

Scholarly Commons @ UNLV Boyd Law

Nevada Supreme Court Summaries

Law Journals

9-22-2005

Summary of Whealon v. Sterling, 121 Nev. Adv. Op. 66

Jarrold Rickard
Nevada Law Journal

Follow this and additional works at: <https://scholars.law.unlv.edu/nvscs>



Part of the [Civil Procedure Commons](#), and the [Dispute Resolution and Arbitration Commons](#)

Recommended Citation

Rickard, Jarrod, "Summary of Whealon v. Sterling, 121 Nev. Adv. Op. 66" (2005). *Nevada Supreme Court Summaries*. 579.

<https://scholars.law.unlv.edu/nvscs/579>

This Case Summary is brought to you by the Scholarly Commons @ UNLV Boyd Law, an institutional repository administered by the Wiener-Rogers Law Library at the William S. Boyd School of Law. For more information, please contact youngwoo.ban@unlv.edu.

***Whealon v. Sterling*, 121 Nev. Adv. Op. 66 (September 22, 2005)¹**

CIVIL PROCEDURE – AMENDMENT OF COMPLAINT

Summary

Appellant agent sought review of a summary judgment from the Eighth Judicial District Court, which ruled in favor of respondent entertainer in a contract dispute.

Disposition/Outcome

Reversed. The Nevada Supreme Court held that although the district court did not abuse its discretion in granting leave for the respondent to amend his complaint, the ruling of the district court was in contravention of the plain meaning of the applicable Nevada Revised Statute.

Factual and Procedural History

Respondent, Dean Sterling, performed an X-rated stage show. Sterling and appellant, Robert Whealon, entered into an oral contract whereby Whealon alleges that he agreed to be the show's agent in exchange for twenty percent of the gross receipts. Sterling contends that the agreement was for a twelve percent promoter's fee, plus an agent fee of three percent.

While acting as Sterling's agent, Whealon found a new venue for the show. This new venue was structured as a lounge lease agreement. Under the agreement, Sterling paid the rent for the lounge space and produced the show but otherwise operated as a separate entity from the hotel. In fact, the hotel paid no wages to Sterling.

Although Sterling paid Whealon a fifteen percent fee between June and November 1999, Whealon brought suit against him for unpaid fees, seeking the difference between the twenty percent agent fee he asserts they orally agreed to and the fifteen percent fee he received. Whealon repeatedly claimed that he was the show's agent, but he admitted during the proceeding that he had never applied for an employment agency license from the Nevada Labor Commissioner.

“In his initial answer and cross-complaint, Sterling failed to raise a violation of the private employment agencies statutes as an affirmative defense.”² “He was later granted leave to file an amended answer and cross-complaint, which included an affirmative defense based on Whealon's failure to secure an employment agency license under the statutes.”³ Thereafter, Sterling moved for summary judgment.

The district court granted summary judgment to Sterling, finding that Whealon had violated the statutory licensing requirements for private employment agencies, thereby rendering the oral agreement unenforceable. Whealon appealed.

¹ By Jarrod Rickard

² *Whealon v. Sterling*, 121 Nev. Adv. Op. 66 (September 22, 2005).

³ *Id.*

Discussion

A. Abuse of Discretion

Whealon first argued that the district court abused its discretion by granting Sterling's motion to amend his pleadings in order to raise a previously omitted affirmative defense.

The Nevada Supreme Court found that the district court did not abuse its discretion. NRCPC 8(c) requires that all affirmative defenses be raised in the pleadings, stating in pertinent part, "a party shall set forth affirmatively...any other matter constituting an avoidance or affirmative defense." An affirmative defense not raised in the pleadings is normally deemed waived⁴ unless the opposing party is given "reasonable notice and an opportunity to respond."⁵ The notice and opportunity to respond requirements may be satisfied if the opposing party is given time to file a response to a motion to amend the pleadings.⁶

In this case, Whealon was given the opportunity to respond to Sterling's motion to amend the pleadings. Further, Whealon failed to demonstrate any prejudice resulting from the amendment.

B. Interpretation of Employment Statute

Whealon next argued that it was error for the district court to grant summary judgment because the private employment agency statutes are limited to employment resulting in the traditional employer-employee relationship and do not apply to independent contracts or leases.

The Nevada Supreme Court agreed with Whealon. NRS 611.030 prohibits an employment agency from conducting business in Nevada without a license. NRS 611.020(2), which is part of the private employment agency statutes, defines "employment agency" as a person who, for a charge, "furnishes information to a person" seeking employment or employees.

Although the statutes do not define the terms "employment" or "employ," the court concluded that the plain meaning of the term "employment" applies to individuals who perform services in exchange for wages, salary, or commissions.

In this case, the court concluded that Whealon did not furnish information to persons seeking "employment" but rather arranged an agreement by which Sterling was able to enter into a lease agreement with the hotel to perform his show.

Conclusion

The court found that while the amount of compensation required under the oral agreement is disputed, summary judgment was improperly granted to Sterling because Whealon was not subject to the licensing requirements of Nevada's private employment agency statutes. The decision of the district court was reversed and the matter remanded for further proceedings.

⁴ *Second Baptist Church v. First Nat'l Bank*, 89 Nev. 217, 219-20, 510 P.2d 630, 631 (1973).

⁵ *Williams v. Cottonwood Cove Dev. Co.*, 96 Nev. 857, 860, 619 P.2d 1219, 1221 (1980).

⁶ *See Id.* at 860-61.