IN THE SUPREME COURT OF THE STATE OF NEVADA

CLARK COUNTY SCHOOL DISTRICT AND EDWARD GOLDMAN,
Appellants,
vs.
RICHARD SEGERBLOM,
Respondent.

No. 37310

FILED

DEC 17 2002

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

ORDER OF AFFIRMANCE

This is an appeal by appellants Clark County School District and Edward Goldman from a final judgment staying arbitration.[1]

In April 1999, respondent, attorney Richard Segerblom, and his client, Muin Mustafa, executed a settlement agreement with Clark County School District ("CCSD") and Edward Goldman, settling an employment discrimination case in federal court.[2] The settlement effectively provided Mustafa with $30,332; $30,000 to be paid to Mustafa's attorney, Richard Segerblom, as attorney fees, and $332 to Mustafa for one day of sick leave.[3] In addition, the settlement agreement (1) contained a confidentiality clause that prohibited the parties and their counsel from publicly discussing the terms of the settlement; (2) provided for liquidated damages if either party breached the confidentiality clause; and (3) contained an arbitration clause to resolve any disputes between the parties regarding the settlement agreement.

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[1]See NRS 38.247.

[2]Mustafa v. Clark County School District, No. CV-S-95-0016-HDM (RJJ) (D. Nev. June 19, 1999) (stipulation and order for dismissal with prejudice).

[3]This payment, although seemingly inconsequential, affected Mustafa's Public Employees Retirement pension rights.

02-21556

In July 1999, CCSD and Goldman moved for the imposition of FRCP 11 sanctions against Segerblom in another case brought by Segerblom, Dellavedova v. Clark County School District,[4] alleging a pattern of harassment in a series of cases filed on behalf of clients against CCSD and Goldman.

In his opposition to the Rule 11 motion in Dellavedova, Segerblom claimed that CCSD implicitly referred to the Mustafa case in the FRCP 11 motion, and that CCSD expected that the confidentiality provision of the Mustafa settlement would render Segerblom unable to refute the accusations as they related to the Mustafa matter.[5] Segerblom stated: "In fact, the Ninth Circuit specifically held that there was sufficient evidence to prove that Goldman had intentionally discriminated against an Arab-American teacher because of his national origin. The District spent over $500,000 defending that case before it was settled." In

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[4]No. CV-S-99-287-HDM (RLH) (D. Nev. September 16, 1999) (order denying motion for sanctions pursuant to Fed. R. Civ. P. Rule 11).

[5]CCSD specifically claimed the following:

> The litigation history between Plaintiff's counsel and the District suggests that Plaintiff's counsel's action in naming Dr. Goldman in the Complaint may have been done for the improper purpose of harassing Dr. Goldman. Specifically, a review of the cases Plaintiff's counsel has filed against the District in the last four (4) years, in which the law firm of Kamer and Zucker has been the attorney of record, indicates that Dr. Goldman has been named individually in five (5) separate litigation matters. This litigation history intimates that Plaintiff's counsel routinely names Dr. Goldman as a Defendant. Sanctions are proper under Rule 11 if pleadings are filed for the improper purpose of harassing the other party.

his declaration attached to that opposition, Segerblom also stated: "In the Mustafa case cited above I am personally knowledgeable that the District spent over $500,000 defending Goldman and the other defendants. That case was recently settled for a confidential amount."[6]

In a confidential letter dated August 17, 1999, CCSD's general counsel notified Segerblom of his alleged confidentiality violations and requested arbitration. Segerblom responded with a letter referencing the Mustafa settlement, copies of which were provided to Mustafa, the Board of School Trustees, the Las Vegas Review Journal and Las Vegas Sun newspapers. On August 20, 1999, Segerblom filed a supplemental opposition to CCSD's motion for sanctions in Dellavedova, in which he disclosed the Mustafa settlement amounts and stated that the Mustafa case "arose from Goldman's arbitrary and capricious acts against a Palestinian-American teacher."

After CCSD notified Segerblom of these additional alleged confidentiality breaches, Segerblom responded with another letter, noting that the Mustafa settlement exceeded $30,000.[7] In response, CCSD filed an application in the federal district court for an order to show cause against Segerblom for contempt based on his alleged violations of the federal court's order mandating confidentiality in Mustafa.[8] The federal

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[6]The district court later denied CCSD and Goldman's motion for FRCP 11 sanctions.

[7]CCSD Regulation 3431.2 requires the board to approve any settlement over $30,000 at a public meeting before it is valid.

[8]On October 9, 1999, the Review Journal published an article in which Segerblom revealed the amount of the Mustafa settlement, a review of the Mustafa case, and Segerblom's motivations for publicizing the case. CCSD supplemented its application for an order to show cause after the publication of the article.

district court denied this motion, but stated that the parties were not precluded form arbitrating "the issue raised in the application for order to show cause."[9]

After proceeding to arbitration under the settlement agreement, the arbitrator determined that his jurisdiction was limited to determining whether Segerblom breached the agreement and not whether the confidentiality provisions violated Nevada law and CCSD policy, as Segerblom argued they did. Segerblom then filed a petition to stay arbitration with the state district court, arguing that the settlement agreement was illegal, thereby rendering the arbitration and confidentiality provisions void as a matter of public policy.

The district court found that CCSD had violated its own regulations by settling the Mustafa case for $30,332 without obtaining the school board's approval.[10] Therefore, the court concluded that the settlement agreement was invalid and unenforceable by CCSD and Goldman. The court accordingly granted Segerblom's petition to stay arbitration. CCSD and Goldman appeal the order granting the petition to stay arbitration proceedings.

DISCUSSION

We conclude that CCSD and Goldman waived their right to assert a breach of confidentiality on Segerblom's part when they publicly filed their FRCP 11 motion in federal court, claiming that Segerblom engaged in a pattern of harassing Goldman via the series of lawsuits. Thus, we conclude that the district court properly stayed arbitration.

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[9]Mustafa v. Clark County School District, No. CV-5-95-0016-HDM (RJJ) (D. Nev. Nov. 22, 1999).

[10]See n.7.

Waiver of a known contractual right may be established intentionally through an express agreement to relinquish the right. Waiver may also be implied "from conduct which evidences an intention to waive a right, or by conduct, which is inconsistent with any other intention than to waive a right."[11]

CCSD and Goldman's implied waiver of confidentiality is analogous to a situation that may occur under the Supreme Court Rules of Professional Conduct. Under SCR 156(1), an attorney is required to keep client information confidential, just as Segerblom was required to keep the terms of the settlement agreement confidential. However, the client confidentiality requirement may be waived when a controversy arises between the client and the attorney under SCR 156(3).[12] When a client sues an attorney, the client, through his conduct, has implicitly waived the duty of confidentiality on the part of the attorney. The attorney is then free to disclose such confidential information as he reasonably believes necessary to defend himself. This conduct constituting waiver is similar to CCSD and Goldman's conduct when they filed the FRCP 11 motion against Segerblom alleging a pattern of abuse in other cases.

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[11]McKellar v. McKellar, 110 Nev. 200, 202, 871 P.2d 296, 297 (1994).

[12]See SCR 156(3), which specifically allows an attorney to

> reveal such information to the extent the lawyer reasonably believes necessary:
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> . . . .
>
> (b) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client . . . or to respond to allegations in any proceeding concerning the lawyers representation of the client.

In the current case, CCSD and Goldman did not limit their motion for sanctions to actions discrete to Dellavedova. Instead, they chose to seek sanctions based upon a claim that Segerblom had engaged in a pattern of harassment in repeatedly naming Goldman as a defendant in a series of employment discrimination actions. In so doing, CCSD and Goldman put at issue whether prior lawsuits filed by Segerblom were improper.[13] Thus, we conclude that CCSD and Goldman waived, as a matter of law, the right to enforce the confidentiality clause of their agreement with Segerblom and Mustafa, and therefore there was nothing about the enforceability of the confidentiality clause to arbitrate.[14] Thus, Segerblom was permitted to disclose formerly confidential evidence concerning prior lawsuits with CCSD and Goldman to the extent he reasonably believed necessary to successfully oppose the Rule 11 motion.

Segerblom chose to reveal the costs expended in Mustafa. This fact tends to demonstrate that Mustafa was not frivolous, as it is unlikely that CCSD and Goldman would have been compelled to spend $500,000 defending a baseless suit. Additionally, Segerblom was permitted to defend his reputation, arguably tarnished by the filing of a public document accusing him of filing cases for the sole purpose of

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[13]See Roundtree v. United States, 40 F.3d 1036 (9th Cir. 1994); Giangrasso v. Kittatinny Regional High School, 865 F. Supp. 1133 (D. N.J. 1994). In both cases, sanctions were appropriate when an attorney had a past practice of filing frivolous suits. The attorneys had been sanctioned under Rule 11 in the past and the courts took into consideration their egregious behavior when determining the merits of current Rule 11 sanctions.

[14]We note that the existence of waiver is generally an issue of fact. See McKellar, 110 Nev. at 202, 871 P.2d at 297. However, the undisputed facts compel the conclusion that a waiver occurred as a matter of law.

harassment. Thus, Segerblom was permitted to make public disclosures, such as appeared in the Review Journal article, to defend his reputation.

In this case, CCSD and Goldman could have avoided waiver by restricting their accusations against Segerblom to matters concerning the Dellavedova case, instead of accusing him of a multi-case pattern of abuse. Thus, CCSD and Goldman, through their own conduct, implicitly waived their right to assert the confidentiality portion of the settlement agreement in Mustafa.[15]

District courts may stay arbitration or determine whether a dispute is arbitrable upon a showing that no enforceable agreement to arbitrate exists.[16] But written agreements to arbitrate are "valid, enforceable and irrevocable, save upon grounds as exist at law or in equity for the revocation of any contract."[17] Thus, similar to a situation in which a party waived its right to assert a breach of contract, a court may determine that a party waived its contract rights to arbitrate a controversy.[18] Consequently, one party cannot assert breach of a confidential agreement when he or she has waived the right to assert that particular breach.[19]

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[15]This is not to say that a pattern of abuse in a series of cases is not the proper subject of a FRCP or NRCP 11 application. Such cases, however, implicate the need of the accused counsel or party to defend the claims. As noted, cases in the alleged pattern that were settled confidentially may be resurrected and relied upon in defense of the Rule 11 claims.

[16]See NRS 38.045(2).

[17]NRS 38.035 (emphasis added.)

[18]See Id.

[19]Because we hold that the district court reached the correct result in staying arbitration, albeit for a different reason than we hold it should

continued on next page . . .

As a logical extension of the district court's prerogatives discussed above, we also conclude that a court may examine whether a party waived its right to arbitrate a controversy without determining whether the claim for arbitration lacks merit.[20] Therefore, the district court should have determined that, while there was a controversy between the parties regarding breach of the confidentiality agreement, CCSD and Goldman had waived their right to arbitrate whether Segerblom had breached that agreement.

We ORDER the judgment of the district court AFFIRMED.[21]

Young, C.J.
Young

Shearing, J.
Shearing

Agosti, J.
Agosti

Becker, J.
Becker

. . . *continued*
have used, we do not reach the question of whether disclosure of the settlement was permitted under Nevada's public records law (NRS 239.010) or whether Segerblom had standing to assert those grounds for his disclosure. Nor do we reach whether the agreement was invalid for violating CCSD Regulation 3431.2.

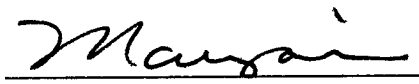
[20]See NRS 38.045(5).

[21]The Honorables Robert E. Rose and Myron E. Leavitt, Justices, voluntarily recused themselves from participation in the decision of this matter.

cc: Hon. Michael L. Douglas, District Judge
Kamer Zucker & Abbott
Laura Wightman FitzSimmons
Clark County Clerk

MAUPIN, J., concurring:

I agree that CCSD and Goldman waived the confidentiality agreement when they filed their FRCP 11 motion in the separate action. However, I also believe the district court was correct in concluding that the settlement agreement was subject to public disclosure.[1]

 , J.
Maupin

[1]See n.7 of the majority's Order of Affirmance.