

IN THE SUPREME COURT OF THE STATE OF NEVADA

MURRELL REDDING, A NEVADA
INDIVIDUAL AND SOLE
PROPRIETOR, D/B/A REDDING
DRILLING & PUMPING SERVICE,
Appellant,
vs.
WELL DEVIL, INC., A NEVADA
CORPORATION; AND PHILLIP W.
REGESKI,
Respondents.

No. 48830

FILED

MAY 07 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY: 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Appeal from a district court judgment entered after a bench trial in a business tort and contract action. Eighth Judicial District Court, Clark County; Kathy A. Hardcastle, Judge.

Appellant Murrell Redding contends that substantial evidence does not support the district court's finding that Redding repudiated a contract to sell his business to respondents Well Devil, Inc. and Phillip Regeski. Redding also asserts that the district court erred in calculating damages. Finally, Redding argues that the district court abused its discretion in awarding respondents' costs and attorney fees. We conclude that Redding's arguments lack merit and therefore affirm the district court's judgment. The parties are familiar with the facts and we do not recount them except as necessary to our disposition.

Contractual repudiation

Redding argues that because respondents failed to make a timely \$400,000 deposit required by the parties' contract, the district court erred in concluding that Redding repudiated the contract. However, the district court actually determined that Redding repudiated the parties'

contract before respondents were required to make the \$400,000 deposit. In light of Redding's repudiation, we conclude that respondents' failure to deposit the \$400,000 until one day after the contractual deadline was inconsequential.¹ Accordingly, we affirm the district court's decision in respondents' favor.²

Damages

Redding next contends that the district court erred in awarding respondents damages because the court awarded expenses that were unrelated to the parties' agreement. We disagree.

The district court's damages award was based on testimony by Regeski and his employee, Stephen Harris. While there was conflicting testimony about a particular \$15,000 expense respondents used to open an account related to the purchase of Redding's business, the district court's damages award related to more than just "reliance"—it also included "additional damages for the breach of good faith and fair dealing . . . and loss of business." Thus, we conclude that the award was reasonable based on the evidence produced at trial.³

¹Finnell v. Bromberg, 79 Nev. 211, 381 P.2d 221 (1963) (noting that further performance is excused following one party's repudiation of a contract).

²Sheehan & Sheehan v. Nelson Malley & Co., 121 Nev. 481, 486, 117 P.3d 219, 223 (2005) (recognizing that a district court's determination that a contract was or was not breached, which is supported by substantial evidence, "will be affirmed unless clearly erroneous").

³Diamond Enters., Inc. v. Lau, 113 Nev. 1376, 1379, 951 P.2d 73, 74 (1997) ("[t]he district court is given wide discretion in calculating an award of damages, and this award will not be disturbed on appeal absent an abuse of discretion").

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Costs and attorney fees

Redding lastly argues that the district court abused its discretion in awarding respondents' costs and attorney fees. We disagree.

With respect to costs, Redding alleges that no timely memorandum of costs was filed since respondents filed their memorandum before the entry of written judgment. However, this argument lacks merit because it is not necessary to wait until after the entry of judgment to file a memorandum of costs.⁴

With respect to attorney fees, Redding contends that he was the prevailing party on some of the issues at trial and that the district court's attorney fees award was therefore improper. This argument—which consists of less than one paragraph and quotes one of our cases

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Separately, Redding asserts that the district court improperly admitted and considered a document listing respondents' expenses that they incurred in preparing to close their deal with Redding. According to Redding, NRS 47.250(4) should have barred the district court's consideration of this document. However, NRS 47.250(4) merely establishes a disputable presumption that "higher evidence would be adverse from inferior being produced." NRS 47.250(4) does not prohibit the admission of evidence, and the district court did not err in considering respondents' list of expenses. Indeed, as the court stated in admitting the list of expenses, "[we are] talking about admissibility, not weight that I may or may not give to it. So the exhibit is admitted."

⁴See NRS 18.110. Under NRS 18.110, a party who claims costs must file a memorandum with the district court "within 5 days after the entry of judgment." In our view, this statute sets a deadline for an application of costs (five days after the entry of judgment); it does not establish a short, five-day window during which a prevailing party may file its memorandum.

without any proper context or analysis—appears to be an attempt to reargue the merits of respondents’ repudiation claim. Since we affirm the district court’s ruling on the repudiation claim, we also affirm its award of attorney fees.

Conclusion

For the reasons set forth above, we conclude that Redding’s arguments on appeal lack merit.⁵ Accordingly, we

⁵Redding also sets forth several other arguments in his opening brief—all of which are unsupported by the record and therefore lack merit. For example, Redding contends that he was entitled to cancel the parties’ contract at any time, citing to a portion of the contract’s language permitting the “Purchaser” to terminate the parties’ agreement at any time prior to closing. Since Redding was the “Seller” of the assets in question, however, this clause gave no rights to him.

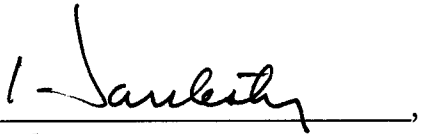
Similarly, Redding argues that the parties’ contract violated public policy by requiring him to transfer individual, nontransferable, licenses and permits. This is not true, however, because the contract clearly limited the sale of assets to “transferable licenses, contracts and approvals used in connection with Seller’s business.” (Emphasis added.)

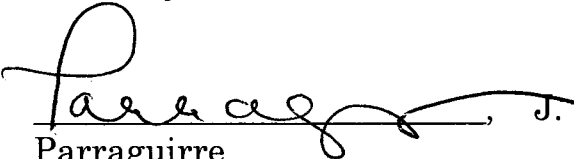
Additionally, Redding asserts that the parties settled this matter when respondent Regeski accepted a refund check from Redding, which stated that Regeski’s endorsement would terminate any and all agreements between the parties. However, Regeski did not endorse that check. Instead, Regeski later accepted and deposited a second check, which did not have the termination clause printed on it. Thus, there is no evidence of a settlement, and Redding’s argument fails.

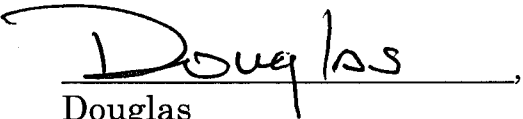
Finally, we reject Redding’s contention that respondents’ alleged violation of NRCP 16.1 mandates reversal. Regeski did not file an answer to Redding’s third party complaint until more than a year after Redding’s pleading was filed. Accordingly, Redding argues that Regeski denied him of his “due process rights both procedurally and substantially.” As a private actor, however, Regeski could not violate Redding’s constitutional

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ORDER the judgment of the district court AFFIRMED.


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

cc: Hon. Kathy A. Hardcastle, District Judge
William C. Turner, Settlement Judge
Stanley W. Pierce
Boyack & Beck
Eighth District Court Clerk

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rights. See Day v. Zubei, 112 Nev. 972, 975, 922 P.2d 536, 538 (1996) (recounting that constitutional rights can only be violated by “state actors”). In addition, since the parties proceeded throughout the litigation as if an answer had been filed, we conclude that dismissal was not mandated under NRCP 16.1. See Arnold v. Kip, 123 Nev. ___, ___, 168 P.3d 1050, 1053 (2007) (noting that a nonexhaustive list of factors in determining whether to dismiss a case under NRCP 16.1 includes “whether the delay has otherwise impeded the timely prosecution of the case”).