IN THE SUPREME COURT OF THE STATE OF NEVADA

MUSIC TRIBE COMMERCIAL NV INC., A NEVADA CORPORATION,
Appellant,
vs.
ATKINS EVENT PRODUCTIONS INC.; AND SEAN ATKINS, AN INDIVIDUAL,
Respondents.

No. 84140

FILED

MAR 24 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER AFFIRMING IN PART AND VACATING IN PART

This is an appeal from a district court order dismissing with prejudice claims for account stated, breach of the implied covenant of good faith and fair dealing, and unjust enrichment, and transferring venue to Makati City, Philippines. Eighth Judicial District Court, Clark County; Mark Gibbons, Sr. Judge.

Facts and procedural history

In 2015, respondent Atkins Event Productions, Inc. (Atkins Company) contracted for the purchase of $500,000 in sound equipment from nonparty Music Group Commercial BM Ltd. (Bermuda Company). Respondent Sean Atkins, Atkins Company's president,[1] personally guaranteed the Sale and Purchase Agreement (the Agreement), which incorporated a payment schedule and interest terms in the event Atkins Company defaulted on its payments. The Agreement also contained a forum-selection clause, providing that the "[p]arties submit to the exclusive jurisdiction of the courts in Makati City, Philippines." After failed attempts by Sean Atkins to renegotiate payment terms via email and to make

[1]We refer to Sean Atkins and the Atkins Company collectively as "Atkins."

payments on such amended terms, appellant Music Tribe Commercial NV Inc. (Nevada Company), a subsidiary of Bermuda Company, filed the underlying complaint.

Atkins filed a motion to dismiss, arguing that Nevada Company was not a party to the Agreement and that, regardless, the Agreement contained a mandatory forum-selection clause. In response, Nevada Company maintained that its claims did not arise under the Agreement, but rather from an account stated in a 2016 email exchange between the parties. The district court held that Nevada Company's claims, as pleaded, did not implicate the forum-selection clause and denied the motion.

Atkins then moved for summary judgment, arguing in part that there was never any debtor-creditor relationship between Atkins Company and Nevada Company as required for an account stated, and that Bermuda Company and Nevada Company were not in an assignor-assignee relationship. Nevada Company, in opposition, claimed for the first time to be Bermuda Company's assignee and supplied a formal assignment and assumption of account as an exhibit. The district court found that there was an issue of fact as to Nevada Company's alleged status as successor in interest to Bermuda Company and denied summary judgment.

Atkins again moved to dismiss and transfer venue, arguing that any assignment subjected Nevada Company to the Agreement's forum-selection clause. It stressed that Nevada Company's assertions that Nevada Company brought its claims independent of the Agreement directly contradicted the contention raised on summary judgment that it was an assignee. In opposition, Nevada Company cited a separate email exchange between its director and Sean Atkins in 2017, allegedly memorializing a novation and account stated. It argued that the assignment only assigned

a right to collect payment on the account, not on the contract, and that a novation via the account stated extinguished the forum-selection clause. Nevada Company argued that in the event the court found a quasi-contract the unjust-enrichment claim must still stand.

After additional oral argument and supplemental briefing, the district court granted Atkins's motion. It concluded that Atkins entered into the Agreement, which included the forum-selection clause with Bermuda Company, not Nevada Company. Nevada Company, on the other hand, simply negotiated a debt obligation that Atkins owed to Bermuda Company. Thus, any "novation of financial terms, if applicable," did not alter the forum-selection clause in the Agreement. The district court issued an order dismissing all pending claims with prejudice and ordering the matter transferred pursuant to the forum-selection clause. Nevada Company appeals that decision.

On appeal, Nevada Company argues that the district court erred in failing to make findings of fact and conclusions of law as to whether the 2017 email exchange created a novation that extinguished all terms—including the forum-selection clause—of the original Agreement. It argues that this novation supplies a basis for its account stated and implied covenant of good faith and fair dealing claims. Alternatively, it argues that the unjust enrichment claim should survive dismissal because it arose from a separate agreement between Nevada Company and Atkins, where Nevada Company forgave interest, altered payment terms, and provided additional

equipment, but Atkins failed to make payments on the account in exchange.[2]

Discussion

"[T]he appropriate way to enforce a forum-selection clause pointing to a state or foreign forum is through the doctrine of forum non conveniens." *Atl. Marine Constr. Co. v. U.S. Dist. Ct. for W. Dist. of Tex.*, 571 U.S. 49, 60 (2013) (italicization omitted). This court reviews "a district court's order dismissing an action for forum non conveniens for an abuse of discretion." *Provincial Gov't of Marinduque v. Placer Dome, Inc.*, 131 Nev. 296, 300, 350 P.3d 392, 395-96 (2015). However, the applicability of a forum-selection clause in a contract and interpretation thereof are reviewed de novo. *See Am. First Fed. Credit Union v. Soro*, 131 Nev. 737, 739, 359

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[2]In reply on appeal, Nevada Company also raised the argument that Atkins was estopped from arguing that the forum-selection clause divests Nevada courts of jurisdiction because their counterclaim stated that jurisdiction was proper in Nevada. However, Nevada Company did not raise this argument in either its opposition to the motion to dismiss and transfer venue or its supplemental briefing before the district court, nor was it raised in its opening brief on appeal; accordingly, the argument is waived. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52 623 P.2d 981, 983 (1981) (deeming arguments not raised below waived unless they go to the jurisdiction of the court); *see also In re Nev. State Eng'r Ruling No. 5823*, 128 Nev. 232, 245, 277 P.3d 449, 457 (2012) (holding that a clause prescribing a forum relates to venue and not jurisdiction); *Liberty Mut. v. Thomasson*, 130 Nev. 27, 34, 317 P.3d 831, 836 (2014) (differentiating between jurisdiction and venue). Even if Nevada Company properly presented the issue for our appellate review, the third element of judicial estoppel fails because Atkins has not successfully asserted the first position as alleged in its counterclaim. *See Matter of Frei Irrevocable Tr. Dated Oct. 29, 1996*, 133 Nev. 50, 56, 390 P.3d 646, 652 (2017) (outlining the five elements of judicial estoppel and recognizing that the third element—that "the party was successful in asserting the first position"—presupposes judicial endorsement of the position).

P.3d 105, 106 (2015). And, "whether a certain or undisputed state of facts establishes a contract is a question of law for the court." *See* 17A Am. Jur. 2d *Contracts* § 18 (2016); *see also* 58 Am. Jur. 2d *Novation* § 22 (2023) (observing that intent to novate is question of law where "the state of the evidence is such that reasonable minds cannot differ as to its effect").

The email exchange did not novate the Agreement

Nevada law defines a novation as a "substitution of a new obligation for an existing one." *Williams v. Crusader Disc. Corp.*, 75 Nev. 67, 70, 334 P.2d 843, 845 (1959). It therefore "discharges the original duty, just as any other substituted contract does, so that breach of the new duty gives no right of action on the old duty." *Restatement (Second) of Contracts* § 280 cmt. b (Am. Law Inst. 1981). However, alterations that retain the contract's general purpose while extending "time for payment" or "merely reschedul[ing] a debt" "constitute a mere modification of the original contract, and not a novation." 58 Am. Jur. 2d *Novation* § 16; *see also Stinnett v. Damson Oil Corp.*, 648 F.2d 576, 582 (9th Cir. 1981) (rejecting a "self-serving" attempt to "mischaracteriz[e]" a price reduction agreement as a novation, as it amounted only to an alteration of the original contract that left "undisturbed its general purpose").

A traditional novation requires at least three parties. 13 Sarah Howard Jenkins, *Corbin on Contracts* § 71.3 (2022). As alleged here, "[a] novation by substituted obligee can be brought about by an agreement between the obligee and the obligor." *Id.* § 71.3[4]. It results either where (1) "an obligee promises his obligor to discharge the obligor's duty in consideration for the obligor's promise to a third person to render either the performance that was due from the obligor or some other performance," or (2) "the obligor's promise is one made directly to the obligee but is one to render the performance to a third person as beneficiary." *Restatement*

(Second) of Contracts § 280 cmt. e. In both of these scenarios, "this substitution is effectuated by an agreement between" the *original* debtor-obligor and creditor-obligee. *See Corbin on Contracts*, *supra* § 71.3[4]. Moreover, Nevada law requires that "[t]he intent of all parties to cause a novation must be clear." *See United Fire Ins. Co. v. McClelland,* 105 Nev. 504, 508, 780 P.2d 193, 195 (1989).

Here, Nevada Company's ability to avoid the Agreement's forum-selection clause turns on whether the 2017 email exchange amounts to a novation under which it became the new obligee and the Agreement ceased to be a binding contract. But an email exchange chiefly dedicated to memorializing a changed payment schedule and amounts, even if taken as true, amounts only to a modification as a matter of law. *See* 58 Am. Jur. 2d *Novation* § 16 ("[T]here is no novation when an agreement allows an extension of time for payment or other performance, or merely reschedules a debt."); *see also Restatement (Second) of Contracts* §§ 89 cmt. a, 280 cmt. a, b (differentiating between a modification, which adjusts "on-going transactions," and a novation, which "discharges the original duty" by "adding a party . . . who was not a party to the original duty"). Any agreement via email was tantamount to "modifications of a quantitative nature and other minor variations to the original contractual relationship" and was not sufficient to "significantly alter" the Agreement. *Francisco Garraton, Inc. v. Lanman & Kemp-Barclay & Co. Inc.*, 559 F. Supp. 405, 407 (D.P.R. 1983) (declining to find an "extinctive novation" that eliminated

the parties' obligations, as "such drastic results can only be produced when the parties are fully aware of them").[3]

Nevada Company also incorrectly argues that the novation is valid so long as the new creditor-obligee assents. In contrast, Nevada law recognizes that "intent of all parties" to novate is necessary. *See United Fire*, 105 Nev. at 508, 780 P.2d at 195. Moreover, assent of the original obligee and obligor is necessary where the parties seek to substitute obligees. *See Restatement (Second) of Contracts* § 280 cmt. c, e; *Restatement (First) of Contracts* § 424 cmt. c (Am. Law. Inst. 1932) ("An agreement between the debtor and a third person that the debtor shall have a new creditor is obviously inoperative as a discharge until and unless the existing creditor is willing to give up his right."); *see also Corbin on Contracts*, *supra*, at § 71.3[4] (illustrating novations with substituted obligees conditioned on the original obligee's agreement). The undisputed state of facts here—an email exchange between Nevada Company's director and Sean Atkins—does not evince a "clear understanding" that either Bermuda Company or Atkins intended to substitute parties and thus assented to a "complete novation." *Pink v. Busch*, 100 Nev. 684, 690, 691 P.2d 456, 460 (1984) (italicization omitted).

Nevada Company further asserts that the requisite assent exists because it functioned as Bermuda Company's agent. But Nevada Company waived this argument because it neither argued this below nor

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[3]We have considered Nevada Company's remaining arguments, including that the email had additional terms that constitute a novation, and conclude that those arguments do not warrant a different outcome. *See Williams*, 75 Nev. at 70, 334 P.2d at 845 (stating that a novation requires a "substitution of a new obligation for an existing one").

addressed the waiver issue in its reply brief on appeal.[4] *See Old Aztec Mine*, 97 Nev. at 52, 623 P.2d at 983 ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal."). In fact, its arguments below and on appeal consistently showcase its misunderstanding that it must evidence Atkins and Nevada Company's intent instead. Taken together, the district court did not err in concluding as a matter of law that the parties' conduct in 2017 only altered the debt obligation and, consequently, left the Agreement and its forum-selection clause intact.[5]

The claims dependent on the nonexistent novation fail

Given that there was no novation of the Agreement, Nevada Company's claims for an account stated and breach of the implied covenant of good faith and fair dealing necessarily fail because such claims are premised on a nonexistent novation.[6] So too does its unjust-enrichment claim fail. The assignment from Bermuda Company to Nevada Company

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[4]Even if it were not waived, Nevada Company failed to provide legal authority for the proposition that its subsidiary status vests it with authority to enter into a complete novation on Bermuda Company's behalf. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (declining to consider arguments that are unsupported by "relevant authority").

[5]Although the district court appeared to use "novation" and "alteration" synonymously, it did not err in ultimately concluding that the forum-selection clause applied and therefore dismissing the claims.

[6]Moreover, no debtor-creditor relationship between Nevada Company and Atkins existed, which is required for an account stated. *See Old West Enters. Inc. v. Reno Escrow Co.*, 86 Nev. 727, 729, 476 P.2d 1, 2 (1970) (stating that an account stated is "an agreement based upon *prior transactions* between the parties with respect to the items composing the account and the balance due" (emphasis added)).

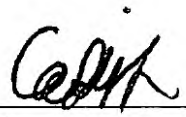
granted a right emanating from the Agreement, but "[a]n action based on a theory of unjust enrichment is not available when there is an express, written contract, because no agreement can be implied when there is an express agreement." *Leasepartners Corp. v. Robert L. Brooks Tr. Dated Nov. 12, 1975*, 113 Nev. 747, 755, 942 P.2d 182, 187 (1997). And the express written contract here, which was merely altered in 2017, contains a forum-selection clause. *See Farrell Lines Inc. v. Columbus Cello-Poly Corp.*, 32 F. Supp. 2d 118, 126 (S.D.N.Y. 1997), *aff'd sub nom. Farrell Lines Inc. v. Ceres Terminals Inc.*, 161 F.3d 115 (2d Cir. 1998) ("[I]f defendants were correct and a party could escape the effect of a forum selection clause by assigning or subrogating its rights, such a clause would serve little purpose."). More importantly, not only did Nevada Company fail to cogently maintain on appeal that an assignment of collection rights carries no ties to the original contract establishing such rights, but it also failed to provide any legal authority for either this proposition or the proposition that this bifurcation of rights allows unjust enrichment claims. *See State v. Eighth Judicial Dist. Court (Doane),* 138 Nev., Adv. Op. 90, 521 P.3d 1215, 1221 (2022) (observing that it is the parties' responsibility to "frame the issues for decisions and assign to courts the role of neutral arbiter of matters the parties present" (citing *Greenlaw v. United States*, 554 U.S. 237, 243 (2008))); *see also Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38 (declining to consider positions not cogently argued and lacking legal support).

Therefore, the district court properly dismissed Nevada Company's asserted claims with prejudice as two are premised on the faulty novation theory and the third is not viable when there is an express contract governing the relationship. However, while the dismissal of these claims with prejudice would not preclude the future assertion of any appropriate

claims under the Agreement and any modifications thereto, *Williams v. Jensen,* 81 Nev. 658, 660, 408 P.2d 920, 921 (1965) (observing that dismissal with prejudice precludes "subsequent action[s] based on the same claim for relief"), the district court erred in ordering the matter transferred to the Philippines, as a Nevada court does not have the power to transfer a case outside the state of Nevada. *See Ficarra v. Consol. Rail Corp.*, 242 A.3d 323, 328 n.7 (Pa. Super. Ct. 2020) (noting that state courts "lack the authority to transfer matters to courts of our sister states"); *see also Liberty Mut.*, 130 Nev. at 34, 317 P.3d at 836 (applying transfer and dismissal as mutually exclusive remedies). Rather, it would be up to the parties to file any claims in that jurisdiction in accordance with the Agreement.

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED IN PART as to the dismissal of claims AND VACATED IN PART as to the purported transfer of those claims to Makati City, Philippines.



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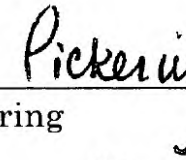

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cc: Hon. Mark Gibbons, Sr. Justice
Stephen E. Haberfeld, Settlement Judge
Hutchings Law Group, LLC

Hofland & Tomsheck
Eighth District Court Clerk