

IN THE SUPREME COURT OF THE STATE OF NEVADA

INDEPENDENT ASPHALT
CONSULTANTS, INC., A NEVADA
CORPORATION,
Appellant,

vs.

LANCE STUDEBAKER, AN
INDIVIDUAL; CINDY STUDEBAKER,
AN INDIVIDUAL; GREAT BASIN
ASPHALT PRODUCTS, INC., A UTAH
CORPORATION; AND QUALITY
EMULSIONS, LLC, AN ARIZONA
LIMITED LIABILITY COMPANY,
Respondents.

No. 53908

FILED

OCT 25 2010

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

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a preliminary injunction in a contracts action. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge.

Respondents Lance and Cindy Studebaker purchased both a manufacturing plant and a license to produce an asphalt sealant called Pitch Black from appellant Independent Asphalt Consultants, Inc. (IAC). The Studebakers and IAC executed a licensing contract and purchase agreement. After making these purchases, the Studebakers operated respondent Great Basin Asphalt Products, Inc., until Lance experienced severe health problems. At that point, the Studebakers decided to sell the plant to respondent Quality Emulsions, LLC.

Prior to the sale, the Studebakers complied with a provision in the purchase agreement that afforded IAC with the first right of refusal. They sent the appropriate notice to IAC with the potential buyer's name and the offer amount, but IAC chose not to purchase the plant. Instead,

IAC filed suit against respondents for numerous claims, including breach of contract, misrepresentation of trade secrets, breach of fiduciary duties, and interference with a contractual relationship. IAC also requested an injunction and filed a motion for a temporary restraining order and preliminary injunction.

The district court initially granted the temporary restraining order, enjoining the Studebakers from selling the plant. But after hearing IAC's motion for a preliminary injunction, the district court denied the preliminary injunction and dissolved the temporary restraining order. IAC now appeals from the district court's order, arguing that the district court abused its discretion by denying the preliminary injunction.

For the reasons set forth below, we conclude that the district court did not abuse its discretion by denying the motion for a preliminary injunction. Therefore, we affirm the district court's order. Because the parties are familiar with the facts and procedural history of this case, we do not recount them further except as necessary for our disposition.

The district court did not abuse its discretion by denying the motion for a preliminary injunction

IAC argues that the district court abused its discretion when it denied the motion for a preliminary injunction. We disagree.

Standard of review

The district court has sound discretion to determine whether to grant or deny a preliminary injunction. University Sys. v. Nevadans for Sound Gov't, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004). This court will not disturb the district court's decision to grant or deny a preliminary injunction unless there was an abuse of discretion. Id. When reviewing the record, this court will only set aside the district court's factual determinations when substantial evidence does not support them. Id.

Substantial evidence is that which a reasonable mind can accept as sufficient to support a conclusion. Whitemaine v. Aniskovich, 124 Nev. 302, 308, 183 P.3d 137, 141 (2008).

IAC failed to satisfy the factors necessary for a preliminary injunction

NRS 33.010(2) authorizes an injunction when the commission of an act would produce irreparable injury to the plaintiff. Before the district court may issue a preliminary injunction, the moving party must show: (1) that there is a likelihood that he or she will be successful on the merits, (2) that there is a reasonable probability that the nonmoving party's conduct will cause irreparable harm for which damages will not be an adequate remedy, and (3) that the moving party's potential hardships outweigh any hardships to the nonmoving party caused by implementing the injunction. University Sys., 120 Nev. at 721, 100 P.3d at 187. The district court will also consider the public interest. Id.

The likelihood that IAC will be successful on the merits

IAC argues that the district court abused its discretion when it concluded that IAC was not likely to be successful on the merits of its lawsuit. We disagree.

IAC argues that the district court should have construed the licensing and purchase agreements to be one contract. IAC notes that this court concluded in Whitemaine that two independently executed agreements can form one contract even though one of the agreements has an integration clause. 124 Nev. at 305, 183 P.3d at 139. Courts may construe two agreements as one contract when: (1) the parties contemporaneously execute the agreements, (2) the agreements address the same subject matter, and (3) one of the agreements refers to the other. Id. at 308, 183 P.3d at 141. If each agreement forms one contract, then

IAC argues that this contract prevents the Studebakers from selling the plant to a competitor without IAC's written consent.

We conclude that IAC's argument lacks merit. Courts will not construe two agreements as one contract if they do not address the same subject matter. Whitemaine, 124 Nev. at 308, 183 P.3d at 141. Here, the licensing agreement does not address the same subject matter as the purchase agreement. The licensing agreement deals with the Studebakers' use of IAC's unique asphalt sealant formula, whereas the purchasing agreement addresses the Studebakers' purchase of a specially designed plant.

As to IAC's breach-of-contract claim, substantial evidence suggests that the Studebakers abided by the terms of the purchase agreement when attempting to sell the plant to Quality Emulsions. Section 16 of this agreement states:

In the event that Buyers sell the Seal Coat Mini-Plant, then Buyers shall give Seller the first right of refusal on any such sale by disclosing to Seller, in writing, the name of the potential buyer and the amount of said potential buyer's offer to purchase the Seal Coat Mini-Plant. Seller shall have fifteen (15) days from the date of receipt of such notification to exercise its right by paying a sum equal to the offer received by Buyers from potential buyer.

This provision expressly sets forth that the Studebakers can sell the plant as long as they provide the appropriate notice to IAC. In this case, the Studebakers did provide the proper notice of the plant's sale by affording IAC with the right of first refusal. However, IAC chose not to purchase the plant.

Therefore, we conclude that the district court did not abuse its discretion by concluding that IAC failed to establish a likelihood of success on the merits.

Whether there is a reasonable probability that respondents' conduct will cause irreparable harm to IAC

IAC argues that the district court abused its discretion by denying the preliminary injunction because the plant's sale would cause IAC irreparable harm, as Quality Emulsions would uncover IAC's trade secrets. We disagree.

Irreparable harm may occur in various situations, including when a party loses its rights to real property. Dixon v. Thatcher, 103 Nev. 414, 416, 742 P.2d 1029, 1030 (1987). Losing rights to real property may cause irreparable harm because the attributes of real property are unique. Id. Here, IAC argues that trade secrets are a unique property interest similar to real property and that there is a reasonable probability that it will suffer irreparable harm if a competitor gains access to its asphalt sealant formula and mini-plant design.

In this case, substantial evidence shows that there is not a reasonable probability that respondents' conduct would cause irreparable harm to IAC. Nothing suggests that Quality Emulsions would gain access to IAC's secret formula by purchasing the plant. Based upon the district court's order, IAC could purchase the remaining inventory of ingredients prior to the sale. In addition, Quality Emulsions plans to use the plant to produce a product other than Pitch Black.

We also note that nothing suggests that Quality Emulsions would gain access to IAC's unique plant design. After purchasing the plant, the Studebakers changed the plant's design by adding and removing equipment. When the Studebakers decided to sell the plant to Quality

Emulsions, the owner of Quality Emulsions signed a confidentiality and nondisclosure contract. With regard to the unique blade design, the district court permitted IAC to remove the blades prior to the sale. Also, respondents will not cause irreparable harm to IAC that damages cannot compensate. This is because the purchase agreement states that \$85,000 in liquidated damages will compensate IAC for a breach of the covenant not to compete.

Therefore, we conclude that the district court did not abuse its discretion by finding that there is not a reasonable probability that respondents' conduct would cause irreparable harm to IAC.

Weighing the parties' potential hardships

IAC argues that the district court abused its discretion by denying the preliminary injunction because the potential hardship it would suffer if Quality Emulsions obtained trade secrets outweighs any hardship to respondents. We disagree.

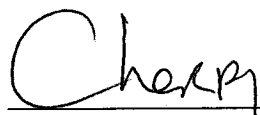
In this case, IAC argues that its trade secrets are very valuable. It took multiple years of research and development for IAC to create its unique asphalt sealant formula and plant design. This formula creates a high-quality product by combining the ingredients with unique blades in a mixing tank.

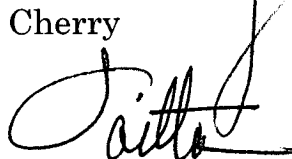
Despite the time and costs IAC expended to create the formula and plant design, we conclude that the balance of hardships weighs in favor of respondents. The district court alleviated any potential hardship to IAC caused by the discovery of trade secrets by permitting IAC to remove the blades from the mixing tank and to recover the inventory of ingredients prior to the sale. In contrast, the Studebakers would suffer great hardship if the court imposed an injunction because they must sell the plant due to Lance's health problems.

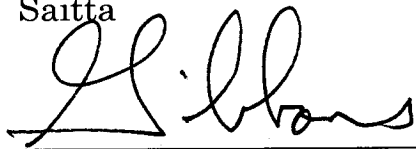
Lance testified during the hearing that his health would be greatly affected if he was unable to sell the plant. According to Lance, his physician told him to avoid stress at all costs to prevent further damage to his heart. The plant causes considerable stress to Lance because it is a seasonal job that puts financial strain on his family. Lance also testified that he has difficulty running the plant in an effective manner due to his health problems.

Therefore, we conclude that the district court did not abuse its discretion by denying the motion for a preliminary injunction because the balance of hardships weighs in favor of respondents. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Hon. Steven P. Elliott, District Judge
Robert L. Eisenberg, Settlement Judge
Woodburn & Wedge
Bennett, Tueller, Johnson & Deere
Law Offices of Mark Wray
Washoe District Court Clerk