IN THE SUPREME COURT OF THE STATE OF NEVADA

OSAMA HAIKAL, M.D., LTD., A NEVADA PROFESSIONAL CORPORATION,
Appellant,
vs.
ROBERT M. YEH, M.D., AN INDIVIDUAL,
Respondent.

No. 52322

FILED

MAY 28 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER REVERSING IN PART, AFFIRMING IN PART, AND REMANDING

This is an appeal from a district court judgment in an employment contract action. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

Appellant Dr. Osama Haikal, Ltd., a Clark County-based medical practice specializing in gastroenterology, sued to enforce the noncompete provisions in its employment agreement with respondent Dr. Robert Yeh. Yeh established an office and began performing procedures in certain locations in Clark County eight months after leaving his employment with Haikal—four months before the expiration of the noncompete agreement. Both sides filed cross-motions for summary judgment, in which each advanced opposing views of the noncompete agreement and asserted that it unambiguously favored him. The district court accepted neither side's view and found that the noncompete provision was ambiguous and unreasonable and reformed it sua sponte.

After discovery, Yeh filed a second motion for summary judgment on Haikal's claims, which the district court granted based on the noncompete agreement as reformed. Thereafter, a bench trial was held on

Yeh's counterclaims, where the court found that Haikal had underpaid Yeh's first- and second-year bonuses and unreasonably delayed payment of the second-year bonus, and ordered statutory interest for the period of delay. The court awarded Yeh attorney fees under NRS 18.010(2)(a), which enables the court to do so when the prevailing party has received a judgment of less than $20,000.

On appeal, Haikal contends that the district court erred in reforming the noncompete agreement sua sponte and in interpreting ambiguous provisions of the agreement on summary judgment. We agree and reverse the district court's judgment in this regard. Haikal also contends that the court lacked substantial evidence to find that Haikal unreasonably delayed payment of Yeh's second-year bonus. We disagree, and affirm on this issue. This disposition makes the district court's award of fees premature and so we vacate the fee award.

Reformation of the noncompete agreement

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." NRCP 56(c); Wood v. Safeway, Inc., 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005). "Although district courts have the inherent power to enter summary judgment sua sponte pursuant to rule 56, that power is contingent upon giving the losing party notice that it must defend its claim." Soebbing v. Carpet Barn, Inc., 109 Nev. 78, 83, 847 P.2d 731, 735 (1993). Our review is de novo. Wood, 121 Nev. at 729, 121 P.3d at 1029.

Neither party argued that the noncompete provision was ambiguous, unreasonable, or a candidate for reformation in their cross-

motions for summary judgment. The district court's finding that the noncompete agreement was unreasonable and should be reformed was made sua sponte. "'[R]egardless of a claim's merit, a district court may not sua sponte enter summary judgment against it until the claim's proponent has been given notice and a reasonable opportunity to be heard.'" Soebbing, 109 Nev. at 84, 847 P.2d at 735 (quoting United States Dev. Corp. v. Peoples Federal Sav. & Loan, 873 F.2d 731, 736 (4th Cir. 1989)). Here, "the district court effectively entered summary judgment sua sponte in favor of [Yeh on the question of reasonableness, but it] . . . did not take any evidence, nor did it allow [Haikal] to submit any affidavits or other documents in support of its position" in opposition. Sierra Nevada Stagelines v. Rossi, 111 Nev. 360, 363, 892 P.2d 592, 594 (1995).

The error was not merely procedural. The noncompete agreement, as drafted, read in relevant part:

> 18. Noncompetition. Yeh shall not seek to establish his own practice or to be employed by or affiliated with another group practice or provider of health care for a period of one (1) years within Clark County, and Yeh shall not seek to enter, or permit any immediate family to enter, into the same or any other practice or specialty thereof as that carried on at any time by the [Haikal Group], either directly or indirectly, as owner, partner, employee or as stockholder, officer or director of any corporation or organization so engaged, within five (5) miles of any office, current or established during the term of Yeh's employment with [the Haikal Group] or any ambulatory surgery center.

The district court reformed the above provision to read:

> 18. Noncompetition. Yeh shall not seek to establish his own practice or to be employed by or affiliated with another group practice or provider

> of health care for a period of one (1) year within five (5) miles of any current office, current or established during the term of Yeh's employment. Yeh shall not perform any procedures at any ambulatory surgery center located within five (5) miles of Yeh's office for the same one (1) year period.

As originally worded, the noncompetition provision was ambiguous—that is, susceptible to more than one plausible interpretation. Its ambiguous terms included the nature and location of Yeh's practice; what was meant by affiliation with another group practice or provider of health care; where precisely Yeh was barred from practicing during the noncompete term; and what is, and is not, an ambulatory surgery center.

To interpret the provision required the court to go beyond its express terms and "examine the circumstances surrounding the parties' agreement in order to determine the true mutual intentions of the parties . . . includ[ing] not only the circumstances surrounding the contract's execution, but also subsequent acts and declarations of the parties." Shelton v. Shelton, 119 Nev. 492, 497, 78 P.3d 507, 510 (2003) (citations and internal quotation marks omitted). Undertaking this analysis and "blue penciling" the noncompete provision sua sponte deprived the parties of the opportunity to lay a foundation to justify applying one or more rules of contract construction or to introduce extrinsic evidence on reasonableness, trade meaning, and/or intent. For this reason, we reverse the judgment reforming and adjudicating the claims arising under the noncompete agreement. See Dickenson, 110 Nev. at 937, 877 P.2d at 1061.

Delay in paying bonus

After a bench trial, the district court found that Haikal had underpaid Yeh's first-year bonus by $6,000, underpaid his second-year bonus by $694.17, and unreasonably delayed payment of $67,000 of Yeh's second-year bonus by four months—and awarded statutory interest for each underpayment or delayed payment. Haikal argues that the district court lacked substantial evidence for its finding that it unreasonably delayed payment of Yeh's second-year bonus.

"Where a question of fact has been determined by the trial court, this court will not reverse unless the judgment is clearly erroneous and not based on substantial evidence." Beverly Enterprises v. Globe Land Corp., 90 Nev. 363, 365, 526 P.2d 1179, 1180 (1974). "Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion." Bally's Employees' Credit Union v. Wallen, 105 Nev. 553, 556 n.1, 779 P.2d 956, 957 n.1 (1989) (citations and internal quotation marks omitted). Additionally, "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." NRCP 52(a).

Here, the employment agreement required Haikal to pay Yeh his bonus within a reasonable time. While Yeh's first-year bonus was paid within two months, his second-year bonus was not paid for ten months. In addition, Haikal testified that the delay in paying Yeh's second-year bonus was longer than the delay in paying any previous employee their second-year bonus. In light of the testimony offered at trial, and the court's opportunity to weigh Haikal's credibility in offering his explanation for why Yeh's second-year bonus was delayed, substantial evidence supported

the district court's finding that Haikal unreasonably delayed payment and we affirm.

Attorney fees award

The district court awarded Yeh $37,215 in attorney fees pursuant to NRS 18.010(2). Given our reversal of the district court's summary judgment to Yeh on Haikal's breach of contract claim on the restrictive covenant, the district court's discretionary award of attorney fees under NRS 18.010(2)(a) will need to be reevaluated in light of the eventual disposition of the restrictive covenant claim, and thus we reverse the award of attorney fees as premature. Kahn v. Morse & Mowbray, 121 Nev. 464, 479, 117 P.3d 227, 238 (2005). Accordingly,

We ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART and REMAND this matter to the district court for proceedings consistent with this order.

_____, J.
Hardesty

_____, J.
Douglas

_____, J.
Pickering

cc: Eighth Judicial District Court Dept. 15, District Judge
Lester H. Berkson, Settlement Judge
Bailey Kennedy
Brown Brown & Premsrirut
Eighth District Court Clerk