IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRIS MCINNIS AND LARRY MARINA, Appellants, vs. MERRILL LYNCH PIERCE FENNER & SMITH, INC., Respondent.	No. 39625
CHRIS MCINNIS AND LARRY MARINA, Appellants, vs. MERRILL LYNCH PIERCE FENNER & SMITH, INC., Respondent.	No. 39974

FILED

DEC 0 8 2003

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

ORDER OF AFFIRMANCE

This is a consolidated appeal from district court orders confirming an arbitration award and awarding attorney fees and costs.

On appeal, the appellants, Chris McInnis and Larry Marina, claim that (1) Merrill Lynch's counsel should have been disqualified, (2) mandatory arbitration was not warranted, (3) the district court erred by confirming the arbitration award, and (4) attorney fees and costs associated with confirming the arbitration award were grossly excessive. The respondent, Merrill Lynch, requests sanctions against McInnis and Marina for filing a frivolous appeal. We conclude that McInnis' and Marina's claims lack merit and that sanctions are not warranted.

Merrill Lynch recruited Marina as a financial consultant in its Las Vegas office. Subsequently, Merrill Lynch recruited McInnis to work as a financial consultant for the same office. Merrill Lynch agreed to have

its corporate counsel represent Marina and McInnis in any legal matters arising from their change in employment to Merrill Lynch.

To transfer their securities licenses to Merrill Lynch, McInnis and Marina signed a Uniform Application for Securities Industry Registration or Transfer document. The document is commonly referred to as a U-4 Form. When McInnis and Marina began working for Merrill Lynch, they each signed an employment agreement, promissory note, and CMA/Payroll Deduction Authorization Form. Both received substantial loans reflecting advances on expected future bonuses. As the bonuses were earned, the loan amounts would be reduced accordingly. If they left Merrill Lynch's employment during the respective term of the loans, they would be obligated to pay the remaining balance plus interest. McInnis' loan was in the amount of $326,000.00 to be repaid over a six-year period. Marina received a $162,500.00 loan to be repaid over a four-year period. Under the employment agreement, McInnis and Marina were also entitled to Financial Consultant Capital Accumulation Award Plan (FCCAAP) awards. The awards were "subject to all of the terms and conditions set forth in the FCCAAP plan document."

The parties do not dispute that the loans were to be repaid. Rather, they argue about which funds could be used to repay the loan. McInnis and Marina argue that the loans were to be repaid from more than service bonuses. Alternatively, Merrill Lynch claims that the loans were to be repaid only by funds McInnis and Marina earned through their annual service bonus.

Both Marina and McInnis voluntarily resigned their employment with Merrill Lynch before the end of the loan repayment periods. Merrill Lynch sought to recover $40,625.00 plus interest from Marina for his outstanding loan balance. It also sought to recover more

than $217,000.00 from McInnis for his outstanding loan balance. McInnis and Marina both claimed that Merrill Lynch was not entitled to additional payment if repayment was calculated based on more than the service bonuses. When McInnis and Marina refused to repay their notes, Merrill Lynch filed separate statements of claim with the National Association of Securities Dealers, Inc. (NASD).

In response, McInnis and Marina filed separate complaints against Merrill Lynch seeking (1) declaratory relief regarding the parties' rights and obligations under the promissory notes, (2) an accounting of the compensation Merrill Lynch allegedly owed them, (3) payment for unpaid compensation, (4) damages for unjust enrichment, (5) damages for tortious interference with a prospective economic advantage, (6) damages for defamation, and (7) attorney fees and costs. McInnis and Marina each filed a copy of their complaint with the NASD in response to Merrill Lynch's statement of claim.

Merrill Lynch filed motions to compel arbitration and stay the district court proceedings. The district court granted the motions. McInnis and Marina each filed in this court a petition for writ of mandamus or prohibition, challenging the district court orders. We denied the petitions. The parties eventually agreed to join and consolidate their claims.

McInnis and Marina then filed a motion with the NASD arbitration panel to disqualify Merrill Lynch's counsel. Merrill Lynch filed a motion for partial summary judgment. The panel denied the motion to disqualify Merrill Lynch's counsel and granted Merrill Lynch's motion for partial summary judgment. The arbitration panel dismissed McInnis' and Marina's remaining claims without prejudice and awarded Merrill Lynch $60,000 in attorney fees.

McInnis and Marina filed a motion in the district court to consolidate their cases and vacate the arbitration award. The district court granted the motion to consolidate, but confirmed the arbitration award. Merrill Lynch sought $31,005.97 in attorney fees and costs for work performed in confirming the arbitration award. After a hearing, the district court awarded Merrill Lynch $28,425.00 in attorney fees and costs. McInnis and Marina also attempted to disqualify Merrill Lynch's counsel in the district court proceedings. The district court denied McInnis' and Marina's motion to disqualify Merrill Lynch's counsel. Lastly, the district court granted a stay of the judgment's execution pending appeal. This appeal follows.

DISCUSSION

Attorney disqualification

McInnis and Marina argue that Rubin & Associates should have been disqualified as Merrill Lynch's counsel due to a conflict of interest. Among other claims, McInnis and Marina allege that they had an attorney-client relationship with Rubin & Associates and that the matters involved in their former representation were similar to the matters being disputed in the instant case.

A district court has broad discretion to determine whether attorney disqualification is necessary in a particular case.[1] The district court's decision will not be disturbed absent an abuse of discretion.[2]

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[1]Cronin v. District Court, 105 Nev. 635, 640, 781 P.2d 1150, 1153 (1989); see 7A C.J.S. Attorney and Client § 169 (1980) (explaining that the facts and circumstances of each particular case dictates the existence of an attorney-client relationship).

[2]Id.

We conclude that the district court did not abuse its discretion by refusing to disqualify Rubin & Associates as Merrill Lynch's counsel. McInnis and Marina never established that they had an attorney-client relationship with Rubin & Associates. Additionally, Rubin & Associates served as Merrill Lynch's corporate counsel when it hired McInnis and Marina. Rubin & Associates acted on Merrill Lynch's behalf during any conversations it may have had with McInnis and Marina. Further, the discussions or involvement Rubin & Associates may have had with McInnis and Marina appear minimal. Moreover, McInnis and Marina waited nearly two years after the proceedings began, and one month before the scheduled arbitration, to seek disqualification.[3] During this time, Rubin & Associates and opposing counsel had several conversations, exchanged discovery, and participated in several hearings.

Mandatory arbitration

McInnis and Marina argue that the U-4 Forms they signed are insufficient to compel arbitration in this matter because the forms are not employment contracts and do not govern broker-employer relationships. McInnis and Marina further allege that the arbitration requirement violates their constitutional right to a trial and deprived them of their right to seek punitive damages.

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[3]See Brown v. Dist. Ct., 116 Nev. 1200, 1205, 14 P.3d 1266, 1270 (2000) (internal citations omitted) (holding that "[w]hile doubts should generally be resolved in favor of disqualification, parties should not be allowed to misuse motions for disqualification as instruments of harassment or delay").

As recognized in Consolidated Generator v. Cummins Engine,[4] interlocutory orders that are not independently appealable can be challenged in an appeal from the final judgment.

We previously denied McInnis' and Marina's petitions for writ of mandamus, citing Kindred v. District Court. In Kindred, we held that a U-4 Form is a valid arbitration agreement and may compel brokers and employers to arbitrate their claims.[5] We conclude that McInnis' and Marina's constitutional claim is without merit.

Arbitration award confirmation

McInnis and Marina claim the district court erred in confirming the arbitration award for numerous reasons.

A district court reviews an arbitration award "to determine whether the arbitrator's decision represents a 'manifest disregard of the law.'"[6] A district court must confirm an arbitration award unless the award indicates that "the arbitrator was aware 'of clearly governing legal principles but decide[d] to ignore or pay no attention to those principles.'"[7] This court reviews de novo a district court's decision to confirm or set aside an arbitration award de novo.[8]

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[4]114 Nev. 1304, 971 P.2d 1251 (1998).

[5]116 Nev. 405, 411, 996 P.2d 903, 907 (2000).

[6]Clark County Sch. Dist. v. Rolling Plains, 117 Nev. 101, 104, 16 P.3d 1079, 1081 (2001) (quoting Graber v. Comstock Bank, 111 Nev. 1421, 1426, 905 P.2d 1112, 1115 (1995)) (receded on other grounds by Sandy Valley Assocs. v. Sky Ranch Estates, 117 Nev. 948, 955 n.7, 35 P.3d 964, 969 n.7 (2001)).

[7]Id.; see also NRS 38.145.

[8]Clark County Sch. Dist., 117 Nev. at 104, 16 P.3d at 1081.

We conclude that the district court did not abuse its discretion in confirming the arbitration award because the arbitration panel did not ignore "'clearly governing legal principle[s]'" when it granted partial summary judgment.[9] Substantial evidence supported the arbitration panel's interpretation of the employment agreements and FCCAAP plan. In addition, the arbitration panel dismissed McInnis' and Marina's remaining counterclaims without prejudice. McInnis and Marina, therefore, may still pursue their remaining contract and tort claims against Merrill Lynch.[10]

Attorney fees and costs

McInnis and Marina allege that the attorney fees awarded by the arbitration panel were grossly excessive. They claim that Rubin & Associates' work was routine in nature and did not involve "great intricacy" because the firm regularly represents Merrill Lynch in employment matters involving former brokers.

An "award of attorney fees and costs will not be disturbed on appeal unless the district court abused its discretion in making the award."[11] Merrill Lynch requested $167,920.55 in attorney fees. Rubin & Associates alleged that it spent 746.7 hours over a two-year period litigating claims against McInnis and Marina. The firm claims that an

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[9]Id. (quoting Graber, 111 Nev. at 1426, 905 P.2d at 1115); see NRCP 56(c).

[10]Counsel acknowledged at oral argument that the remaining claims were minor in comparison to the issues involving the FCCAP and loan repayment structure.

[11]U.S. Design & Constr. v. I.B.E.W. Local 357, 118 Nev. ___, ___, 50 P.3d 170, 173 (2002).

additional $9,428.15 was spent on copying, postage, travel and lodging for witness interviews and preparation, long-distance phone calls and other expenses. The arbitration panel awarded Merrill Lynch $60,000.00, a significantly lesser amount. We conclude the arbitration panel did not ignore clearly governing legal principles in awarding Merrill Lynch $60,000.00 in attorney fees. The district court, therefore, did not abuse its discretion by confirming the arbitration award.

Attorney fees for arbitration award confirmation

McInnis and Marina claim that the $28,425.00 award for attorney fees and costs to confirm the arbitration award was grossly excessive.

A district court may award attorney fees and costs associated with confirming an arbitration award.[12] We will not disturb an award of attorney fees and costs absent an abuse of discretion.[13]

Prior to awarding Merrill Lynch attorney fees for the arbitration confirmation, the district court reviewed Rubin & Associates' billing statements and conducted a hearing on the matter. Merrill Lynch originally sought $31,005.97 in attorney fees and costs, but the district court reduced the amount based on McInnis' and Marina's argument that local counsel's fees were duplicative. We conclude that the district court did not abuse its discretion in awarding Merrill Lynch $28,425.00 in attorney fees to confirm the arbitration award.

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[12]NRS 38.165; see Mausbach v. Lemke, 110 Nev. 37, 41-42, 866 P.2d 1146, 1149 (1994).

[13]U.S. Design & Constr., 118 Nev. at ___, 50 P.3d at 173.

Sanctions for frivolous claim

Merrill Lynch requests this court to impose sanctions against McInnis and Marina for filing a frivolous appeal. It argues that McInnis and Marina had no basis to appeal the district court's order compelling arbitration. We conclude sanctions are not warranted in this case.[14] Accordingly, we

ORDER the judgment and order of the district court AFFIRMED.

Becker, J.
Becker

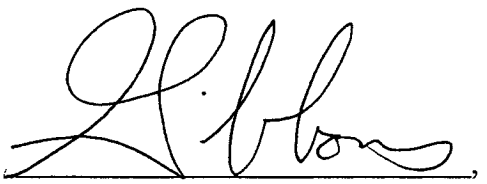
Shearing, J.
Shearing

cc: Hon. Michael L. Douglas, District Judge
Albert D. Massi, P.C.
Haney, Woloson & Mullins
Ruben & Associates PC
Clark County Clerk

[14]See NRAP 38(b).

GIBBONS, J., dissenting:

The arbitration award should not have been confirmed and should be vacated pursuant to NRS 38.145. The arbitrators exceeded their powers and abused their discretion by granting partial summary judgment and by refusing to hear evidence of offsets raised by Chris McInnis and Larry Marina. From the record considered as a whole, there are genuine issues of material fact in dispute which preclude summary judgment as a matter of law.



Gibbons, J.