IN THE SUPREME COURT OF THE STATE OF NEVADA

VALVINO LAMORE, LLC; PALO, LLC; TOASTY, LLC; MARC RUBENSTEIN; AND DESERT INN COUNTRY CLUB HOMEOWNERS ASSOCIATION,
Appellants,
vs.
STEPHANIE SWAIN, TRUSTEE OF THE MARK SWAIN REVOCABLE TRUST, AND PANNEE LEITCH,
Respondents.

No. 38832



ORDER VACATING TEMPORARY INJUNCTION

This appeal arises from the district court's issue of a temporary injunction requiring Valvino Lamore, LLC ("Valvino") to contribute its proportionate share of security costs for the Desert Inn Estates common interest community pending resolution of a dispute over the termination of the Desert Inn Homeowners' Association ("DIHOA").

DIHOA was created on January 10, 1952, and historically provided a number of services to homeowners in the Desert Inn Estates subdivision. Included among these services was landscaping of common areas, development and maintenance of private roads, and security via gated entrances to the subdivision.

Valvino acquired, either directly or through wholly owned subsidiaries, forty-eight of the fifty-eight exterior lots (eighty-three percent) in Desert Inn Estates and all fifteen of the interior lots. On or about June 12, 2001, Valvino cast its votes in compliance with the CC&R's and was successful in its effort to terminate the Desert Inn Estates

common interest community pursuant to NRS 116.2118. After the termination, the DIHOA Board, controlled by Valvino, voted unanimously to dissolve the DIHOA on June 27, 2001. The following day, DIHOA filed a Certificate of Dissolution with the Nevada Secretary of State.

Accordingly, in a letter dated July 18, 2001, homeowners Stephanie Swain and Pannee Leitch were informed of the Plan of Dissolution and notified that private security services for Desert Inn Estates that had been secured by DIHOA would be terminated on September 8, 2001. The former DIHOA Board then continued to wind up its affairs and distribute any remaining DIHOA assets in accordance with NRS 116.3101.

On September 19, 2001, Swain filed a motion for a temporary injunction with the district court, requesting that the court order the DIHOA to reactivate the security services pending resolution of arbitration proceedings. Three days later, Leitch filed a motion for joinder.

On October 12, 2001, the district court issued a decision stating that the DIHOA was to continue to provide security services to Desert Inn Estates. The court entered an injunction to that effect on October 18, 2001, but offered no guidance on the method that should be employed to comply with the order. On November 19, 2001, the district court clarified its injunction and ordered Valvino "to pay directly to the designated security company its share (81%) of the costs for such security services."

On March 21, 2002, Valvino requested, and the district court agreed, to increase the bond to $67,000 to cover the anticipated costs of security services. The court declined Valvino's request, however, to increase the bond to cover Valvino's attorney fees and costs.

Valvino brings this appeal, alleging that the district court abused its discretion by issuing an injunction where there is no probability of success for Swain and Leitch based on the merits. Valvino further contends that the court abused its discretion by setting a bond amount insufficient to cover its anticipated attorney fees and costs. Therefore, Valvino requests that this court reverse the district court's order granting the injunction.

The standard of review on appeal from an order granting or denying a preliminary injunction is abuse of discretion by the district court.[1] The decision to grant or deny a preliminary injunction is within the sound discretion of the trial court, and that discretion will not be disturbed absent abuse.[2] "This court's review is limited to the record to determine whether the lower court exceeded the permissible bounds of discretion."[3] A district court's determinations of fact will not be set aside

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[1]See Number One Rent-A-Car v. Ramada Inns, 94 Nev. 779, 780, 587 P.2d 1329, 1330 (1978) (citing Nevada Escrow Service, Inc. v. Crockett, 91 Nev. 201, 533 P.2d 471 (1975)).

[2]Dangberg Holdings v. Douglas Co., 115 Nev. 129, 142-43, 978 P.2d 311, 319 (1999) (citing Number One Rent-A-Car v. Ramada Inns, 94 Nev. 779, 781, 587 P.2d 1329, 1330 (1978)).

[3]S.O.C., Inc. v. Mirage Casino-Hotel, 117 Nev. 403, 407, 23 P.3d 243, 246 (2001).

unless they are clearly erroneous.[4] If the district court's findings are supported by substantial evidence, they will be upheld.[5] "Questions of law are reviewed de novo."[6]

A party seeking a preliminary injunction bears the burden of establishing: (1) a likelihood of success on the merits; and (2) a reasonable probability that the non-moving party's conduct, if allowed to continue, will cause irreparable harm for which compensatory damage is an inadequate remedy.[7]

Valvino contends that the district court's injunction was an abuse of discretion because Swain and Leitch have not demonstrated a reasonable likelihood of success on the merits. It is impossible for this court to evaluate Swain's and Leitch's probability of success. Swain and Leitch did not provided the district court with any basis demonstrating even a reasonable chance for success. Valvino, on the other hand, appears to have complied with statutory provisions for dissolution of a homeowner's association. Here, the district court's order of injunctive relief was unreasonable under the circumstances because Swain and

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[4]Hermann Trust v. Varco-Pruden Buildings, 106 Nev. 564, 566, 796 P.2d 590, 591-92 (1990) (citing Trident Construction Corp. v. West Electric, Inc., 105 Nev. 423, 425, 776 P.2d 1239, 1241 (1989)).

[5]Nelson v. Peckham Plaza Partnerships, 110 Nev. 23, 25, 866 P.2d 1138, 1139 (1994) (citing Pandelis Constr. Co. v. Jones-Viking Assoc., 103 Nev. 129, 130, 734 P.2d 1236, 1237 (1987)).

[6]SIIS v. United Exposition Services Co., 109 Nev. 28, 30, 846 P.2d 294, 295 (1993).

[7]See Dangberg Holdings, 115 Nev. at 142, 978 P.2d at 319 (citing Pickett v. Comanche Construction, Inc., 108 Nev. 422, 426, 836 P.2d 42, 44 (1992)); see also NRS 33.010.

Leitch did not provide a basis for reasonable likelihood of success on the merits.

Valvino also claims that Swain and Leitch will suffer no irreparable injury by paying for their own security guards. This argument is somewhat disingenuous. Swain and Leitch have not objected to paying for their own security; instead, they object to bearing the burden of 100 percent of the costs to secure the entire development when they and their fellow homeowners own only 19 percent of the DIHOA property.

Nevertheless, Valvino claims that the injuries to Swain and Leitch are financial in nature – thus, compensatory damages are adequate should Swain and Leitch prevail at trial. In support, Valvino contends that Swain and Leitch must demonstrate that they will suffer an injury for which compensatory damages are inadequate.[8] Moreover, they must show that the alleged harm they will suffer is "neither remote nor speculative, but actual and imminent."[9]

The loss of security services that were in effect at the time that many of the homes were purchased is a loss for which compensatory damages are adequate. The potential for vandalism and burglary is purely speculative. Swain and Leitch are not precluded from procuring security for their homes. If the homeowners' underlying action is successful, they can seek monetary damages for Valvino's share of these costs. Should the homeowners choose to forego security yet prevail on the

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[8]See Czipott v. Fleigh, 87 Nev. 496, 498-99, 489 P.2d 681, 683 (1971).

[9]Shapiro v. Cadman Towers, Inc., 51 F.3d 328, 332 (2d Cir. 1995) (citing Tucker Anthony Realty Corp. v. Schlesinger, 888 F.2d 969, 975 (2d Cir. 1989) (quotation omitted)). See also Morgan v. Nevada Bd. of State Prison Comm'rs, 593 F.Supp. 621, 624 (D.Nev. 1984).

underlying action, they can seek damages in the event that any property is damaged because security was wrongfully terminated.

Valvino contends that it should not be forced to pay for security services that it no longer wants or requires. While the record is unclear as to the current status of the Valvino lots, it would be wasteful for Valvino to spend significant money protecting homes that will ultimately be destroyed. Swain and Leitch counter that they should not be forced to see their share of security costs quadrupled as a result of Valvino's acquisition of property for commercial development. While the arguments of both sides have merit, temporary injunctions are appropriate only if the moving party is subject to irreparable harm. Swain and Leitch's claims of harm are purely speculative and financial in nature; thus, the issue of a temporary injunction in this matter was improper.

Last, Valvino claims that the district court abused its discretion by failing to increase the bond to an amount that would compensate not only for the security costs in dispute, but also its attorney fees and costs.

The party moving for a temporary injunction is required to post a bond to compensate the non-moving party for damages in the event that the non-moving party is wrongfully damaged by the injunction. NRCP 65(c) provides, in pertinent part:

> No restraining order or preliminary injunction shall issue except upon the giving of security by the application, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.[10]

Here, the district court ordered Swain and Leitch to obtain a bond covering the cost of security. The court declined, however, to increase the bond to cover Valvino's anticipated attorney fees and costs.

Valvino rightfully contends that attorney fees and costs are considered costs and damages under NRCP 65(c).[11] The rule, however, grants the district court discretion to determine the amount of security bonds "in such sum as the court deems proper." Here, the dispute arose out of Valvino's actions to terminate DIHOA over the objections of the remaining homeowners. While it may not have been foreseeable that Valvino would have continued liability for security costs post-termination, Valvino certainly should have foreseen that its actions would likely trigger legal proceedings that would result in additional fees and costs. Moreover, the plaintiffs in the underlying case own property in an exclusive subdivision. If Valvino ultimately prevails, there is little danger that it will be unable to recover any legal costs awarded by the court.

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[10]NRCP 65(c) (emphasis added).

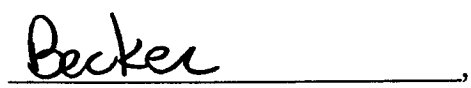
[11]See Sandy Valley Assocs. v. Sky Ranch Owners Ass'n, 117 Nev. ___, ___, 35 P.3d 964, 968 n.6 (2001).

The district court abused its discretion by issuing a temporary injunction in this matter. Swain and Leitch, have not demonstrated that they are likely to succeed on the merits nor have they demonstrated that they would be irreparably harmed absent the injunction. Accordingly, we

ORDER the temporary injunction of the district court VACATED.

Shearing, J.

Leavitt, J.



Becker, J.

cc: Hon. Mark R. Denton, District Judge
Schreck Brignone Godfrey/Las Vegas
Netzorg & Caschette
Nitz Walton & Heaton, Ltd.
Clark County Clerk