IN THE COURT OF APPEALS OF THE STATE OF NEVADA

GREG ANDERSON, AN INDIVIDUAL; LYNDA KEANE-ANDERSON, AN INDIVIDUAL; AND PARADISE PROPERTY HOLDINGS, LLC, A WYOMING LLC,
Appellants,
vs.
FORD RANCH LLC, A DISSOLVED NEVADA LLC; FORD RANCH TRUST; SCOTT A. SIBLEY, INDIVIDUALLY AND IN HIS CAPACITY AS TRUSTEE FOR FORD RANCH TRUST; CHRISTOPHER M. SHELTON, AN INDIVIDUAL; RYAN B. WELCH, AN INDIVIDUAL; AND RICHARD A. CRIGHTON, AN INDIVIDUAL,
Respondents.

No. 78684-COA

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

Greg Anderson, Lynda Keane-Anderson, and Paradise Property Holdings, LLC, appeal from a district court order granting summary judgment in a contract action. Eighth Judicial District Court, Clark County; Douglas Smith, Judge.[1]

[1]We do not recount the facts except as necessary to our disposition.

Greg Anderson and Lynda Keane-Anderson (the Andersons)[2] entered into a Residential Purchase Agreement with Ford Ranch, LLC[3] (Ford Ranch) on February 28, 2017. In the purchase agreement, the parties contracted for the sale of a residential property known as "Ford Ranch" (the property), which is made up of five separate parcels of land. As relevant to this appeal, Section 18 of the purchase agreement, labeled "DEFAULT," contains a mediation provision that states: "Before any legal action is taken to enforce any term or condition under this Agreement, the parties agree to engage in mediation, a dispute resolution process, through GLVAR." Both parties agreed to the terms of the purchase agreement, including the mediation provision, and the sale of the property closed on May 5, 2017.[4]

After taking possession of the property, the Andersons discovered that several fixtures and utilities on the property were

---

[2]After the close of escrow, Greg Anderson and Linda Keane-Anderson transferred title of the property to appellant Paradise Property Holdings, LLC.

[3]Respondent Ford Ranch Trust, through its trustee, respondent Scott A. Sibley, managed Ford Ranch, LLC. The other respondents were also members of Ford Ranch, LLC: Richard A. Crighton, Christopher M. Shelton, and Ryan V. Welsh.

[4]According to the Andersons' amended complaint, the parties' "contract" includes "the residential Purchase Agreement, the Financing Addendum, Counter offer #1, Counter offer #2, and Addendums 1, 2, 3 & 4." However, the financing addendum, counter offers, and other addenda are not contained within the record on appeal, and it is unclear whether these documents were presented to the district court. We presume that items not included in the record on appeal support the district court's decision. *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007).

inoperable or in a state of disrepair.[5] The Andersons allege that Ford Ranch either knew of these defects and failed to disclose the same, or actively concealed these defects from the Andersons before the close of escrow.

On May 2, 2018, almost one year after escrow closed on the property, the Andersons filed a complaint in district court alleging five causes of action: (1) breach of contract, (2) breach of warranty, (3) breach of statutory disclosures, (4) fraud, and (5) alter ego. The Andersons later filed an amended complaint on August 17, 2018, that added two more specific instances of fraud. Ford Ranch filed its answer and moved for summary judgment, arguing that the mediation provision was a condition precedent to litigation and, because the Andersons did not attempt to mediate before they filed their complaint, Ford Ranch was entitled to summary judgment.

In their opposition to the motion for summary judgment, the Andersons argued that the condition precedent did not bar their entire complaint as the mediation provision was limited to actions to "enforce any term or condition" of the purchase agreement. Additionally, the Andersons attached a document entitled "Homesellers/Homebuyers DISPUTE RESOLUTION SYSTEM (DRS) Mediation Program" (GLVAR mediation program) as an exhibit to their opposition, and argued that this document was incorporated by reference into the purchase agreement. This GLVAR mediation program document states that the "[s]tatute of limitations [for mediation through the program] is 180 days from discovery or date transaction concluded, whichever is later."[6] The Andersons argued that the

---

[5]The amended complaint identifies 22 discrete issues pertaining to the condition of the property.

[6]Notably, no reference to this GLVAR mediation program can be found in the purchase agreement.

GLVAR mediation program has a statute of limitations period of 180 days and because 180 days had passed since the discovery of any defects and the close of the transaction, attempting mediation would be futile.

In its reply, Ford Ranch argued that the Andersons contractually agreed to the shortened statute of limitations period and failed to abide by the condition precedent. Therefore, Ford Ranch contended that all of the Andersons' claims should be dismissed with prejudice because the Andersons not only failed to seek mediation through GLVAR, they also failed to mediate their claims within the 180-day limitations period.

The district court granted Ford Ranch's motion for summary judgment. In its order, the district court found that: (1) the purchase agreement's mediation provision was a condition precedent to litigation that applied to all of the Andersons' causes of action, (2) the 180-day statute of limitations applied, and (3) all claims were time-barred because the 180-day statute of limitations had expired. Accordingly, the district court ordered all of the Andersons' claims dismissed with prejudice. This appeal followed.

On appeal, the Andersons argue: (1) the district court erred in "concluding that mediation through GLVAR was a condition precedent to [the Andersons] filing suit on their claims . . . of breach of warranty, breach of statutory disclosures and fraud" and (2) the district court erred in concluding that the "Purchase Agreement incorporated a 180-day statute of limitations and dismissing all of [the Andersons'] claims with prejudice because they were allegedly time barred."

Standard of review

We review a district court's decision to grant summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026,

1029 (2005). Summary judgment is proper if the pleadings and all other evidence on file demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Id.* All evidence must be viewed in a light most favorable to the nonmoving party. *Id.* Additionally, "[c]ontract interpretation is a question of law and, as long as no facts are in dispute, this court reviews contract issues de novo, looking to the language of the agreement and the surrounding circumstances." *Am. First Fed. Credit Union v. Soro*, 131 Nev. 737, 739, 359 P.3d 105, 106 (2015) (quoting *Redrock Valley Ranch, LLC v. Washoe Cty.*, 127 Nev. 451, 460, 254 P.3d 641, 647-48 (2011)).

The scope of the mediation provision

We first address whether the district court erred by determining that the Andersons' breach of warranty, breach of statutory disclosures, fraud, and alter ego claims are subject to the mediation provision. The Andersons admit that the mediation provision contains a valid condition precedent to litigation, and concede that their breach of contract claim falls within the scope of the mediation provision and was therefore ripe for summary adjudication.[7]

However, the Andersons argue that their breach of warranty, breach of statutory disclosures, fraud, and alter ego claims are not actions seeking to "enforce a term or condition" of the purchase agreement and therefore the district court erred in granting summary judgment on these claims. In response, Ford Ranch asserts that because the plain language of the mediation provision contains a dependent clause, the parties must engage in mediation through GLVAR before *any* legal action is taken. Ford

[7]However, as discussed below, the Andersons contend that the district court erred in dismissing their breach of contract claim *with prejudice.*

Ranch further argues that all of the Andersons' causes of action arise from or out of the facts and circumstances surrounding the purchase agreement and therefore each of the Andersons' claims are subject to the condition precedent in the mediation clause.[8]

"It has long been the policy in Nevada that absent some countervailing reason, contracts will be construed from the written language and enforced as written." *Kaldi v. Farmers Ins. Exch.*, 117 Nev. 273, 278, 21 P.3d 16, 20 (2001) (quoting *Ellison v. Cal. State Auto. Ass'n*, 106 Nev. 601, 603, 797 P.2d 975, 977 (1990)); *see also Love v. Love*, 114 Nev. 572, 580, 959 P.2d 523, 529 (1998) ("Where language in a document is clear and unambiguous on its face, the court must construe it based on this plain language."). When interpreting a contract, courts must read the contract as a whole and avoid negating any of the contract's provisions. *Rd. & Highway Builders, LLC v. N. Nev. Rebar, Inc.*, 128 Nev. 384, 390, 284 P.3d 377, 380 (2012). Additionally, "[a] basic rule of contract interpretation is that every word must be given effect if at all possible." *Bielar v. Washoe Health Sys., Inc.*, 129 Nev. 459, 465, 306 P.3d 360, 364 (2013) (internal quotation marks omitted).

---

[8]On appeal, Ford Ranch presents several arguments relating to the merits of the Andersons' claims. However, these arguments were not raised before the district court. Because the district court did not consider whether summary judgment should be entered on the merits of the Andersons' claims, we do not address these arguments as they are presented for the first time on appeal. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court . . . is deemed to have been waived and will not be considered on appeal."). Accordingly, we express no opinion as to the merits of the Andersons' underlying claims, and nothing in this order should be construed as a resolution of those claims.

A contract provision that requires the parties to mediate before filing suit creates a condition precedent to litigation, *MB Am., Inc. v. Alaska Pac. Leasing, Co.*, 132 Nev. 78, 81-82, 367 P.3d 1286, 1288-89 (2016), and summary adjudication is appropriate when the parties fail to comply with the condition precedent, *id.* at 84, 367 P.3d at 1290. The mediation provision at issue is located within Section 18 of the purchase agreement, which is labeled "DEFAULT" and contains three subsections: "MEDIATION," "IF SELLER DEFAULTS," and "IF BUYER DEFAULTS." As relevant here, the mediation subsection states:

> Before any legal action is taken to enforce any term or condition under this Agreement, the parties agree to engage in mediation, a dispute resolution process, through GLVAR. Notwithstanding the foregoing, in the event the Buyer finds it necessary to file a claim for specific performance, this section shall not apply.

The plain language of the mediation provision limits its scope to actions initiated to "enforce any term or condition" of the purchase agreement, which is considerably narrower than a provision, such as the one in *MB America*, that requires "any disputes or questions . . . including the construction or application of the Agreement" to be submitted to mediation. *See MB Am.*, 132 Nev. at 83, 367 P.3d at 1289. Therefore, we must look at whether the Andersons' causes of action were pleaded to "enforce any term or condition" under the purchase agreement.

We acknowledge that there are alternate meanings to the phrase "term or condition," as the phrase is not only used to denote legal concepts (such as a condition precedent or condition subsequent) that qualify a duty under a contract, but is also used with a more ordinary

meaning, i.e., the provisions of the parties' contract.[9] However, "particular words or phrases in a contract should generally not be considered in a vacuum and isolated from the context but rather in light of the entire contract and the intentions of the parties as so manifested." 11 William A. Lord, *Williston on Contracts* §30:10 (4th ed. 2012).

The mediation provision is located in the section on default, which further details the remedies that both the Andersons (as buyers) and Ford Ranch (as the seller) can seek if either party defaults under the terms of the purchase agreement. The placement of the mediation provision in this specific section demonstrates that legal actions to "enforce any term or condition" does not mean any action related to any provision of the purchase agreement or any fact relevant to the sale of the property, as Ford Ranch claims, but instead refers specifically to legal actions filed to resolve a dispute or disagreement regarding the parties' obligations under the purchase agreement.

Consequently, when reviewing the Andersons' claims for breach of warranty, breach of statutory disclosures, fraud, and alter ego, we must discern whether the Andersons are seeking to enforce a duty imposed by law, or a duty or obligation arising "by virtue of the [ ] express agreement

---

[9]*See, e.g.*, 13 William A. Lord, *Williston on Contracts* §38:4 (4th ed. 2013) (acknowledging that the "haphazard and even sloppy use of the word 'condition' to mean the basic provisions of the parties' agreement, such as when the word is used in a standard form heading such as "Terms and Conditions," leads to confusion); *see also Condition*, *Black's Law Dictionary* (11th ed. 2019) (defining condition as "[a] future and uncertain event on which the existence or extent of an obligation or liability depends; an uncertain act or event that triggers or negates a duty to render a promised performance"); *Term*, *Black's Law Dictionary* (11th ed. 2019) (defining term as both "[a] contractual stipulation" itself and "[p]rovisions that define an agreement's scope, conditions or stipulations").

between the parties." *See Bernard v. Rockhill Dev. Co.*, 103 Nev. 132, 135, 734 P.2d 1238, 1240 (1987) (internal quotation omitted) (distinguishing between duties imposed by law and duties imposed by contract).

Breach of Warranty

In their complaint, the Andersons allege that in the purchase agreement, Ford Ranch "made certain warranties, both express and implied, as to the nature and condition of the property," and that Ford Ranch "breached those warranties by failing to disclose known defects in the property." The Andersons fail to identify what warranties in particular they claim were breached by Ford Ranch and, as noted above, the record on appeal does not contain the "Financing Addendum, Counter offer #1, Counter offer #2, and Addendums 1, 2, 3 & 4," which allegedly modify the purchase agreement. Nonetheless, we conclude that an action for breach of warranty is an action seeking to enforce a term or condition of the purchase agreement.

A warranty under contract is "[a]n express or implied promise that something in furtherance of the contract is guaranteed by one of the contracting parties; esp., a seller's promise that the thing being sold is as represented or promised." *Warranty*, *Black's Law Dictionary* (11th ed. 2019). "[A] seller may make an express warranty in [a] contract of sale as to the condition of real property. A breach of the warranty would be a breach of the contract, entitling the purchaser to the appropriate remedies . . . ." 17 Richard A. Lord, *Williston on Contracts* §50:36 (4th ed. 2015). Therefore, to the extent the Andersons are seeking to enforce a promise or guarantee under the contract, such as the condition of fixtures and personal property sold with the property, we conclude that these claims fall within the scope of the mediation provision. Accordingly, the district

court did not err when it granted summary judgment and ordered this claim dismissed for failure to comply with the condition precedent of mediation.[10]

Breach of Statutory Disclosures

In their complaint, the Andersons alleged that (1) Ford Ranch failed to provide them with the "required Gaming Enterprise District disclosure, notwithstanding that Clark County has a population in excess of 400,000 people,"[11] (2) that Ford Ranch failed to provide the "required Energy Consumption Evaluation,"[12] and (3) that Ford Ranch generally provided disclosures that were "substantially untruthful, incorrect and incomplete," ostensibly invoking the provisions of NRS 113.150.[13] Further, the purchase agreement contains a section entitled "Disclosures" where Ford Ranch agreed to provide the Andersons with a "Seller Real Property Disclosure Form" pursuant to NRS 113.130, and a "Construction Defect Claims Disclosure" pursuant to NRS 40.688 "within five (5) calendar days of Acceptance" of the agreement. Ford Ranch did not agree to provide any other disclosures in the purchase agreement.

---

[10]As discussed below, we conclude that while the district court correctly determined that the breach of warranty claim should be dismissed as it is subject to the condition precedent, it erred in dismissing this claim *with prejudice*.

[11]This appears to refer to NRS 113.080.

[12]This allegation appears to relate to NRS 113.115 (2011), which has since been repealed by the Nevada Legislature. *See* 2011 Nev. Stat., ch. 348, § 30, at 1956.

[13]NRS 113.150(4)(requiring compliance with the provisions of NRS 113.130 and providing for the recovery of treble damages and attorney fees if the seller is aware of defects within the property and fails to disclose those defects before conveying the property)

We conclude the Andersons' breach of statutory disclosures claim falls outside the scope of the mediation provision for two reasons. First, we recognize that NRS 113.150 creates a private right of action. *See Webb v. Shull*, 128 Nev. 85, 91-92, 270 P.3d 1266, 1270 (2012) ("It appears that the overriding purpose of NRS 113.150 is to create a statutory private right of action to award a victim adequate compensation to remedy an error or omission in disclosures made in the sale of a personal residence.").

Second, the terms and conditions of the purchase agreement do not create a duty to disclose. Rather, these disclosures are required by NRS Chapter 113, which sets forth specific statutory duties imposed by law independent of the purchase agreement's terms and conditions. Additionally, the terms of the purchase agreement do not require Ford Ranch to do anything other than *provide* the listed disclosures, and the Andersons are not seeking to force Ford Ranch to provide such disclosures.

Instead, the Andersons' breach of statutory disclosures claim challenged the substance of the disclosures as "substantially untruthful, incorrect and incomplete," which goes beyond the requirements of the agreement. Therefore, we conclude that the district court erred in granting summary judgment on this claim because it is not subject to the mediation provision, and we reverse the district court's grant of summary judgment as to this claim and remand it back to the district court for further proceedings.

Fraud

In their complaint, the Andersons allege that Ford Ranch "made a number of material misrepresentations of fact" and that the Andersons subsequently "relied to their detriment on these material misrepresentations of fact, both in agreeing to addenda modifying the

obligations to the parties as to the water rights issues, and also in agreeing to move forward with the purchase of the property."

Nevada has long recognized that contractual claims are separate from contract-related tort claims, such as fraudulent misrepresentation. "A breach of contract may be said to be a material failure of performance of a duty arising under or imposed by agreement." *Bernard v. Rockhill Dev. Co.*, 103 Nev. 132, 135, 734 P.2d 1238, 1240 (1987) (quoting *Malone v. Univ. of Kan. Med. Ctr.*, 552 P.2d 885, 888 (Kan. 1976)). "A tort, on the other hand, is a violation of a duty imposed by law, *a wrong independent of contract*." *Id.* (quoting *Malone*, 552 P.2d at 888). In *Bernard*, the supreme court concluded that while the appellants and respondent maintained a contractual relationship, the appellants also had a separate tort claim for fraudulent misrepresentation independent from the contract claim. *Id.* (recognizing that "[t]orts can, of course, be committed by parties to a contract. The question to be determined . . .is whether the actions or omissions complained of constitute a violation of duties imposed by law, or of duties arising by virtue of the alleged express agreement between the parties." (internal quotation omitted)).

Here, the Andersons have pleaded a cause of action for fraudulent misrepresentation, which sounds in tort, not contract. Consequently, these claims, while concerning the same subject matter as the purchase agreement, do not fall under the contract as they are not seeking to enforce a term or condition of the agreement. We therefore conclude that the district court improperly granted summary judgment on the fraud claim for failure to comply with the condition precedent, reverse the district court's dismissal of the Andersons' fraud claim, and remand this claim back to the district court for further proceedings.

Alter Ego

The Andersons' claim of alter ego, which would potentially allow recovery against the managers and members of Ford Ranch, LLC, does not fall within the scope of the mediation provision as alter ego is a legal theory separate from the terms or conditions of the purchase agreement. *See LFC Mktg. Grp., Inc. v. Loomis*, 116 Nev. 896, 902-03, 8 P.3d 841, 845-46 (2000) (discussing the elements and purpose of the alter ego doctrine.). We therefore conclude that the district court improperly granted summary judgment on the Andersons' alter ego claim.

Statute of limitations

We now turn to whether the district court erred by concluding that the purchase agreement incorporated a 180-day statute of limitations for all claims, thereby dismissing all of the Andersons' claims with prejudice.

Because we concluded above that the Andersons' breach of statutory disclosures, fraud and alter ego claims are not subject to the mediation provision, we likewise conclude that those claims are not subject to the 180-day statute of limitations. Accordingly, the district court additionally erred in dismissing these claims with prejudice for failure to comply with the 180-day statute of limitations. We now address whether the 180-day statute of limitations applies to bar the Andersons' breach of contract and breach of warranty claims.

On appeal, the Andersons argue that the "180-day statute of limitations" noted on the GLVAR mediation program document should not have barred their claims because there is no evidence that the parties contractually agreed to shorten the statute of limitations. They further argue that shortening the statute of limitations period from 6 years to 180

days is unreasonable and against public policy. Ford Ranch contends that the Andersons are enjoined "from making this argument, in that it was [the Andersons] that argued in the district court that the GLVAR mediation program [including the statute of limitations] was specifically incorporated into the Residential Purchase Agreement . . . ."

Nevada has long recognized a public "interest in protecting the freedom of persons to contract." *Hansen v. Edwards*, 83 Nev. 189, 192, 426 P.2d 792, 793 (1967). Consequently, the supreme court has held that "a party may contractually agree to a limitations period shorter than that provided by statute as long as there exists no statute to the contrary and the shortened period is reasonable." *Holcomb Condo. Homeowners' Ass'n, Inc. v. Stewart Venture, LLC*, 129 Nev. 181, 187, 300 P.3d 124, 128 (2013). "A contractually modified limitations period is unreasonable if the reduced limitations period 'effectively deprives a party of the reasonable opportunity to vindicate his or her rights.'" *Id.* at 188, 300 P.3d at 129 (quoting *Hatkoff v. Portland Adventist Med. Ctr.*, 287 P.3d 1113, 1121 (Or. Ct. App. 2012)).

We conclude that the district court erred for two reasons. First, under *Holcomb*, the parties must contractually agree to the shortened statute of limitations. *See Holcomb*, 129 Nev. at 187, 300 P.3d at 128. Here, although the Andersons argued that the GLVAR mediation program was incorporated by reference into the purchase agreement, there is no express agreement or language in the purchase agreement that shows that the parties intended to contractually shorten the statute of limitations period to file suit in district court. Indeed, there is no mention of the statute of limitations within the purchase agreement, and the 180-day statute of limitations contained within the GLVAR mediation program applied only to mediation through GLVAR. Therefore, interpreting the purchase

agreement as containing a statute of limitations to file suit in district court "would be virtually creating a new contract for the parties, which they have not created or intended themselves, and which, under well settled rules of construction, the court has no power to do." *Reno Club, Inc. v. Young Inv. Co.*, 64 Nev. 312, 323, 182 P.2d 1011, 1016 (1947).

Second, even assuming arguendo that the purchase agreement contained an express agreement to contractually shorten the statute of limitations to file suit in district court, we recognize that imposing a 180-day statute of limitations may "effectively deprive [the Andersons] of the reasonable opportunity to vindicate [their] rights." *See Holcomb*, 129 Nev. at 188, 300 P.3d at 129. A 6-year statute of limitations period ordinarily applies to breach of contract claims and breach of warranty claims. *See* NRS 11.190(1). We conclude shortening a claim's limitations period from 6 years to 180 days, without an express agreement to do so, is not effective to bind the parties. Therefore, we agree with the Andersons that the district court erred when it dismissed their breach of contract and breach of warranty claims *with prejudice*.[14]

Accordingly, we affirm the district court's grant of summary judgment as to the breach of contract and breach of warranty claims and modify the order of the district court to state that those claims are dismissed *without prejudice*, rather than *with prejudice* as the parties did not contractually agree to shorten the statute of limitations period. However, as discussed above, we reverse the portion of the district court's order granting summary judgment on the Andersons' breach of statutory

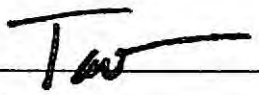
---

[14]*See Tattoo Art, Inc. v. TAT Int'l, LLC*, 711 F. Supp. 2d 645, 652, 655 (E.D. Va. 2010) (dismissing the action without prejudice for failing to comply with a condition precedent).

disclosures, fraud, and alter ego claims, because the district court erroneously determined that these claims were subject to the condition precedent contained within the mediation provision. Thus, we remand this matter to the district court for further proceedings regarding these claims.[15] Therefore, we

ORDER the judgment of the district court AFFIRMED IN PART as modified AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.

_____, C.J.
Gibbons



_____, J.
Tao

_____, J.
Bulla

cc: Hon. Linda Marie Bell, Chief Judge
Lansford W. Levitt, Settlement Judge
Brian K. Berman
Kerry P. Faughnan
Eighth District Court Clerk

---

[15]Insofar as the parties raise arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal. *See Weaver v. State, Dep't of Motor Vehicles*, 121 Nev. 494, 502, 117 P.3d 193, 198-99 (2005) (explaining that this court need not consider issues raised for the first time on appeal in appellant's reply brief).