IN THE SUPREME COURT OF THE STATE OF NEVADA

AT&T COMMUNICATIONS, INC., A DELAWARE CORPORATION,
Appellant,
vs.
SIERRA 76, INC., D/B/A SIERRA SID'S, A NEVADA CORPORATION,
Respondent.

No. 39805

FILED

DEC 0 8 2003

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

ORDER OF AFFIRMANCE

This is an appeal from a final judgment entered pursuant to a bench trial in a contract dispute.

Appellant AT&T Communications, Inc. and respondent Sierra 76, Inc., d/b/a Sierra Sid's, had a contractual relationship by which AT&T was to provide telex services and Sierra 76 was to pay a monthly fee. The telex line was established in September 1977. On March 5, 1999, Sierra 76 discovered the telex line was not valid and that no circuits could be found even though Sierra 76 had been billed and paid for the service.

On December 9, 1999, Sierra 76 filed a complaint against AT&T Communications, alleging breach of contract, breach of the covenant of good faith and fair dealing and unjust enrichment. AT&T answered, denying Sierra 76's allegations and raising several affirmative defenses.

In August 2001, Sierra 76 noticed the depositions of AT&T's witnesses, John Carrozza, Sherri McNabb, Mary Wern, and NRCP Rule 30(b)(6) designees, for August 24, 2001. AT&T called Sierra 76 and sent a confirming letter stating its inability to present the deponents on the requested date because the witnesses were no longer AT&T employees and because both of AT&T's attorneys had vacations scheduled during that

time. However, AT&T offered to extend the discovery deadline until one week before trial.

Sierra 76 responded that it was not in a position to cancel the depositions. AT&T replied, again proclaiming an inability to produce the witnesses on the 24th and reaffirming its offer to leave discovery open until one week before trial. Sierra 76 responded that due to a lack of an offer for alternative dates, the depositions would proceed on August 24.

Subsequently, when the deponents failed to appear for the depositions, Sierra 76 filed a motion to compel the discovery and sanction AT&T and a motion for shortened time. The discovery commissioner held a hearing on August 29. AT&T opposed the motion via telephone. The discovery commissioner granted AT&T additional time to locate the witnesses and indicated that sanctions would not be imposed. Sierra 76 thereby re-noticed the depositions for September 17.

On September 12, 2001, Sierra 76 filed a request for submission of the motion to compel with the district court. AT&T mistakenly understood that the submission included the minutes from the discovery commissioner's hearing, reflecting AT&T's opposition to the motion as well as the discovery commissioner's recommendations. AT&T presumed that Sierra 76 sought to formalize the discovery commissioner's recommendation. The record indicates, however, that Sierra 76's submittal did not include the minutes of the discovery hearing.

The district court, unaware of the discovery commissioner's ruling, entered an order granting Sierra 76's motion to compel on September 21. The district court ordered AT&T to produce John Carrozza, Sherry McNabb, Mary Wern and its NRCP 30(b)(6) designees for deposition no later than October 1, 2001, or AT&T would be precluded from offering their testimony at trial.

The depositions were rescheduled for September 17. However, after the events of September 11, 2001, AT&T contacted Sierra 76 to suggest a rescheduling of the dispositions because air travel in the United States was suspended. The parties did not reach a decision at that time. On September 13, AT&T sent a letter to Sierra 76 updating counsel on the status of its witnesses. AT&T was unable to locate Sherri McNabb and Mary Wern, stating that because they would not be present at trial, there was no need for Sierra 76 to depose them.

Additionally, AT&T declared that John Carrozza, a resident of New Jersey, would not be available for the deposition in Nevada because of his unwillingness to fly due to the events of September 11. However, AT&T offered to pay to fly counsel for Sierra 76 to New Jersey to depose Mr. Carrozza, or in the alternative, to depose Mr. Carrozza via telephonic or video conferencing. Sierra 76 refused the offered alternatives and demanded that the witness be produced in Nevada.

AT&T filed a motion for a protective order and rehearing on September 27, stating the reasons behind its inability to produce Mr. Carrozza, and repeated its offered alternatives. AT&T also filed a motion for relief from the district court's discovery order on October 1, 2001. AT&T outlined the findings from the discovery commissioner's hearing and asserted that its failure to produce the witness was not willful, but due to circumstances beyond its control.

Nevertheless, AT&T failed to submit its motions for decision pursuant to WDCR 12(4). As a result of AT&T's failure to comply with WDCR 12(4), the district court was never informed of the pending motions and did not issue an order. The depositions of AT&T's listed witnesses were never held.

Approximately seven months later, trial was held. Sierra 76 called two witnesses, both of whom were cross-examined by AT&T. At the close of Sierra 76's case, AT&T stated that it had no witnesses to present due to the discovery sanction. AT&T attempted to make an offer of proof regarding Mr. Carrozza's proposed testimony; however, the district court disallowed the offer.

Judgment was entered on behalf of Sierra 76 in the amount of $56,588.36. AT&T appeals, alleging that the district court committed three errors. First, AT&T argues that the applicable statute of limitations, which the parties contend is NRS 11.190(2)(a), bars this action. NRS 11.190(2)(a) provides a four-year statute of limitations for "[a]n action on an open account for goods, wares and merchandise sold and delivered." While this case concerns an open account, the record does not reflect that the account was for goods, wares and merchandise sold and delivered. The account was for services, and services do not fall under NRS 11.190(2)(a).

We conclude this action is governed by NRS 11.190(2)(c), "[a]n action upon a contract, obligation or liability not founded upon an instrument in writing," which provides for a four-year statute of limitations. The parties had an oral contract under which AT&T would provide the telex service and Sierra 76 would pay the agreed upon amount for the service.

Questions of law are reviewed de novo.[1] "The appropriate accrual date for the statute of limitations is a question of law only if the

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[1]Associated Bldrs. v. So. Nev. Water Auth., 115 Nev. 151, 156, 979 P.2d 224, 227 (1999).

facts are uncontroverted."[2] Here, both parties acknowledge the pertinent dates, and there is no conflicting evidence as to when a fact was known or reasonably should have been known. Therefore, the issue before the court is a question of law and subject to de novo review.

"[A] cause of action accrues when the wrong occurs and a party sustains injuries for which relief could be sought."[3] However, "[u]nder the discovery rule, the statutory period of limitations is tolled until the injured party discovers or reasonably should have discovered facts supporting a cause of action."[4] The discovery rule applies to contract actions.[5]

Sierra 76 discovered that it was not receiving the telex service in March 1999 when it telephoned AT&T to verify the vendor account and was told the line was not operational.[6] Therefore, under the discovery rule, the statute of limitations was tolled until March 1999, when Sierra 76 discovered facts supporting its cause of action. The case was commenced nine months after the statute of limitations had begun to run, on December 9, 1999, well within the four-year statute of limitations.

Second, AT&T argues that the damages awarded by the district court were excessive. It contends that the district court improperly awarded damages to Sierra 76 that were incurred more than

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[2]Day v. Zubel, 112 Nev. 972, 977, 922 P.2d 536, 539 (1996).

[3]Petersen v. Bruen, 106 Nev. 271, 274, 792 P.2d 18, 20 (1990).

[4]Id.

[5]Bemis v. Estate of Bemis, 114 Nev. 1021, 1025 967 P.2d 437, 440 (1998).

[6]The parties do not dispute that Sierra 76 discovered that it was not receiving the telex service in March 1999.

four years before the discovery date. The statute of limitations operates to bar suits more than four years after the date of discovery, not damages incurred more than four years before the discovery. Therefore, even for payments made in 1994, the statute of limitations was tolled until the discovery in 1999, and only then did the statute of limitations come into effect.

Additionally, this court has repeatedly expressed its reluctance to substitute its judgment for that of the trier of fact on the issue of damages.[7] Thus, unless the damage award is "flagrantly improper" the court will allow the judgment to stand.[8] In this case, the district court awarded damages in the amount of $56,588.36, plus interest and costs. This amount is based on actual substantiated records of payments made, i.e. invoice records and records showing proof of payment. Therefore, we conclude that the award was properly based on substantial evidence.

Lastly, AT&T argues that the district court abused its discretion when it excluded the testimony of three of its witnesses as a discovery sanction for failure to present the witnesses for depositions. The district court has discretion to sanction a party for failure to comply with the court's rules or orders.[9] This court will not reverse a particular

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[7]Automatic Merchandisers, Inc. v. Ward, 98 Nev. 282, 284, 646 P.2d 553, 555 (1982).

[8]Id. at 285, 646 P.2d at 555.

[9]Nevada Power v. Flour Illinois, 108 Nev. 638, 644, 837 P.2d 1354, 1358 (1992); Esworthy v. Williams, 100 Nev. 212, 213, 678 P.2d 1149, 1150 (1984).

sanction imposed by the district court unless the court has abused its discretion.[10]

We do not need to consider the merits of AT&T's claim that its failure to produce the witnesses for deposition was for good cause or that Sierra 76 acted in bad faith since AT&T never presented this information to the district court for consideration.

WDCR 12(4) states, "Upon the expiration of the 5-day period [in which a moving party has to serve and file reply points], either party may notify the filing office to submit the matter for decision by filing and serving all parties with a written request of the submission of the motion." Unless the party submits its motion for decision, the district court does not consider the information.

AT&T filed a motion for a protective order and rehearing and a motion for relief from the order granting Sierra 76's motion to compel. These motions explained AT&T's reasons for its failure to timely present the witnesses for deposition. However, AT&T never submitted these motions to the district court for decision, pursuant to WDCR 12(4). Additionally, while AT&T had seven months between the entry of the order sanctioning it and trial in which to correct the district court's potential misunderstanding, AT&T never acted to bring this matter to the district court's attention.

Absent evidence in the record to the contrary, we must conclude that since AT&T never submitted its motions for decision, the district court was not aware of AT&T's justifications for its failure to present the witnesses for deposition. Therefore, based on the information before the district court, we conclude that the preclusion of AT&T's

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[10]Nevada Power, 108 Nev. at 644, 837 P.2d at 1358.

witnesses as a discovery sanction was appropriate and not an abuse of discretion.[11] Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Becker, J.
Becker

Shearing, J.
Shearing

Gibbons, J.
Gibbons

cc: Hon. Jerome Polaha, District Judge
Walsh & Stone
Walther Key Maupin Oats Cox & LeGoy
Washoe District Court Clerk

[11]AT&T also contends the district court abused its discretion when it disallowed AT&T's offer of proof. The trial judge must permit counsel to make an offer of proof so that the propriety of the proposed, but excluded, evidence may be examined as to admissibility and preserved for appeal. Accordingly, the district court erred by refusing to allow AT&T to make an offer of proof as to Carrozza's excluded testimony. Nevertheless, since we conclude that the discovery sanction excluding Carrozza's testimony was not an abuse of discretion, the district court's refusal of AT&T's offer of proof did not prejudice AT&T.