IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVE L. BERGSTROM,
Appellant,
vs.
JUDGE STEPHEN DAHL, INDIVIDUALLY; CONSTABLE HERB BROWN, INDIVIDUALLY; AND MARK KINCAID, INDIVIDUALLY,
Respondents.

No. 39051

ORDER OF AFFIRMANCE

This is a proper person appeal from a district court judgment entered on a court-annexed arbitration award.[1] Appellant also challenges district court orders striking his trial de novo request and partially dismissing his intentional tort action. Eighth Judicial District Court, Clark County; Mark R. Denton, Judge.

After the conclusion of the 1998 race for constable of North Las Vegas, appellant candidate Steve Bergstrom filed a complaint in the Clark County district court, alleging that participants in his opponent's campaign had been involved in numerous legal improprieties against him. One participant, respondent Marc Kincaid, filed an answer and counterclaim against Bergstrom. The other alleged participants,

[1]Proper person appellant's notice of appeal states that this appeal is taken from the district court's "order of dismissal." We construe the timely filed notice of appeal as from the final judgment entered on the court-annexed arbitration award in this matter. See Forman v. Eagle Thrifty Drugs & Markets, 89 Nev. 533, 536, 516 P.2d 1234, 1236 (1973), overruled on other grounds by Garvin v. Dist. Ct., 118 Nev. 749, 59 P.3d 1180 (2002).

respondents Stephen Dahl and Herb Brown, filed motions to dismiss the complaint.

Having met certain requirements, the entire civil action was automatically referred to Nevada's mandatory court-annexed arbitration program.[2] The program's purpose "is to provide a simplified procedure for obtaining a prompt and equitable resolution of certain civil matters,"[3] and affords parties an inexpensive means of resolving their claims while reducing the district court's caseload.[4] In general, mandatory court-annexed arbitration is non-binding, and any party to the arbitration proceedings who timely files a request has the right to a post-arbitration trial de novo in the district court.[5]

However, Nevada Arbitration Rule (NAR) 22(A) sanctions a party who fails to participate in good faith in mandatory court-annexed arbitration proceedings by providing that failed good-faith participation

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[2]See NAR 3(A) (determining which matters are subject to the court-annexed arbitration program); NRS 38.250 (providing for mandatory nonbinding court-annexed arbitration in certain civil actions); NRS 38.253(1) and 38.255(1)(a) (authorizing the Supreme Court to adopt rules establishing the NRS 38.250 arbitration program); see also Morgan v. Las Vegas Sands, Inc., 118 Nev. 315, 318, 43 P.3d 1036, 1038 (2002) (noting that, regardless of the monetary amount, all damage-seeking civil matters are presumed subject to NAR arbitration, which may only be avoided by filing an exemption request under NAR 5(A)).

[3]NAR 2(A).

[4]See Casino Properties, Inc. v. Andrews, 112 Nev. 132, 135 n.2, 911 P.2d 1181, 1182 n.2 (1996) (concluding that the New Jersey mandatory arbitration program's quick and affordable dispute resolution and caseload reduction purposes are "substantially similar" to those of Nevada's court-annexed arbitration program).

[5]Morgan, 118 Nev. at 322, 43 P.3d at 1040; NAR 18.

"shall constitute a waiver of the right to a trial de novo." Since a trial de novo is the sole method of "appealing" the merits of a judgment entered on a court-annexed arbitration award,[6] a judgment entered after a trial de novo request has been properly stricken is final and, thus, the merits of the award are not subject to this court's review on appeal. Nevertheless, a party may file a timely appeal from the district court's final judgment to challenge the underlying order striking the request for a trial de novo and any interlocutory orders partially disposing of the action.[7]

In this case, the district court granted the motions to dismiss Bergstrom's complaint as to Dahl and Brown, and later struck Bergstrom's request for a trial de novo after the court-annexed arbitration proceedings terminated in Kincaid's favor. The district court then entered judgment on the arbitration award, from which Bergstrom timely appealed.[8] Accordingly, although we will not examine the merits of the judgment

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[6]Compare NAR 18 with NAR 19(B) (providing that no appeal may be taken from a judgment entered on an arbitration award rendered in court-annexed arbitration when no trial de novo is sought) and NAR 22(A); see also Malted Mousse, Inc. v. Steinmetz, 79 P.3d 1154 (Wash. 2004) (recognizing that a trial de novo is the sole way to appeal an adverse award entered pursuant to Washington's mandatory court-annexed arbitration program).

[7]See Chamberland v. Labarbera, 110 Nev. 701, 704, 877 P.2d 523, 524 (1994) (stating that this court has jurisdiction to address the decision to strike a trial de novo request, within the context of an appeal from a final judgment); Consolidated Generator v. Cummins Engine, 114 Nev. 1304, 1312, 971 P.2d 1251, 1256 (1998) (stating that this court has jurisdiction to consider interlocutory orders within the context of an appeal from a final judgment).

[8]On December 30, 2003, this court issued an order directing responses to this appeal, to which all parties responded.

itself, we will review the district court orders striking Bergstrom's trial de novo request under NAR 22(A) and partially disposing of his claims.

Order striking Bergstrom's trial de novo request

For purposes of NAR 22(A), "good faith" participation in arbitration proceedings is equated with "meaningful participation."[9] A district court's order striking a trial de novo request is reviewed on appeal for abuse of discretion.[10] The denial of a trial de novo request under NAR 22(A) must be accompanied by the district court's specific written findings of fact and conclusions of law,[11] which will not be disturbed on appeal unless they are clearly erroneous or unsupported by substantial evidence.[12]

In this case, the district court adopted the arbitration commissioner's specific written findings of fact and conclusions of law, which recommended that the motion to strike Bergstrom's trial de novo request be granted. The arbitration commissioner determined that despite the arbitrator's written and oral instructions, Bergstrom had (1) failed to timely file the provided arbitration selection list, rendering any stricken names meaningless;[13] (2) failed to prepare and exchange witness

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[9]Gittings v. Hartz, 116 Nev. 386, 390, 996 P.2d 898, 901 (2000).

[10]Id. at 391, 996 P.2d at 901.

[11]Chamberland, 110 Nev. at 705, 877 P.2d at 525.

[12]Campbell v. Maestro, 116 Nev. 380, 996 P.2d 412 (2000); see also NRCP 52(a).

[13]See NAR 6(C)(1) (providing that each party shall file the selection list with no more than two names stricken within ten days).

and document lists both at the early arbitration conference[14] and after being told to do so by the arbitrator; (3) engaged in no discovery as permitted by the arbitrator's order; (4) failed to exchange the required pre-hearing statement;[15] and (5) failed to attend the final arbitration hearing or present any evidence. Additionally, the arbitration commissioner pointed out that Bergstrom had been reminded of his duty to follow the Nevada Rules of Civil Procedure, the Nevada Rules of Evidence, and the NAR. Finally, the arbitration commissioner noted that, given the nature of Bergstrom's claims, i.e. defamation and being placed in a false light, the prosecution of his complaint required witness testimony and documentation. Therefore, the arbitration commissioner concluded, Bergstrom's inactions amounted to a failure to meaningfully participate in, and impeded, the arbitration proceedings because Kincaid was unable to engage in meaningful discovery or form an adequate arbitration strategy, and the arbitrator was unable to conduct a proper inquiry into the merits of Bergstrom's complaint and defense.

We agree that substantial evidence demonstrates Bergstrom's failure to participate in good faith in the arbitration proceedings. Although Bergstrom asserts that he adequately prepared for and participated in the early arbitration conference but was later confused by the arbitrator's order, even assuming that his early preparation and participation was indeed adequate, no evidence negates the arbitration commissioner's finding that Bergstrom otherwise failed to meaningfully

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[14]See NAR 11(A).

[15]See NAR 13(A) (requiring a party to serve, at least ten days before the arbitration hearing, a statement containing final witness, exhibit, and document lists).

participate in the arbitration proceedings. Accordingly, the district court did not abuse its discretion in following the arbitration commissioner's recommendation, and we affirm the order striking Bergstrom's trial de novo request.

Orders partially disposing of Bergstrom's claims

Bergstrom initially asserts that the district court erred in allowing Dahl and Brown to even file the dismissal motions, based upon Eighth District Court Rule (EDCR) 2.24(a) (disallowing renewal of a motion already heard and disposed of in the same cause), because a prior motion to dismiss Bergstrom's amended complaint had been denied. This assertion has no merit. The motion relating to the amended complaint was to "strike and dismiss, or in the alternative, to dismiss." Since the court accorded the first alternative, granting in part the motion to strike, it never "heard" the alternative motion to dismiss. Moreover, the latter dismissal motions were directed at a different complaint, the re-amended complaint. Thus, as the district court explained, EDCR 2.24 does not apply in this instance. Accordingly, the dismissal motions were properly filed in and considered by the district court.

The standard of review for the dismissal of claims under NRCP 12(b)(5) for failure to state a claim upon which relief may be granted requires this court to "construe the pleading liberally and draw every fair inference in favor of the non-moving party."[16] A complaint's factual allegations must be accepted as true, and a "complaint will not be dismissed for failure to state a claim unless it appears beyond a doubt that

[16]Simpson v. Mars Inc., 113 Nev 188, 190, 929 P.2d 966, 967 (1997).

the plaintiff could prove no set of facts which, if accepted by the trier of fact, would entitle him or her to relief."[17]

In his "re-amended" complaint, Bergstrom alleged claims for defamation, false light, and conspiracy to defame and place in false light. These claims apparently related to (1) a campaign mailer alleging that Bergstrom lacked certain job qualifications, (2) alleged statements made to various outside parties concerning Bergstrom's character and "racist" views, and (3) the alleged illegal obtainment of employment records through the use of the Dahl's and Brown's official positions.

Preliminarily, in regard to the third allegation, we note that Dahl and Brown obtained dismissal of the original complaint as to their official capacities. Accordingly, Bergstrom's latest amended complaint did not designate their official capacities. In any case, "illegal obtainment" is not a proper subject for defamation or false light claims. Thus, the district court properly dismissed all claims relating to the obtainment of employment records. The remaining allegations are discussed below.

In order to establish a viable claim of public figure defamation, a plaintiff must allege a false and defamatory statement, its unprivileged publication, fault, damages, and the defendants' actual malice.[18] Only defamatory statements of fact, rather than opinion, are actionable.[19] A

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[17]Id.

[18]See id.; Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); see also Pegasus v. Reno Newspapers, Inc., 118 Nev. 706, 720-21, 57 P.3d 82, 90-91 (2002); Nevada Ind. Broadcasting v. Allen, 99 Nev. 404, 414, 664 P.2d 337, 341 (1983).

[19]Pegasus, 118 Nev. at 714, 57 P.3d at 88; PETA v. Berosini, Ltd., 111 Nev. 615, 895 P.2d 1269 (1995), holding modified on other grounds by

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defamatory statement is one that tends to subject its target to derogatory community opinion and contempt.[20] However, an exaggeration or generalization is not defamatory if it could be "interpreted by a reasonable person as 'mere rhetorical hyperbole.'"[21]

The false light tort is defined as "giv[ing] publicity to a matter concerning another that places the other before the public in a false light."[22] Like public figure defamation, a valid claim for being placed in a false light requires a false statement of fact, as well as actual malice.[23] Recovery is barred when the published information is found to have been true, mere opinion, or pure rhetorical hyperbole.[24]

Dahl and Brown argue that the alleged statements were opinion and/or "vituperative rhetorical epithets" furthering "the political/electoral process of this nation" and, consequently, are protected speech.[25] Whether a statement constitutes fact or opinion is a question of

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Las Vegas Downtown Redev. Agency v. Hecht, 113 Nev. 644, 650, 940 P.2d 134, 138 (1997)).

[20]Lubin v. Kunin, 117 Nev. 107, 111, 17 P.3d 422, 425 (2001) (quoting K-Mart Corporation v. Washington, 109 Nev. 1180, 1191, 866 P.2d 274, 281-82 (1993)).

[21]Pegasus, 118 Nev. at 715, 57 P.3d at 88 (quoting Wellman v. Fox, 108 Nev. 83, 88, 825 P.2d 208, 211 (1992)).

[22]Restatement (Second) of Torts §652E (1977).

[23]Flowers v. Carville, 310 F.3d 1118, 1132 (9th Cir. 2002) (citing Restatement (Second) of Torts §652E(b)).

[24]Flowers, 310 F.3d at 1133 n.14.

[25]See Greenbelt Pub. Assn. v. Bresler, 398 U.S. 6, 14 (1970); Wellman v. Fox, 108 Nev. 83, 825 P.2d 208 (1992).

law; in making such a determination, the court asks "whether a reasonable person would be likely to understand the remark as an expression of the source's opinion or as a statement of existing fact."[26] In claims involving political comment, "there is a strong inclination to determine the remarks to be opinion rather than fact."[27]

In this matter, a reasonable person is not likely to understand any of the pleadings' alleged comments, obviously made in the political context, as expressions of fact rather than opinion.[28] Therefore, the campaign mailer's qualification comments and the other alleged statements constitute mere opinion and/or non-defamatory political hyperbole, and are non-actionable as a matter of law. Accordingly, the district court properly dismissed the defamation and false light claims against Dahl and Brown.

Further, an actionable civil conspiracy occurs when a combination of persons, intending to unlawfully harm another, engage in a damaging act.[29] As a necessary predicate, there must exist a valid cause of action for the underlying unlawful objective.[30] Because Bergstrom's defamation and false light claims were properly dismissed, it follows that his conspiracy to defame and place in false light claims were also properly

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[26]Pegasus, 118 Nev. at 715, 57 P.2d at 88 (quoting Nevada Ind. Broadcasting, 99 Nev. at 410, 664 P.2d at 342).

[27]Nevada Ind. Broadcasting, 99 Nev. at 410, 664 P.2d at 342.

[28]See id.

[29]Consolidated Generator, 114 Nev. at 1311, 971 P.2d at 1256.

[30]See Flowers v. Carville, 266 F. Supp. 2d 1245, 1249 (D. Nev. 2003), aff'd in part and rev'd in part by 310 F.3d 1118 (2002).

dismissed. Therefore, the district court properly dismissed all of Bergstrom's claims against respondents Dahl and Brown.

Accordingly, for the reasons stated above, we

ORDER the judgment of the district court AFFIRMED.[31]

Shearing, C.J.

Agosti, J.

Rose, J.

Becker, J.

Maupin, J.

Gibbons, J.

Douglas, J.

cc: Hon. Mark R. Denton, District Judge
Steve L. Bergstrom
Cremen Law Offices
Kummer Kaempfer Bonner & Renshaw
Potter Law Offices
Clark County Clerk

[31]Although appellant was not granted leave to file papers in proper person, see NRAP 46(b), we have considered the proper person documents received from appellant.