

IN THE SUPREME COURT OF THE STATE OF NEVADA

PAUL CHAI,
Appellant/Cross-Respondent,
vs.
RIO PROPERTIES, INC., D/B/A RIO
PROPERTIES SUITE HOTEL &
CASINO,
Respondent/Cross-Appellant.

No. 46061

FILED

JAN 30 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *S. Young*
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

This is an appeal and cross-appeal from a district court judgment in a contract and tort action and an order denying a new trial. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

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

Appellant/cross-respondent Paul Chai claims that the district court erred in awarding him approximately one half of his calculated attorney fees. Because the determination of this issue hinges upon whether there is substantial evidence in the record to support the jury's verdict as to Chai's claim under the Fair Credit Reporting Act, we review and address the cross-appeal instituted by respondent/cross-appellant Rio Properties, Inc.¹ As such, we additionally address whether there is

¹We do not review, however, Rio Properties' arguments as to whether the district court erred in denying Rio Properties' motion for partial summary judgment and whether the district court abused its discretion in instructing the jury as to Nevada gaming regulations and contract interpretation. Rio Properties has not supported its arguments

continued on next page . . .

substantial evidence in the record to support the jury's verdict holding Rio Properties liable for breach of contract, whether the district court erroneously instructed the jury on Chai's libel claim, and whether Chai was entitled to an award of punitive damages.

Breach of contract claim

On appeal, this court will not disturb a district court's findings of fact if they are supported by substantial evidence.² "Substantial evidence is that which 'a reasonable mind might accept as adequate to support a conclusion.'"³ The district court's conclusions of law, however, are reviewed de novo.⁴

Rio Properties argues that it was entitled to judgment as to Chai's claim for breach of contract. Rio Properties contends that Chai's unwillingness to sign a discount agreement made the settlement agreement unenforceable and that his unwillingness also caused the agreement to be in violation of Nevada gaming regulations. Thus, Rio Properties argues that the jury erred in finding it liable for breach of contract because Chai's performance of the settlement agreement was impossible without Chai's signature on a discount agreement. Further,

... continued

as to error with any citations to pertinent legal authority. See NRAP 28; SIIS v. Buckley, 100 Nev. 376, 382, 682 P.2d 1387, 1390 (1984).

²Keife v. Logan, 119 Nev. 372, 374, 75 P.3d 357, 359 (2003).

³Construction Indus. v. Chalue, 119 Nev. 348, 352, 74 P.3d 595, 597 (2003) (quoting Richardson v. Perales, 402 U.S. 389, 401 (1971)).

⁴Keife, 119 Nev. at 374, 75 P.3d at 359.

Rio Properties argues that it was entitled to judgment as to Chai's breach of contract claim because Chai failed to mitigate his damages.

We conclude that these arguments lack merit; there is substantial evidence in the record to support the jury's verdict that Rio Properties breached its settlement agreement with Chai.⁵ The record reveals that in reaching the settlement agreement, there were no express terms requiring Chai to enter into a discount agreement; the settlement agreement was not an executory accord, which would have required Chai to sign a discount agreement. Further, because Rio Properties' desire to have Chai sign a discount agreement was termed as a "favor," this allowed the jury to reasonably conclude that Chai's signature on a discount agreement was not a requisite term under the settlement agreement.

As to Rio Properties' contention that the settlement agreement was in violation of Nevada gaming regulations, we conclude that despite not having Chai's signature on a discount agreement, the settlement agreement did not violate Nevada law because performance of the settlement agreement was not impossible.⁶ Chai's unwillingness to sign a discount agreement simply required Rio Properties to report additional gross revenue;⁷ it did not make the settlement agreement voidable.

⁵See id.

⁶See Vincent v. Santa Cruz, 98 Nev. 338, 341, 647 P.2d 379, 381 (1982) ("Generally, contracts made in contravention of the law do not create a right of action."); see also State Gaming Control Bd. v. Breen, 99 Nev. 320, 322, 611 P.2d 1309, 1310 (1983) ("The Board's power extends exclusively to state licensees and applicants for state licenses.").

⁷See Nevada Gaming Regulation 6.120(4).

Additionally, we conclude that there is substantial evidence in the record to support the jury's verdict because the jury was instructed as to mitigation of damages, and the record indicates that the jury took mitigation into account when it calculated damages. While Chai had presented evidence of at least \$750,000 in damages, the jury only awarded \$35,000 in damages for breach of contract. Therefore, we affirm the jury's verdict holding Rio Properties liable for breach of contract.

Fair Credit Reporting Act claim

Rio Properties argues that it was entitled to judgment as to Chai's Fair Credit Reporting Act claim under 15 U.S.C. § 1681s-2(b).⁸ Rio

⁸15 U.S.C. § 1681s-2(b) provides in pertinent part:

After receiving notice pursuant to section 1681i(a)(2) of this title of a dispute with regard to the completeness or accuracy of any information provided by a person to a consumer reporting agency, the person shall –

(A) conduct an investigation with respect to the disputed information;

(B) review all relevant information provided by the consumer reporting agency pursuant to section 1681i(a)(2) of this title;

(C) report the results of the investigation to the consumer reporting agency;

(D) if the investigation finds that the information is incomplete or inaccurate, report those results to all other consumer reporting agencies to which the person furnished the information and that compile and maintain files on consumers on a nationwide basis; and

continued on next page . . .

Properties contends that because Chai had merely disputed that the account did not belong to him, it took reasonable steps in subsequently verifying that the account indeed belonged to Chai.

We disagree and conclude that there is substantial evidence in the record to support the jury's verdict as to Rio Properties violating section 1681s-2(b) of the Fair Credit Reporting Act.⁹ Section 1681s-2(b)(1)(B) required Rio Properties to "review all relevant information provided by the consumer reporting agency." Because the record reflects that the dispute form sent to Rio Properties provided that Chai wanted "this item to be investigated and removed," we conclude that Rio Properties did not have "scant" knowledge of this disputed report and that Rio Properties did not conduct a reasonable investigation.¹⁰ Even though

... continued

(E) if an item of information disputed by a consumer is found to be inaccurate or incomplete or cannot be verified after any reinvestigation under paragraph (1), for purposes of reporting to a consumer reporting agency only, as appropriate, based on the results of the reinvestigation promptly –

- (i) modify that item of information;
- (ii) delete that item of information; or
- (iii) permanently block the reporting of that item of information.

⁹See Keife, 119 Nev. at 374, 75 P.3d at 359.

¹⁰Cf. Westra v. Credit Control of Pinellas, 409 F.3d 825, 826 (7th Cir. 2005) (holding that a collection agency did not violate the Fair Credit Reporting Act because it conducted a reasonable investigation of a claim
continued on next page . . .

Rio Properties believed that Chai had not fulfilled the requisite terms of the settlement agreement, it should have at the very least investigated and reported to TransUnion, as required under section 1681s-2(b)(1)(E)(i), that Chai owed \$20,000 and not \$30,000, as Chai had paid \$10,000 to Rio Properties for performance on the settlement agreement.

Accordingly, we affirm the jury's verdict holding Rio Properties liable under section 1681s-2(b) of the Fair Credit Reporting Act.

Attorney fees

Chai argues that while the district court properly awarded attorney fees under 15 U.S.C. §§ 1681n(a)¹¹ and 1681o(a),¹² the district

... continued

that a disputed account did not belong to a consumer; "given the scant information it received," the collection agency conducted a reasonable investigation because it verified the name, address, and date of birth of the account holder and sent that information to the credit reporting agency).

¹¹15 U.S.C. § 1681n(a) provides in pertinent part:

Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of . . . (3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

¹²15 U.S.C. § 1681(o)(a) provides in pertinent part:

Any person who is negligent in failing to comply with any requirement imposed under this subchapter with respect to any consumer is liable

continued on next page . . .

court erred in only awarding approximately one half of the attorney fees that he had requested. We agree.

Attorney fees are only available when authorized by a rule, statute, or contract, and the decision to award attorney fees is left to the sound discretion of the district court.¹³

The correct method of determining attorney fees under federal statutes has been decided by the United States Supreme Court and other federal courts.¹⁴ As such, after determining that attorney fees are appropriate under federal statutes, the district court is required to multiply the number of hours reasonably spent on the case by a reasonable hourly rate to reach the “lodestar” amount.¹⁵ As the lodestar amount has a strong presumption of being reasonable, the district court may adjust the lodestar amount based on twelve “Johnson-Kerr” factors.¹⁶

. . . *continued*

to that consumer in an amount equal to the sum of . . . (2) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney’s fees as determined by the court.

¹³Flamingo Realty v. Midwest Development, 110 Nev. 984, 991, 870 P.2d 69, 73 (1994).

¹⁴Herbst v. Humana Health Ins. of Nevada, 105 Nev. 586, 590, 781 P.2d 762, 764 (1989) (relying on Pennsylvania v. Delaware Valley Citizens’ Council for Clean Air, 478 U.S. 546, 564-66 (1986)); see also Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 69-70 (9th Cir. 1975); Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 719 (5th Cir. 1974).

¹⁵Id.

¹⁶Id.

The 12 factors are: (1) the time and work required; (2) the difficulty of the issue; (3) the skill required to perform the service; (4) the amount of time taken away from other work; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) the time limitations imposed on the attorney by the case; (8) the amount of money involved and the results obtained; (9) the reputation, experience, and ability of the attorney; (10) the lack of desirability of the case; (11) the length of acquaintanceship with the client; and (12) awards in similar cases.¹⁷

Accordingly, “the calculation of the lodestar amount as well as the use of the Johnson-Kerr factors are applicable to all cases in which Congress has authorized an award of attorney’s fees to the prevailing party.”¹⁸

In this case, the district court’s award of approximately one half of Chai’s attorney fees was based on the district court’s determination that too many attorneys had billed for preparing the jury instructions. The district court’s determination, however, was not adequately explained, and no findings were made as to the lodestar calculation or lodestar adjustments under the Johnson-Kerr factors. Thus, we conclude that the district court abused its discretion in calculating Chai’s attorney fees.

Accordingly, we reverse the district court’s award of attorney fees and remand this matter for proceedings consistent with this order.¹⁹

¹⁷Id. at 590 n.1, 781 P.2d at 764 n.1.

¹⁸Id. at 590, 781 P.2d at 764.

¹⁹In calculating attorney fees, we instruct the district court that Chai’s award of attorney fees under the federal statutes shall be limited to those attorney fees stemming from Chai’s claim under the Fair Credit Reporting Act.

Libel claim and punitive damages

Rio Properties contends that the district court erroneously instructed the jury on Chai's libel claim. Jury Instruction No. 34 provided in pertinent part:

The Court has determined that the communication stating that plaintiff owes the Rio \$30,000.00 and that the account has been submitted to collection is defamatory as a matter of law.

....

The Court has determined that the communication stating that plaintiff owes the Rio \$30,000.00 and that the account has been submitted to collection is libel per se.

Jury Instruction No. 36 provided that: "Only a false statement of fact can be defamatory. Thus, if the statement which is alleged to be defamatory is in fact true, the statement cannot be a defamatory statement." While coupling these instructions together, Rio Properties contends that these instructions were unjustly prejudicial and misleading; it argues that these instructions improperly charged the jury to conclude that its communication to Experian must have been false because the statements were defamatory as a matter of law.

We agree and conclude that the district court abused its discretion in instructing the jury as to libel.²⁰ As argued by Rio Properties, these instructions coupled together improperly charged the jury to conclude that Rio Properties' statements must have been false.

²⁰See Skender v. Brunsonbuilt Constr. & Dev. Co., 122 Nev. ___, ___, 148 P.3d 710, 714 (2006).

Whether Rio Properties' communication to Experian was defamatory was a question of fact for the jury;²¹ because the circumstances here could lead a trier of fact to reach different conclusions, it should have been in the province of the jury to determine whether Rio Properties defamed Chai with this communication or merely attempted to collect money that it believed it was due.²²

Accordingly, because the jury instructions as to libel were prejudicial and misleading, we reverse the district court's judgment as to libel and consequently reverse the award of punitive damages stemming from Chai's libel claim.²³

Conclusion

We conclude that there is substantial evidence in the record to support the jury's verdict for breach of contract and for Chai's claim under the Fair Credit Reporting Act. We further conclude that the district court abused its discretion in calculating Chai's attorney fees. As to Chai's libel

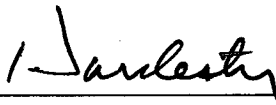
²¹See Lubin v. Kunin, 117 Nev. 107, 111-12, 17 P.3d 422, 425-26 (2001) (holding that whether a statement is defamatory is generally a question of law; however, where a statement is susceptible of different constructions, one of which is defamatory, resolution of the ambiguity is a question of fact for the jury).

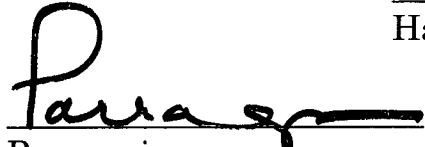
²²See id. at 111, 17 P.3d at 425 ("A statement is defamatory when it would tend to lower the subject in the estimation of the community, excite derogatory opinions about the subject, and hold the subject up to contempt.").

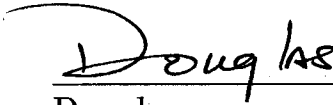
²³As to punitive damages, we further conclude that Chai did not demonstrate the requisite oppression, fraud, or malice necessary under NRS 42.005 for punitive damages. As to Rio Properties' argument that there was no substantial evidence in the record to support the jury's verdict for libel, we render it moot.

claim, we conclude that the district court abused its discretion in instructing the jury as to libel and that punitive damages stemming from Chai's libel claim were inappropriate.²⁴ 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.


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

²⁴On cross-appeal, Rio Properties additionally argues that the district court erred in allowing Chai to present evidence of his new claims for damages after the parties had completed the initial phases of discovery. We conclude this argument to be without merit. While Rio Properties contends that the district court should have granted it a longer continuance for more meaningful discovery, the record reveals that Rio Properties was the party who suggested a sixty-day continuance to the district court; the record further reveals that the district court may have been inclined to give a longer continuance if Rio Properties had initially requested it. Additionally, the record reveals that Chai's claims for damages as to not being able to obtain home financing were not introduced one judicial day before the first day of trial, as the record indicates that Rio Properties was made aware of such damages in October and December 2004 (whereas the trial began in May 2005).

Rio Properties, moreover, argues on cross-appeal that the district court should not have provided a special interrogatory that asked the jury whether Rio Properties must remove derogatory credit information from various credit reporting agencies. Because the district court's judgment did not order Rio Properties to remove its negative report that it had submitted to Experian, we conclude that the district court did not inappropriately exercise any powers in equity.

cc: Hon. Michelle Leavitt, District Judge
Janet Trost, Settlement Judge
Jolley Urga Wirth Woodbury & Standish
Smith Currie & Hancock LLP/Las Vegas
Eighth District Court Clerk