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Summary of Francis v. Wynn Las Vegas, LLC, Nev. Adv. Op. No. 60

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CIVIL PROCEDURE – Privilege Against Self Incrimination

Summary

An appeal from a district court summary judgment in a contract action.

Disposition/Outcome

The Supreme Court of Nevada affirmed, holding that the district court did not abuse its discretion when it refused to permit a civil litigant to withdraw his Fifth Amendment invocation and denied his requests to reopen and continue discovery because it properly balanced the interests of the invoking party against the opposing party's right to fair treatment.

Factual and Procedural History

Joseph Francis ("Francis") owed \$2 million to Wynn Las Vegas ("Wynn") in outstanding casino markers² resulting from a trip to Las Vegas in 2007. Francis acknowledged the debt and stated his intention to pay but claimed entitlement to a discount. Francis never paid any portion of the debt.

In June 2008, Wynn sued Francis for breach of contract, conversion, unjust enrichment, and breach of the covenant of good faith and fair dealing. Francis answered with various affirmative defenses and counterclaims including breach of contract, conspiracy and extortion. A stipulated schedule and discovery plan proceeded whereby Wynn produced initial disclosures of over 100 documents, while Francis produced only a letter from his bank. In September 2008, the Clark County District Attorney's office initiated a criminal prosecution charging Francis with theft and passing a bad check with intent to defraud, relating to the unpaid markers.

During depositions, without seeking any accommodation from the district court regarding his self incrimination concerns, Francis asserted his Fifth Amendment privilege to nearly every question from Wynn counsel. Discovery closed in April 2009 with no attempt by Francis to cure his deposition or waive his privilege.

Wynn filed a motion for summary judgment in May 2009 based on Francis's bad faith assertion of privilege and failure to present any evidence contradicting Wynn's evidence. In opposing Wynn's motion for summary judgment, Francis asserted that a genuine issue of material fact existed regarding the amount owed because he was entitled to a discount and Wynn failed to mitigate its damages. Francis sought to reopen discovery,³ stating he might still cure his deposition. During the summary judgment hearing, Francis's counsel indicated Francis would like to withdraw his privilege.

¹ By Amanda Ireland

² The Court explained that a casino marker is an instrument that is the equivalent of a check for purposes of NEV. REV. STAT. §205.130(1) (2007), the Nevada bad check statute.

³ Francis also sought a continuance to conduct discovery under NEV. R. CIV. P. 56(f), seeking to subpoena bank records and depose two individuals.

Noting that Francis's deposition was "the most ridiculous exercise of the 5th Amendment," the district court granted summary judgment against Francis and found he owed Wynn \$2 million on the unpaid markers. The court determined Francis improperly asserted the Fifth Amendment privilege and produced no evidence to rebut Wynn. The court refused to permit Francis to withdraw his invocation or reopen discovery and denied his motion for continuance of discovery because he explained neither his failure to undertake discovery nor how extending discovery would produce a genuine issue of material fact.

Discussion

Justice Saitta authored the unanimous opinion of the Court. The Court followed settled federal precedent that a claim of privilege would not prevent an adverse finding or even summary judgment if the litigant did not present sufficient evidence to satisfy the usual evidentiary burdens.⁴ Nonetheless, because the privilege against self-incrimination was constitutionally protected, courts needed to carefully balance the interests of the party claiming protection and the adversary's entitlement to equitable treatment.⁵ Federal case law further guided the Court to elaborate upon the various considerations relevant to striking such balance.

When federal courts analyzed a request for accommodation for self-incrimination concerns, they examined the nature and timing of the invocation or its withdrawal, the nature of the civil proceeding and any parallel criminal proceeding, and the extent of prejudice an opposing party would incur without remedial action. With timely requests for legitimate self-incrimination concerns a court "should explore all possible measures" to accommodate the privilege.⁶ However, attempted withdrawal at the last minute of a proceeding strongly indicated an invoking party was abusing his or her privilege to gain an unfair advantage,⁷ and in such cases severe remedial measures - such as preventing the invoking party from presenting previously protected material - were appropriate.

Where a defendant faced parallel civil and criminal proceedings brought by different governmental entities arising from the same set of facts, courts could respond to a timely request for accommodation of the privilege by granting a stay of the civil proceeding until the criminal matter was concluded.⁸ Finally, extensive remedial measures could be taken where the opposing party would otherwise suffer substantial prejudice.⁹ The Court concluded that courts could take a wide range of remedial measures to balance the interests of the invoking party and the opposing party's right to fair treatment.

The Court determined that the relevant considerations weighed heavily in favor of the remedial measures taken by the district court to balance the parties' competing interests. Notably, Francis never requested the court accommodate his privilege, his invocation was overbroad and his refusal to answer nearly every question was unjustifiable. The Court found the

⁴ United States v. 4003-4005 5th Ave., 55 F.3d 78, 83 (2d Cir. 1995).

⁵ SEC v. Graystone Nash, Inc., 25 F.3d 187, 194 (3d Cir. 1994).

⁶ 4003-4005 5th Ave., 55 F.3d at 84.

⁷ *Id.* at 85.

⁸ SEC v. Zimmerman, 854 F. Supp. 896, 899 (N.D. Ga. 1993).

⁹ 4003-4005 5th Ave., 55 F.3d at 84.

timing and context of Francis's attempted withdrawal problematic because he waited until Wynn moved for summary judgment before indicating a willingness to withdraw his privilege, a last minute attempt suggesting abuse of privilege. Additionally, Francis was not in the predicament of defending parallel civil and criminal proceedings brought simultaneously by governmental entities because Wynn brought the civil action, and Francis's tactics resulted in unnecessary expense and delay for Wynn.

Further, the Court stated that a motion for continuance under NRCP 56(f) was appropriate only when the movant expressed how further discovery would lead to a genuine issue of material fact,¹⁰ and that it was not an abuse of discretion for the district court to deny the motion if the movant had previously "failed diligently to pursue discovery."¹¹ Francis had not in any way diligently pursued discovery, so the Court concluded the district court did not abuse its discretion by denying Francis's motion for a NRCP 56(f) continuance. Finally, given Francis submitted no affidavits or admissible evidence to rebut Wynn's motion for summary judgment, the district court did not err in granting Wynn's motion for summary judgment.

Conclusion

District courts should balance the interests of the invoking and opposing parties in the face of a request for accommodation of the privilege against self incrimination. In striking such a balance, courts should consider: the nature of the invocation, the manner and timing of any withdrawal of invocation, the nature of the civil proceeding and any parallel criminal proceeding, and the extent of prejudice an opposing party would incur without remedial action.

Here, Francis's invocation of privilege was overbroad and unjustifiable, the timing of his withdrawal suggested abuse of the privilege, and Wynn suffered unnecessary expense and delay. Therefore, the district court did not abuse its discretion in refusing to permit Francis to withdraw his invocation and denying his requests to reopen and continue discovery, and correspondingly, there was no error in the grant of summary judgment.

¹⁰ Aviation Ventures v. Joan Morris, Inc., 121 Nev. 113, 118, 110 P.3d 59, 62 (2005).

¹¹ Chance v. Pac-Tel Teletrac Inc., 242 F.3d 1151, 1161 (9th Cir. 2001).