

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2 TRP INTERNATIONAL, INC., a
3 Delaware corporation,

4 Appellant,

5 vs.

6 PROIMTU MMI LLC, a Nevada
7 limited liability company,

8 Respondent.

Case No. 71398

District Ct Case No. 2016-0017

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Elizabeth A. Brown
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9 **RESPONDENT'S OPPOSITION TO RESPONSE TO ORDER TO**
10 **SHOW CAUSE**

11 **I. INTRODUCTION**

12 The order from which TRP International, Inc. ("TRP") appealed
13 ("Appealed Order") is not an appealable order. NRAP 3A(b) designates
14 which orders are appealable and if no statutory authority to appeal exists,
15 there is no right to appeal. The Appealed Order resulted from a motion to
16 vacate the judgment pursuant to NRCP 59(e). The Appealed Order vacated
17 the judgment and denied TRP's Motion to Dismiss. Neither an order
18 vacating a judgment nor an order denying a motion to dismiss is appealable
19 under NRAP 3(A)(b).

1 The Appealed Order cannot be a special order after judgment under
2 NRAP 3A(b)(8). The timing of the motion does not make it a special order
3 after judgment as TRP argues. Additionally, the Appealed Order did not
4 affect the rights of TRP arising out of the judgment because the judgment
5 was vacated. Because the judgment was vacated, the Appealed Order
6 denying TRP's motion to dismiss was interlocutory. Furthermore, even if
7 not interlocutory, the Appealed Order did not affect any rights of TRP
8 created by the judgment. TRP had already waived the effect of the forum
9 selection clause in its contract with Proimtu MMI, LLC ("Proimtu") and
10 consented to the jurisdiction of Nevada's courts by litigating some of
11 Proimtu's claims on the merits as evidenced by the original Findings of Fact
12 and Conclusions of Law and Order on Motion to Dismiss Complaint and
13 Final Judgment Pursuant to NRCP 54(b). See, **Exhibit "1"** to TRP's
14 Response, pp. 5-6, Conclusions of Law 19-23. The judgment outlines the
15 waiver in detail. The Appealed Order simply effectuates the waiver that
16 already occurred.

17 **II. PROCEDURAL HISTORY**

18 This Court lacks jurisdiction to consider this appeal because the
19 Appealed Order is not an appealable order under NRAP 3(A)(b). TRP

1 appeals an order denying a motion to dismiss. See, **Exhibit “2”** to TRP’s
2 Response To Order to Show Cause, p. 3, Conclusion of Law 4. The district
3 court granted TRP’s motion to dismiss initially, but then granted Proimtu’s
4 motion to vacate the judgment and deny the motion to dismiss. *Id.* The
5 court’s decision was predicated upon TRP’s acceptance of the district
6 court’s jurisdiction to seek and obtain relief on the merits on certain claims,
7 thus waiving the forum selection clause that was the basis of the original
8 motion to dismiss. *Id.*

9 **III. LEGAL ARGUMENT**

10 **A. THE APPEALED ORDER IS A NON-APPEALABLE** 11 **INTERLOCUTORY ORDER.**

12 “NRAP 3A(b) designates the judgments and orders from which an
13 appeal may be taken, and where no statutory authority to appeal is granted,
14 no right exists.” *Taylor Constr. Co. v. Hilton Hotels Corp.*, 100 Nev. 207,
15 209, 678 P.2d 1152, 1153 (1984) (internal citations omitted)). Orders
16 amending or vacating a judgment pursuant to NRCP 59(e) are not among
17 the appealable matters listed in NRAP 3A(b). See, *AA Primo Builders, LLC*
18 *v. Washington*, 126 Nev. 578, 582, 245 P.3d 1190, 1193 (2010)(Motion to
19 vacate judgment was properly brought under NRCP 59(e) but only original

1 order dismissing the case was appealable—not the motion to vacate the
2 original judgment.). Other cases decided earlier by this court reached the
3 same result. For example, this Court previously held that an order vacating
4 a prior judgment of dismissal and denying a motion to dismiss is not
5 appealable. *Bates v. Nevada Savings & Loan Assoc.*, 85 Nev. 441, 444, 456
6 P. 2d 450, 452 (1969). Although *Bates* found that the grant of a motion for
7 reconsideration could be a special order after judgment that could be
8 appealed under former NRCP 72, *AA Primo Builders* made it clear that a
9 motion to vacate a judgment pursuant to NRCP 59(e), if made within 10
10 days of the judgment, is not a motion for rehearing or reconsideration and is
11 not by itself appealable. *AA Primo Builders, LLC*, 126 Nev. at 584-585,
12 245 P.3d at 1194-1195. Thus, no right to appeal exists in this case, based
13 upon the vacation of the judgment pursuant to NRCP 59(e).

14 This Court only has jurisdiction to hear TRP’s appeal if an order
15 denying a motion to dismiss is appealable. An order denying a motion to
16 dismiss is clearly interlocutory and non-appealable. *Bates*, 85 Nev. at 444,
17 456 P. 2d and *Musso v. Triplett*, 78 Nev. 355, 358, 372 P.2d 687, 689
18 (1962). To permit “an appeal from all intermediate orders and decisions of
19 the district courts would result in such vexatious and intolerable confusion

1 and delay as to render impossible an orderly and expeditious administration
2 of justice by the courts of the state.” *Id.* (citing *State ex rel. State Board of*
3 *Medicine v. Smith*, 80 Idaho 267 328 P.2d 581.).

4 This case would be delayed for an extended period of time if the
5 Appealed Order is appealable. TRP has already litigated the merits of some
6 of Proimtu’s claims, thus invoking the jurisdiction of the district court,
7 despite now claiming the benefit of a forum selection clause. Having
8 invoked the jurisdiction of the district court, TRP is not prejudiced by
9 having the district court consider the merits of all claims and defenses,
10 which is what the Appealed Order requires.

11 **B. THE APPEALED ORDER IS NOT A SPECIAL ORDER**
12 **AFTER JUDGMENT.**

13 TRP argues that the order denying its motion to dismiss is a special
14 order after final judgment. Under NRAP 3A(b)(8), an aggrieved party may
15 appeal from “any special order made after final judgment.” “The mere fact
16 that the order in point of time is made after a final judgment has been
17 entered does not render it appealable.” *Gumm v. Mainor*, 118 Nev. 912, 916,
18 59 P.3d 1220, 1223 (2002). Moreover, three years after *Gumm* was decided,
19 this Court made it clear that once a judgment is vacated, the special order

1 section of NRAP 3A(b)(8) does not apply because there is no judgment.
2 *Reno Hilton Resort Corp. v. Verderber*, 121 Nev. 1, 6 n.24, 106 P.3d 134,
3 137 n.24 (2005). Once the judgment is vacated, the order vacating the trial
4 is an interlocutory order that is only appealable if listed in NRAP 3A(b). *Id.*
5 This Court explained its reasoning for not permitting an appeal when a
6 judgment has been vacated as follows:

7 We further note that an order granting a new trial
8 could not be a special order after final judgment,
9 because if a new trial is granted, then the judgment
10 is vacated. The order granting a new trial would
 simply be a nonappealable interlocutory order if it
 were not included in NRAP 3A(2)(b). *Verderber*,
 121 Nev. 1, 6 n.24, 106 P.3d 134, 137 n.24.

11 Here, once the judgment is vacated, the merits of both parties' claims
12 and defenses remain to be litigated, making the Appealed Order
13 interlocutory. TRP fails to address this issue in its response.

14 Even if the vacation of the judgment did not make the Appealed
15 Order interlocutory, TRP fails to demonstrate that vacation of the judgment
16 affected its rights growing out of the judgment. TRP claims that the
17 judgment gave it the right to litigate "in a forum that both parties had agreed
18 to and forces jurisdiction of Nevada on TRP". Response p. 4. This was a
19 contract right referenced in the judgment. TRP no longer has the right to

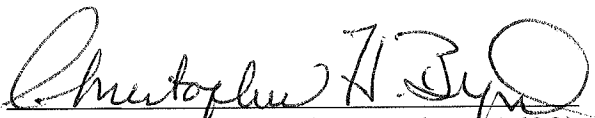
1 litigate elsewhere, however, based upon its actions in the district court that
2 are spelled out in the judgment. TRP has already litigated in Nevada by
3 obtaining judgment against Proimtu on the merits of three causes of action.
4 Having invoked the jurisdiction of Nevada, the Appealed Order does not
5 affect TRP's rights arising out of the judgment. Instead, the Appealed
6 Order effectuates TRP's waiver of the contractual forum selection clause.
7 Thus, TRP cannot satisfy a critical element of the special order rule, even if
8 the judgment had not been vacated.

9 **IV. CONCLUSION**

10 For the above reasons Proimtu requests that this Court dismiss TRP's
11 appeal for lack of jurisdiction.

12 DATED this 28nd day of November, 2016.

13 **FENNEMORE CRAIG, P.C.**

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