

IN THE SUPREME COURT OF THE STATE OF NEVADA

KNIGHT PIESOLD AND CO., A
COLORADO CORPORATION,
Petitioner,

vs.

THE FOURTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF ELKO,
AND THE HONORABLE MIRIAM
SHEARING, SENIOR JUDGE,

Respondents,

and

CANYON CONSTRUCTION COMPANY,
A NEVADA CORPORATION; SAINT
PAUL FIRE & MARINE INSURANCE
COMPANY, A MINNESOTA
CORPORATION; AND CITY OF ELKO,
A MUNICIPAL CORPORATION,
Real Parties in Interest.

No. 54270

FILED

SEP 28 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER DENYING PETITION

This is an original petition for a writ of mandamus challenging district court orders that compelled petitioner to participate in arbitration proceedings pursuant to NRS Chapter 338, Nevada's public works statute. Fourth Judicial District Court, Elko County; Miriam Shearing, Judge.

This case involves a services contract between the City of Elko and petitioner Knight and Piesold and Company for the engineering design, as well as additional program management and construction inspection services, for the Elko Regional Airport expansion and reconstruction project. The City filed an action against Canyon Construction, the general contractor on the project, and Knight, seeking to recover damages for a failing concrete apron. After discovery and some

litigation of issues on the merits, Canyon filed a motion to compel arbitration between Canyon and the City based upon NRS 338.150's mandatory arbitration provision for public works contracts between public entities and contractors. Knight was not included in this motion to compel. Over the City's opposition, the district court granted Canyon's motion to compel arbitration for all parties involved pursuant to NRS 338.150—a decision that it affirmed after Knight's subsequent motions for clarification and for reconsideration. The district court entered an order confirming that Knight should also be subject to arbitration pursuant to NRS 338.150, based on its status as a contractor providing labor on a public works contract pursuant to NRS 338.150. Knight now seeks a writ of mandamus from this court.¹

On appeal, Knight argues that: (1) the City waived binding arbitration or should be judicially estopped from asserting that Knight falls within the mandatory arbitration provision; (2) the district court incorrectly interpreted former NRS 338.150 when it compelled Knight, a design professional, to participate in binding arbitration; and (3) in doing so, the district court violated Knight's due process and jury trial rights.² See 2005 Nev. Stat., ch. 424, § 20, at 1808. We conclude that the district court properly compelled Knight into arbitration.

¹The parties are familiar with the facts, and we do not recount them further except as necessary to our disposition.

²We note that Knight's request for a stay contained in the petition was denied by this court on August 21, 2009. Knight Pieshold and Co. v. Dist. Ct., Docket No. 54270 (Order Directing Answer and Denying Emergency Motion for Stay, August 21, 2009).

Standard of review

Orders compelling arbitration typically involve mixed questions of law and fact, which we review under different standards, even in the context of a writ petition. See D.R. Horton, Inc. v. Green, 120 Nev. 549, 553, 96 P.3d 1159, 1162 (2004). The district court's factual findings are given deference, but questions purely of law are reviewed de novo. Id.

Waiver and judicial estoppel

Knight argues that the City either waived, or is estopped from, seeking arbitration. However, the City did not act to try to demand arbitration with Knight, the district court did this of its own accord after Canyon moved to compel the City into arbitration. See Nevada Gold & Casinos v. American Heritage, 121 Nev. 84, 90, 110 P.3d 481, 485 (2005) (“a waiver may be shown when the party seeking to arbitrate (1) knew of his right to arbitrate, (2) acted inconsistently with that right, and (3) prejudiced the other party by his inconsistent acts”) (emphasis added); Mainor v. Nault, 120 Nev. 750, 765, 101 P.3d 308, 318 (2004) (the doctrine of judicial estoppel “should be cautiously applied only when ‘a party’s inconsistent position [arises] from intentional wrongdoing or an attempt to obtain an unfair advantage.’” (alterations in original) (quoting Kitty-Anne Music Co. v. Swan, 4 Cal. Rptr. 3d 796, 800 (Ct. App. 2003))). Indeed, the City attempted to keep the case in district court, as opposed to resolving the dispute through arbitration, and the City did not support arbitration until after the district court ruled that the City must arbitrate the dispute with Canyon.³

³After the district court acted to compel arbitration, Knight filed motions for clarification and for reconsideration of the decision. The City
continued on next page . . .

Therefore, we conclude that Knight has neither alleged nor demonstrated that the City supported the district court's compulsion of Knight into arbitration for improper purposes. Thus, the doctrine of judicial estoppel is inapplicable here. Further, because the City did not act to compel arbitration, waiver of its right to arbitrate is inapposite.

NRS Chapter 338

Knight contends that pursuant to NRS Chapter 338, Knight is not a contractor, the work done was not labor, and the contract was not for a public work and, as such, the contract cannot be read to include a mandatory arbitration provision.⁴ We disagree.

Statutory interpretation is an issue of law that we review de novo. Beazer Homes Nevada, Inc. v. Dist. Ct., 120 Nev. 575, 579, 97 P.3d 1132, 1135 (2004). When the language of a statute is clear on its face, we will deduce the legislative intent from the words used. Cleghorn v. Hess, 109 Nev. 544, 548, 853 P.2d 1260, 1262 (1993).

We conclude that the district court properly interpreted NRS 338.150 to require Knight to arbitrate with the City based on its status as a contractor providing labor, as Knight provided its engineering design services, as well as its program management, construction inspection

... continued

then filed an opposition to the motion for reconsideration in which it, for the first time, supported the district court's order to compel arbitration.

⁴Knight also argues that the district court improperly subjected Knight to arbitration because it considered Knight to be part of a design-build team under NRS 338.010. However, the district court made it very clear that it did not rely on the design-build prong of the definition of "contractor" in subjecting Knight to arbitration. See NRS 338.010(3).

services, and other special services, on a public work contract.⁵ See NRS 624.020(2); NRS 338.010(3). These extra services in Knight's contract removed Knight from the position of acting under the contract as merely a design professional; instead, we agree that Knight was performing the services of a contractor. See NRS 338.010(7), 624.020(2). We conclude that Knight satisfied the requirements of NRS 338.010(3) by performing "such work that [it] is not required to be licensed pursuant to chapter 624 of NRS." As such, we conclude that because Knight acted as a contractor and performed labor under the plain meaning of the statute, the district court correctly determined that Knight became subject to NRS 338.150(1)'s mandatory arbitration provision.

Due process

Knight argues that because the City did not request that Knight be compelled into arbitration, the district court decided an issue not originally presented to the district court, ordered relief that was not requested, and thereby denied Knight its due process right to present a defense. Knight further argues that because the motion did not involve Knight, it was not able to participate in the exchange of pleadings in connection with the motion to compel arbitration and its options were limited to filing a motion for reconsideration.

Both the Fourteenth Amendment to the United States Constitution and Article 1, Section 8 of the Nevada Constitution

⁵While Knight contends that labor only includes physical labor, this interpretation would be inconsistent with Nevada caselaw and a plain reading of the statute. Labor is commonly understood to include both physical and mental exertion.

guarantee all litigants the right to due process. The due process clause guarantees an individual's fundamental right to be heard. Browning v. Dixon, 114 Nev. 213, 217, 954 P.2d 741, 743 (1998). "A procedural due process claim has two distinct elements: (1) a deprivation of a constitutionally protected liberty or property interest, and (2) a denial of adequate procedural protections." Brewster v. Bd. of Educ. of Lymwood U. School Dist., 149 F.3d 971, 982 (9th Cir. 1998). However, "[d]ue process is flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481 (1972)). Due process "recogni[zes] that not all situations calling for procedural safeguards call for the same kind of procedure." Id.

We conclude that Knight was provided with adequate due process. In analyzing whether Knight has been denied its due process rights, we first consider Knight's private interest that will be affected; we then consider the risk of an erroneous deprivation of the protected interest and the probable value of providing additional or substitute procedures; and lastly, we consider the City's interest, including any financial and administrative burdens associated with additional or substitute procedures. Mathews v. Eldridge, 424 U.S. 319, 335 (1976). Here, while it is clear that Knight's interest in having a trial is affected by the district court's order, there is no indication that any additional or substitute procedures would have provided Knight with more or better process. In addition, the governmental interest in efficiency and judicial economy weigh in favor of the conclusion that the type of process afforded to Knight was adequate. Further, Knight failed to indicate that it lost the opportunity to present any arguments or defenses simply because it was

limited to filing a motion for reconsideration. Consequently, we conclude that Knight was not deprived of its due process rights.

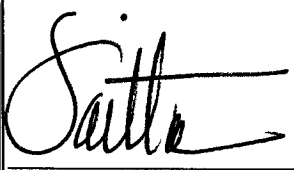
Right to a jury trial


Knight argues that its contract with the City is a protected property interest that does not contain a waiver of the right to a jury trial and that the district court's order inappropriately deprives it of this important right. However, we determined in Harris Associates v. Clark County School District that NRS 338.150's requirement of binding arbitration does not violate a litigant's right to a jury trial. 119 Nev. 638, 644, 81 P.3d 532, 536 (2003). Furthermore, we determined that this mandatory arbitration provision must be read into any public works contracts involving a contractor. Id. As such, we conclude that because Knight voluntarily agreed to contract for public works subject to mandatory arbitration pursuant to NRS 338.150, thereby accepting the condition of arbitration through incorporation, Knight waived its right to a jury trial. Therefore, we conclude that the mandatory arbitration requirement does not violate Knight's constitutional right to trial by jury.

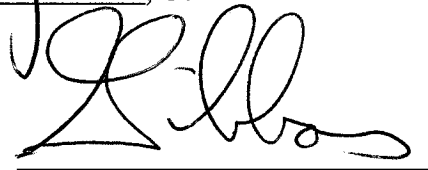
Accordingly, we decline to exercise our discretion and deny Knight's request for a petition for a writ of mandamus.

In light of the foregoing, we

ORDER the petition DENIED.


_____, J.
Saitta


_____, J.
Cherry


_____, J.
Gibbons

cc: Chief Judge, Fourth Judicial District
Hon. Miriam Shearing, Senior Justice
Weil & Drage, APC
Wulfsberg Reese Colvig & Firstman Professional Corporation
Law Offices of Michael B. Springer
Wilson Barrows & Salyer, Ltd.
Elko County Clerk