IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM STEINKOHL, M.D., AN INDIVIDUAL,

Appellant,

vs.

SHELDON J. FREEDMAN, M.D., LTD., A NEVADA PROFESSIONAL CORPORATION,

Respondent.

No. 37322

FILED

JAN 10 2002

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

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court order granting a preliminary injunction that enforces a forty-five day non-competition clause in a contract.[1] The district court ordered the injunction to begin when respondent Sheldon J. Freedman, M.D., Ltd. posts a $150,000 bond.

Appellant William Steinkohl, M.D. first contends that the district court abused its discretion in granting the preliminary injunction because Freedman did not demonstrate a reasonable likelihood of success on the merits and any threat of irreparable harm.

"A preliminary injunction is available if an applicant can show a likelihood of success on the merits and a reasonable probability that the

[1]Pursuant to NRAP 34(f)(1), we have determined that oral argument is not warranted in this appeal.

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non-moving party's conduct, if allowed to continue, will cause irreparable harm for which compensatory damage is an inadequate remedy."[2] The district court's decision of whether to grant a preliminary injunction is discretionary, and will not be disturbed on appeal absent an abuse of discretion.[3]

We conclude that the district court abused its discretion in granting the preliminary injunction because Freedman did not demonstrate that Steinkohl's alleged breach of the covenant not to compete caused irreparable harm, unable to be remedied through compensatory damages. Freedman's argument that irreparable harm can be inferred from the district court's finding of breach is unpersuasive. The covenant not to compete provided that upon termination, Steinkohl could not compete within a seven-mile radius of Freedman's principle place of business for a period of forty-five days. Steinkohl's services were terminated on March 31, 2000. Freedman did not file the preliminary injunction motion until June 5, 2000, after the forty-five-day period had expired. Thus, a threat of irreparable harm was lacking here, once the non-competition period had expired. Further, any loss to Freedman resulting from Steinkohl's breach of the non-competition clause appears to be compensable through monetary damages. Thus, the district court

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[2]See Dangberg Holdings v. Douglas Co., 115 Nev. 129, 142, 978 P.2d 311, 319 (1999); see also NRS 33.010.

[3]See Number One Rent-A-Car v. Ramada Inns, 94 Nev. 779, 781, 587 P.2d 1329, 1330-31 (1978).

abused its discretion in granting the preliminary injunction, warranting reversal.

Steinkohl next contends that the district court erred by deeming its findings of fact on the preliminary injunction to be final under NRCP 65(a)(2), prohibiting re-litigation of these issues at trial. Steinkohl argues that he did not violate the covenant not to compete, and he should be allowed to conduct discovery and present evidence on this issue at trial.

We agree. NRCP 65(a)(2) provides that even when the hearing on the application for preliminary injunction and the trial on the merits are not consolidated, "any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial." The language of the district court's order is more limiting than NRCP 65(a)(2), stating that the findings are final and need not be re-litigated at trial. NRCP 65(a)(2) merely states that evidence need not be repeated at trial. It does not preclude additional evidence at trial, as the district court's order suggests. The district court's preliminary factual findings, that Freedman had two principle places of business and that Steinkohl breached the covenant by opening his own medical practice and performing hospital surgeries, are based merely on Freedman's allegations in his preliminary injunction motion and supporting affidavit. Freedman argues unpersuasively that these factual findings are uncontroverted. Thus, the district court erred in precluding re-litigation of these issues at trial, warranting reversal.

Accordingly, we reverse the preliminary injunction order of the district court, and remand this matter to the district court for

proceedings consistent with this order. We vacate our June 15, 2001 stay of the preliminary injunction order.

It is so ORDERED.

Maupin, C.J.

Rose, J.

Becker, J.

cc: Hon. Nancy M. Saitta, District Judge
Law Office of Daniel Marks
Cook & Kelesis
Clark County Clerk