IN THE SUPREME COURT OF THE STATE OF NEVADA

WILBUR B. SWIFT, AN INDIVIDUAL,
Appellant,
vs.
HERB KAUFMAN, AN INDIVIDUAL; VISITEL NETWORK, INC., A NEVADA CORPORATION; AND VISITEL NETWORK, INC., A DELAWARE CORPORATION,
Respondents.

No. 40373

FILED

AUG 25 2004

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

ORDER OF AFFIRMANCE

Appellant, Wilbur B. Swift, appeals from a district court judgment, entered at the conclusion of a non-jury trial, in favor of respondents, Herb Kaufman, Visitel Network, Inc., a Nevada corporation (Visitel-Nevada), and Visitel Network, Inc., a Delaware corporation. Eighth Judicial District Court, Clark County; Ronald D. Parraguirre, Judge. We affirm.

FACTUAL AND PROCEDURAL HISTORY

Swift claims that he and Kaufman entered into an oral agreement in 1988, under which Swift purchased four percent of Visitel-Nevada for $200,000.00. According to Swift, he delivered a cashier's check to Kaufman in that amount but, because of the restricted nature of the shares, Kaufman deferred delivery of the stock certificate for a period of one year. From 1993 through 1994, Swift made a series of oral requests to Kaufman for delivery of the stock certificate. In 1995, Swift's counsel tendered formal demand for delivery to Visitel. In the face of continued refusals to comply, Swift filed the action below on February 18, 1997,

against Kaufman and Visitel, seeking a determination of rights under the contract and, alternatively, damages for breach of contract and fraud.

At trial, Swift testified to numerous assurances of delivery over a period of years, and elicited testimony as to Kaufman's admissions that Swift had invested $200,000.00 dollars in Visitel-Nevada. Swift also produced a copy of the check he used to purchase a Valley Bank cashier's check to fund the acquisition, as well as the receipt he received from the bank to memorialize its purchase. Donald Boshard, a Valley Bank branch manager, testified that he was present when Swift purchased the cashier's check with a personal draft. Boshard further testified that Swift registered complaints some time in 1992 concerning Kaufman's failure to deliver the shares. Kaufman testified that he could not recall receiving $200,000.00 from Swift and denied soliciting Smith to invest in Visitel. At no point in the trial did Swift produce a copy of the negotiated cashier's check.

The district court rendered formal findings of fact and conclusions of law. Based upon Boshard's testimony, the court found that Swift discovered, or with reasonable diligence should have discovered, the purported fraud in 1992. Because the action was filed in February of 1997, the district court concluded that the applicable statutes of limitation concerning actions on oral agreements and fraud barred Swift's causes of action.[1] The district court further concluded that Swift failed to present sufficient evidence to establish the existence of the alleged agreement. As part of the judgment rendered on findings of fact and conclusions of law,

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[1]Discovery of the fraud would constitute discovery of the contractual breach.

the district court awarded Kaufman and Visitel their litigation costs in the amount of $1,033.03. Swift filed his timely notice of appeal.[2]

DISCUSSION

Breach of contract claim

Swift contends that a preponderance of the evidence at trial established the existence of an agreement with Kaufman. Although conceding that Kaufman denied entering into the agreement, Swift claims that he corroborated his claims with the testimony of independent witnesses and with evidence concerning the cashier's check. Thus, Swift claims that the district court's factual determination was erroneous. We disagree.

"'Where a trial court, sitting without a jury, has made a determination upon the basis of conflicting evidence, that determination should not be disturbed on appeal if it is supported by substantial evidence.'"[3] We will not disturb a district court's findings on appeal "'unless they are clearly erroneous and are not based on substantial evidence.'"[4] Substantial evidence is that quantity and quality of evidence "which 'a reasonable mind might accept as adequate to support a

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[2]Swift does not appeal from the district court's award of Kaufman's costs.

[3]Jensen v. Nielson, 91 Nev. 412, 414, 537 P.2d 321, 322-23 (1975) (quoting Fletcher v. Fletcher, 89 Nev. 540, 542, 516 P.2d 103, 104 (1973)).

[4]Campbell v. Maestro, 116 Nev. 380, 383, 996 P.2d 412, 414 (2000) (quoting Gibellini v. Klindt, 110 Nev. 1201, 1204, 885 P.2d 540, 542 (1994)).

conclusion.'"[5] Further, the trier of fact has the sole duty to evaluate the credibility of witnesses and to assign weight to their testimony.[6]

Kaufman was under no evidentiary burden to disprove Swift's proofs at trial. While Swift testified that he entered into an agreement with Kaufman for the purchase, and that he paid Kaufman $200,000.00 for his investment, the district court did not have to credit this testimony. The district court was justified in finding that no contract existed because of Swift's failure to provide documentary evidence that Kaufman ever received or negotiated the $200,000.00 cashier's check. Thus, substantial evidence supports the district court's conclusion that no contract existed between Swift and Kaufman.

Statutes of limitation

We find no error in the district court's conclusion that Swift's suit was barred under applicable statutes of limitation. Under NRS 11.190(2), a plaintiff must commence an action based upon the breach of an oral contract within four years of actual or constructive knowledge of the breach. Additionally, NRS 11.190(3)(d) provides that a plaintiff must commence an action based upon fraud within three years and the "cause of action in such a case shall be deemed to accrue upon the discovery by the aggrieved party of the facts constituting the fraud or mistake." This court

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[5]State, Emp. Security. v. Hilton Hotels, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986) (quoting Richardson v. Perales, 402 U.S. 389, 401 (1971)).

[6]Young v. Nevada Title Co., 103 Nev. 436, 441, 744 P.2d 902, 904 (1987).

has held that "[i]n a discovery based cause of action, a plaintiff must use due diligence in determining the existence of a cause of action."[7]

Evidence at trial supports the conclusion that Swift knew of sufficient facts giving rise to his potential fraud and breach of contract claims for over four years prior to the commencement of his action below. To demonstrate, Boshard testified that Swift lodged complaints of Kaufman's failure to honor the agreement as early as 1992, and the district court expressly found this testimony to be credible. The district court, sitting as the fact finder and as the final arbiter of law and equity, was entitled to accept any portion of Boshard's testimony that it found worthy of belief.[8] Having found as a factual matter that Swift made statements of actual or constructive knowledge of a potential cause of action against Kaufman in 1992, the district court correctly concluded that the applicable statutes of limitation barred his February 18, 1997, suit for breach of contract and fraud.[9]

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

[8]Swift complains that

> [t]he District Court picked and chose the testimony it would believe from Boshard seemingly in an effort to justify its decision that Mr. Swift had failed to timely file the Complaint and missed the Statute of Limitations. Appellant (Swift) contends that to do so was clear error and basis for reversal.

This claim is meritless. We would admonish counsel that this type of indiscrete rhetoric should be avoided in the future.

[9]While Swift contends on appeal that Kaufman's persistent fraudulent misrepresentations should have equitably tolled the statutes of

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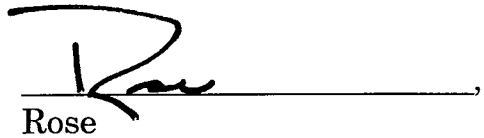
Finally, we deny Kaufman's request for attorney fees for defending against Swift's appeal. While Swift's claims on appeal may lack merit, they are not so lacking as to be frivolous, and it does not appear that he has appealed to this court for an improper purpose.[10]

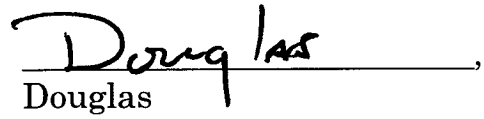
CONCLUSION

We affirm the district court's judgment finding that no enforceable oral agreement existed and that the applicable statutes of limitation barred Swift's claims. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Rose


_____, J.
Maupin


_____, J.
Douglas

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limitation, we conclude that doctrine is not implicated in this matter. We have limited the doctrine of equitable tolling to exceptional situations. See Golden Nugget, Inc. v. Ham, 98 Nev. 311, 646 P.2d 1221 (1982) (statutes of limitation may be tolled if fiduciary fails to fulfill obligations and fraudulently conceals this fact); Allen v. Webb, 87 Nev. 261, 485 P.2d 677 (1971) (in a fiduciary relationship situation, where fraudulent concealment and constructive fraud exists, the statutes of limitation may be tolled). Here, the district court found that no special relationship existed between the parties and neither Visitel nor Kaufman defrauded Swift, thus the court implicitly concluded that the doctrine of equitable tolling did not apply in this situation. We find no error in this conclusion.

[10]See NRAP 38(b).

cc: Hon. Ronald D. Parraguirre, District Judge
Kerr & Associates
Berkley, Gordon & Goldstein, LLP
Clark County Clerk