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Seibel v. Eighth Jud. Dist. Ct., 138 Nev. Adv. Op. 73 (Nov. 23, 2022)

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CIVIL LAW: BURDEN OF PROOF FOR CRIME-FRAUD EXCEPTION TO APPLY UNDER
NRS 49.095 AND NRS 49.115(1)

Summary

In this opinion drafted by Justice Hardesty, the Court clarifies the burden of proof that district courts are to use when determining whether the crime-fraud exception should apply under NRS 49.115(1).² The Court holds that the party seeking to invoke the crime-fraud exception must satisfy a two-part test which the party must show by a preponderance of the evidence: (1) “the client was engaged in or planning a criminal or fraudulent scheme when it sought the advice of counsel to further the scheme” and (2) the attorney-client communications for which production is sought are “sufficiently related to and were made in furtherance of the intended, or present, continuing illegality.”³ Furthermore, the Court found that the district court may determine that an in-camera review of the privileged document is necessary before deciding whether the crime-fraud exception applies. The Court held that the respondent had established by a preponderance of the evidence that the petitioner was engaged in fraud and properly moved for an in-camera review to analyze the second step. Additionally, it found that the district court properly granted disclosure of the privileged document in finding that the crime-fraud exception applied. Thus, the Court denied the petitioner’s petition for extraordinary relief.

Background

Rowen Seibel (“Seibel”) entered into a development agreement with Caesars Entertainment, Inc., (“Caesars”). Seibel was later convicted of tax fraud. Caesars, discovered this, terminated the agreement per the contract term that allowed them to terminate if the relationship with Seibel could jeopardize Caesars’ gaming license. Seibel sued Caesars for breach of contract and claimed that he had created an irrevocable trust and was no longer affiliated with the business entities assigned to the development agreement. Caesars filed a counterclaim arguing Seibel had committed fraud, causing it damages. During litigation, Caesars obtained a copy of Seibel’s and his wife’s prenuptial agreement that was executed simultaneously with Seibel’s trust and allowed Seibel to benefit from the trust. Caesars argued that Seibel had used legal counsel to create both the trust and prenuptial agreement to retain the benefits of development agreements while tricking Caesars into thinking he had dissociated from them. Because of this suspicion, Caesars moved to compel the discovery of documents from Seibel’s attorney-client privilege log under Nevada’s crime-fraud exception.

The district court granted the discovery motion in two orders. The first granted an in-camera review of the documents after the court determined Caesars had met its burden of showing that Seibel was attempting to deceive Caesars when he sought counsel to create his trust and prenuptial agreement. The second order granted the motion to compel disclosure of all the documents after the in-camera review indicated that the documents were sufficiently related to Seibel’s fraudulent scheme.

¹ By Tzu-Wen Lin.

² NEV. REV. STAT. § 49.115(1).

³ In re Napster, Inc. Copyright Litig., 479 F.3d 1078, 1090, 1094–95 (9th Cir. 2007).

Seibel sought a writ of prohibition or mandamus preventing the district court from compelling disclosure of the documents and ordering the district court to find the requested documents undiscoverable. Seibel argues that the district court erred when it found that Caesars had met the initial burden of demonstrating Seibel was engaged in fraud when he sought legal advice and erred when it concluded that Seibel's privileged communications of the trust and prenuptial agreement were sufficiently related to the fraud.

Discussion

Writ relief

Although writ relief is generally not available to review discovery orders, the Supreme Court considered this petition because it challenged orders that compelled the disclosure of privileged information. The Court stated, "a later appeal would not remedy any improper disclosure of the information."⁴ Additionally, the writ is appropriate to clarify an issue of law on attorney-client privilege. The Court elected to treat the petition as one for prohibition instead of mandamus because what is challenged are discovery orders that compelled privileged information.⁵

Standard of Review

The Court reviews the district court's legal determinations regarding crime-fraud exception de novo since discovery is based on the district court's discretion and factual findings are given deference unless clearly erroneous.⁶

Application of Nevada's crime-fraud exception to the attorney-client privilege

Nevada's statutes for the attorney-client privilege ("NRS 49.095")⁷ and the crime-fraud exception ("NRS 49.115(1)")⁸ do not establish the procedure or burden of proof that courts are to use when determining whether the crime-fraud exception applies. The Court relies on federal case law to interpret NRS 49.095 and NRS 49.115(1). Looking to the Court of Appeals for the Ninth Circuit, the Court determined that the authorities were persuasive and adopted the two-part test for determining whether the crime-fraud exception applies. Using *Napster*, the Court determined that to invoke the crime-fraud exception, the moving party must satisfy a two-part test by a preponderance of the evidence: (1) "the client was engaged in or planning a criminal or fraudulent scheme when it sought the advice of counsel to further the scheme" and (2) the attorney-client communications for which production is sought are "sufficiently related to and were made in furtherance of the intended, or present, continuing illegality."⁹ Furthermore, the Court held that the district court may determine that an in-camera review of the privileged document is necessary before deciding whether the crime-fraud exception applies. From there, the district court must first require that the moving party show a good faith belief that an in-camera review of the materials may reveal evidence to establish that the crime-fraud exception applies. During in-camera review, the district court must examine the documents to determine

⁴ Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court, 133 Nev. 369, 374, 399 P.3d 334, 341 (2017).

⁵ Las Vegas Dev. Assocs., LLC v. Eight Judicial Dist. Court, 130 Nev. 334, 338, 325 P.3d 1259, 1262 (2014).

⁶ See Canarelli v. Eighth Judicial Dist. Court, 136 Nev. 247, 250–51, 464 P.3d 114, 119 (2020).

⁷ NEV. REV. STAT. § 49.095.

⁸ NEV. REV. STAT. § 49.115(1).

⁹ *In re Napster, Inc. Copyright Litig.*, 479 F.3d at 1090, 1094–95.

that the attorney-client communications are “sufficiently related to and made in furtherance of the intended, or present, continuing illegality.”¹⁰

Turning to the case at hand, the Court held, for the first step in the analysis, that Caesars had established by a preponderance of the evidence that Seibel was engaged in or planning a criminal or fraudulent scheme when he sought the advice of legal counsel in drafting the prenuptial agreement. The Court held that they would defer those findings by the district court as they were supported by the prenuptial agreement, trust, and other evidence in the record and were not clearly erroneous. Moving to the second step, the Court held that the district court properly proceeded with an in-camera review to determine that the documents were sufficiently related to the fraud.

The district court did not abuse its discretion in ordering the disclosure of Seibel’s privileged communications after conducting an in camera review

Seibel argues that the district court erred in only quoting from three documents in its order and was overbroad in disclosing every document. The Court held that Seibel did not argue which privileged documents were improperly disclosed and that no legal authority required the district court to make specific factual findings regarding each document reviewed in camera. The Court held that the district court acted properly after conducting an in-camera review and found that the crime-fraud exception applied to all of Seibel’s privileged documents. Therefore, the district court properly granted disclosure of the privileged documents and denied Seibel’s writ relief.

Conclusion

The district court will apply a two-part test to determine whether NRS 49.115(1) applies to NRS 49.095. The two-part inquiry must show, by a preponderance of the evidence by the moving party, that: (1) “the client was engaged in or planning a criminal or fraudulent scheme when it sought the advice of counsel to further the scheme” and (2) the attorney-client communications for which production is sought are “sufficiently related to and were made in furtherance of the intended, or present, continuing illegality.”¹¹ The district court found that Caesars had established by a preponderance of the evidence that Seibel was engaged in a fraudulent scheme when he sought the advice of legal counsel in drafting the prenuptial agreement and properly moved for an in-camera review and determined that the documents were related to the fraud. Thus, the district court properly granted disclosure of the privileged documents under Nevada’s crime-fraud exception to attorney-client privilege. The Court denies Seibel’s petition for a writ of relief. Justice Stiglich and Justice Herndon concur.

¹⁰ In re Grand Jury Investigation, 810 F.3d 1110, 1114 (9th Cir. 2016).

¹¹ In re Napster, Inc. Copyright Litig., 479 F.3d at 1090, 1094–95 (9th Cir. 2007).