IN THE SUPREME COURT OF THE STATE OF NEVADA

PLANET CHINA, INC., AND REGENT INDUSTRY & COMMERCE (USA) INC.,
Appellants/Cross-Respondents,
vs.
MARK REFRIGERATION, INC.,
Respondent/Cross-Appellant.

No. 40424

FILED

MAR 18 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
DEPUTY CLERK

ORDER VACATING JUDGMENT AND REVERSING AND REMANDING

This is a cross-appeal from a final judgment and an order awarding fees and costs and an appeal from an order denying a motion for a new trial in a contract dispute. Eighth Judicial District Court, Clark County; Michael L. Douglas, Judge.

Appellants/cross-respondents Planet China, Inc., and Regent Industry & Commerce (USA), Inc., (Planet China, collectively) are both Nevada corporations whose respective purposes were to exhibit and promote the works of an artistic form of ice sculpting at the Fremont Street Experience. To house the exhibit, Planet China entered into a written agreement with respondent/cross-appellant Mark Refrigeration, Inc., (MRI) for the construction of a temporary 10,800 square-foot walk-in freezer in exchange for $254,964. Thereafter, building and temporary commercial permits were issued. Mark Williams, a licensed civil engineer, prepared the steel plans for the structure and K & J Steel prepared the shop drawings. MRI then built the 10,800 square-foot walk-in freezer. Williams certified that the design of the freezer was in accordance with the 1997 Uniform Building Code.

On October 27, 1999, MRI provided Planet China with a one-year warranty, which stated that MRI would correct any part of its work found defective or not conforming to the building contract. The Las Vegas Department of Building & Safety issued a certificate of occupancy for the

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10,800 square-foot walk-in freezer, indicating that it was in substantial compliance with the city's various structure, fire, and life safety codes regulating building construction or use. Artisans flown in from China then built the ice sculptures.

The ice sculpture exhibit opened in January 2000 and closed on February 12 after rain "ponded" on the roof and began leaking into the exhibition space. MRI repaired the leakage. However, on February 21, 2000, during heavy rains, five roof panels collapsed and fell into the exhibition space, damaging one-third of the ice sculptures. Afterwards, rain continued to enter through the collapsed portion of the roof and damaged all the blocks of ice that served as the foundations of the ice sculptures. The following day, MRI commenced roof repairs, which were performed in consultation with a city inspector and completed in approximately two weeks. Even so, the exhibition remained closed and did not re-open. Planet China filed suit against MRI, alleging negligence and contractual theories of recovery.

On April 17, 2001, the discovery commissioner filed a discovery scheduling order, which stated that "the last day to supplement [the parties'] witness list, including expert and rebuttal witnesses, shall be 60 days prior to trial, unless otherwise ordered by the trial court or Discovery Commissioner." The district court set the trial for July 2, 2002, over one year away.

Approximately eight months prior to trial, Planet China requested MRI's list of expert witnesses pursuant to NRCP 26(b)(5) (2003) (amended 2005). MRI responded that it had yet to designate any expert witnesses, but reserved the right to do so. On May 1, 2002, sixty-two days before trial, MRI faxed a supplemental response to Planet China, designating Christopher Money and Seb Ficcadenti as expert witnesses.

Money was to testify on the valuation of Planet China's damages claim and Ficcadenti was to serve as MRI's liability expert, testifying about the structural aspects of plaintiff's claim, including the adequacy of the structural design, the adequacy of the repair work, and the cause of the roof collapse.

Planet China filed a motion in limine to preclude the testimony of Money and Ficcadenti because they were designated within seventy days of trial in violation of NRCP 26(b)(5)(B) (repealed 2005).

The district court heard the matter on June 3, 2002, and decided to allow Money's testimony because Planet China's counsel was aware of Money and his activities on behalf of MRI. However, the court excluded Ficcadenti's testimony pursuant to NRCP 26(b)(5)(B). The court's ruling was filed on June 19, 2002. Money was deposed on June 21 and July 5, 2002.

The trial commenced on July 23, 2002. The jury returned a verdict for Planet China, awarding damages totaling $617,900.76. The damages were divided into three components: (1) $43,062 for profit/economic loss, (2) $433,583.76 for consequential damages, and (3) $141,255 for property damage. The district court entered a judgment in accordance with the jury award and also included attorney fees, costs, and interest.

Planet China appealed from the district court's order denying its motion for additur of $1.25 million for design and licensing costs or for a new trial. MRI appealed from the judgment. MRI argues that, in disclosing Ficcadenti sixty-two days before trial, it complied with the district court's discovery scheduling order. In reply, Planet China argues that the trial court did not abuse its discretion by striking Ficcadenti. Planet China asserts that MRI identified its experts approximately fifty-

nine days prior to the trial date, violating both the discovery scheduling order and the deadline set out in NRCP 26(b)(5)(B). Planet China further contends that the district court's order granting its motion in limine to preclude the testimony of MRI's expert trumps any order or request that came before it.

While interlocutory orders are not independently appealable, they may be reviewed by this court if they were entered into before a final judgment that is being appealed.[1] Thus, we are permitted to review the district court's pre-trial order excluding Ficcadenti because MRI is appealing from the judgment.

Whether a witness will be permitted to testify as an expert witness is within the discretion of the district court, and that determination will not be disturbed on appeal unless there is an abuse of discretion.[2]

"A case commenced by the filing of a complaint must first have a scheduling order entered before a trial date is set."[3] A scheduling order advises the parties of the time period to be allowed for discovery.[4] "As directed by the court, a discovery commissioner may enter scheduling orders pursuant to Rule 16(b) . . . ."[5]

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[1]See Matter of Adoption of Minor Child, 118 Nev. 962, 964 n.2, 60 P.3d 485, 486 n.2 (2002); Consolidated Generator v. Cummins Engine, 114 Nev. 1304, 1312, 971 P.2d 1251, 1256 (1998).

[2]Barry v. Lindner, 119 Nev. 661, 667, 81 P.3d 537, 541 (2003); Johnson v. Egtedar, 112 Nev. 428, 436, 915 P.2d 271, 276 (1996).

[3]EDCR 2.60.

[4]Morgan v. Las Vegas Sands, Inc., 118 Nev. 315, 318, 43 P.3d 1036, 1038 (2002).

[5]NRCP 16.2(b).

Under NRCP 16(b) (2003) (amended 2005), a judge or a discovery commissioner shall enter a scheduling order that limits the time to complete discovery. "A schedule shall not be modified except by leave of the judge or a discovery commissioner upon a showing of good cause."[6]

NRCP 26(b)(5)(B) states in relevant part that:

> [Expert witness lists must be exchanged] 20 days after the date of service of demand on the party (3 days shall be added to the prescribed time if served by mail pursuant to N.R.C.P. 6(e)) or 70 days prior to the date set for the commencement of the trial, whichever is later.

However, "the orders of the district court regarding the timing of discovery supersede NRCP 26(b)(5)(B)."[7] We conclude that the district court erred in barring Ficcadenti pursuant to NRCP 26(b)(5).

In Hansen v. Universal Health Services, the appellant submitted additional experts after the court-ordered one-year deadline had passed, but before the seventieth day prior to trial. We concluded that the district court did not abuse its discretion by refusing to allow the additional experts because the district court's orders regarding the timing of discovery supersede NRCP 26(b)(5)(B).[8] Furthermore, it did not appear to us that the appellant would be precluded from raising any relevant issues, that the respondent would have been prejudiced, or that the trial date would have been continued again to allow discovery if the new

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[6]NRCP 16(b) (2003) (amended 2005).

[7]Hansen v. Universal Health Servs., 115 Nev. 24, 28, 974 P.2d 1158, 1160-61 (1999).

[8]Id.

experts were to testify.[9] While Hansen's facts do not perfectly mirror the facts in this case, the case is instructive.

Here, the discovery scheduling order stated that the last day to supplement witness lists was sixty days prior to trial. MRI designated Money and Ficcadenti on May 1, 2002, sixty-two days prior to the scheduled trial date. While Planet China claims that it received notice of Ficcadenti being listed as a witness fifty-nine days before the scheduled trial, this claim lacks basis because the record reveals that Planet China received actual notice of this additional witness on May 1, 2002, when Ficcadenti's name as an additional witness was faxed to Planet China's attorneys. Planet China moved to exclude the experts because they were untimely designated pursuant to NRCP 26(b)(5)(B), which states that the last day to exchange witness lists is seventy days prior to trial. However, we conclude that the discovery scheduling order trumps Planet China's motion because, per Hansen, a district court's order regarding the timing of discovery supersedes NRCP 26(b)(5)(B) and, therefore, MRI's witnesses were designated in a timely manner.

It is within the district court's discretion to set the deadline for expert witnesses sixty days before trial in a discovery scheduling order.[10] However, it is not within the district court's discretion to contravene the discovery scheduling order at the behest of a party making a motion in

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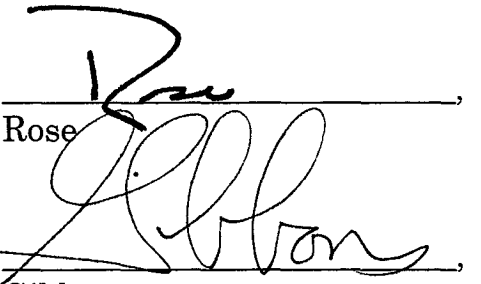
[9]Id. at 28-29, 974 P.2d at 1161.

[10]We note that in Hansen, we did not limit the scope of a trial court's discretion in setting an expert designation deadline. The fact that we deemed an expert designation made at least seventy days before trial to be untimely in Hansen, while here, MRI submitted its expert list sixty-two days before trial, is of no consequence. The district court has discretion in setting the expert designation deadline either long before or shortly after the seventy-day deadline in NRCP 26(b)(5)(B).

limine per NRCP 26(b)(5)(B). The district court should not have overseen the setting of an expert designation deadline at sixty days prior to trial and then extended the deadline to seventy days, after the seventy-day mark had already passed. The district court's exclusion of Ficcadenti prejudiced MRI, preventing it from presenting its sole liability expert. At trial, MRI only presented Gene Mark and Money as witnesses on its behalf. Furthermore, allowing Ficcadenti to testify would not have prejudiced Planet China, or resulted in the undue continuation of the trial date. The trial date was already continued to July 23, 2002, to allow for Money's deposition.

For the above reasons, we conclude that the district court abused its discretion and a new trial is warranted.[11] Accordingly, we REVERSE the order denying a new trial, VACATE the judgment, and REMAND this matter to the district court for proceedings consistent with this order.



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Rose

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Gibbons

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Hardesty

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[11]We decline to address the issues concerning damages, costs, expenses, and fees because a new trial will encompass these issues. At this new trial, Planet China will have the opportunity to present additional evidence in support of the second agreement and the receipts showing the alleged payments made, and the district court will have the opportunity to reconsider the admission of these documents.

cc: Eighth Judicial District Court Dept. 11, District Judge
Kravitz Schnitzer & Sloane, Chtd.
Bremer, Whyte, Brown & O'Meara, LLP
Lyles & Associates
Clark County Clerk