

IN THE SUPREME COURT OF THE STATE OF NEVADA

BROKER AGENT MAGAZINE, L.L.C.,  
AN ARIZONA LIMITED LIABILITY  
COMPANY,  
Appellant,

vs.

MELODIE C. MILLER,  
INDIVIDUALLY, AND D/B/A SUCCESS  
MAGAZINE,  
Respondent.

No. 45316

**FILED**

JUL 05 2006

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Rubard*  
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND  
REMANDING

This is an appeal from a district court order refusing to grant a preliminary injunction in a contract dispute. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge.

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

“The decision to grant or deny a preliminary injunction is within the sound discretion of the trial court and that discretion will not be disturbed absent abuse.”<sup>1</sup> This court will reverse “where the district court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact.”<sup>2</sup>

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<sup>1</sup>S.O.C., Inc., v. The Mirage Casino-Hotel, 117 Nev. 403, 407, 23 P.3d 243, 246 (2001).

<sup>2</sup>Attorney General v. NOS Communications, 120 Nev. 65, 67, 84 P.3d 1052, 1053 (2004) (quoting U.S. v. Nutri-cology, Inc., 982 F.2d 394, 397 (9th Cir. 1992)).

A motion for preliminary injunction may be granted where the “applicant can show a likelihood of success on the merits and a reasonable probability that the non-moving party’s conduct, if allowed to continue, will cause irreparable harm for which compensatory damage is an inadequate remedy.”<sup>3</sup>

Non-compete clause

“In determining whether [a party] enjoyed a reasonable probability of success on the merits of its case, the court must consider whether the provisions of the non-competition agreements would likely be found reasonable at trial.”<sup>4</sup> The agreement provided that Arizona law would govern the terms of the agreement.<sup>5</sup> Pursuant to Arizona law, “employer-employee restrictive covenants are disfavored and strictly construed against the employer.” Under Arizona law, a covenant not to compete in an employment agreement is “valid and enforceable by injunction when the restraint does not exceed that reasonably necessary to protect the employer’s business, is not unreasonably restrictive of the rights of the employee, does not contravene public policy, and is reasonable as to time and space.”<sup>6</sup>

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<sup>3</sup>Dangberg Holdings v. Douglas Co., 115 Nev. 129, 142, 978 P.2d 311, 319 (1999); see NRS 33.010.

<sup>4</sup>See Camco, Inc. v. Baker, 113 Nev. 512, 518, 936 P.2d 829, 832 (1997).

<sup>5</sup>We review the reasonableness of the non-compete clause in accordance with Arizona’s substantive law. Furthermore, Arizona’s reasonableness test for restrictive covenants appears to be very similar to Nevada’s.

<sup>6</sup>Bed Mart, Inc. v. Kelley, 45 P.3d 1219, 1221 (Ariz. Ct. App. 2002) (quoting Phoenix Orthopaedic Surgeons v. Peairs, 790 P.2d 752, 755 (Ariz.

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Additionally, a restrictive covenant is “reasonable and enforceable when it protects some legitimate interest of the employer beyond the mere interest in protecting itself from competition such as preventing ‘competitive use, for a time, of information or relationships which pertain peculiarly to the employer and which the employee acquired in the course of the employment.’”<sup>7</sup>

Reasonableness is a fact-intensive inquiry that depends on the totality of the circumstances. A restriction is unreasonable and thus will not be enforced: (1) if the restraint is greater than necessary to protect the employer's legitimate interest; or (2) if that interest is outweighed by the hardship to the employee and the likely injury to the public.<sup>8</sup>

The parties failed to argue the reasonableness of the non-compete clause below and the parties also fail to argue it on appeal.<sup>9</sup> The reasonableness of the non-compete clause is paramount to Broker Agent succeeding on the merits of its claim, and, consequently, it is paramount to the decision of whether or not to grant its motion for a preliminary injunction.

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Ct. App. 1989) disapproved on other grounds by, Valley Medical Specialists v. Farber, 982 P.2d 1277 (Ariz. 1999)).

<sup>7</sup>Kelley, 45 P.3d at 1221 (quoting Farber, 982 P.2d at 1281).

<sup>8</sup>Farber, 982 P.2d at 1282 (internal citations omitted).

<sup>9</sup>The non-compete clause is essentially a restrictive covenant in an employment contract.

Therefore, we conclude that Broker Agent failed to demonstrate that it had a reasonable probability of success on the merits, and thus failed to establish all of the elements necessary for injunctive relief.

Although the district court relied on Nevada law instead of Arizona law, the court nonetheless reached the correct result in denying Broker Agent's motion to enjoin Miller and Success Magazine from competing with Broker Agent, and we do not disturb the district court's decision with regard to this issue.

Broker Agent's proprietary and confidential information

We reverse and remand with regards to Miller's use of Broker Agent's proprietary and confidential information.

The district court provides no reasoning for its denial of the injunction with regards to Broker Agent's proprietary and confidential information. The employment agreement clearly states that Miller was to return all proprietary and confidential information relating to Broker Agent at the termination of her employment. Broker Agent also alleged sufficient facts and made a sufficient showing that Miller's use and disclosure of Broker Agent's proprietary information, if allowed to continue, would cause irreparable harm for which compensatory damages would be an inadequate remedy. As such, Miller must return all of Broker Agent's proprietary and confidential information, as delineated in the agreement. Further, Miller must be enjoined from any further use or disclosure of Broker Agent's proprietary and confidential information. Accordingly, we

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

Douglas, J.  
Douglas

Becker, J.  
Becker

Parraguirre, J.  
Parraguirre

cc: Hon. Stewart L. Bell, District Judge  
Munger Chadwick, P.L.C.  
Smith Larsen & Wixom  
Shimon & Lovaas  
Clark County Clerk