

IN THE SUPREME COURT OF THE STATE OF NEVADA

NATURE'S BODYCARE, INC., A
NEVADA CORPORATION,
Appellant,

vs.

CHARLENE LATTINO; LORETTA
URBINA; SHEILA LAPLANTE; JAMES
LAPLANTE; LAYNE YRANIAN; LILLIE
ELMS; JOHN ELMS; AND WILLIAM
WATTERS,
Respondents.

No. 39019

FILED

MAR 17 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a motion to compel arbitration.

On April 17, 2001, respondents, Sheila and James LaPlante, filed a negligence complaint against Nature's BodyCare, Inc. (NBC), alleging that its product, TG-2000, caused Sheila to suffer a stroke. Sheila purchased TG-2000 while she was an independent distributor of NBC products. On July 11, 2001, NBC moved the district court to compel arbitration, claiming that there was an agreement to arbitrate all disputes between Sheila and NBC. On November 26, 2001, the district court denied the motion. NBC now appeals.

This matter focuses on whether an agreement to arbitrate was formed, and thus, is a question of fact.¹ If a district court's findings of fact

¹See Genesco Inc. v. T. Kakiuchi & Co., Ltd., 815 F.2d 840, 845 (2nd Cir. 1987); Matter of Hart Ski Mfg. Co., Inc., 711 F.2d 845, 845 (8th Cir.

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are supported by substantial evidence, this court will uphold them on appeal.² The district court order only states “[t]hat Defendant Nature’s Body Care, [sic] Inc.’s Motion to Compel Arbitration is denied.” However, we assume the district court found that there was no agreement to arbitrate because if there had been an agreement, the district court would have had to compel arbitration pursuant to NRS 38.045(1).³

NBC had the burden to prove the existence of an arbitration agreement between itself and Sheila.⁴ NBC is the successor-in-interest of Australian BodyCare, Inc. (ABC). Sheila started as an independent distributor for ABC. The only evidence in the record is an affidavit of Tony Schoonover’s, the NBC president, samples of NBC and ABC agreements, and Sheila’s affidavit.

The ABC agreement states that ABC may amend the agreement automatically after ten-day notice to an independent distributor. The agreement also states that all disputes between ABC and the independent distributor must be adjudicated in a court located in Washoe County. NBC argues that when it changed its name from ABC to

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1983); Hanes Supply Co. v. Valley Evaporating Company, 261 F.2d 29, 34 (5th Cir. 1958).

²Hermann Trust v. Varco-Pruden Buildings, 106 Nev. 564, 566, 796 P.2d 590, 591-92 (1990).

³See Obstetrics and Gynecologists v. Pepper, 101 Nev. 105, 107, 693 P.2d 1259, 1260 (1985) (noting that this court can imply findings “where the evidence clearly supports the judgment”).

⁴See id. at 108, 693 P.2d at 1261; NRS 38.045(1).

NBC, it amended the ABC agreement to state that all disputes must be submitted to arbitration. Schoonover attested that Sheila received notice of this amendment but submitted no written documentation of its receipt. Sheila states that she never received any information regarding arbitration. NBC did not submit any signed agreement in which Sheila agreed to arbitrate disputes between NBC and herself or any evidence that the new NBC agreement was actually an amendment of the old ABC agreement.

NBC argues that the agreement to arbitrate can be shown without resort to a signed agreement because Sheila continued to purchase TG-2000 after ABC converted to NBC.⁵ However, an agreement implied in fact must be founded upon mutual assent, and an individual's conduct must manifest an intention to abide by agreed-upon terms.⁶ Sheila's continuing purchase of TG-2000 does not evidence any intention to agree to arbitrate disputes between herself and NBC because Sheila attests she never received any notification regarding arbitration. When Sheila ordered TG-2000, she might have assumed her ABC agreement was still valid and that disputes were to be adjudicated in court, not arbitration.

Because substantial evidence supports a finding that there was no agreement to arbitrate between Sheila and NBC, we


⁵See Coast Hotels & Casinos v. Culinary Workers Union, 35 F. Supp. 2d 765, 769 (D. Nev. 1999) (stating that consent to arbitration "can be implied from conduct").

⁶Hercules Inc. v. United States, 516 U.S. 417, 424 (1996).

ORDER the judgment of the district court AFFIRMED.


_____, J.
Shearing


_____, J.
Leavitt


_____, J.
Becker

cc: Hon. Michael A. Cherry, District Judge
Quarles & Brady Streich Lang, LLP
Schreck Brignone Godfrey/Las Vegas
Law Offices of White & Meaney
Clark County Clerk