IN THE SUPREME COURT OF THE STATE OF NEVADA

P. MICHAEL MARFISI,

Appellant,

vs.

PETER D. DURNEY, THOMAS R. BRENNAN, AND DURNEY & BRENNAN, LTD., A NEVADA CORPORATION,

Respondents.

No. 35745

FILED

SEP 07 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order granting respondents' motion for change of venue. On appeal, appellant, P. Michael Marfisi, argues that the district court improperly granted the motion because it erroneously found that there was no particular place of performance for respondents' obligations under the parties' joint venture agreement. Marfisi contends that this error occurred because the district court abused its discretion by denying his request for a hearing on the motion. In addition, Marfisi argues that the district court erred in granting the motion for change of venue because the contract obligation was incurred in Elko County, and the district court improperly applied NRS 13.040, instead of NRS 13.010(1), in determining venue. Because we conclude that all of Marfisi's arguments lack merit, we affirm the district court's order.

Marfisi first argues that the district court erred in granting respondents' motion to change venue from Elko County to Washoe County because it incorrectly determined that there was no particular place of performance for respondents' obligations pursuant to the parties' joint venture agreement. We disagree.

As a matter of right, a defendant may have a case tried in his county of residence as long as he complies with

statutory requirements.[1] Once a defendant files a timely demand for change of venue, the plaintiff carries the burden of proving that the county in which the action was initially filed is the proper venue.[2] NRS 13.010(1)provides:

> When a person has contracted to perform an obligation at a particular place, and resides in another county, the action must be commenced, and, subject to the power of the court to change the place of trial . . . , must be tried in the county in which such obligation is to be performed or in which he resides; and the county in which the obligation is incurred shall be deemed to be the county in which it is to be performed, unless there is a special contract to the contrary.

Marfisi filed the complaint against respondents in Elko County. Neither party alleged a special contract existed. Both contracting obligors resided in Washoe County. Given these undisputed facts, to prevail in his opposition to respondents' change in venue motion pursuant to NRS 13.010(1), Marfisi needed to prove that respondents either agreed to perform the joint venture contract in Elko County or that the obligation was incurred there.

Marfisi filed an affidavit asserting that respondents agreed to perform the joint venture contract in Elko County. Respondents filed an affidavit to the contrary. Neither party provided a written joint venture agreement. In addition, respondents claimed, and Marfisi did not dispute, that respondents performed all accounting and bookkeeping, a majority of all correspondence, and nearly all case management for the joint venture in Washoe County.

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[1]Stocks v. Stocks, 64 Nev. 431, 438, 183 P.2d 617, 620 (1947).

[2]Washoe County v. Wildeveld, 103 Nev. 380, 382, 741 P.2d 810, 811 (1987).

Marfisi's main allegation of error is that in light of these conflicting affidavits, the district court erred by denying his request for a hearing so that he could testify that performance was obligated in Elko County. Thus, the district court was unable to consider all pertinent evidence concerning the motion to change venue.

Rule 11(14) of the Fourth Judicial District Court grants the district court discretion as to whether to schedule a hearing on a motion, as long as it stays within the bounds of its governing rules.[3] This court will not interfere with such a district court decision absent an abuse of discretion.[4]

Marfisi's argument that the district court abused its discretion by denying his request for a hearing lacks merit because the testimony he claims he would have presented at that hearing was already before the court in his affidavit. No rule mandates that a district court must hold a hearing on a motion simply because a party requests one. Marfisi presented no proof to this court that the district court was unable to consider evidence concerning which venue was proper because it did not hold a hearing. The absence of any evidentiary support for Marfisi's request was adequate reason for the district court to deny the request.[5]

Marfisi next argues that Elko County was the proper venue because the contractual obligation between the parties was incurred in Elko County. However, because Marfisi did not

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[3]Zupancic v. Sierra Vista Recreation, 97 Nev. 187, 192, 625 P.2d 1177, 1180 (1981).

[4]Id. at 192-93, 625 P.2d at 1180.

[5]Cf. Bakerink v. Orthopaedic Associates, Ltd., 94 Nev. 428, 431, 581 P.2d 9, 11 (1978).

raise this argument before the district court, he is precluded from doing so on appeal.[6]

Finally, Marfisi contends that the district court may have erroneously based its decision on NRS 13.040 instead of NRS 13.010(1). We conclude that the district court applied NRS 13.040, the catch-all venue statute, here because Marfisi failed to establish that venue should remain in Elko County pursuant to NRS 13.010(1).

NRS 13.040 provides, in pertinent part: "In all other cases, the action shall be tried in the county in which the defendants, or any of them, may reside at the commencement of the action . . . ." "[A] motion for a change of venue pursuant to NRS 13.040, based on the defendant's residence, does not permit an exercise of discretion by the district court."[7]

In its order granting change of venue, the district court acknowledged the parties' arguments on whether NRS 13.010(1) or NRS 13.040 applied to the case. However, although the district court decided that the change of venue motion was proper, it did not explain which statute it applied or why.

Ordinarily, NRS 13.010(1) applies to a contract action, or a tort action that is interrelated and dependent on a contract claim, but Marfisi's failure to establish that respondents contracted to perform their obligations in Elko County or incurred that obligation there activated the catch-all, non-contractual venue statute, NRS 13.040, by default.

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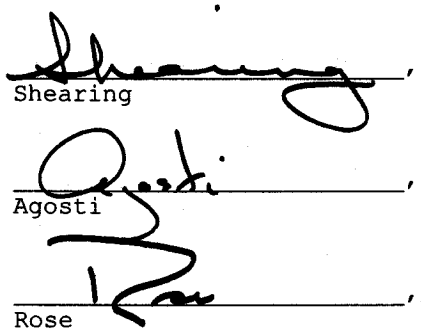
[6]See Borden v. Silver State Equipment, 100 Nev. 87, 89 n.1, 675 P.2d 995, 996 n.1 (1984); see also Carson Ready Mix v. First Nat'l Bk., 97 Nev. 474, 476, 635 P.2d 276, 277 (1981).

[7]Halama v. Halama, 97 Nev. 628, 629, 637 P.2d 1221, 1221 (1981).

Thus, the granting of this venue change by the district court was mandatory, not discretionary.

Because a district court has the discretion whether or not to grant a hearing on a motion and Marfisi presented no proof that the district court abused that discretion, we conclude that the district court did not abuse its discretion in granting the motion for a change in venue without a hearing. Also, because Marifisi failed to establish that NRS 13.010(1) governed the determination of venue in this case, we conclude that the district properly determined that, by default, NRS 13.040 applied. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Shearing

_____, J.
Agosti

_____, J.
Rose

cc: Hon. James W. Hardesty, District Judge
McDonald Carano Wilson McCune Bergin Frankovich & Hicks LLP
Wilson & Barrows
Walther Key Maupin Oats Cox Klaich & LeGoy
Elko County Clerk