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RTTC Communications, Inc. v. The Saratoga Flier, Inc.,
121 Nev. Adv. Op. 6 (April 14, 2005)¹

COMMERCIAL LAW - LICENSING

Summary

Appeal from a final district court judgment in a contract dispute and an order awarding attorney fees.

Disposition

Affirmed. The Court concluded that NRS 611.030 does not require that an executive recruiting agency operating in another state obtain a Nevada license when that agency is hired for a single transaction by a Nevada employer. Furthermore, the Court held that the district court did not abuse its discretion in awarding attorneys' fees in favor of the plaintiff.

Factual and Procedural History

In the fall of 2001, appellant Reno Tahoe Tech Center Communications, LLC (RTTC) solicited appellee Saratoga Flier, Inc., d/b/a Pinsker and Co. (Pinsker) to recruit and select a chief executive officer (CEO) for RTTC. Pinsker was a California corporation, but California law did not require it to be licensed as an employment agency.²

Pinsker and RTTC manager Kreg Rowe (Rowe) signed a recruitment agreement in Nevada. In it, RTTC agreed to provide a \$50,000.00 consulting fee to hire a CEO, and, if RTTC hired any other employee as a direct result of Pinsker's services, RTTC would pay Pinsker an amount equal to one-third of that employee's actual first year cash compensation.

Pinsker and RTTC executives met to develop a profile for the CEO position, after which Pinsker recommended Madison Laird (Laird), a California resident, for the position. RTTC hired Laird as its President/CEO, and Pinsker assisted RTTC in negotiating Laird's compensation package. RTTC paid Pinsker the requisite \$50,000.00 fee.

During its CEO search, Pinsker also interviewed Janice Fetzer (Fetzer), also a California resident. Pinsker informed RTTC that while Fetzer was not a CEO candidate, she would be a good candidate for a Vice-President position. Pinsker eventually recommended Fetzer to Laird, who asked Pinsker how any fee due Pinsker for hiring Fetzer would affect RTTC's bottom line. Pinsker told Laird that the fee was governed by

¹ By Patrick Murch

² See Cal. Civil Code § 1812.501(a)(1) (West 1998) (defining employment agencies as "[a]ny person who, for a fee or other valuable consideration to be paid, directly or indirectly by a jobseeker, performs, offers to perform, or represents it can or will perform any of the following services")

the recruitment agreement between Pinsker and RTTC. Laird interviewed Fetzner and later hired her at an annual salary of \$160,000.00. Subsequently, Pinsker billed RTTC \$53,333.00 under the agreement.

RTTC never paid Pinsker. Consequently, Pinsker sued RTTC and Rowe in March, 2002 to collect the \$53,333.00. RTTC counterclaimed for the return of the fee it paid to Pinsker for hiring Laird, alleging that Pinsker was not licensed in Nevada as an employment agency.

Pinsker initially named RTTC, Rowe (as RTTC's agent) and Redundant Networks, Inc. (Redundant) (as RTTC's successor-in-interest) as defendants. In May, 2002, Pinsker offered to take judgment against all three defendants for \$45,000.00. RTTC rejected the offer. Rowe and Redundant were voluntarily dismissed in September, 2002. Following a two-day trial, the trial court ruled in Pinsker's favor, holding that the agreement was valid and enforceable, that Pinsker deserved to be compensated, and that NRS Chapter 611 did not apply to Pinsker. The court awarded Pinsker \$53,333.00, plus interest, and dismissed RTTC's counterclaim. Subsequently, the court granted Pinsker's motion for attorneys' fees pursuant to Nev. R. Civ. P. 68. RTTC filed a timely appeal.

Discussion

A. Definition of Employment Agency and "Doing Business" in Nevada

1. Statutory Definition of Employment Agency

The Nevada Supreme Court determined that Pinsker, an executive recruitment firm that charges fees only to employers, is an "employment agency" pursuant to NRS 611.020(2)(b)³ because Pinsker furnished employee information to RTTC. After making this determination, the Court considered whether Nevada law requires an out-of-state employment agency to be licensed in Nevada for a single transaction within Nevada.

2. "Doing Business" in Nevada

Employment agencies operating in Nevada must be licensed.⁴ Unlicensed agencies are forbidden from opening, operating, keeping, or maintaining an employment agency in Nevada.⁵ Furthermore, unlicensed agencies may not solicit employers within Nevada, nor may they refer or place a person for employment within the State, or otherwise do business in Nevada.⁶

³ In pertinent part, an "employment agency" means "any person who, for a fee, commission or charge . . . furnishes information to a person seeking employees enabling or tending him to enable him to obtain employees." NEV. REV. STAT. 611.020(2)(b) (2004).

⁴ NEV. REV. STAT. 611.030 (2004).

⁵ *Id.*

⁶ *Id.* The Court found that NRS 611.030(1) was inapplicable in this case because Pinsker, which was located in California, did not open, keep, operate, or maintain an employment agency in Nevada. As such, the issue before the Court, which was an issue of first impression, was whether Pinsker's agreement with RTTC constituted "doing business in" Nevada for purposes of NRS 611.030(2).

RTTC argued that Pinsker was "doing business in" Nevada because the parties signed the agreement in Nevada and because RTTC hired the two employees in Nevada.⁷ Alternatively, RTTC argued that Pinsker had no standing to bring a collection action because it had not qualified and filed as a foreign corporation doing business in Nevada as required by NRS 80.055.

The Court utilized a two-prong test set forth in *Sierra Glass*⁸ to determine whether Pinsker was required to qualify and file under Nevada's foreign corporation statutes to be eligible to bring a collection suit against RTTC. The *Sierra Glass* test requires that the Court examine: (1) the *nature* of the company's business functions in the state; and (2) the *quantity* of business it conducts in the state.⁹ The Court determined that Pinsker's business functions in Nevada were limited to meeting with RTTC and signing the agreement, and that Pinsker actually conducted most, if not all, of the search for executives in California. Furthermore, the two employees were California natives. Thus, the Court held that neither the nature nor quantity of business that Pinsker conducted in Nevada rose to the level necessary to be considered "doing business in" Nevada pursuant to NRS 611.030(2). As a result, the fact that Pinsker lacked an employment agency license did not render the agreement unenforceable.

B. Attorneys' Fees

The Court upheld the district court's grant of Pinsker's motion for attorneys' fees pursuant to Nev. R. Civ. P. 68. The district court has the discretion to award attorneys' fees,¹⁰ but may not award attorneys' fees absent statutory authority.¹¹ Nev. R. Civ. P. 68 and NRS 17.115 allow the district court to award attorneys' fees to a party that makes an offer of judgment that is refused by the other party, after which the offering party obtains a more favorable judgment.¹²

The Court recognized that the district court, in exercising its discretion to award attorneys' fees to Pinsker, properly considered the four factors set forth in *Beattie v. Thomas*:¹³ (1) whether the plaintiff's claim was brought in good faith; (2) whether the defendants' offer of judgment was reasonable and in good faith in both its timing and amount; (3) whether the plaintiff's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith; and (4) whether the fees sought by the offeror are reasonable and justified in amount.¹⁴ Furthermore, the Court found that the district court appropriately determined that, pursuant to *Yamaha Motor Co. v. Arnoult*,¹⁵ when the

⁷ Pursuant to Nevada law, "[t]ransacting business in interstate commerce" does not constitute doing business in Nevada, because states may not impose filing requirements in such a way as to interfere with federal regulation of interstate commerce. See NEV. REV. STAT. 80.015(1)(m) (2004); see also *Sierra Glass & Mirror v. Viking Indus.*, 808 P.2d 512, 513 (Nev. 1991) (citing *Robbins v. Shelby Taxing Dist.*, 120 U.S. 489 (1986)).

⁸ 808 P.2d at 513 (citing *Eli Lilly & Co. v. Sav-On Drugs*, 366 U.S. 276 (1961)).

⁹ *Id.*

¹⁰ *Allianz Ins. Co. v. Gagnon*, 860 P. 2d 720, 722 (Nev. 1993).

¹¹ *State, Dep't of Human Resources v. Fowler*, 858 P.2d 375, 376 (Nev. 1993).

¹² NEV. R. CIV. P. 68(f)(2) ("[T]he offeree shall pay the offeror's post-offer costs, applicable interest . . . and reasonable attorney's fees.").

¹³ 668 P.2d 268, 274 (Nev. 1983).

¹⁴ *Id.*

¹⁵ 955 P.2d 661 (Nev. 1998).

defendant is the offeree rather than the offeror, the first *Beattie* factor should be whether the defendant's claims or defenses were litigated in good faith.

The Court found that, despite RTTC's argument to the contrary, there was ample evidence in the record to support the district court's findings that Pinsker's claim and offer of judgment were brought in good faith, that RTTC had a meritorious defense and acted in good faith in rejecting Pinsker's offer, and that the attorneys' fees requested by Pinsker were reasonable and justified, so the district court did not abuse its discretion in its analysis of the *Beattie* factors.

Furthermore, the Court upheld the district court's determination that despite the fact that Pinsker originally named RTTC, Rowe as RTTC's agent, and Redundant as defendants, RTTC was solely authorized to decide whether or not to settle, and would be solely liable for any judgment rendered. Nev. R. Civ. P. 68(c)(2) allows for an award of attorneys' fees when an offer made to multiple defendants is rejected, but only if: (1) there is a single common theory of liability against all the offeree defendants; and (2) the same entity, person, or group is authorized to decide whether to settle the claims against the offerees.¹⁶ Thus, the Court found that substantial evidence supported the district court's finding of unity of interest and a single theory of liability, so the district court did not abuse its discretion as to its award of attorneys' fees to Pinsker.

Conclusion

The Nevada Supreme Court upheld the district court's determination that Pinsker's single transaction in Nevada was not considered "doing business in" Nevada pursuant to NRS 611.030(2) because: (1) it was conducting business in interstate commerce; (2) it was incorporated in California, where it sought and identified the employees eventually hired by RTTC; and (3) it maintained no offices in Nevada and did not solicit Nevada employers, so it was not required to qualify and file under Nevada's foreign corporation statutes to be eligible to bring a collection suit against RTTC. Moreover, the Court upheld the district court's award of attorneys' fees in Pinsker's favor, pursuant to Nev. R. Civ. P. 68, because RTTC was solely authorized to decide whether to settle the claims against it, Rowe as its agent, and Redundant Networks, and because there was a single common theory of liability against all three defendants.

¹⁶ NEV. R. CIV. P. 68(c)(2) (1998).