IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVEN CSOMOS, INDIVIDUALLY AND ON BEHALF OF A CLASS OF ALL SIMILARLY SITUATED PERSONS,
Appellant,
vs.
VENETIAN CASINO RESORT, LLC,
Respondent.

No. 55203

FILED

SEP 19 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court judgment in an employment action. Eighth Judicial District Court, Clark County; Jessie Elizabeth Walsh, Judge.

Appellant Steven Csomos complains that while he was employed as a server at the Venetian Casino Resort, his employer improperly kept a portion of the service charges assessed as a required gratuity on room service customers. In his first amended complaint, Csomos asserted eight claims for relief labeled: 1) breach of contract, 2) unpaid wages after termination of employment under NRS 608.040, 3) wrongful interference with prospective economic advantage, 4) conversion, 5) unjust enrichment, 6) fraud, 7) quantum meruit, and 8) relief for damages sustained as a third-party contract beneficiary.

The district court granted summary judgment to the Venetian on the first two claims and dismissed the remaining claims asserted in the amended complaint as insufficient. Csomos timely appeals, and we affirm.

I. Facts and proceedings below

Csomos worked for the Venetian as an In Suite Dining (ISD) server, providing room service to guests at the Venetian hotel. The

11-28635

Venetian hired Csomos, and similar employees, as at-will employees. As an ISD server, Csomos would deliver a bill with the room service order. The bill included a 17%-18% service charge and advised that gratuity was included. However, the bill included a line allowing customers to enter an additional gratuity, if they wished.

The Venetian distributes ISD service charges to Venetian employees. It divides the charges among various employees, including servers, assistant servers, bartenders, and sales agents. Although Csomos received service charge monies every pay period, he did not know the exact percentage that ISD servers received.

Csomos sued the Venetian after leaving its employ. He originally filed a two-count class action complaint, alleging breach of contract and a claim under NRS 608.040 for unpaid wages due after termination of employment. Both claims alleged that the Venetian kept a portion of the service charge that Csomos and others were entitled to receive under contract or as wages. Csomos then served the Venetian with a request for production of documents, requesting all documents relating to Csomos's employment and the distribution of service fees. Months later, Csomos filed an amended complaint, adding six more causes of action including wrongful interference with prospective economic advantage, conversion, unjust enrichment, fraud, quantum meruit, and relief for damages sustained as a third-party contract beneficiary. He filed the amended complaint without moving for leave to amend.

In response to Csomos's amended complaint, the Venetian filed a combined motion to strike or dismiss with prejudice, and for summary judgment (combined motion). In its motion, the Venetian first argued that the amended complaint should be stricken because Csomos

needed, but lacked, leave to amend under NRCP 15(a). Next, the Venetian argued that the six new claims failed to state claims upon which relief could be granted under NRCP 12(b)(5). Finally, the Venetian moved for summary judgment on Csomos's two original claims of breach of contract and violation of NRS 608.040, asserting that Csomos had no contractual or statutory entitlement to service fees, and that Csomos failed to exhaust his administrative remedies before the Labor Commission.

Csomos opposed the Venetian's combined motion, claiming he properly filed the amended complaint. In addition, Csomos argued in his opposition that he sufficiently pleaded all claims and needed discovery to develop them more fully.

The district court granted the Venetian's combined motion. In doing so, the district court did not specifically address Csomos's filing of an amended pleading without formal leave of court. However, it granted summary judgment to the Venetian on Csomos's two original claims, finding that there was no contract or legal duty to provide Csomos with service charges. It further concluded that the new claims sought to be added by the amended complaint did not identify independent facts beyond the first complaint, meriting their dismissal. This appeal followed.

II. Discussion

Breach of contract claim

Summary judgment is appropriate if, after viewing the record before the district court in the light most favorable to the nonmoving party, "'no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law.'" Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (quoting NRCP 56(c)). This court

applies de novo review to a district court's summary judgment determination. Id.

This court held in Baldonado v. Wynn Las Vegas, 124 Nev. 951, 194 P.3d 96 (2008), that at-will employees do not have contractual rights to continued employment and that an employer of an at-will employee can prospectively change the terms and conditions of employment, with the employee's assent to those changes being implicit in his or her continuing to work for the employer. Further, an implied contract cannot be formed if there is an appropriate disclaimer. Id. at 966, 194 P.3d at 106.

Csomos was an at-will employee and the Venetian requires employees to sign documents acknowledging this and disavowing any implied contracts. The Venetian never agreed to give Csomos or other employees a specific percentage of the service charges. Csomos received at least some service charges during each pay period, along with his hourly pay. Therefore, the district court correctly granted summary judgment on the basis that there can be no breach of contract claim when there was no evidence of a contract, express or implied, between Csomos and the Venetian, or its breach. At most, the Venetian promised to pay Csomos an unspecified share of the room service charges, which his affidavit admits it did; further, as an at-will employee, this arrangement was not fixed but changeable at will.

NRS 608.040 claim

The Venetian contends that there is no private cause of action under NRS 608.040 to recover service fees, citing Baldonado. However, Baldonado only applies to NRS 608.160. 124 Nev. at 961, 194 P.3d at 102. Some labor laws expressly create private rights of action to obtain unpaid

wages or other benefits. Id. at 964 n.33, 194 P.3d at 104 n.33. Although NRS 608.040, which assesses penalties for failure to pay a discharged employee, does not have explicit language authorizing a private cause of action, NRS 608.140 allows for assessment of attorney fees in a private cause of action for recovery of wages. It is doubtful that the Legislature intended a private cause of action to obtain attorney fees for an unpaid wages suit but no private cause of action to bring the suit itself. See Fierle v. Perez, 125 Nev. ___, ___, 219 P.3d 906, 915-16 (2009) (statutes should be interpreted in a manner to avoid conflict with other related statutes). The legislative scheme is consistent with a private cause of action for employees and the Legislature enacted the statute to protect employees, supporting a private cause of action under NRS 608.040.

However, viewing the record in the light most favorable to Csomos, there is nothing in the record to support Csomos's argument that the Venetian is keeping any of the service charges. The Venetian provided affidavits confirming that 100% of the service charges are paid to employees and that the hourly pay rate of ISD servers is not reduced based on service charges received. Csomos and his former co-worker, Mary Montag, both admit they were never told by anyone that the Venetian withheld any portion of the service charge. Csomos did not provide any paystubs or other evidence to show a genuine issue of material fact regarding the alleged withholding of wages by the Venetian. Therefore, the district court correctly granted summary judgment on this claim as well.

Csomos did not have leave to amend his first complaint

Csomos did not amend his complaint until almost four months after the Venetian's answer and did not move to amend. Both NRCP 15(a)

and the Eighth Judicial District Court Rule 2.30 (EDCR) required leave from the district court for Csomos to amend the pleadings. The amended complaint fell outside the 20-day window for leave to amend as a matter of right under NRCP 15(a); EDCR 2.30 only allows for amendments as a matter of right or by court order. Csomos maintains he somehow secured telephonic permission from the judge's assistant to file his amended complaint, but the record does not include an order or stipulation to support this. Without an order permitting Csomos to amend the complaint, his unilateral filing of an amended complaint was improper. Therefore, his claims of wrongful interference with prospective economic advantage, conversion, unjust enrichment, fraud, quantum meruit, and relief for damages sustained as a third-party contract beneficiary are not properly before this court.

Even accepting arguendo that Csomos properly relied on telephonic permission, amendment is not appropriate when the amendment would be futile. Reddy v. Litton Industries, Inc., 912 F.2d 291, 296-97 (9th Cir. 1990); see Allum v. Valley Bank of Nevada, 109 Nev. 280, 287, 849 P.2d 297, 302 (1993) (adopting Reddy, 912 F.2d 291, regarding leave to amend and futile claims). Csomos acknowledged in his sworn affidavit that the Venetian did not promise him a specified percentage of ISD fees and that he always received some of those fees. Csomos could not allege conversion, unjust enrichment, fraud, or quantum meruit without a disappointed contract or other right to the fees, which his sworn affidavit contradicts. See Aldabe v. Adams, 81 Nev. 280, 285, 402 P.2d 34, 37 (1965), overruled on other grounds by Siragusa v. Brown,

114 Nev. 1384, 1393, 971 P.2d 801, 807 (1998). Therefore, any leave to amend for those claims would be futile. For these reasons, we

ORDER the judgment of the district court AFFIRMED.

Cherry, J.
Cherry

Gibbons, J.
Gibbons

Pickering, J.
Pickering

cc: Hon. Jessie Elizabeth Walsh, District Judge
William F. Buchanan, Settlement Judge
Leon M. Greenberg
Fox Rothschild, LLP
Eighth District Court Clerk