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Summary of Finkel v. Cashman Professional, Inc., 128 Nev. Adv. Op. No. 6

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CONTRACTS – NON-COMPETE AGREEMENTS/TRADE SECRETS

Summary

The court considered consolidated appeals from two district court orders in a contract action, the first granting a preliminary injunction and the second refusing to dissolve the preliminary injunction.

Disposition/Outcome

The panel of three Justices affirmed in part and reversed in part. The Court held that the district court acted appropriately when it issued the injunction, but abused its discretion when it refused to dissolve the injunctive provisions related to the terminated Agreement and when it failed to make findings pursuant to NRS 600A.040(1) as to: 1) the continued existence of a trade secret and 2) as to what constitutes a “reasonable period of time” for extending the injunctive provisions under Nevada’s Uniform Trade Secrets Act.

Factual and Procedural History

Beginning in 2001, appellant Mark Finkel (“Finkel”) worked for respondent Cashman Professional Inc., which is affiliated with respondents Cashman Enterprises, Inc., and Cashman Photo Enterprises of Nevada (collectively, Cashman). In his time in multiple executive positions at Cashman, Finkel performed many high-level duties which Cashman wished to keep confidential. Finkel was one of only four employees with access to Cashman’s contracts. Cashman locked the contracts up to prevent competitive underbidding.

When Finkel ended his employment with Cashman in 2008, the parties entered into the Agreement that provided Finkel would serve as a consultant to Cashman and was to be compensated in exchange for being bound to restrictive covenants prohibiting him from competing with, disparaging, soliciting the employees of, or disclosing confidential information of Cashman.

In early 2009, Finkel purchased a printing company called IQ Variable Data, LLC, and renamed it Influent Solutions. Finkel utilized several Cashman employees to establish his business and approached at least two of Cashman’s customers in an attempt to move their entire wedding photo and print production to Influent.

In response, Cashman filed a motion in the district court that alleged breach of the Agreement and sought a preliminary injunction to enjoin its restrictive covenants. The district court granted the preliminary injunction, finding that Finkel had likely violated the Agreement, misappropriated trade secrets, and that Cashman would face irreparable harm without an injunction. The preliminary injunction applied to both the Agreement and Finkel’s misappropriation of trade secrets.

¹ By Travis Akin

Finkel appealed, informed Cashman he was terminating the Agreement, and filed a motion to dissolve the preliminary injunction upon termination of the Agreement. The district court denied the latter motion, finding that it still had the authority to protect Cashman from unfair competition. Finkel appealed this order, and the Court consolidated both appeals.

Discussion

Justice Parraguirre wrote for the unanimous three justice panel. The Court first considered Finkel's argument that the district court abused its discretion in issuing the preliminary injunction because substantial evidence did not support that Cashman would suffer irreparable harm or establish the likelihood of success in establishing that Finkel breached the agreement or misappropriated trade secrets.

The Court found that Finkel competed with, disparaged, solicited the employees of, and disclosed confidential information of Cashman. The Court noted that this is the precise conduct that could cause a business irreparable harm, and that the district court had substantial evidence to support its conclusions.

The Court then moved on to the issue of trade secrets. Finkel argued that any information that he may have used was not a "trade secret." A trade secret "[d]erives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by the public," and is information that is "the subject of efforts that are reasonable under the circumstances to maintain its secrecy."² After applying the four-prong test to determine if information is a trade secret,³ the Court agreed with the district court that substantial evidence showed Finkel misappropriated trade secrets and that this conduct could result in irreparable harm to Cashman.

In the appeal of the second order, Finkel argued that the district court erred in denying his motion to dissolve the preliminary injunction after termination of the Agreement. While the Court agreed with Finkel on the injunctive provisions concerning the covenants, it did not outright agree on the provisions related to trade secrets. Agreeing with the Ninth Circuit in *Economics Laboratory, Inc. v. Donnolo*,⁴ the Court set Nevada precedent by refusing to enforce provisions of a noncompete agreement after the period set forth in the agreement expires. The Court then reversed the portion of district court's second order that denied Finkel's motion to dissolve the injunctive provisions arising out of violating the restrictive covenants of the Agreement.

Turning to the remaining portion of the second order, the Court explained that NRS 600A.040(1) requires termination of an injunction when a trade secret no

² NEV. REV. STAT. 600A.030(5)(A)-(B).

³ See *Frantz v. Johnson*, 116 Nev. 455, 466-67, 999 P.2d 351, 358-59 (2000)

("(1) the extent to which the information is known outside of the business and the ease or difficulty with which the acquired information could be properly acquired by others; (2) whether the information was confidential or secret; (3) the extent and manner in which the employer guarded the secrecy of the information; and (4) the former employee's knowledge of customer's buying habits and other customer data and whether this information is known by the employer's competitors...").

⁴ 612 F.2d 405, 408 (9th Cir. 1979).

longer exists and that an injunction be extended for a “reasonable period of time.” The district court erred when it made no findings with regards to either of these two requirements. Thus, the Court reversed the district court order on the injunctive provisions related to the issue of trade secrets, and instructed the district court to make findings pursuant to NRS 600A.040(1) on remand.

Conclusion

- (1) Under NRS 600A.040(1), a district court must terminate an injunction when trade secrets no longer exist.
- (2) The Court agreed with the Ninth Circuit, holding that it will decline to enforce a non-compete agreement after the period set forth in the agreement has expired.
- (3) In order to maintain a preliminary injunction beyond the termination date of the parties’ agreement, trade secrets must still exist and the injunction may only be extended for a “reasonable period of time” pursuant 600.040(1).