.

Direct claimed it was unaware of the alleged alterations and asserted that the only reason its employee altered the documents was because she thought she was missing another document. Direct also asserted that any errors in the documents did not matter because Century ultimately received the materials needed for the project and was not actually overcharged. Lastly, Direct argued a conflict of interest did not exist because Century's upper management had to approve any Project Work Authorizations the land development manager processed.

After these discoveries, the arbitrator stopped all other discovery and ordered an independent third-party IT specialist to sweep Direct's computers, cell phones, and server. The IT specialist performed the sweep but alleged that Direct intentionally used software upgrades to complicate the sweep and purposely concealed computer data by withholding the computer or hard drive used by the employee who allegedly altered the records. Following this report, Century motioned for sanctions against Direct, asking the arbitrator to strike Direct's claims, enter adverse claims against Direct, remove Direct's mechanic liens, dismiss any claims Direct had against Century's surety bonds, and award Century its fees and costs. The arbitrator refused to strike Direct's claims, electing, rather, to reserve the right to later supplement the order or make a further

¹ By Kaleb Bailey

ruling on Direct's potential failure to preserve evidence. However, despite not striking Direct's claims, the arbitrator ordered Direct to pay Century \$130,000.

Century moved for clarification and reconsideration of the arbitrator's order, asking the arbitrator to make an express ruling on Century's motion to expunge Direct's liens and release the bonds. Century also asserted that the conflict of interest was a breach of the parties' agreement and should prevent Direct from receiving any pay. Lastly, Century requested an evidentiary hearing to obtain more evidence, an issue of an interim award, and additional sanctions because Direct had still not yet paid Century the \$130,000 from the previous sanctions.

In response, the arbitrator stated the prior ruling was clear and unambiguous that no liens were to be expunged yet. Additionally, the arbitrator ordered that the \$130,000 would be deducted from one of Direct's mechanic's liens if Direct did not pay Century in 30 days. Lastly, the arbitrator denied Century's demands for an evidentiary hearing and ordered the parties to prepare a joint recommendation for proposed additional discovery.

Unsatisfied, Century filed a motion in district court for provisional relief pursuant to NRS 38.222, requesting the district court to remedy Direct's misconduct and rule on their motion. The district court found it (i) had authority to intervene under NRS 38.222 because it would be providing provisional relief and (ii) had inherent authority under NRCP 37 to address alleged discovery misconduct and alteration of documents because Direct earlier filed a complaint that was stayed and removed to arbitration. Direct filed a motion for reconsideration but the motion was denied. Direct then filed the instant petition for writ relief.

DISCUSSION:

We exercise our discretion to entertain the writ petition

Direct's writ petition posed an important issue of first impression: whether NRS 38.222 authorizes district courts to intervene in binding arbitration to remedy alleged misconduct. Thus, the court elected to consider Direct's writ petition, reasoning that clarifying this issue would serve judicial economy by ensuring the matter proceeded in the correct forum.

The district court erred by hearing a discovery dispute from parties involved in arbitration

The district court erred by hearing the discovery dispute between Century and Direct because a provisional remedy can only be provided if the "matter is urgent and the arbitrator is not able to act timely or . . . provide an adequate remedy."² A proper example of a provisional remedy would be "a temporary restraining order, a preliminary injunction, a prejudgment receivership, or an attachment," that "is intended to maintain the status quo by protecting a person's safety or preserving property."³ NRS 38.222 does not allow district courts to withdraw cases from arbitration or award potentially case-ending sanctions that the arbitrator previously declined to

² NEV. REV. STAT. § 38.222(2)(b) (2021).

³ *Remedy, provisional remedy*, BLACK'S LAW DICTIONARY (11th ed. 2019).

award.⁴ Rather, it only allows a district court to provide a temporary remedy to preserve the status quo if the arbitrator is unable to do so.

NRS 38.222

Here, nothing about Century's motion for provisional relief filed in the district court suggested NRS 38.222 applies to allow district court intervention. Century failed to show the arbitrator lacked enough time or was unable, as opposed to unwilling, to remedy any demonstrated misconduct. Additionally, Century failed to show the matter was urgent and failed to request a proper provisional remedy. Instead, Century requested sanctions for misconduct, an evidentiary hearing, and expungement of Direct's liens. If the district court were to grant Century's motion, it will have effectively resolved the entire case in Century's favor rather than preserve the status quo. Thus, the district court erred in hearing the discovery dispute as NRS 38.222 does not allow such interference in arbitration.

Inherent powers

Additionally, the district court erred in concluding it had inherent authority under NRCP 37. The district court's reasoning was flawed because it detrimentally relied on several cases that only concerned a court's authority over its own pending cases and not cases that have been stayed and removed to arbitration.⁵ Thus, the district court's conclusion that Direct's initially filed complaint gave it inherent authority was erroneous because Direct's complaint was merely filed to preserve the statute of limitations and was then removed to arbitration. The district court does not have any inherent authority over the arbitration case.

CONCLUSION:

Thus, the district court did not have authority to intervene in arbitration to sanction party misconduct where parties did not seek, and the district court did not provide, a provisional remedy. Further, district court did not have any inherent authority to intervene because neither Nevada law, nor Direct's lawsuit filed in the district court, gave it authority under the facts of this case. Accordingly, Direct's petition for writ relief is granted and the district court's order granting Century's motion for provisional relief is vacated. The case is returned to arbitration.

⁴ Cf. *Sea Vault Partners LLC v. Bermello, Ajamil & Partners, Inc.*, 274 So. 3d 473, 478 (Fla. Dist. Ct. App. 2019) (addressing a statute identical to NRS 38.222(2)(b) and concluding "a plain reading of the statute . . . does not confer jurisdiction on the trial court to award sanctions simply because the [a]rbitrator declined to do so").

⁵ *Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. 606, 615, 245 P.3d 1182, 1188 (2010); *Bass-Davis v. Davis*, 122 Nev. 442, 452, 134 P.3d 103, 109 (2006); *Young v. Johnny Ribeiro Building, Inc.*, 106 Nev. 88, 91, 787 P.2d 777, 779 (1990).