

IN THE SUPREME COURT OF THE STATE OF NEVADA

DEBORAH ANN GRUBER; AND
JARED SHAFER, SPECIAL CO-
ADMINISTRATORS FOR THE ESTATE
OF CHARLES KOTICK,
Appellants,


vs.

NATALIA SHVACHKO, AN
INDIVIDUAL; AND JOEL KOTICK, IN
HIS CAPACITY AS TRUSTEE OF THE
NATALIA SHVACHKO 2005 TRUST,
Respondents.

No. 50758

FILED

NOV 15 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court summary judgment in a declaratory relief action and from post-judgment orders denying NRCPC 60(b) relief and awarding attorney fees. Eighth Judicial District Court, Family Court Division, Clark County; Sandra Pomrenze, Judge.

I. Background

Charles Kotick married respondent Natalia Shvachko in 2000 in Las Vegas. When the couple applied for a marriage license, Shvachko stated under oath that she had not been previously married. Despite this statement, Shvachko had married Sergey Shvachko in Ukraine in 1992 and allegedly divorced him in Ukraine in 1996.

Kotick created an irrevocable trust in 2005 naming Shvachko as a beneficiary. The trust declared that Shvachko would be its primary beneficiary if she was living with and married to Kotick at the time of his death. If Shvachko did not fulfill this condition, the children of appellant Deborah Gruber (Kotick's daughter) would be the trust's primary

beneficiaries. Kotick died soon after executing the trust, while he was living with and married to Shvachko.

During litigation concerning Kotick's estate in New York, questions about Shvachko's previous marriage were raised. Shvachko had made inconsistent statements about the divorce certificate's location when testifying in depositions. She testified on different occasions that (1) she may have a divorce certificate but did not remember the divorce date, (2) the certificate was located in Ukraine at her mother's residence, and (3) the certificate was always located in her New York apartment and she knew the exact date of the divorce.

Gruber filed a complaint in Nevada requesting that the district court annul Shvachko's marriage to Kotick. Shvachko moved to dismiss the complaint, or in the alternative, for summary judgment. Gruber opposed the summary judgment motion arguing (1) that the district court should grant a continuance under NRCP 56(f) because she had not been able to commence discovery in the case and (2) that there was a genuine issue of material fact regarding whether Shvachko's marriage to Kotick was void based upon bigamy. Gruber contends that Shvachko prevented discovery by refusing to participate in a pretrial conference until after the deadline for Gruber's opposition to the summary judgment motion. Shvachko faxed a copy of an apostille with a copy of an attached divorce decree to Gruber a few months before the summary judgment hearing.¹ One week before the summary judgment hearing,

¹An apostille is "a standard certification provided under the Hague Convention for authenticating documents used in foreign countries."
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Shvachko provided a document purportedly authenticating the divorce decree. The district court denied Gruber's NRCP 56(f) motion, granted summary judgment for Shvachko, and awarded attorney fees in favor of Shvachko.

On appeal, Gruber argues that the district court abused its discretion by denying Gruber's request for a continuance under NRCP 56(f) to allow discovery before granting summary judgment. For the reasons set forth below, we conclude that the district court committed reversible error by denying Gruber a continuance to allow discovery. Because the parties are familiar with the remaining facts and procedural history of this case, we do not recount them further except as necessary for our disposition.

II. The district court abused its discretion by denying Gruber's request for a continuance to allow discovery before granting summary judgment

Gruber argues that the district court abused its discretion by denying a continuance of the summary judgment motion under NRCP 56(f) so that she could conduct discovery. We agree.

NRCP 56(f) states that a district court may order a continuance on a summary judgment motion to permit further discovery when it appears "from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition." The decision to grant or deny a continuance is reviewed for an abuse of discretion. Aviation Ventures v. Joan Morris,

... continued

Black's Law Dictionary 93 (7th ed. 1999); see NRS 52.115 and NRCP 44(a)(2).

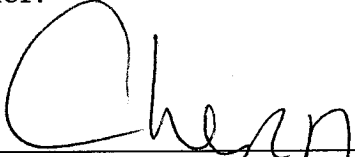
Inc., 121 Nev. 113, 118, 110 P.3d 59, 62 (2005). In Aviation Ventures, this court reversed a district court's grant of summary judgment in an action to collect on a promissory note where the summary judgment motion was filed before the parties had even begun discovery. Id. at 115, 119, 110 P.3d at 60, 63. This court explained that a continuance under NRCP 56(f) is proper if the movant sets forth how further discovery will create a genuine issue of material fact and the movant does not possess a dilatory motive. Id. at 118-19, 110 P.3d at 62-63.

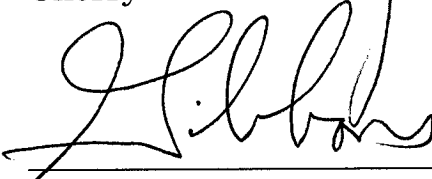
Here, the motion for summary judgment was filed before discovery had commenced. Because the Ukraine government does not grant access to its files until there is pending litigation, Gruber never had the opportunity to investigate Shvachko's marriage and divorce documents kept by the Ukraine government. However, Gruber did discover that the marriage certificate appeared in Shvachko's publicly available list of confidential documents in the Ukrainian government records, while the divorce decree did not appear on that list. Only one week before the summary judgment hearing, Shvachko provided Gruber with a document purporting to authenticate the divorce decree. Gruber never had the opportunity to have her own expert inspect the divorce decree to determine its authenticity and to investigate the documents kept by the Ukraine government.

Further discovery is warranted because an inference can be drawn that Shvachko concealed her first marriage and made inconsistent statements concerning the purported divorce decree. Gruber has the right to conduct further discovery and have an expert review the Ukrainian documents and the decree of divorce. Therefore, we conclude that the district court abused its discretion by denying Gruber a continuance to

conduct discovery before granting the motion for summary judgment. Accordingly, we

ORDER the judgment and the order awarding attorney fees REVERSED and REMAND this matter to the district court for proceedings consistent with this order.²


_____, J.
Cherry



_____, J.
Gibbons

cc: Hon. Sandra Pomrenze, District Judge, Family Court Division
Robert E. Gaston, Settlement Judge
Greenberg Traurig, LLP
Lewis & Roca, LLP/Las Vegas
Markewich and Rosenstock, LLP
Eighth District Court Clerk

²Because we conclude that the district court committed reversible error by denying Gruber a continuance of the summary judgment motion to allow discovery, we do not address the other issues raised on appeal.

SAITTA, J., dissenting:

I would affirm the judgment of the district court. The district court did not abuse its discretion by denying the continuance under NRCP 56(f). Gruber's pleadings provided nothing more than mere speculation and failed to present any material facts by affidavit or otherwise to support the claim that there were irregularities with the divorce granted in the Ukraine.

 _____, J.
Saitta