For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

MOHAMMED SUID, Appellant/Plaintiff, v. **LAW OFFICE OF KARIN A. BENTZ, P.C. and KARIN A. BENTZ**, Appellees/Defendants.	)	**S. Ct. Civ. No. 2020-0017** Re: Super. Ct. Civ. No. 349/2018 (STT)

On Appeal from the Superior Court of the Virgin Islands
Division of St. Thomas & St. John
Superior Court Judge: Hon. Denise M. Francois

Argued: March 9, 2021
Filed: September 9, 2021

Cite as: 2021 VI 14

BEFORE: **RHYS S. HODGE**, Chief Justice; **MARIA M. CABRET**, Associate Justice; and **IVE ARLINGTON SWAN**, Associate Justice.

APPEARANCES:

Lee J. Rohn, Esq.
Rhea Lawrence, Esq. (Argued)
Lee J. Rohn & Associates, LLC
St. Croix, U.S.V.I.
Attorneys for Appellant,

Charlotte K. Perrell, Esq.
Dudley Newman Feuerzeig LLP
St. Thomas, U.S.V.I.
Attorney for Appellees.

OPINION OF THE COURT

HODGE, Chief Justice.

¶ 1 Appellant Mohammed Suid appeals from the Superior Court's January 30, 2020 order,

which denied his motion for relief under Rule 60(b) of the Virgin Islands Rules of Civil Procedure. For the reasons that follow, we reverse.

I. BACKGROUND

¶ 2 On July 20, 2018, Suid sued the Law Offices of Karin A. Bentz, P.C., and its principal, Karin A. Bentz, Esq. (collectively "Bentz") on various causes of action related to a billing dispute stemming from Bentz's representation of Suid in several personal injury matters in the Virgin Islands and Florida. Bentz filed a motion to compel arbitration on September 4, 2018, relying on an arbitration clause in all the fee agreements which provided, in pertinent part, that

> Questions or disputes as to the amount of a statement shall be brought to the attention of the Firm within fifteen (15) days of receipt of the bill. The statement will be reviewed and you may be charged for this time unless that statement is in error. If Agreement cannot be reached, the matter shall be submitted to Mediation first and then to the American Arbitration Association in accordance with their rules for Commercial Disputes for a final binding and judicially-enforceable arbitration award concerning amounts due.

(J.A. 42.) The Superior Court granted the motion in an October 26, 2018 order, which compelled that the parties proceed to arbitration and dismissed Suid's complaint with prejudice.

¶ 3 Suid complied with the Superior Court's order by filing a demand for arbitration with the American Arbitration Association ("AAA") on October 31, 2018. Approximately one month later, the AAA advised the parties in a November 27, 2018 letter that it would apply its consumer rules to the arbitration. It further advised that, for the arbitration to proceed, Suid was required to pay a $200 filing fee and that Bentz was required to register her business with the AAA as well as pay a fee of $3,050. The AAA set a December 11, 2018 deadline for payment of these fees, and advised that if the AAA were to not administer the arbitration, "either party may choose to submit its dispute to the appropriate court for resolution." (J.A. 127.) In a December 11, 2018 letter, Bentz advised the AAA that that she would not do so unless the AAA applied its commercial rules to the

dispute rather than the consumer rules, and noted that the fee agreements required the parties the submit to mediation administered by the AAA prior to arbitration. In a November 27, 2018 letter, the AAA reiterated that pursuant to a specific provision within its commercial rules that applies to "disputes arising out of consumer arbitration agreements," (J.A. 126) its consumer rules would apply to the dispute, and that Bentz was required to register her business and pay the $3,050 fee by an extended deadline of December 11, 2018. (J.A. 127.) On December 12, 2018, the registration and payment deadline was again extended to December 27, 2018. (J.A. 128) In a December 27, 2018 letter, Bentz renewed her argument that the commercial rules should apply, and that mediation occur before arbitration. The AAA, in a January 4, 2019 email, reaffirmed its determination that the consumer rules were the applicable provisions, noted that it had received the filing fee from Suid, and gave Bentz until January 18, 2019, to register her business and pay the $3,050 fee. The email further stated that "[a]t this time the AAA will only address case-related issues concerning administrative filing requirements" and that "[a]ny other issues the parties raise will be deferred until such time as the filing requirements have been met." (J.A. 188.) Despite the AAA having advised the parties that it would defer consideration of all other issues until all administrative filing requirements were met, on January 17, 2019, Bentz sent another letter to the AAA requesting that the AAA refer the matter to mediation. Therefore, in a January 23, 2019 letter, the AAA stated that because Bentz had not complied with the AAA's filing requirements, it would return the filing fee to Suid and close its file on the arbitration.

¶ 4 On January 30, 2019, Suid filed a motion with the Superior Court pursuant to Rule 60(b) of the Virgin Islands Rules of Civil Procedure,[1] requesting that it set aside its October 26, 2018

[1] Pursuant to this rule,

dismissal order and reinstate his complaint because Bentz had waived her right to arbitrate by failing to participate in the arbitration proceeding. Bentz filed an untimely opposition to that motion on March 4, 2019, without obtaining leave of court,[2] which renewed her argument that the parties were required to mediate the dispute prior to arbitration.

¶ 5 The Superior Court did not immediately rule on the Rule 60(b) motion. Again without obtaining leave of court, Bentz filed a supplemental opposition to the motion on December 12, 2019, which contended that Suid's motion was moot because the parties had mediated the dispute on September 18, 2019, with a resolution not reached, and that Bentz had initiated a new arbitration proceeding with the AAA on September 22, 2019. Suid did not file a formal response to the supplemental opposition, but instead on January 15, 2020, filed an emergency motion to stay arbitration and seeking a ruling on the pending Rule 60(b) motion.

¶ 6 On January 30, 2020, the Superior Court issued two separate orders. In the first order, the Superior Court denied the Rule 60(b) motion as moot without addressing Suid's waiver argument,

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> On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
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> (1) mistake, inadvertence, surprise, or excusable neglect;
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> (2) newly discovered evidence that could not, with reasonable diligence, have been discovered in time to move for a new trial under Rule 59(b);
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> (3) fraud (whether in a form previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
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> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
>
> (6) any other reason that justifies relief.

V.I. R. CIV. P. 60(b).

[2] *See* V.I. R. Civ. P. 6-1(f) ("Unless otherwise ordered by the court, a party shall file a response within 14 days after service upon the party of any motion – except a motion filed pursuant to Rule 12 or Rule 56.").

concluding that the motion was moot because Bentz filed a new arbitration proceeding with the AAA. In the second order, the Superior Court denied the request for a ruling on the Rule 60(b) motion as moot and declined to stay the arbitration proceeding.

¶ 7 Suid filed a timely notice of appeal with this Court on February 26, 2020. *See* V.I. R. APP. P. 5(a)(1). On February 19, 2021, this Court granted Suid's motion to stay the arbitration proceeding, which had been scheduled to begin on February 22, 2021. *See Suid v. Bentz*, 2021 VI 1U.

II. DISCUSSION

A. Jurisdiction and Standard of Review

¶ 8 Pursuant to the Revised Organic Act of 1954, this Court has appellate jurisdiction over "all appeals from the decisions of the courts of the Virgin Islands established by local law[.]" 48 U.S.C. § 1613a(d). Title 4, section 32(a) of the Virgin Islands Code vests this Court with jurisdiction over "all appeals arising from final judgments, final decrees, [and] final orders of the Superior Court." Because the Superior Court's January 30, 2020 orders resolved all of the claims between the parties, taken together, they constitute a final judgment within the meaning of section 32(a), thereby conferring jurisdiction on this Court. *Joseph v. Daily News Publishing Co., Inc.*, 57 V.I. 566, 578 (V.I. 2012).

¶ 9 The denial of a motion for relief under Rule 60(b) is reviewed only for abuse of discretion. *Martin v. Martin*, 54 V.I. 379, 387 (V.I. 2010). "An abuse of discretion involves a finding of clearly erroneous fact, an errant conclusion of law, or an improper application of law to fact." *Shoy v. People*, 55 V.I. 919, 925 (V.I. 2011).

B. Denial of Rule 60(b) Relief

¶ 10 The sole issue on appeal is whether the Superior Court erred when it denied Suid's Rule

60(b) motion as moot.[3] Specifically, Suid contends that the Superior Court erroneously ignored its argument that Bentz had waived her right to arbitration, and that as a matter of law he was entitled to have his complaint reinstated because of that waiver.

¶ 11 It is well-established that the Superior Court lacks the discretion to simply ignore a claim or issue that was properly before it. *Bryan v. Fawkes*, 61 V.I. 416, 476 (V.I. 2014) (citing *Garcia v. Garcia*, 59 V.I. 758, 771 (V.I. 2013)). Here, Suid raised the issue of waiver in a timely-filed Rule 60(b) motion, yet the Superior Court did not address that claim on the merits. Rather, the Superior Court, after summarizing Suid's arguments, simply concluded that

> [S]ubsequent court filings by Suid and the Firm have established that the parties have filed new arbitration proceedings before the AAA and an arbitrator has been appointed. Given that the parties have proceeded to arbitration, Suid's Motion will be denied as moot.

(J.A. 7.)

¶ 12 Had Suid's Rule 60(b) motion requested that the Superior Court compel Bentz to participate in arbitration, her decision to initiate a new arbitration proceeding and pay the requisite fees may very well have rendered that motion moot. But that is not the relief Suid sought in that motion. Rather, Suid sought vacatur of the October 26, 2018 dismissal order and reinstatement of his complaint. This form of relief could still have meaningfully been granted by the Superior Court. *V.I. Taxi Ass'n v. V.I. Port Auth.*, 67 V.I. 643, 663 (V.I. 2017). And to the extent any doubt or ambiguity existed as to what relief Suid sought through his Rule 60(b) motion, his January 15, 2020 filing should have dispelled it, in that he expressly requested that the Superior Court stay the newly filed arbitration proceeding and issue a ruling granting the Rule 60(b) motion. Thus, the

[3] In his appellate brief, Suid also argues that the Superior Court erred when it declined to stay the arbitration proceedings. However, this issue is moot in light of this Court's February 19, 2021 order granting such a stay pending appeal.

Rule 60(b) motion did not become moot simply because Bentz initiated a new arbitration proceeding, in that the Superior Court could have determined that Bentz waived her right to arbitrate the dispute under the fee agreements and therefore could have granted the motion to reinstate the complaint.

¶ 13 Since the Superior Court failed to consider Suid's waiver argument, we may vacate the January 30, 2020 orders on that ground alone. *Rivera-Mercado v. General Motors Corp.*, 51 V.I. 307, 312 (V.I. 2009). But while we may vacate the judgment on that ground, we are not necessarily required to do so. Ordinarily, on appeal this Court reviews the denial of a Rule 60(b) motion only for abuse of discretion. *Gould v. Salem*, 59 V.I. 813, 817 (V.I. 2013). However, in this case the facts relevant to the Rule 60(b) motion are entirely undisputed, and all that remains to adjudicate is a pure legal question: whether Bentz, by failing to arbitrate in the initial arbitration proceeding, waived her right to arbitrate the dispute. Consequently, we may, in our discretion, look past the Superior Court's error and determine whether the Superior Court should have granted the Rule 60(b) motion due to Bentz's alleged waiver. *Harris v. Garcia*, S. Ct. Civ. No. 2008-0082, 2010 WL 330331, at *4 (V.I. Jan. 14, 2010) (unpublished). In making this determination, "this Court considers whether the Superior Court could have properly denied [the] motion on the merits even if it had not erroneously denied it" on other grounds. *Id.*

¶ 14 We agree with Suid that Bentz has waived her right to demand arbitration of the claims raised in his complaint. Numerous courts have held that a party who demands arbitration under an arbitration agreement but then refuses to pay the arbitration filing fee, resulting in dismissal or closure of the arbitration proceeding, has committed a material breach of the arbitration agreement and waived the right to compel arbitration. *See, e.g., Freeman v. SmartPay Leasing, LLC*, 771 Fed. Appx. 926 (11th Cir. 2019); *Pre-Paid Legal Services, Inc. v. Cahill*, 786 F.3d 1287 (10th Cir.

2015); *Brown v. Dillard's, Inc.,* 430 F.3d 1004 (9th Cir. 2005); *Sanderson Farms, Inc. v. Gatlin*, 848 So.2d 828 (Miss. 2003). Moreover, the courts that have considered the question have also held that a party who has breached the arbitration agreement by failing to pay the arbitration filing fee cannot undo or cure that breach by initiating a second arbitration proceeding and paying the fee in that matter. *See, e.g., Bruzda v. Sonic Automotive,* 2017 WL 5178967, at *5 (D. Colo. Jan. 23, 2017) (unpublished) ("Defendant's willingness to pay fees in [the second] case is insufficient to overcome the prior default."); *Norgren, Inc. v. Ningbo Prance Long, Inc.*, 2015 WL 5562183, at *10 (D. Colo. Sept. 22, 2015) (unpublished) ("NPL argues that *Pre-Paid Legal Services* is not controlling because NPL has paid its required fees in the Second Arbitration and is not in default in that particular proceeding. This argument, however, is squarely at odds with the Tenth Circuit's unambiguous statement that 'a party's failure to pay its share of arbitration fees breaches the arbitration agreement and precludes any subsequent attempt by that party to enforce that agreement.'") (quoting *Pre-Paid Legal Servs., Inc.*, 786 F.3d at 1294); *Fire Ass'n of Philadelphia v. Appel*, 80 N.E. 952, 955 (Ohio 1907) ("When one arbitration fails from default of one of the parties, the other is not bound to enter into a new arbitration agreement.").

¶ 15 Bentz, perhaps recognizing the overwhelming authorities in support of waiver under very similar factual circumstances, places great emphasis on the fact that the parties' agreement provided for them to mediate any dispute before arbitration.[4] As a threshold matter, Bentz's

[4] Bentz also argues that the AAA failed to apply the terms of the fee agreements when it determined that it would apply its consumer rules to the proceeding rather than the commercial rules. However, Rule 1 of the AAA Commercial Rules grants the AAA the discretion to determine whether to apply its consumer rules in lieu of the commercial rules in the event of a dispute between the parties. But even if it were error for the AAA to apply the consumer rules, it would not excuse her refusal to register her business and pay the required arbitration fee. As noted above, the AAA advised the parties that all non-administrative issues would be considered by the arbitrator after the parties complied with all administrative requirements. Thus, had Bentz

September 4, 2018 motion did not request that the Superior Court order the parties to mediate their dispute – rather, it expressly and unambiguously requested that the Superior Court compel arbitration or, in the alternative, stay the case pending arbitration. Consequently, Bentz waived any protections afforded by the mediation clause in the agreement by taking the inconsistent action of moving the Superior Court to compel only arbitration. *See Sako v. Lush Cosmetics, Inc.*, 2019 WL 2119647, at *6 (Cal. Ct. App. May 15, 2019) (unpublished) ("By petitioning to compel arbitration, [the defendant] also waived the mediation condition.").

¶ 16 Because Bentz waived application of the mediation clause through filing a motion to compel arbitration without requesting that mediation also be compelled, Suid was not required to mediate the dispute before initiating arbitration. *Accord, LBL Skysystems (USA), Inc. v. APG-America, Inc.*, 2005 WL 2140240, at *31 (E.D. Pa. Aug. 31, 2005) (unpublished) (concluding that by "act[ing] in a manner inconsistent with the intent to enforce the mediation provision" in the agreement at issue, "APG waived any right to mediation and . . . this waiver excused any failure by LBL to comply with the [ ]contract by attempting mediation with APG"). This is reflected in the Superior Court's October 26, 2018 opinion and order which, although mentioning the mediation clause in passing dicta, contained the following decretal language:

> **ORDERED** that Defendant's Motion to Compel Arbitration, Dismiss the Case, or in the Alternative, Stay Proceedings, and Memorandum of Law in Support, filed on September 4, 2018, is **GRANTED** to the extent that the Motion requests the Court to compel arbitration and dismiss the case; and
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> **ORDERED** that Motion to Compel Arbitration, Dismiss the Case, or in the Alternative, Stay Proceedings, and Memorandum of Law in Support, filed on

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registered her business and paid the fee, she would have been permitted to renew her argument before the assigned arbitrator that the commercial rules should apply. And to the extent the arbitrator denied that request and applied the consumer rules over Bentz's objection, Bentz would have had the opportunity to file a motion to vacate any arbitration award issued in Suid's favor, as would be the case with respect to any error in an arbitration proceeding that results in an adverse result.

> September 4, 2018, is **DENIED** to the extent that the Motion requests to stay proceedings pending arbitration; and it is further
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> **ORDERED** that Mohammed Suid's Complaint is **DISMISSED with prejudice**, and Suid may file his written request to initiate arbitration proceedings with the American Arbitration Association in accordance with the Contract for Legal Services of the parties.

(J.A. 206.)

¶ 17 But even if Bentz did not waive application of the mediation clause during the Superior Court proceedings, she did so through her failure to participate in the arbitration proceedings. In her motion to compel arbitration, Bentz strenuously argued that the arbitration clauses in the fee agreements should be construed so as to delegate to the arbitrator all questions of arbitrability, so that "the arbitrator shall have the power to rule on his or her own jurisdiction," and that "the claims raised in the Complaint are to be evaluated by the arbitrator first to determine whether the controversy falls within the scope of the arbitration provision." (J.A. 32-33.) Bentz, having advocated for this interpretation of the arbitration clause in support of her motion to compel arbitration, is judicially estopped from proposing a contrary interpretation at a later stage of the proceeding, for "doing so would constitute a fraud on the court." *Sarauw v. Fawkes*, 66 V.I. 253, 260 (V.I. 2017).

¶ 18 Here, the record reflects that Bentz repeatedly informed the AAA in her several letters that she believed Suid's claims could not be arbitrated until they were first mediated. The AAA did not simply ignore this issue – rather, it consistently advised the parties that it would defer consideration of this and any other issues until after Bentz registered her business and paid the $3,050 fee. Since Bentz argued that the arbitrator shall have the power to determine whether the controversy falls within the scope of the arbitration provisions, it is implicit that an arbitration must be initiated first to allow the arbitrator to determine whether arbitration was precluded due to

non-compliance with the mediation clause. Bentz, by now arguing that the Superior Court or this Court should hold that as a matter of law that the arbitration clauses prohibited Suid from initiating arbitration proceedings prior to participating in mediation, is essentially retreating from her representation that the arbitrator must determine whether the claims are arbitrable.

¶ 19 Even if we were to hold that Bentz did not waive application of the mediation clause, that she is not judicially estopped from arguing that Suid was compelled to initiate a mediation before commencing an arbitration with the AAA, and that the issue of arbitrability was one for the court to decide and not the arbitrator, Bentz's argument remains unavailing. Assuming, without deciding, that the Federal Arbitration Act ("FAA") governs the arbitration provisions of all the fee agreements,[5] the FAA is inapplicable to mediation clauses. *See, e.g., Advanced Bodycare Solutions, LLC v. Thione International, Inc.*, 524 F.3d 1235, 1239-40 (11th Cir. 2008) (establishing a "bright line rule" that "[m]ediation is not within the FAA's scope" because it is non-binding and therefore cannot result in an "award"); *Wasinger v. Roman Catholic Diocese of Salina*, 407 P.3d 665, 671 (Kan. Ct. App. 2017) ("With the dispute clause calling for mediation, neither the Federal

[5] In its October 26, 2018 opinion, the Superior Court applied the FAA, but did not expressly identify a reason for doing so. While the Superior Court acknowledged that this Court had held that the FAA applies to arbitration agreements in which there is an interstate nexus, it also cited to dicta from this Court noting that it is arguable that the FAA "may" apply through the Territorial Clause of the United States Constitution. *Whyte v. Bockino*, 69 V.I. 749, 758 (V.I. 2018). Yet although acknowledging that this Court expressly stated that it "need not decided today whether Congress utilized its Commerce Clause power or Territorial Clause power in applying the FAA to the Virgin Islands," *id.* at 760, the Superior Court applied the FAA without making a finding of an interstate nexus or determining that the FAA applies to all Virgin Islands arbitration agreements due to the Territorial Clause. Significantly, although an interstate nexus is present with respect to one of the fee agreements—relating to Bentz's representation of Suid in connection with an automobile accident in Florida—it is not clear that the existence of an interstate nexus in one agreement is sufficient to extend the FAA to all the fee agreements, including those which involve representation for events that occurred exclusively in the Virgin Islands. Nevertheless, we need not reach this issue as part of this appeal since the result would be the same regardless of whether the FAA applies to all or some of the agreements.

Arbitration Act nor Kanas Arbitration Act apply.").

¶ 20 But even more importantly, the relevant provisions of the fee agreements do not place the burden on Suid to initiate a mediation – rather, it simply says that if the parties cannot reach an agreement, "the matter shall be submitted to Mediation first" and then to arbitration. (J.A. 42.) Courts that have considered arbitration agreements containing similar language providing for mediation before arbitration have held that when the agreement does not specify which party must request the mediation, the obligation falls on *both* parties to initiate the mediation, and that the failure of either party to formally initiate mediation results in the arbitration clause never activating, and the FAA never applying. *See Kemiron Atlantic, Inc. v. Aguakem International, Inc.*, 290 F.3d 1287, 1290 (11th Cir. 2002). Here, the record contains no indication that Bentz ever formally requested mediation prior to filing her motion to compel arbitration or the Superior Court entering its October 26, 2018 order granting that motion and dismissing Suid's complaint with prejudice. Consequently, even if Bentz has not waived her right to arbitrate, the Superior Court committed error by issuing an order compelling arbitration when one of the conditions precedent to that arbitration had not occurred. *Id.*

¶ 21 Under these circumstances, Bentz waived her right to arbitrate Suid's claims pursuant to the arbitration clauses of the fee agreements, in that she materially breached those agreements by failing to register her business and pay the $3,050 fee required by the AAA, resulting in dismissal of the arbitration. Moreover, she waived any application of the mediation clause by failing to move to compel mediation prior to arbitration, and in any case she is judicially estopped from arguing that the issue of whether the failure to mediate rendered the dispute non-arbitrable is one that should be decided outside of the arbitration process. Accordingly, we reverse the January 30, 2020 order denying the Rule 60(b) motion, vacate the October 26, 2018 order compelling

arbitration and dismissing the complaint, and direct the Superior Court to reinstate Suid's complaint.

III. CONCLUSION

¶ 22 The Superior Court erred when it determined that the Rule 60(b) motion had become moot, since the relief Suid requested in that motion was not precluded simply because Bentz unilaterally initiated a second arbitration proceeding. Moreover, Suid possessed a right to have his complaint reinstated as a matter of law due to Bentz's failure to initiate mediation prior to pursuing arbitration of their dispute and her breach of the arbitration agreements through her failure to participate in the initial arbitration. Therefore, we reverse the January 30, 2020 order denying the Rule 60(b) motion, vacate the October 26, 2018 order, and order that Suid's complaint be reinstated on remand.

Dated this 9th day of September, 2021.

BY THE COURT:

/s/ Rhys S. Hodge
RHYS S. HODGE
Chief Justice

ATTEST:

VERONICA J. HANDY, ESQ.
Clerk of the Court

By: /s/ Kendra Eubanks
Deputy Clerk II

Dated: September 9, 2021