

IN THE SUPREME COURT OF THE STATE OF NEVADA

NYLYNN COSMETICS, INC., A
FOREIGN CORPORATION,
Appellant,
vs.
ALOE COMMODITIES
INTERNATIONAL, INC., A FOREIGN
CORPORATION,
Respondent.

No. 41345

FILED

NOV 09 2004

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

ORDER OF REVERSAL AND REMAND

This is an appeal from a final district court judgment in an indemnity action. Eighth Judicial District Court, Clark County; Mark R. Denton, Judge.

FACTS

This case involves two separate lawsuits. The underlying lawsuit was brought by Hilarie Sandoval against Nylynn Cosmetics for products liability claims. After Sandoval prevailed on her claim through arbitration, Nylynn filed a separate lawsuit seeking indemnity from Aloe, the manufacturer of the product. This appeal is taken from the district court's judgment which determined that Nylynn was not entitled to indemnity.

In January 1996, Sandoval was training at the Academy of Hair Design in Las Vegas. Sandoval also worked for several cosmetic companies as a spokeswoman because she had beautiful skin. In April 1996, a Nylynn representative attended the Academy of Hair Design to demonstrate and present its products to the students. Sandoval informed the representative that she had used Nylynn's Derma Renewal Complex for approximately four months. Based on this information, the Nylynn

representative gave Sandoval a sample of Nylynn's Medium Lactic Acid Peel. Nylynn had purchased the lactic acid peel from Aloe, who manufactured it.

Following the instructions she received in class, Sandoval placed Nylynn's Medium Lactic Acid Peel on her face that evening. Sandoval noticed a burning sensation on her face; and after about five minutes, she removed the peel because of the pain. When Sandoval awoke the next day, she noticed blood spots on her pillow. Sandoval's face was burned and swollen. She promptly visited Dr. Scott MacCleod, a dermatologist, who diagnosed her with a chemical burn and a staph infection. Dr. MacCleod later concluded that Sandoval had residual hyperpigmentation and her skin damage was likely permanent.

In February 1998, Sandoval filed a lawsuit against Nylynn alleging claims of negligence and strict products liability. In April 1998, Nylynn's attorney demanded in writing that Aloe defend and indemnify Nylynn in this lawsuit. Aloe's insurance company responded on May 12, 1998, and requested additional information before it could accept or decline Nylynn's request to defend and indemnify Nylynn. Allegedly, Aloe agreed to share the costs of litigation in this case with Nylynn. Neither Aloe nor its insurance company defended or agreed to indemnify Nylynn regarding this claim. In November 1998, Nylynn's attorney again requested that Aloe and its insurance company defend and indemnify Nylynn in this lawsuit.

On November 17, 1999, Sandoval and Nylynn stipulated to binding arbitration through a private agreement that was not filed with the district court. The stipulation stated in part that Sandoval agreed to forgo her right to litigate the products liability claim. In December 1999,

Sandoval filed a brief stipulation to binding arbitration with the court, and the parties proceeded to arbitration. Sandoval's arbitration brief argued only her products liability claim against Nylynn.¹ The arbitrator awarded Sandoval \$518,073.97. In March 2000, the district court entered an order confirming the arbitrator's award.

In November 2000, Nylynn sued Aloe for breach of contract, indemnification, and contribution for the losses Nylynn sustained in Sandoval's action. In February 2003, the district court conducted a one-day bench trial. The only witness who testified at trial was Gregg Gochneaur, the president of Nylynn. Gochneaur testified that approximately two months after Sandoval filed the underlying lawsuit, he met with Scott McKnight, the president of Aloe. Gochneaur testified that McKnight said that Aloe would share the attorney fees and expenses with Nylynn. Nylynn's attorney offered exhibits showing that Nylynn's prior attorney had sought indemnity from Aloe on several occasions. Aloe did not pay for any expenses that Nylynn incurred in the underlying lawsuit.

During closing argument, Nylynn's attorney stated that the underlying case was arbitrated as a products liability claim. He stated that there was no evidence of any negligence and although Sandoval pleaded negligence in her complaint, the negligence claim was not argued. Nylynn's attorney further argued that if a manufacturer does not defend when it has been given notice, the manufacturer is bound by the judgment. Aloe's attorney admitted that Aloe should have defended Nylynn in the underlying lawsuit. Specifically, she stated, "[I]t's

¹In the conclusion of the brief, Sandoval did request damages as a result of Nylynn's negligence, but the issue was not briefed or discussed.

undisputed that Aloe should have come in -- or its insurance carrier -- come in and defended Nylynn in the underlying action." Aloe's attorney, however, argued that a conflict of interest in the underlying action had abrogated Aloe's duty to defend. Aloe's attorney also stated that Aloe was not disputing the equitable indemnity issue.

The district court held that (1) Nylynn should have impleaded Aloe into the original lawsuit under NRCP 14; (2) Sandoval's strict products liability claim was not initially put at issue in the arbitration and thus it did not implicate Aloe's duty to defend or indemnify; (3) even if the strict products liability claim was pursued in arbitration, the arbitration stipulation stated that Sandoval gave up her right to litigate the products liability claim; (4) no evidence existed that Aloe breached any contract with Nylynn; and (5) a conflict of interest precluded Aloe from defending Nylynn in the case. Nylynn appeals the district court's order.

DISCUSSION

Standard of review

"[A] district court's conclusions of law are reviewed de novo."² A district court's findings of fact will be upheld if supported by substantial evidence.³ In the instant case, the district court concluded that Nylynn should have impleaded Aloe into the original lawsuit under NRCP 14. The district court also determined that Sandoval's strict products liability claim was not initially at issue in the arbitration and that Nylynn was not entitled to indemnification from Aloe.

²Clark County v. Sun State Properties, 119 Nev. 329, 334, 72 P.3d 954, 957 (2003).

³Ringle v. Bruton, 120 Nev. 82, 91, 86 P.3d 1032, 1038 (2004).

Indemnity after arbitration

Nylynn argues that although the underlying case was resolved in arbitration, Aloe still had a duty to defend and indemnify Nylynn. We agree.

"When one party is subject to liability, which, as between that party and another, the other should bear, the first party is entitled to full indemnity."⁴ Nevada has previously recognized the indemnity obligation from a manufacturer to a retailer.⁵ We have upheld an arbitration award where the arbitrator ordered indemnification in a contractual relationship.⁶ We have also recently addressed the issues of implied indemnity and contribution.⁷ We conclude that indemnity actions from arbitration awards are permissible.⁸

In the instant case, Aloe did not indemnify Nylynn even though there was no dispute that Aloe manufactured the facial peel that caused Sandoval's injury in the underlying case. During trial, the district court stated that because the arbitrator did not specify the reason he found Nylynn liable, the court was unsure how to interpret the award. The district court ultimately held that Nylynn was not entitled to

⁴Black & Decker v. Essex Group, 105 Nev. 344, 345, 775 P.2d 698, 699 (1989).

⁵Id.

⁶County of Clark v. Blanchard Constr. Co., 98 Nev. 488, 490, 653 P.2d 1217, 1219 (1982).

⁷Doctors Company v. Vincent, 120 Nev. ___, ___ P.3d ___ (Adv. Op. No. 72, October 13, 2004).

⁸In re Shigellosis Litigation, 647 N.W.2d 1, 6, 13 (Minn. Ct. App. 2002).

indemnity from Aloe because the court determined that the products liability claim was not initially an issue in arbitration. Based on this reasoning, the district court determined that the duty to defend or indemnify was not implicated.

However, evidence from the record indicates that the only claim pursued during arbitration was products liability. Sandoval's arbitration brief alleges and argues only a products liability claim; it does not argue negligence or any other cause of action. The stipulation by Sandoval and Nylynn to arbitrate the underlying case also mentioned only a products liability claim and did not mention a negligence claim. Additionally, Nevada has a strong public policy encouraging arbitration.⁹ Precluding indemnity where the underlying action proceeds to arbitration would greatly deter parties from pursuing arbitration. Based on our prior decisions and the public policy encouraging arbitration, we hold that the district court erred in refusing to allow Nylynn to obtain indemnity from Aloe because the underlying judgment was obtained by arbitration.

NRCP 14 impleader

Nylynn argues that the district court erred in determining that Nylynn should have impleaded Aloe into the underlying lawsuit under NRCP 14. We agree.

In pertinent part, NRCP 14 states, "At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him." (Emphasis added.) From its plain

⁹Phillips v. Parker, 106 Nev. 415, 417, 794 P.2d 716, 718 (1990).

language, NRCP 14 is a permissive, not mandatory, rule that allows impleader.

Missouri has a third-party practice rule similar to NRCP 14.¹⁰ The Missouri Supreme Court has recognized that "Rule 14 impleader is permissive and not compulsory."¹¹

In the instant case, Nylynn did not implead Aloe into the underlying lawsuit although Aloe received notice of the lawsuit and was asked to defend and indemnify Nylynn. However, the district court determined that "[t]he proper method for Nylynn to bring Aloe into an action for indemnity and contribution was, under the circumstances, the use of NRCP impleader provisions." The right to indemnification, however, should not depend on the pleading choices of the parties.¹² A party is allowed to choose whether to implead a manufacturer into a lawsuit or wait until the underlying case has been determined prior to bringing suit for contribution and indemnity.¹³ So long as the party gave the potential indemnitor notice during the underlying lawsuit, the party should be able to choose impleader or a separate lawsuit.

¹⁰Missouri's Supreme Court Rule 52.11, similar to NRCP 14 states, "At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and petition to be served upon a person not a party to the action who is or may be liable to the defending party for all or part of the plaintiff's claim against the defending party."

¹¹Safeway Stores, Inc. v. City of Raytown, 633 S.W.2d 727, 731 (Mo. 1982).

¹²See generally Piedmont Equip. Co., 99 Nev. at 528, 665 P.2d at 260.

¹³See NRS 17.285(1).

Nylynn gave Aloe notice of the underlying lawsuit on several occasions. Nylynn was not required to implead Aloe. Additionally, Nylynn did not know whether it would win the underlying lawsuit and did not know whether it needed to seek indemnity until the conclusion of the lawsuit. Public policy is also served by allowing the parties to choose whether to implead an indemnitor or wait until after there is a final judgment in the matter because of the relationship between a retailer and a manufacturer. We conclude that Nylynn could properly sue Aloe for indemnification in the instant case even though Nylynn failed to implead Aloe under NRCP 14. Therefore, the district court erred in determining that Nylynn should have impleaded Aloe.

Abandonment of products liability claim

Nylynn argues that the district court erred in construing the language of the first arbitration stipulation to mean that Sandoval agreed to abandon her products liability claim. We agree.

The district court's decision stated that the parties in the underlying lawsuit agreed to arbitrate the negligence claim and abandon the products liability claim. The district court further stated that "even if Ms. Sandoval's arbitration brief discussed product liability theories, and even if those theories ended up being the only ones pursued in arbitration, such went beyond the stipulation and beyond what Aloe at that point was on notice to expect to be litigated in arbitration." The evidence contained in the record contradicts the district court's conclusion.

The first arbitration stipulation between Sandoval and Nylynn was a private agreement that was not filed with the district court in Sandoval's action, but it was filed in Nylynn's action. That agreement specifically stated, "In consideration of this Stipulation, the parties (SANDOVAL and NYLYNN) agree to give up the right to further litigate

the products liability claim as set forth in the Complaint filed in the above-captioned lawsuit." Sandoval filed the second arbitration stipulation with the district court. It provided "that the above captioned matter be remanded from the litigation process to binding arbitration." Additionally, Sandoval's arbitration brief argued only the issue of products liability. Based on this evidence, it is unclear how the district court concluded that Sandoval had abandoned her products liability claim.

The language of the arbitration stipulation states that Sandoval gave up her right to litigate the products liability claim. To litigate means "[t]o settle a dispute or seek relief in a court of law."¹⁴ Nylynn argues that because Sandoval was pursuing her claims in arbitration, she was not litigating her claims in a court of law. There is no mention in the second arbitration stipulation that Sandoval was abandoning her products liability claim. In addition, the parties understood that they were stipulating to arbitration and forgoing litigation in court. This becomes evident when the first arbitration stipulation is viewed in conjunction with the second stipulation and Sandoval's arbitration brief. Because the parties' intent was to arbitrate the products liability claim instead of litigating it in a court of law, the district court erroneously interpreted the first arbitration stipulation.

Aloe's notice of the arbitration stipulation

The district court stated that if a products liability claim was pursued in arbitration, it went "beyond what Aloe at that point was on notice to expect to be litigated in arbitration." The first arbitration stipulation was not filed with the district court and there is no evidence in

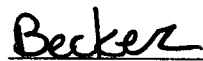
¹⁴Black's Law Dictionary 841 (5th ed. 1979).


the record that Aloe received a copy of that stipulation. Consequently, the district court erred in inferring that Aloe relied on the stipulation. Even if Aloe did receive a copy of the first arbitration stipulation, there is no evidence in the record that Aloe relied on that stipulation in not participating in the underlying case. Aloe and its insurance company refused to participate in the case before the parties filed the arbitration stipulation with the court. The stipulation did not induce Aloe's non-participation; Aloe plainly stated that the stipulation was the necessary prerequisite to its participation.

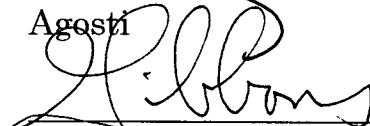
CONCLUSION

We conclude that the district court erred in determining that Nylynn was not entitled to indemnity from Aloe. Nylynn was not required to implead Aloe under NRCP 14 and NRS 17.285(1) in the underlying case. Sandoval did not abandon her strict products liability claim in the arbitration stipulation.¹⁵ Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.


_____, J.
Becker


_____, J.
Agosti


_____, J.
Gibbons

¹⁵We have reviewed Aloe's other arguments and determine they are without merit.

cc: Hon. Mark R. Denton, District Judge
Vannah Costello Vannah & Ganz
Stephenson & Dickinson
Clark County Clerk