

IN THE SUPREME COURT OF THE STATE OF NEVADA

RBC DAIN RAUSCHER, INC., A
MINNESOTA CORPORATION,
Appellant,
vs.
LAWRENCE R. MARINA, JR.,
Respondent.

No. 41992 FILED

JUN 15 2005

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

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

This is an appeal from an order granting respondent's preliminary injunction and an order awarding respondent attorney fees and costs. Eighth Judicial District Court, Clark County; Jessie Elizabeth Walsh, Judge.

Appellant, RBC Dain Rauscher (RBC Dain), employed respondent, Lawrence Marina, as an investment executive. After his employment was terminated, Marina sought access to his clients' records pursuant to the parties' employment agreement (the agreement). Marina sought specific performance of provisions in the employment agreement relating to client records, injunctive relief to direct RBC Dain to provide copies of the clients' records, and declaratory relief regarding the parties' obligations under the employment agreement. Marina then filed a motion for preliminary injunction. On July 23, 2003, the district court granted Marina's request for an order shortening time, and on the same day Marina served RBC Dain's resident agent with the motion for preliminary injunction, which contained the order shortening time, setting the hearing date for July 29, 2003.

RBC Dain failed to appear at the hearing. The district court granted Marina's motion for a preliminary injunction and, upon Marina's

oral motion, awarded Marina attorney fees and costs. RBC Dain appeals contending that: (1) it did not receive adequate notice of the preliminary injunction hearing, (2) the district court abused its discretion in granting the preliminary injunction because Marina failed to establish a reasonable probability of success on the merits and failed to demonstrate irreparable injury, and (3) the district court erred in awarding attorney fees and costs. Conversely, Marina contends that it is entitled to attorney fees and costs on appeal because the appeal is frivolous under NRAP 38(a) and (b). We conclude that RBC Dain received adequate notice of the preliminary injunction hearing and that the preliminary injunction was properly granted. However, we have determined that the district court erred in awarding fees and costs.

RBC Dain complains that it was deprived of due process under the law because it did not receive adequate notice of the order shortening time on the preliminary injunction hearing. NRCP 65(a)(1) states that “[n]o preliminary injunction shall be issued without notice to the adverse party.” Further, this court has noted, “[a] central tenet of our legal system is the concept of notice and hearing. Justice is served only when parties are given adequate notice and an appropriate opportunity to respond in open court.”¹

Here, we conclude that Marina provided RBC Dain with the notice required under Nevada law. In this case, Marina served RBC Dain’s resident agent with copies of the summons, complaint, and motion for preliminary injunction. Contained within the motion for preliminary

¹Clark County Sports Enterprises v. Kaighn, 93 Nev. 395, 396, 566 P.2d 411, 412 (1977).

injunction was an order from the district court shortening time. Notably, the title page of the motion contained the words “order shortening time,” in parentheses, below the title “Motion for Preliminary Injunction.” The order shortening time appeared on page three, under an underlined heading stating “ORDER SHORTENING TIME.” The order stated that “IT IS HEREBY ORDERED the undersigned plaintiff’s MOTION FOR PRELIMINARY INJUNCTION shall be heard on the 29 day of July, 2003, at the hour of 11:00 a.m. o’clock before the above entitled court” It is undisputed that RBC Dain received the order and that its in-house counsel reviewed the pleadings. Accordingly, we conclude that RBC Dain received adequate notice of the hearing, and we reject RBC Dain’s contention that it suffered a deprivation of its due process right to adequate notice and a hearing.²

We further conclude that the district court properly granted Marina’s motion for a preliminary injunction. We will only reverse a district court’s decision to grant a preliminary hearing if we determine that the district court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact.³ A preliminary injunction may issue when a party can demonstrate a likelihood of success on the merits and that the non-moving party’s

²We have also considered, and we reject RBC Dain’s argument that the order was insufficient because it failed to state when RBC Dain’s substantive response to the motion was due pursuant to Eighth Judicial District Court Rule 2.10. Instead, we conclude that EDCR 2.10(a) specifically excludes instances in which the court sets forth an order fixing a shorter time from the requirements of EDCR 2.10(c).

³Attorney General v. NOS Communications, 120 Nev. 65, ___, 84 P.3d 1052, 1053 (2004).

conduct will cause irreparable harm for which compensatory relief is inadequate if permitted to continue.⁴

We conclude that the district court did not abuse its discretion in determining that both elements were met. First, the language of the agreement between RBC Dain and Marina supports a finding that RBC Dain was required to produce complete, unaltered, unredacted, and unedited records of Marina's former clients. The language of the agreement clearly states that nothing will prevent the employee, "at any time," from making and retaining copies of the records for the clients personally and individually served by the employee.

Additionally, the language of the agreement states that an employee is allowed to make copies of "such records." This statement refers to language in the agreement prohibiting the divulgence of the names, numbers, addresses, client financial statements, portfolio contents, account worksheets, and other information. Accordingly, the district court did not make a clearly erroneous finding when it determined that Marina was entitled to access the complete, unaltered, unredacted, and unedited records of Marina's former clients whom he served while employed at RBC Dain. It was reasonable for the district court to determine that the agreement provides for such access. As a result, we conclude further that the district court did not err in finding that Marina had a reasonable probability of success on the merits.

We also agree with the district court's determination that Marina demonstrated the second requirement by showing that there was

⁴Dangberg Holdings v. Douglas Co., 115 Nev. 129, 142, 978 P.2d 311, 319 (1999).

an immediate, irreparable injury, damage, or loss that would result if he was unable to maintain contact with his clients. As Marina notes, if contact were lost, reestablishment of his business relationships could prove difficult, resulting in a substantial loss to Marina's client base. Therefore, because this is sufficient to demonstrate an immediate irreparable damage or loss, we conclude that the district court did not abuse its discretion in granting the preliminary injunction.

RBC Dain also complains that Marina did not properly file a verified memorandum of costs as required under Nevada law.⁵ Therefore, RBC Dain contends that the district court erred in awarding costs to Marina. We agree. Pursuant to NRS 18.110(1):

The party in whose favor judgment is rendered, and who claims his costs, must file with the clerk, and serve a copy upon the adverse party, within 5 days after the entry of judgment, or such further time as the court or judge may grant, a memorandum of the items of his costs in the action or proceeding, which memorandum must be verified by the oath of the party, or his attorney or agent, or by the clerk of his attorney, stating that to the best of his knowledge and belief the items are correct, and that the costs have been necessarily incurred in the action or proceeding.⁶

⁵We further note that Marina failed to file a motion requesting attorney fees and costs or to include such a request in the motion requesting a preliminary hearing.

⁶This court has determined that the five-day period is not jurisdictional and that the district court has the discretion to reach the merits of an untimely motion for costs and expert witness fees. Eberle v. State ex rel. Redfield Trust, 108 Nev. 587, 590, 836 P.2d 67, 69 (1992).

This court has previously explained that costs must be reasonable and that “‘reasonable costs’ must be actual and reasonable, ‘rather than a reasonable estimate or calculation of such costs.’”⁷

Here, Marina never filed a memorandum demonstrating that it actually incurred the amount of costs granted by the district court’s order. Instead, Marina merely made an oral motion and then prepared the order granting costs upon the district court’s request. We conclude that such an award of costs constitutes error on the part of the district court.

Additionally, Marina challenges the district court’s award of attorney fees, which may only be awarded when authorized by a rule, statute, or contract.⁸ Under NRS 18.010(3), “[i]n awarding attorney’s fees, the court may pronounce its decision on the fees at the conclusion of the trial or special proceeding without written motion and with or without presentation of additional evidence.” The district court’s award of attorney fees must recite the basis for the award in order to avoid being arbitrary and capricious.⁹

In this case, the district court failed to cite the basis for the award. After listening to Marina’s argument on the motion, the district


⁷Bobby Berosini, Ltd. v. PETA, 114 Nev. 1348, 1352, 971 P.2d 383, 385-86 (1998) (quoting Gibellini v. Klindt, 110 Nev. 1201, 1206, 885 P.2d 540, 543 (1994)).

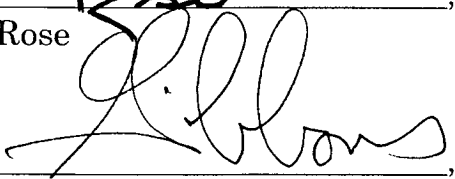
⁸Bd. of Gallery of History v. Datecs Corp., 116 Nev. 286, 288, 994 P.2d 1149, 1150 (2000); Henry Prods., Inc. v. Tarmu, 114 Nev. 1017, 1020, 967 P.2d 444, 446 (1998).

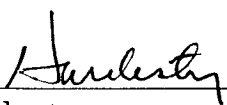
⁹Integrity Ins. Co. v. Martin, 105 Nev. 16, 19, 769 P.2d 69, 70 (1989).

court simply stated that it was inclined to grant the motion. As a result, we conclude that the award of attorney fees was arbitrary and capricious.

Accordingly, we affirm the district court's order granting the preliminary injunction, reverse the order granting attorney fees and costs, and remand this matter to the district court.


_____, J.
Rose


_____, J.
Gibbons


_____, J.
Hardesty

cc: Hon. Jessie Elizabeth Walsh, District Judge
Guild Russell Gallagher & Fuller
Kummer Kaempfer Bonner & Renshaw/Las Vegas
Clark County Clerk