IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL PITZEL,
Appellant,
vs.
SOFTWARE DEVELOPMENT AND INVESTMENT OF NEVADA, D/B/A TRAFFIC-POWER.COM, A NEVADA CLOSELY HELD CORPORATION; RICHARD SPLAIN, AN INDIVIDUAL; AND MATTHEW MARLON, AN INDIVIDUAL,
Respondents.

No. 49163

FILED

DEC 31 2008

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

ORDER OF AFFIRMANCE

This is a proper person appeal from a district court judgment in a contract action and from a post-judgment order denying a motion for a new trial and to set aside the judgment. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge.

Appellant Michael Pitzel filed, through counsel, a district court complaint against respondents Software Development and Investment of Nevada (SDIN), Richard Splain, and Matthew Marlon, asserting claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and unjust enrichment.[1] Pitzel's claims were based on allegations that, as a 4.8 percent shareholder in SDIN, he was entitled to distributions of company profits, as set forth in the shareholder agreement. Instead of paying him these distributions, Pitzel alleged that Splain and Marlon, two other SDIN shareholders, fraudulently misdirected company assets to bank accounts and other business entities

[1]Respondents filed counterclaims that were later dismissed.

owned by them. Pitzel also alleged that, under the shareholder agreement, respondents were obliged to invoke a buyout option that provided shareholders an opportunity to purchase another shareholder's shares if there was a disagreement over continuing the corporation.

Respondents subsequently filed a motion for partial summary judgment, which the district court granted in part in an order entered on April 12, 2006. In the portions of the April 12 order relevant to this appeal, the district court found that Pitzel's opposition to the partial summary judgment motion presented no affidavits or admissible evidence and found that no genuine and material factual issues existed as to whether SDIN had distributed any profits to its shareholders. The April 12 order thus limited the issues at the upcoming bench trial to (1) whether respondents breached the shareholder agreement by not invoking the buyout option; and (2) if respondents did breach the shareholder agreement, the value that should be attributed to Pitzel's 4.8 percent shareholder interest. In addition, the April 12 order stated that Pitzel could pursue this relief under both a breach of contract theory and an unjust enrichment theory at trial.

During the bench trial, the district court orally denied Pitzel's motions to reconsider the order granting partial summary judgment, to compel further discovery, and to continue trial pending this court's resolution of a writ petition filed by Pitzel. The court later entered an order that formally rejected Pitzel's objections and approved the discovery commissioner's report and recommendations, which had recommended denying a motion by Pitzel to compel discovery. After Pitzel presented his case-in-chief, respondents moved for a "directed verdict." The district court granted respondents' motion, concluding that Pitzel had presented

no evidence showing that the shareholder agreement was breached by any failure to invoke the buyout option or the valuation of his interest in SDIN and that the existence of the shareholder agreement precluded relief based on Pitzel's theory of unjust enrichment. The district court subsequently granted respondents' motion for attorney fees and costs and then denied Pitzel's motion for a new trial and to set aside the judgment. Pitzel has appealed.

Pitzel argues on appeal that the district court (1) erred in granting partial summary judgment and improperly refused to reconsider that ruling, (2) abused its discretion in denying Pitzel's motion to compel further discovery and in adopting the discovery commissioner's report and recommendations, (3) abused its discretion in refusing to grant Pitzel's motion to continue the trial or stay proceedings pending this court's resolution of his writ petition, (4) erred in granting judgment as a matter of law, and (5) abused its discretion in awarding respondents attorney fees and costs. Additionally, Pitzel challenges the district court's refusal to grant him a new trial and to set aside the judgment.

Partial summary judgment

Concerning the partial summary judgment, Pitzel raises issues in three areas: procedure, the district court's substantive ruling, and the district court's denial of his motion for reconsideration.

Procedural issue

Regarding the procedural issue, Pitzel argues that he was not properly served with the motion for partial summary judgment, since he received only 2 pages of the 137-page document. Respondents assert, however, that the district court determined as a matter of fact that Pitzel was properly served with the motion. They also point out that Pitzel filed

an opposition and supplemental opposition to the motion and was represented by counsel during two hearings on the motion.

Here, Pitzel opposed the entirety of the motion both in writing and orally, and thus, suffered no detriment from the alleged harm.[2] Accordingly, we conclude that Pitzel's procedural challenges to the order granting partial summary judgment lack merit.

Substantive ruling

Pitzel also disputes the district court's substantive finding that he failed to support his opposition to the summary judgment with admissible evidence or affidavits demonstrating genuine issues of material fact with respect to any shareholder distributions. Respondents insist, however, that the evidence presented with the motion for partial summary judgment—affidavits, SDIN's responses to interrogatories, and SDIN's tax returns for 2000, 2001, 2002, and 2003—conclusively established that no distributions were made to SDIN shareholders.

This court reviews de novo an order granting summary judgment.[3] Summary judgment is appropriate when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law.[4] In order to defeat a motion for summary judgment, the

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[2]See Soebbing v. Carpet Barn, Inc., 109 Nev. 78, 83-84, 847 P.2d 731, 735-36 (1993) (explaining that due process can be satisfied by notice and a reasonable opportunity to be heard).

[3]Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

[4]Id. at 731, 121 P.3d at 1031.

nonmoving party "must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial."[5]

The record demonstrates that, in opposing summary judgment, Pitzel failed to provide any evidence regarding profit distributions that SDIN made to any shareholders, despite respondents' documentation showing no distributions. Thus, we conclude that the district court correctly determined that no genuine issue of material fact existed as to whether SDIN had distributed profits to other shareholders, and therefore, the district court properly granted partial summary judgment on this point.[6]

Reconsideration ruling

As for the denial of reconsideration, Pitzel argues that the evidence he presented when seeking reconsideration of the order granting partial summary judgment, such as ledger documents produced by SDIN allegedly demonstrating that profits were distributed in a disguised manner as phony corporate expenditures, established genuine issues of material fact regarding whether SDIN distributed profits to certain shareholders.[7] Respondents contend that the expense account ledgers

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[5]Id. at 732, 121 P.3d at 1031.

[6]See id.

[7]Pitzel points to exhibits presented with his motion for reconsideration, including a list of supplies SDIN purchased between January 1, 2003, and May 24, 2004; a series of graphs that, for example, compare SDIN's income to the expenditures on supplies; and Pitzel's affidavit. In the affidavit, Pitzel, among other things, averred (1) that despite SDIN spending $1,890,781 on supplies, $329,493 on computer equipment, and $19,923 on other equipment, very little of those assets was

continued on next page . . .

constituted mere speculation or conjecture, as they failed to evidence that distributions were paid to shareholders and thus did not create a genuine issue of fact sufficient to defeat the motion for partial summary judgment.

As these documents were not presented by Pitzel until the motion for reconsideration and Pitzel failed to assert a reasonable explanation for his failure to submit them earlier, the district court did not abuse its discretion in refusing to reconsider its partial summary judgment.[8]

Discovery issues

With respect to the discovery issues, Pitzel argues that respondents failed to completely respond to his discovery requests and to the discovery commissioner's minute order, claiming that the missing documents addressed matters essential to his case. Pitzel further asserts that the district court erred in not reopening discovery when respondents filed counterclaims.

The district court's minutes from a December 15, 2004, hearing reflect that the discovery commissioner ordered respondents to produce the following documents: "bank statements for SDIN from inception to the present, SDIN's general ledger from January 1, 2003 to the present

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. . . *continued*
declared on SDIN's tax returns; (2) that SDIN's business, i.e., using "automated software to produce electronically measured effects for customers on the internet," does not expend supplies "in this fashion"; and (3) that the amount spent on supplies suspiciously tracks the company's income.

[8]See, e.g., DCR 13(7); EDCR 2.24.

and financial statements for 2003." Thereafter, seeking to compel discovery and extend the discovery deadlines, Pitzel claimed below that, despite this order from the discovery commissioner, he never received ledger accounts, invoices, monthly and yearly statements of operation and balance sheets, and depreciation schedules for all property and equipment. Pitzel also asserted that he was entitled to account information for "Traffic-Power," which Pitzel asserts is an alter-ego entity of SDIN.

Responding to Pitzel's assertions, the discovery commissioner, apparently disagreeing with Pitzel's interpretation of the minute order's scope, filed a report and recommendation stating that Pitzel did not sufficiently demonstrate that respondents had failed to comply with Pitzel's discovery requests. Further, the discovery commissioner found that Pitzel was dilatory in seeking to reopen discovery because almost six months had passed since the answer had been filed, discovery had closed approximately one year prior to Pitzel's motion, and the trial date had already been continued approximately seven times. Therefore, the discovery commissioner recommended denying Pitzel's motions to compel discovery and to extend discovery deadlines. The district court summarily adopted this report and recommendation and rejected Pitzel's objections thereto.

The district court has wide discretion in controlling pretrial discovery.[9] Having reviewed the discovery commissioner's finding that Pitzel had failed to show that his requests for discovery had not been

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[9]See MGM Grand, Inc. v. District Court, 107 Nev. 65, 70, 807 P.2d 201, 204 (1991) (citing Hahn v. Yackley, 84 Nev. 49, 54, 436 P.2d 215, 218 (1968)).

complied with, as well as the discovery commissioner's timing concerns, we perceive no abuse of the district court's wide discretion in approving the discovery commissioner's report and recommendations or in declining to reopen discovery when respondents filed a counterclaim.

Motion to continue trial or stay proceedings

Pitzel next argues that the district court abused its discretion in denying his motion to continue trial pending resolution of his writ petition, filed in this court, which challenged the district court's denial of various motions, including the above-mentioned motions for reconsideration, to defer the trial date, to extend discovery deadlines, and to compel discovery.[10] Pitzel contends that the district court failed to fully consider the request and to determine whether he was likely to prevail on the merits of his writ petition.

A motion for a continuance or stay is addressed to the district court's sound discretion.[11] As Pitzel sought writ relief only just before trial was set to commence, we conclude that the district court did not abuse its discretion in denying Pitzel a continuance or stay.

Judgment as a matter of law

Regarding the judgment as a matter of law, Pitzel argues that the court erred in determining that he had failed to provide a valuation of his interest in SDIN, as he was qualified, as a stockholder, to personally provide evidence of the value of his interest in the company. Pitzel argues

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[10]See Pitzel v. Dist. Ct., Docket No. 48678 (Order Denying Petition for Writ of Mandamus, January 11, 2007).

[11]Southern Pac. Transp. Co. v. Fitzgerald, 94 Nev. 241, 243, 577 P.2d 1234, 1235 (1978).

that he provided testimony from personal knowledge that salespeople were paid approximately 20 percent commission, and that because SDIN paid a total of approximately $150,000 per week in commissions, it would be reasonable to conclude that the company had a gross income of $3,000,000 per month.[12] Pitzel also contends that, contrary to the district court's conclusion, the existence of a written shareholder agreement does not preclude the possibility of equitable relief under a theory of unjust enrichment.

Preliminarily, we note that, even though this matter was tried without a jury, respondents moved for a directed verdict under NRCP 50(a), and the court's order granting that motion also cites to NRCP 50(a). NRCP 50(a), however, applies only to jury trials. When a case is tried before the court, NRCP 52 governs. NRCP 52(a) requires the district court, "[i]n all actions tried upon the facts without a jury," to separately state facts and its conclusions of law. Further, that subsection provides that these factual findings "shall not be set aside unless clearly erroneous." Under NRCP 52(c), after a party has been fully heard on an issue, the court may enter judgment as a matter of law against the party on that issue.

Although respondents' motion was made pursuant to NRCP 50(a), because a bench trial was held below, the district court essentially granted judgment as a matter of law pursuant to NRCP 52(c). Further, the court's order properly contains findings of fact and conclusions of law,

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[12]We understand Pitzel's math as follows: if $150,000 represents a 20 percent commission, then weekly income would be $750,000. Thus, a monthly income would be $3,000,000.

as required by NRCP 52(a) and (c). Accordingly, we will treat the order as an NRCP 52(c) judgment as a matter of law, and the district court's findings of fact will not be set aside unless clearly erroneous.

Here, after Pitzel presented his case-in-chief, the district court found that Pitzel had "failed to provide any valuation of his business interest in [SDIN]." Valuation of a minority interest in a closely held corporation is notoriously complex.[13] For example, in Bowen v. Bowen, the Supreme Court of New Jersey noted that a realistic valuation of a closely held corporation should address not only "book value," but also good will, actual profit, and a discount for a minority interest.[14] Accordingly, although a business owner generally may be competent to testify as to the business's value,[15] here, we conclude that it was not clearly erroneous for the district court to find as a matter of fact that Pitzel's valuation based on

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[13]See In re Marriage of Melnick, 468 N.E.2d 490, 495 (Ill. Ct. App. 1984) (explaining that the valuation of stock for a closed corporation "should, of course, be determined as accurately as is professionally possible using such business and accounting expertise as may be available"); Bowen v. Bowen, 473 A.2d 73, 76-77 (N.J. 1984) (explaining, generally, the difficulties and intricacies of providing a reasonable valuation of interests in a close corporation); Akin, Gump, Strauss v. Nat. Dev. Research, 232 S.W.3d 883, 893 (Tex. Ct. App. 2007) (explaining that a part owner of a business may testify about the market value of that business's stock if his testimony shows that he is familiar with the market value and that the opinion is based on market value).

[14]473 A.2d at 76-77.

[15]See Lucini-Parish Ins. v. Buck, 108 Nev. 617, 621-22, 836 P.2d 627, 630 (1992) (permitting an owner to testify to the purchase price and value of a thoroughbred horse); City of Elko v. Zillich, 100 Nev. 366, 371, 683 P.2d 5, 8 (1984) (permitting an owner to testify to the value of condemned property).

commissions paid, recounted above, failed to sufficiently address the complexities involved in valuing the shares of a closely held corporation.[16] Further, having considered Pitzel's arguments that the existence of the shareholder agreement should not preclude relief under his theory of unjust enrichment, we conclude that they lack merit.[17]

Attorney fees and costs

Concerning the attorney fees and costs award, Pitzel argues that the district court abused its discretion in granting respondents attorney fees and costs under the shareholder agreement because respondents were not prevailing parties, as they incurred attorney fees and costs only "by thwarting enforcement of the [a]greement, by stonewalling and pettifoggery." Pitzel points out that the shareholder agreement provided reimbursement of only those reasonable attorney fees and costs incurred in enforcing the agreement,[18] and he argues that the fees awarded were neither reasonable nor incurred in enforcing the

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[16]See NRCP 52(a) and (c).

[17]See LeasePartners Corp. v. Brooks Trust, 113 Nev. 747, 755, 942 P.2d 182, 187 (1997) (explaining that unjust enrichment is not available where there is an express, written contract).

[18]The relevant provision of the shareholder agreement provides

> Attorney Fees and Costs. In the event a party to this Agreement must employ an attorney to enforce the provisions hereof or to secure performance by a defaulting party under the terms herein stated, the prevailing party in litigation arising therefrom shall be entitled to an award of its reasonable attorney's fees and costs of suit, whether at arbitration, trial or appeal, incurred in enforcing this Agreement and/or securing performance of its terms.

agreement. Pitzel also contends that respondents' memorandum of costs was insufficient because the sum for expert witness fees was not itemized, respondents did not call any expert witnesses at trial, and respondents did not use any depositions at trial. Pitzel further argues that the affidavits supplied by respondents to support the motion for attorney fees and costs are inadmissible, as the notary was an employee of respondents' law firm. Respondents disagree.

The district court may not award attorney fees and costs unless authorized to do so by a statute, rule, or contract.[19] This court will not disturb on appeal a district court's award of attorney fees and costs absent an abuse of discretion.[20]

Here, in granting the motion for attorney fees and costs, the district court noted that the award was made pursuant to the provisions of the shareholder agreement. As respondents defeated all of Pitzel's claims, which involved complying with the shareholder agreement, the district court did not abuse its discretion in awarding attorney fees and costs to respondents under the contract.[21] Having also reviewed Pitzel's remaining arguments regarding the reasonableness and supportability of

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[19]U.S. Design & Constr. v. I.B.E.W. Local 357, 118 Nev. 458, 462, 50 P.3d 170, 173 (2002).

[20]Id.

[21]See Valley Elec. Ass'n v. Overfield, 121 Nev. 7, 10, 106 P.3d 1198, 1200 (2005) (explaining that parties can "prevail" if they "succeed[ ] on any significant issue in litigation which achieves some of the benefit . . . sought in bringing suit" and explaining that the term "prevailing party" is construed so as to encompass plaintiffs, counterclaimants, and defendants).

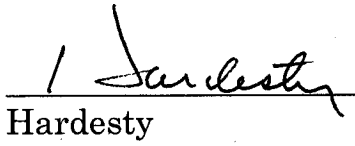
the district court's award of attorney fees and costs, we conclude that they lack merit.

Post-judgment order

Lastly, although Pitzel does not provide separate arguments that challenge the district court's post-judgment order denying his motion for a new trial and to set aside the judgment, in light of our determinations that the district court did not err in awarding judgment to respondents, we also affirm the district court order denying post-judgment relief.

Accordingly, as the district court properly entered partial summary judgment, issued judgment as a matter of law, including the attorney fees and costs award, and denied Pitzel's post-judgment motions, we

ORDER the judgment and post-judgment orders of the district court AFFIRMED.



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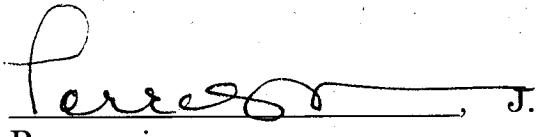

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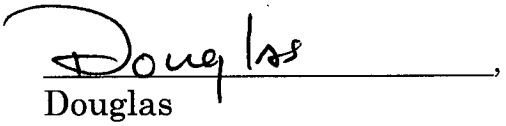

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Douglas

cc: Hon. Elizabeth Goff Gonzalez, District Judge
Michael Pitzel
Gordon & Silver, Ltd.
Eighth District Court Clerk