IN THE SUPREME COURT OF THE STATE OF NEVADA

EXCELLENCE COMMUNITY MANAGEMENT, LLC, A NEVADA LIMITED LIABILITY COMPANY,
Appellant,
vs.
KRISTA GILMORE, INDIVIDUALLY; AND MESA MANAGEMENT, LLC, A NEVADA LIMITED LIABILITY COMPANY,
Respondents.

No. 62189

FILED

DEC 18 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a preliminary injunction in an employment matter. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Respondent Krista Gilmore was employed by Appellant Excellence Community Management, LLC (ECM) as a community association manager. As a condition of her employment she signed an employee confidentiality and restrictive covenants agreement, which prohibited Gilmore from revealing trade secrets and disclosing ECM's confidential information. The agreement also contained an 18-month non-solicitation clause and an 18-month non-competition clause. It did not include an assignment clause. Shortly after Gilmore signed the agreement, ECM's owners sold their membership interests to First Service Residential Management Nevada (FSRM).

Sometime after the sale, Gilmore left ECM to work for respondent Mesa Management, LLC. ECM's new owners sent Gilmore a

Order Vacated per Order Filed 6/25/15 13-38421

cease and desist letter alleging that she was soliciting ECM's clients in violation of the employee agreement. When Gilmore asserted that her conduct was not in violation of the agreement, ECM filed a complaint and subsequent motion seeking damages and injunctive relief. The district court ultimately denied ECM's request for a preliminary injunction relying on this court's holding in *Traffic Control Services, Inc. v. United Rentals Northwest, Inc.*, 120 Nev. 168, 87 P.3d 1054 (2004), to find that ECM was not likely to succeed on the merits. The district court also found that ECM failed to provide sufficient evidence of potential irreparable harm should the injunction not issue. ECM appeals the denial of the motion.

In Nevada "[a] preliminary injunction is available when the moving party can demonstrate that" it is reasonably likely that it will succeed on the merits, and that it will suffer "irreparable harm for which compensatory relief is inadequate." *Boulder Oaks Cmty. Ass'n v. B & J Andrews Enters., L.L.C.*, 125 Nev. 397, 403, 215 P.3d 27, 31 (2009). The district court maintains discretion in determining whether to grant a preliminary injunction, and this court will only reverse a decision "where the district court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact." *Id.* (internal quotations omitted).

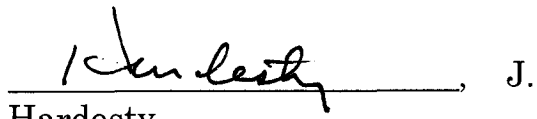
In *Traffic Control*, this court addressed "whether noncompetition covenants may be assigned from one employer to another through the medium of an asset sale (or otherwise)" and held that "absent an agreement negotiated at arm's length, which explicitly permits assignment and which is supported by separate consideration, employee noncompetition covenants are not assignable." 120 Nev. at 172, 87 P.3d at 1057. And in *HD Supply Facilities Maintenance, Ltd., v. Bymoen*, this

court clarified the application of the rule articulated in *Traffic Control* when it held that the rule did not apply to mergers because it was grounded in the law of contractual assignments and its goal was to "preserv[e] an employee's individualized choice to covenant not to compete with a particular employer." *HD Supply*, 125 Nev. 200, 205, 210 P.3d 183, 186 (2009). Therefore, while the rule from *Traffic Control* "logically applies in the contractual setting of an asset purchase transaction because, in an asset purchase, 'the transaction introduces into the equation an entirely different entity, the acquiring business,'" that rationale would not apply to mergers because in a merger two corporations become one single corporation, and the employee does not get an entirely new employer. *HD Supply*, 125 Nev. at 205-06, 210 P.3d at 186-87 (quoting *Corporate Express Office Prods., Inc. v. Phillips*, 847 So. 2d 406, 412 (Fla. 2003)).

Here, ECM's owners sold and transferred all of their interest in ECM to FSRM. Thus, Gilmore had a new employer after the sale, even if the name of the company did not change, and the district court properly applied the rule articulated in *Traffic Control*. Furthermore, because the agreement Gilmore originally signed did not contain an assignability clause, the district court correctly determined that under the rule in *Traffic Control* ECM could not enforce the agreement following the sale. Therefore, the district court did not abuse its discretion when it denied

ECM's request for a preliminary injunction because it found that ECM was not reasonably likely to succeed on the merits of its complaint.[1]

Accordingly, we ORDER the judgment of the district court AFFIRMED.



_____, J.
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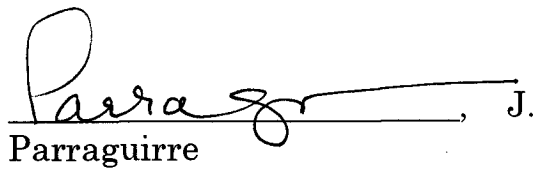

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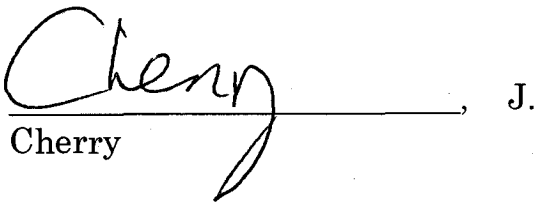

_____, J.
Cherry

cc: Hon. Michael Villani, District Judge
Persi J. Mishel, Settlement Judge
Durham Jones & Pinegar
Alessi & Koenig, LLC
Eighth District Court Clerk

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[1]Because we conclude that the district court did not abuse its discretion when it determined that ECM was not likely to succeed on the merits of its complaint, we need not reach ECM's argument that the district court also erred in determining that ECM failed to show irreparable harm should the injunction not issue.