

IN THE SUPREME COURT OF THE STATE OF NEVADA

SONJA KOKOS,
Appellant,
vs.
SOUTHERN NEVADA
ENVIRONMENTAL, INC., A NEVADA
CORPORATION,
Respondent.

No. 48211

SONJA KOKOS,
Appellant,
vs.
SOUTHERN NEVADA
ENVIRONMENTAL, INC., A NEVADA
CORPORATION,
Respondent.

No. 49388

FILED

MAY 21 2009
THACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

These are consolidated appeals from a district court summary judgment in an employment matter and from a post-judgment order awarding attorney fees and costs. Eighth Judicial District Court, Clark County; Valorie Vega, Judge.

Sonja Kokos was employed as a biologist, specifically as a desert tortoise monitor, with Southern Nevada Environmental Inc. (SNEI). When Kokos began her employment with SNEI, she was asked to, and did, sign an employment agreement containing a noncompete clause as well as a separate confidentiality and noncompete agreement. Kokos was later laid off by SNEI.

Kokos brought suit against SNEI to rescind the contracts on the basis that they were unreasonable restrictions on her trade as a biologist and that she was fraudulently induced to sign them. The district court granted SNEI's motion for a preliminary injunction seeking

enforcement of the agreements. Thereafter, SNEI filed a motion for summary judgment, which the district court also granted. This appeal follows.¹

On appeal, Kokos argues that the district court erred in granting summary judgment to SNEI because there are genuine issues of material fact as to whether she was fraudulently induced into signing the employment agreements and because the district court failed to make a permanent determination as to whether the covenant not to compete was reasonable before granting SNEI's motion for summary judgment.²

We conclude that the district court erred in granting summary judgment to SNEI because genuine issues of material fact exist as to whether Kokos was fraudulently induced into signing the employment contracts with SNEI and because the district court failed to hold a trial on the merits of the preliminary injunction that enforced the covenant not to compete before granting SNEI's motion for summary judgment.

Fraud in the inducement

The district court granted SNEI's motion for summary judgment on the issue of fraud in the inducement. The district court found that there were no genuine issues of material fact present on this issue

¹As the parties are familiar with the facts of this case, we decline to restate them in detail here and use only those that are pertinent to the discussion below.

²Kokos also argues that the district court erred in awarding attorney fees and costs. Because we conclude that the district court erred in granting summary judgment to SNEI there is no need to address this issue at this time, but we do instruct the district court to vacate the award of attorney fees and costs consistent with this order.

that required submission to a trier of fact because Kokos was not subjected to duress when signing the employment agreements. We disagree.

Kokos contends that for purposes of summary judgment, the district court should have concluded that genuine issues of material fact exist as to whether a misrepresentation as to the scope of the employment and the restrictive covenant was made, and whether Kokos relied on that misrepresentation when she executed the contracts. Kokos claims that she presented evidence supporting each of the elements required to prove a claim of fraud in the inducement. Specifically, Kokos contends that she was never given a meaningful opportunity to read and comprehend the agreements and that management purposefully distracted her during the time allotted for her review of the contracts, thus creating fraud in the inducement. We agree that there were genuine issues of material fact at issue on whether there was fraud in the inducement based on Kokos' deposition testimony.

We review a district court's grant of summary judgment de novo. Wood v. Safeway Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper when the court has examined the record in the light most favorable to the nonmoving party and found no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Id.

To establish a claim for fraud in the inducement, a plaintiff must establish by clear and convincing evidence that: 1) a false representation was made by the other party, 2) the other party had knowledge that the representation was false or that the other party had an insufficient basis for the representation, 3) the other party intended to induce consent to the agreement's formation, 4) the plaintiff justifiably

relied on the representation, and 5) damage to the plaintiff occurred from such reliance. J.A. Jones Const. v. Lehrer McGovern Bovis, 120 Nev. 277, 290, 89 P.3d 1009, 1018 (2004) (citing Rosenthal v. Great Western Financial Sec., 926 P.2d 1061, 1073 (Cal. 1996); Wohlers v. Bartgis, 114 Nev. 1249, 1260-61, 969 P.2d 949, 958 (1998)).

We conclude that the testimony given by Kokos at her deposition provides factual disputes on the issue of whether she was fraudulently induced to sign the employment contracts. Specifically, Kokos testified that: 1) she was told she would not be able to review the agreements before signing them, 2) if she refused to sign the agreements before reviewing them she would not be allowed to return to work and would be terminated, 3) she was repeatedly denied copies of the agreements to review. Kokos' deposition testimony creates a genuine issue of material fact as to whether there was fraud in the inducement of her signing the employment agreements with SNEI and, as such, it was error for the district court to grant SNEI's motion for summary judgment on this issue. Therefore, we reverse the district court's summary judgment on this issue.

Preliminary injunction³

SNEI sought and received a preliminary injunction from the district court that prohibited Kokos from seeking or obtaining employment


³SNEI argues that we are precluded from hearing this issue on appeal because Kokos failed to appeal the preliminary injunction. We conclude that we are not precluded from hearing this issue because the language of NRAP 3A(b)(2) does not prevent our review of an issue that could have been previously appealed from being reviewed on an appeal from a final judgment.

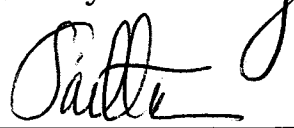
for two years with competitors in Lincoln, Nye and Clark Counties, Nevada, and San Bernardino County, California. The order also prohibited Kokos from disclosing any of SNEI's proprietary information and from soliciting business from SNEI's customers or clients.

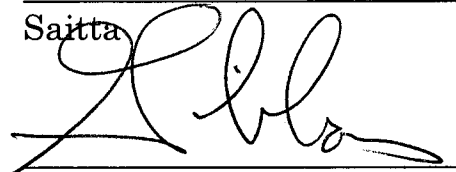
However, the district court failed to hold a trial on the merits of the preliminary injunction in order to consolidate the preliminary injunction into a permanent injunction. See NRCP 65(a)(2). Thus, the district court also failed to issue permanent findings of fact with regard to the reasonableness and enforceability of the covenant not to compete. Id. We conclude that the district court erred in granting summary judgment to SNEI without first consolidating the preliminary injunction because the findings of fact used to support the district court's order granting SNEI's motion for summary judgment were not binding, as they were only part of a preliminary injunction. Therefore we reverse the district court's summary judgment on this issue.

In light of the foregoing discussion, we

ORDER the judgment of the district court REVERSED and REMAND this matter to the district court for further proceedings consistent with this order.


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Hon. Valorie Vega, District Judge
Janet Trost, Settlement Judge
Graziadei & Cantor, Ltd.
Hutchison & Steffen, Ltd.
Eighth District Court Clerk