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Case No.: 6759-1
District Court Case No. A-13-0000
686303-C
Dept. No.: XXVII

V.

Respondents.

From the Eighth Judicial District Court

The Honorable Nancy L. Allf, District Judge

RESPONDENT'S ANSWERING BRIEF

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1 **CERTIFICATION PURSUANT TO NRAP 26.1**

2 The undersigned certified that the following have an interest in the
3 outcome of this appeal. These representations are made to enable judges of
4 the Panel to evaluate possible disqualifications or recusal:
5

6
7 [NOT APPLICABLE]

8 Dated this 22nd day of January, 2016.
9

10
11 FENNEMORE CRAIG, P.C.

12 By: 

13 Samuel S. Lionel, Esq.

14 Nevada State Bar No. 1766

15 300 S. Fourth Street, #1400

16 Las Vegas, NV 89101

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18 *Sig Rogich aka Sigmund Rogich as*

19 *Trustee of the Rogich Family*

20 *Irrevocable Trust*
21
22
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24
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1 **ISSUE PRESENTED**

2 Is the Rogich Trust the prevailing party?

3 **STATEMENT OF THE CASE**

4
5 Appellants Carlos A. Huerta (“Huerta”) and the Alexander Christopher
6 Trust (“AC Trust”) sued Defendant Sig Rogich, Trustee of the Rogich
7 Family Irrevocable Trust (“Rogich”), for breach of express contract, breach
8 of the covenant of good faith and fair dealing and negligent
9 misrepresentation. Summary Judgment was granted to Rogich on the
10 ground of judicial estoppel. Attorney fees were awarded to Rogich.
11

12
13 Huerta and the AC Trust appealed the awards of summary judgment
14 and attorney fees. The summary judgment appeal was dismissed as
15 untimely. The attorney fee award appeal was not untimely and this appeal
16 concerns that award. 15-19597¹
17

18 **SUMMARY OF ARGUMENT**

19
20 The district court awarded Rogich Summary Judgment on the ground
21 that Appellants were judicially estopped from suing Rogich because Huerta
22 had falsely, under oath, failed to disclose to his bankruptcy creditors his
23

24 ¹ Nanyah Vegas, LLC was also a Plaintiff with a claim for unjust enrichment
25 against Defendant Eldorado Hills, LLC. Summary Judgment was granted to
Eldorado. Nanyah Vegas appealed. The appeal has been submitted without
oral argument. 15.28641.

1 alleged claim against Rogich. The claim was based on an agreement, the
2 Purchase Agreement, whereby Huerta and Go Global, Inc., his wholly owned
3 corporation, sold its membership interest in Eldorado, Inc. to Rogich.
4 Paragraph 7(d) of the Purchase Agreement provided for prevailing party
5 attorney fees if an action was instituted to enforce or interpret the terms of
6 the Purchase Agreement.
7

8
9 Despite the express language of paragraph 7(d) providing for its
10 applicability if the action is “instituted”, appellants totally ignore such
11 contractual provision and, argue that the “fee shifting provision provides that
12 fees may be awarded if the contract is interpreted or enforced” Op. Br. at
13 13:20-21. Because Appellants instituted this action to enforce and interpret
14 the Purchase Agreement and the court ruled in favor of Rogich, Rogich was
15 the prevailing party and the award of fees to Rogich was proper.
16
17

18 **FACTS**

19
20 1. On October 30, 2008 Huerta and his wholly owned corporation,
21 Go Global, sold to the Rogich Trust, its membership interest in Eldorado
22 Hills, LLC (“Eldorado”) for the sum of \$2,747,729.50, payable out of profit
23 distributions, if any, as, when and if distributed to Rogich by Eldorado. The
24 Agreement memorializing the transaction is the Purchase Agreement. App. at
25

1 0012-21.

2 2. On July 30, 2013, Go Global assigned to the AC Trust “all
3 rights, title and interest” it held in the Purchase Agreement. The Assignment
4 provides that the AC Trust “shall be entitled to all money, assets or
5 compensation remaining to be paid pursuant to the Purchase Agreement or
6 from any act of recovery seeking to enforce the obligations of the parties
7 therein.” (“Assignment”). *Id.* at 190. The Assignment also provides that “at
8 Assignee’s discretion it may initiate recovery, prosecution for claims arising
9 from the Purchase Agreement against The Rogich Family Irrevocable Trust,
10 or other parties as necessary, as if in the stead of Go Global, Inc.” It also
11 provided that all recoveries would belong to the AC Trust. *Id.*

12 3. On November 5, 2014, The Court awarded the Rogich Trust
13 partial summary judgment against Huerta and the AC Trust on the ground
14 that Huerta failed to disclose the claim against Rogich to his bankruptcy
15 creditors and had falsely declared that his disclosures were true and accurate.
16 *Id.* at 140-143.

17 4. On February 6, 2015, an Order was entered granting Motion for
18 Award of Attorneys' Fees which awarded Rogich \$237,954.50 against
19 Huerta and the AC Trust. App. 229-231. The Order set forth findings
20
21
22
23
24
25

1 supporting the award. *Id.* at 230.

2 5. On February 23, 2015, a Final Judgment was duly entered
3
4 dismissing the Amended Complaint of Huerta and the AC Trust with
5 prejudice, and awarding Rogich \$237,954.50 for attorneys' fees and costs
6 taxed in the amount of \$5,016.77. *Id.* at 236.

7
8 6. The District Court made the following findings:

9 1. The Court has disposed of all of Plaintiffs' causes
10 of action in a five page written Order that incorporated Findings
11 of Fact and Conclusions of Law.

12
13 2. This Action was actively litigated and involved
14 sophisticated issues of law. It required a high level of skill to
15 defend, the issues raised by the parties were complex. The
16 attorney who primarily represented the Defendant Rogich Trust,
17 by reason of his experience, professional standing, skill and
18 advocacy, successfully represented his clients and as a result all
19 of Plaintiffs' substantial claims were dismissed.

20
21 3. The hourly rates charged were appropriate given
22 the experience and skill necessary to defend the action and the
23 time spent in the defense was reasonable.
24
25

1 4. Paragraph 7(d) of the Purchase Agreement is clear
2 and unambiguous and Defendant was the prevailing party and
3 entitled to its attorneys' fees as provided therein.
4

5 5. Defendant is awarded its fees for the defense of
6 Plaintiffs' claims in the amount of \$237,954.50. The Plaintiffs,
7 Carlos A. Huerta and The Alexander Christopher Trust are
8 liable jointly and severally to The Rogich Family Irrevocable
9 Trust for said award.
10

11 *Id.* at 230.
12

13 ARGUMENT

14 I. 15 APPELLANTS' ARGUMENT THAT THE CONTRACTUAL PROVISION 16 FOR AWARDING PREVAILING PARTY FEES DOES NOT APPLY 17 UNLESS THE COURT HAS INTERPRETED OR ENFORCED THE 18 AGREEMENT IS MERITLESS

19 Paragraph 7(d) of the Purchase Agreement provides that "In the event
20 that any action or proceeding is instituted to interpret or enforce the terms
21 and provisions of this Agreement, however, the prevailing party shall be
22 entitled to its costs and attorneys' fees, in addition to any other relief it may
23 obtain or to which it may be entitled."
24

25 "Parties are free to provide for attorney fees by express contractual

1 provisions.” *Davis v. Beling*, 128 Nev. Adv. Op. 28, 278 P. 3d 501, 515
2 (2012) citing *Musso v. Binick*, 104 Nev. 613, 614, 764 P.2d 477, 477 (1988).
3
4 “The objective in interpreting an attorney fees provision, as with all
5 contracts, ‘is to discern the intent of the contracting parties.’” *Id.* quoting
6 *Cline v. Rocky Mountain, Inc.*, 998 P.2d 946, 949 (Wyo. 2000). “Traditional
7
8 rules of contract interpretation are employed to accomplish that result.” *Id.*
9 “Therefore, the initial focus is on whether the language of the contract is
10 clear and unambiguous; if it is, the contract will be enforced as written.” *Id.*
11
12 citing *Ellison v. California State Auto Ass’n*, 106 Nev. 601, 603, 797 P.2d
13 975, 977 (1990).

14 The language in 7(d) is clear and unambiguous. Notwithstanding,
15
16 Appellants state “The fee shifting provision provides that fees may be
17 awarded if the contract is interpreted or enforced.” Op. Br.at 13:20-21, fn 3.
18 That interpretation of paragraph 7(d) is indefensible².

19
20 Except that Appellants quote 7(d) immediately following the above

21 ²Equally egregious is Appellants’ attempt in footnote 2 to show that the
22 summary judgment was without prejudice stating that. “NRCPP 41(a)(2) states
23 that a dismissal, unless otherwise designated is without prejudice.” NRCPP
24 41(a) applies to a dismissal at plaintiff’s instance. NCRP 41(2)(b) applies to
25 a dismissal order following defendant’s motion and such order, is with
prejudice unless otherwise specified, and is an adjudication upon the merits.
Five Star Capital Corporation v. Ruby, 124 Nev. 1048, 1058, 194 P. 3d 709,
715 (2008). Furthermore, the Final Judgment expressly provides the
dismissal is with prejudice. App. at 236:11

1 footnote, they do not in their entire 26 page brief mention that the fee shifting
2 paragraph applies if the action is instituted to interpret or enforce agreement
3 terms and not litigation with respect to interpretation or enforcement.
4

5 Clearly, the intention of the Purchase Agreement parties was that if an
6 action was instituted with respect to interpretation or enforcement, the party
7 who won the case would be entitled to prevailing party attorney's fees. The
8 Rogich Trust was the clear winner and entitled to its attorney fees.
9

10 The action was instituted by Huerta and the AC Trust to interpret or
11 enforce the Purchase Agreement. Their first cause of action was for breach
12 of express contract by Rogich not paying \$2,747,729.50 to them. *Id.* at
13 25:12-26:4. Their breach claim was based on Rogich's transfer of Rogich's
14 Eldorado interest to Teld, LLC. Even though the Purchase Agreement did not
15 preclude such transfer, Appellants were seeking an interpretation that such
16 transfer was a breach of the Purchase Agreement. Thus, Appellants sought
17 both an interpretation and enforcement of the Purchase Agreement.
18
19
20

21 Although the Purchase Agreement required only the institution of an
22 action for enforcement or interpretation, the summary judgment awarded was
23 in fact based on litigation of the significant issue of whether the conduct of
24 Huerta and Go Global, in not disclosing their alleged claim against Rogich to
25

1 the creditors in their bankruptcy, barred enforcement of their claim. The
2 court ruled that their conduct did bar their enforcement claim and that “this is
3 a case that’s very ripe for judicial estoppel and under the applicable case law
4 the motion [for summary judgment] is granted. App. at 133:23-25.

5
6 Appellants argue Rogich was not the prevailing party because the
7 Summary Judgment was based on judicial estoppel and “not for a significant
8 reason arising under the contract nor did Defendant obtain a money
9 judgment.” Op. Br. at 20:21-24. Appellants ignore that paragraph 7(d)
10 requires institution of an action for enforcement or interpretation. Huerta
11 instituted this action for Purchase Agreement enforcement which the Court
12 denied. Rogich obtained a favorable adjudication upon the merits. See
13 footnote 2.
14
15
16

17 Accordingly, Rogich was the prevailing party and entitled to attorney
18 fees.
19

20 II.

21 APPELLANTS MISCELLANEOUS OTHER ARGUMENTS ARE 22 IRRELEVANT AND IN ANY EVENT PRECLUDED BY NRCP 61

23 Appellants argue that because Judge Allf in her oral ruling from the
24 bench stated that “the fee award would go against all the plaintiffs, whose
25

1 names appeared in the case caption, was improper. Op. Br. at 14:2-21,
2 22:23-23:7. That harmless error (NRCP 61) was duly corrected in the Order
3 Granting Motion for Award of Attorneys' Fees and in the Final Judgment.
4 APP at 229, 236 where fees were awarded against Huerta and the AC Trust
5 only.
6

7
8 Appellants argue that Rogich claimed that Go Global remained liable
9 for attorneys' fees because its obligations under the Purchase Agreement
10 continued after its Assignment to the AC Trust. Op. Br. at 23:8-24:67.
11 While such claim was made below, the short answer is that no fees were
12 awarded against Go Global and it is not a party to this appeal.
13

14 Appellants argue that Rogich t has failed to show justification for the
15 Rogich Trust's reverse alter ego claim which was made below. Appellants
16 neglect to tell the court the claim below was only made with respect to Go
17 Global. App. at 148:18-22.
18

19 20 **III.**

21 APPELLANTS HAVE NOT CHALLENGED FEES AWARDED

22 Exhibit "A" to Rogich's Motion for Award of Attorneys' Fees
23 contains 17 pages setting forth descriptions of services rendered to Rogich,
24 dates of the services, times spent and the charges for such services. App. at
25

1 151-173. Appellants do not challenge any aspect of such showing.

2 Exhibit 1 to the Motion is the Declaration of Samuel S. Lionel which
3 states that fees charged in Exhibit "A" of \$237,954.50 "represent charges
4 actually and necessarily rendered to the Rogich Trust in connection with
5 defense of the Huerta claims." *Id.* at 154. That Declaration is not challenged
6 nor are any findings of Judge Allf, set forth in the facts herein, disputed by
7 Appellants.
8

9
10 **IV.**

11 THE DECISIONS CITED BY THE APPELLANTS DO NOT HELP THEM
12

13 Appellants cite numerous decisions, none of which impact the
14 correctness of the award of prevailing party attorney fees to Rogich.
15 Comments with respect to their non applicability of some of those cases are
16 as follows:
17

18 *Valley Elec. Ass'n v. Overfield* 121 Nev. 7, 10, 106 P. 3d 1198, 1200
19 (2005). Op. Br. at 16:19-17:2. The money judgment requirement under NRS
20 18.010 has no applicability here.
21

22 *Glenbrook Homeowners Ass'n v. Glenbrook Co....*Nev. 98, 909, 922,
23 901. P. 2d 132, 41 (1985). Op. Br. at 17:2-7. Huerta did no prevail on any
24 issue. Only Rogich prevailed.
25

1 *Eberle v. The State of Nevada Upon the Relation of the Neil J.*
2 *Redfield Trust*, 108 Nev. 587, 590-591, 836 P.2d 67, 69-70 (1991). Op. Br.
3
4 at 17:9-18:2. Rogich did prevail on an issue raised in the complaint. The
5 Court denied enforcement of Appellants' \$2,747,729.50 claim and the case
6 proceeded to judgment.
7

8 *LVMPD v. Blackjack Bonding*, 131 Nev. Adv. Op. 10, 343 P. 3d 608,
9 615, 2015. Op. Br. at 18:4-21. Rogich did prevail on the significant issue of
10 whether Appellants were entitled to the enforcement of their claim.
11

12 *Foley v. Kennedy*, 110 Nev. 1295, 1304, 885 P. 2d 583, 588 (1994).
13 Op. Br. at 18:21-26. The award of costs under NRS 18.010 has no
14 applicability here.
15

16 *BP. Am. Prod. Co. v. Chesapeake Exploration LLC.*, 747 F. 3d 1253,
17 1262 (10th Cir. 2014). Op. Br. at 20:7-10. Paragraph 7(d) does not require a
18 prevailing privity to have an affirmative judgment in its favor.
19

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FENNEMORE CRAIG, P.C.

Attorneys for Respondent
*Sig Rogich aka Sigmund Rogich as
Trustee of the Rogich Family
Irrevocable Trust*

1 **CERTIFICATION PURSUANT TO NRAP 28.2**

2 1. I hereby certify that this brief complies with the formatting
3
4 requirements of NRAP 32(a)(4), the typeface requirements of NRAP
5 32(a)(5) and the type style requirements of NRAP 32(a)(b) because:

6 This brief has been prepared in proportionally spaced typeface using
7
8 Microsoft Word 2010 in Times New Roman with a font size of 14.

9 2. I further certify that this brief complies with the page-or-type-
10 volume limitations of NRAP 32(a)(7) because, excluding the parts of the
11 brief exempted by NRAP 32(a)(7)(C), it is:

12 Proportionally spaced, has a typeface of 14 points or more, and
13
14 contains 2,147 words and does not exceed 30 pages.
15

16 3. Finally, I hereby certify that I have read this appellate brief, and
17 to the best of my knowledge, information and belief, it is not frivolous or
18 interposed for an improper purpose. I further certify that this brief complies
19 with all applicable Nevada Rules of Appellate Procedure. In particular NRAP
20 28(A)(3), which requires every assertion in the brief regarding matters in the
21 record to be supported by a reference to the page and volume number, if any,
22 of the transcript or appendix, where the matter relied on is to be found. I
23
24 understand that I may be subject to sanctions in the event that the
25

1 accompanying brief is not in conformity with the requirements of the Nevada
2 Rules of Appellate Procedure.
3

4 Dated this 22nd day of January, 2016

5 FENNEMORE CRAIG, P.C.

6
7 By 

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Doree Lauhem
An employee of Fennemore Craig