

IN THE SUPREME COURT OF THE STATE OF NEVADA

FAICAL JANNANI,  
Appellant,  
vs.  
BELLAGIO, LLC,  
Respondent.

No. 41828

**FILED**

NOV 16 2005

ORDER OF AFFIRMANCE

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

This is an appeal from a district court judgment entered after a bench trial in a contract action to collect unpaid gaming markers. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

The judgment below ordered that appellant Faical Jannani pay a \$300,000 gaming debt incurred at the Bellagio resort in Las Vegas. The respondent Bellagio, LLC owns and operates the resort.

Evidence below indicated that Jannani, a Bellagio customer, secured his potential gaming losses with a series of markers totaling \$300,000, and further left a "check on board" in that amount. Jannani sustained losses up to the \$300,000 limit and returned to his home country of Brazil. After several attempts to secure payment, the Bellagio deposited the check for collection. Jannani's bank dishonored the check at his request and the Bellagio referred the matter to the local authorities for prosecution. Following the criminal trial, the Bellagio commenced proceedings below and, as stated, obtained a favorable judgment. We affirm.

DISCUSSION

Discovery and admissibility of evidence

Jannani conceded at trial that he owed a portion of the gross losses claimed. The crux of his defense was that he and Bellagio

representatives orally agreed that he would be entitled to a seven percent travel discount and a ten percent discount from any losses in excess of \$100,000. According to Jannani, he was entitled to the discounts regardless of the time period within which payments were made on the account. According to the Bellagio, Jannani and casino representatives orally agreed that the discounts were available only if Jannani paid the markers within 90 days. Jannani asserts that the district court erroneously prohibited his discovery and presentation of evidence concerning the Bellagio's customary agreements with other gaming clients regarding debt repayment terms, including extensions of the discounts beyond the 90-day period.

District courts are afforded reasonable discretion in controlling the conduct of discovery, and this court reverses such decisions only where clear abuse appears.<sup>1</sup> NRCp 26(b)(1) provides that “[p]arties may obtain discovery regarding any matter, not privileged, which is relevant” to the proceedings. NRS 48.015 defines relevant evidence as evidence having any tendency to make the existence of any fact of consequence more or less probable than without the evidence. However, under NRS 48.035(1), relevant evidence is inadmissible if unfair prejudice substantially outweighs its probative value.

We cannot conclude that the district court abused its discretion in prohibiting discovery and excluding evidence of repayment terms offered by the Bellagio to other customers. First, regardless of the relevance of such terms, the sensitive nature of the information sought,

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<sup>1</sup>Diversified Capital v. City N. Las Vegas, 95 Nev. 15, 23, 590 P.2d 146, 151 (1979).

which included the names of other resort customers, merited trade secret protection.<sup>2</sup> Second, even with redaction of the names of other customers, it was not unreasonable for the district court to conclude that the other agreements were irrelevant to the individual arrangement alleged to have been struck between Jannani and the Bellagio.

#### Judicial disqualification

Jannani asserts that the district court judge failed to recuse herself despite having reached a conclusion as to a central issue in the case before the beginning of trial. “[A] judge is presumed to be impartial, and the party asserting a challenge carries the burden of establishing sufficient factual and legal grounds warranting disqualification.”<sup>3</sup> A judge’s remarks do not indicate improper bias or prejudice unless they demonstrate that the judge “has closed his or her mind to the presentation of all the evidence.”<sup>4</sup> Jannani takes issue with the district court’s remark that he owed money to the Bellagio. Given Jannani’s ultimate concession in this matter that he owed at least \$249,000 on the markers, we conclude that the district judge’s commentary did not warrant disqualification.

#### Failure to deposit markers

Jannani asserts that the Bellagio could have deposited the markers within the 90-day period, during which he maintained sufficient funds in the account upon which the markers were drawn to pay the

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<sup>2</sup>See NRS 600A.070 (requiring courts to preserve the secrecy of alleged trade secrets by reasonable means such as granting protective orders).

<sup>3</sup>Las Vegas Downtown Redev. v. Dist. Ct., 116 Nev. 640, 643, 5 P.3d 1059, 1061 (2000).

<sup>4</sup>Cameron v. State, 114 Nev. 1281, 1283, 968 P.2d 1169, 1171 (1998).

discounted amount. From this, Jannani reasons that he was not in breach of the marker agreement and can therefore claim the seventeen percent discount under his oral agreement with the Bellagio.

“[T]his court will not set aside a district court’s findings of fact unless they are clearly erroneous or not supported by substantial evidence.”<sup>5</sup> As the finder of fact, the district court is entitled to weigh the evidence, determine witness credibility, and act upon such conclusions.<sup>6</sup> We conclude that substantial evidence supports the district court’s implicit finding that that the markers served as security in the event Jannani failed to affirmatively pay his debt. Under that finding, the Bellagio had no obligation under the agreement to deposit the markers within the 90-day period. Going further, given the Bellagio’s attempts to maintain a positive customer relationship with Jannani, substantial evidence supports the district court’s conclusion that the Bellagio waited a reasonable time to collect on the markers.

#### Malicious prosecution

Jannani asserts that the district court erred in dismissing his counterclaim for malicious prosecution. The claim related to the Bellagio’s referral of the matter to the Clark County District Attorney for prosecution, and Jannani’s subsequent acquittal on all charges.

To establish a claim for malicious prosecution, a claimant must demonstrate the following: (1) lack of probable cause to initiate prior criminal proceedings, (2) malice, (3) termination of the prior criminal

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<sup>5</sup>Sandy Valley Assocs. v. Sky Ranch Estates, 117 Nev. 948, 954, 35 P.3d 964, 968 (2001).

<sup>6</sup>See Olivero v. Lowe, 116 Nev. 395, 403, 995 P.2d 1023, 1028 (2000).

proceedings, and (4) damages.<sup>7</sup> The district court found that the Bellagio did not act with malice in referring Jannani's case to the district attorney and that the Bellagio reasonably believed probable cause existed to support the referral. We conclude that substantial evidence supports this finding, especially in light of Jannani's lack of belief, as asserted in his deposition, that the Bellagio harbored ill will toward him.

### Hearsay

Jannani asserts that the district court violated the hearsay rule by admitting the contents of a May 25, 2000, letter from his counsel to the district attorney, along with a copy of a motion in the criminal case requesting a physical inspection of the markers. In the letter, Jannani's counsel took the position that no debt existed. More particularly, the second and third paragraphs stated:

Mr. Jannani asserts that he does not owe the Bellagio any money. . . .

Mr. Jannani played with markers issued by the hotel for a while and was winning an amount close to \$500,000 but ended up even. Mr. Jannani asserts that when he left the Bellagio Hotel he did not owe any money whatsoever and that the representative of the hotel from Brazil assured him that he would pick up the signed blank check and return it to him.

Jannani argues that the letter was an out-of-court statement by his attorney offered to prove Jannani repudiated the agreement and claimed he owed nothing. While this is true, the statement remains admissible under NRS 51.035, which provides that:

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<sup>7</sup>LaMantia v. Redisi, 118 Nev. 27, 30, 38 P.3d 877, 879 (2002).

“Hearsay” defined. “Hearsay” means a statement offered in evidence to prove the truth of the matter asserted unless:

....

3. The statement is offered against a party and is:

(a) His own statement, in either his individual or a representative capacity; [or]

....

(c) A statement by a person authorized by him to make a statement concerning the subject

....

We must assume on this record that Jannani authorized this communication. Accordingly, we find no error in the admission of the contents of the letter and the copy of Jannani’s moving papers seeking inspection of the markers. In short, the letter constitutes an admissible denial of the debt at the time of the prosecution of the criminal case. Going further, regardless of any merit that this assignment of error might have, Jannani admitted in his deposition testimony that he believed he owed the Bellagio nothing as of the date of the letter.

We note Jannani’s contention that “statements made by a person’s attorney are normally tactical in nature and should not be used as [an] admission against that party’s attorney.” We assume that counsel means to state that such statements should not be used against the client—as counsel was not a party to the action. Also, we take this opportunity to disabuse counsel of the assumption that somehow such statements have no binding effect upon the client. The assumption is counterintuitive to NRS 51.035 and the fact that the attorney is always the speaking agent of the client.

The oral agreement

Finally, we conclude that substantial evidence supports the district court's finding that the discount was conditioned upon payment of the markers within 90 days. Under that finding, Jannani cannot claim the seventeen percent discount because he failed to affirmatively pay his debt within 90 days per the oral agreement.

CONCLUSION

We conclude that Jannani's assignments of error lack merit. Therefore, we

ORDER the judgment of the district court AFFIRMED.

Becker, C.J.  
Becker

Maupin, J.  
Maupin

Hardesty, J.  
Hardesty

cc: Hon. Valerie Adair, District Judge  
Orlando J. De Castroverde  
Waldo De Castroverde  
Newman Morris & Dachelet, Ltd.  
Clark County Clerk