IN THE SUPREME COURT OF THE STATE OF NEVADA

LORREN STILES, AN INDIVIDUAL; AND ADVANCED IMAGING SOLUTIONS, INC., A NEVADA CORPORATION,
Appellants,
vs.
SKIPCO, INC., A NEVADA CORPORATION,
Respondent.

No. 40377

FILED

JUN 0 7 2004

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

ORDER OF REVERSAL AND REMAND

This is an appeal from a preliminary injunction. The injunction prohibits appellant Advanced Imaging Services, Inc. (AIS), and its employee or agents, including appellant Lorren Stiles, from using confidential information to influence respondent Skipco, Inc.'s customers to switch their business to AIS. The injunction states, "In the event that any customer of Skipco becomes a customer of AIS, or the extent [AIS or Stiles] cause a Skipco customer to terminate their relationship with Skipco, the burden of proof shall be upon [AIS and Stiles] to establish that [AIS and Stiles] have complied in all respects with this Order."

As a preliminary matter, Skipco argues that this court lacks jurisdiction to hear this case via direct appeal. Skipco contends that Stiles and AIS are essentially challenging a contempt order, which must be made through a writ petition not a direct appeal.[1]

[1]See Pengilly v. Rancho Santa Fe Homeowners, 116 Nev. 646, 649-50, 5 P.3d 569, 571 (2000).

No contempt order was entered in this case. This is an appeal from a preliminary injunction. This court has jurisdiction to hear a direct appeal from an order granting an injunction pursuant to NRAP 3A(b)(2).

In addition, Skipco alleges that until a contempt proceeding alleging a violation of the preliminary injunction is brought, the issue of the interpretation of the injunction language is not ripe for adjudication. The district court hearing a contempt proceeding may interpret the injunction in a manner consistent with Stiles and AIS, thus eliminating any alleged burden shifting in the injunction language.

The issue involved in the controversy must be ripe for review.[2] "[L]itigated matters must present an existing controversy, not merely the prospect of a future problem."[3] "The factors to be weighed in deciding whether a case is ripe for judicial review include: (1) the hardship to the parties of withholding judicial review, and (2) the suitability of the issues for review."[4]

We conclude that this issue is ripe for review as it arises from a final order entered by the district court, which became effective upon entry of the order. The express terms of the injunction, including the burden of proof, govern the actions of AIS and Stiles. Therefore, this issue is ripe for appeal.

AIS and Stiles argue that the district court improperly placed the burden on them, in a contempt proceeding, to prove compliance with

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[2]Resnick v. Nevada Gaming Commission, 104 Nev. 60, 66, 752 P.2d 229, 233 (1988).

[3]Id.

[4]Matter of T.R., 119 Nev. ___, ___, 80 P.3d 1276, 1279 (2003).

the injunction. AIS and Stiles argue that the burden should fall upon Skipco to prove AIS or Stiles violated the injunction. We agree.

In a civil contempt proceeding, the movant has the burden to prove three things. The movant must show: (1) the existence of a valid court order, (2) the defendant has knowledge of the order, and (3) the defendant disobeyed the order.[5] The movant must prove its case by clear and convincing evidence.[6] "The clear and convincing evidence standard is higher than the 'preponderance of the evidence' standard, common in civil cases, but not as high as 'beyond a reasonable doubt.'"[7]

However, the burden of proof is different from the burden of going forward, that is the burden to produce evidence. Once the district court determines that a movant has presented evidence sufficient to establish a prima facie showing that these three elements have been satisfied, the burden of producing evidence shifts to the defendant to

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[5]Elec. Workers Pension v. Gary's Elec., 340 F.3d 373, 379 (6th Cir. 2003); S.E.C. v. Showalter, 227 F. Supp. 2d 110, 120 (D.D.C. 2002); Bad Ass Coffee of Hawaii v. Bad Ass Ltd. Partner., 95 F. Supp. 2d 1252, 1256 (D. Utah 2000); Arthur Young & Co. v. Kelly, 588 N.E.2d 233, 239 (Ohio Ct. App. 1990).

[6]Travelhost, Inc. v. Blandford, 68 F.3d 958, 961 (5th Cir. 1995).

[7]Id.

justify the noncompliance.[8] Justifications include affirmative defenses, substantial compliance or impossibility.[9]

It is unclear from the district court's order whether the order refers to the burden of proof or the burden of producing evidence. One interpretation is that the district court found that all Skipco needed to do to establish a prima facie violation of the injunction was provide competent evidence that a Skipco customer was now an AIS customer.[10] AIS and Stiles would then have the burden of producing evidence demonstrating that the customer's decision was not influenced by conduct constituting a violation of the injunction. However, the injunction language may also be reasonably read to require AIS and Stiles to prove they did not violate the injunction. This is improper as the movant, not the respondent, always has the ultimate burden of proving a violation of an injunction.

Because the order is unclear and could be read to improperly place the burden on AIS and Stiles to show compliance with the injunction, we conclude the district erred in including such language in the injunction. If Skipco believes there has been a violation of the injunction, it has the burden, as the movant, to show there is a valid court

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[8]McCormick v. District Court, 67 Nev. 318, 326, 218 P.2d 939, 943 (1950); Elec. Workers, 340 F.3d at 379; Showalter, 227 F. Supp. 2d at 120; Arthur Young, 588 N.E.2d at 242.

[9]See, e.g., McCormick, 67 Nev. at 326-27, 218 P.2d at 943; Elec. Workers, 340 F.3d at 379; Showalter, 227 F. Supp. 2d at 120; Arthur Young, 588 N.E.2d at 242.

[10]The other elements, existence of a valid order and notice to Skipco, are not at issue.

order, of which AIS and Stiles are aware, and that a customer of Skipco has switched to AIS due to AIS' or Stiles' improper conduct. Whether the fact that a customer switched, standing alone, is sufficient to make a prima facie case is left to the district court to decide in the context of any contempt proceedings. Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court with instructions to correct the injunction in accordance with this order.

Becker, J.
Becker

Agosti, J.
Agosti

Gibbons, J.
Gibbons

cc: Hon. Mark R. Denton, District Judge
Bell, Lukens, Marshall & Kent
Wright Judd & Winckler
Santoro, Driggs, Walch, Kearney, Johnson & Thompson
Stradling, Yocca, Carlson & Rauth
Clark County Clerk