IN THE SUPREME COURT OF THE STATE OF NEVADA

MM DEVELOPMENT COMPANY, INC., D/B/A PLANET 13, a Nevada Corporation,

Appellant,

vs.

TRYKE COMPANIES SO NV, LLC, A Nevada Limited Liability Company,

Respondent.

Case No. 81938

Electronically Filed
Jul 23 2021 09:38 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Appellant MM Development Company, Inc. ("MM Development") has not done anything remotely illegal. MM Development has not even done anything targeted at, or towards, Respondent Tryke Companies SO NV, LLC ("Tryke"). In reality, MM Development has done nothing more than take part in the long-standing and ubiquitous practice of tipping rideshare and taxi drivers who bring customers to MM Development's Planet 13 dispensary.

The entire theory of Tryke's case is that MM Development's participation in this practice is actually a scheme to intentionally and illegally divert customers from Tryke's Reef dispensary to Plant 13. Tryke has no evidence to support this position and, as Tryke concedes, neither does it have any legal claim against MM Development for diversion under Nevada law because diversion can only be committed by rideshare ***drivers*** or taxi ***drivers***. Instead, Tryke has manufactured derivative claims of civil conspiracy and aiding and abetting, claiming diversion as the underlying illegal act, between MM Development and rideshare drivers in an attempt to improperly impute alleged wrongful acts by *drivers* to MM Development – an entirely separate and unrelated party. In its Answering Brief, Tryke argues that it has not brought a formal diversion claim against MM Development, while it nonetheless alleges *ad nauseum* that MM Development has participated in diversion.

Tryke wants to have it both ways: it wants to hang an albatross around MM Development's neck based upon alleged illegal diversion, but without actually proving any claim for diversion. *See e.g.,* Ans. Br. at 12 ("Tryke has not alleged a claim of 'diversion' but rather has alleged diversion as the method and means employed by Planet 13").

Regardless of its underlying diversion allegations against MM Development, in support of its motion for a preliminary injunction Tryke failed to produce any

evidence to support its claims. For example, Tryke did not produce evidence that Planet 13 had any involvement in or knowledge of any *actual diversion* of any *actual rideshare passenger* by any *actual rideshare driver*. Tryke presented no evidence that Planet 13 had knowledge of any actual diversions nor that Planet 13 ever intended in any way to encourage or promote any illegal diversion. The only evidence that Tryke did present was nothing more than double and triple hearsay statements, mixed in with conjecture and innuendo. Notwithstanding the unreliable nature of Tryke's hearsay evidence, the district court did not hold an evidentiary hearing to elicit live testimony before granting the preliminary injunction.

It is uncontroverted that for each of its causes of action against MM Development, Tryke must satisfy a heightened element of specific intent. Ans. Br. at 21 (Tryke admits that "[e]ach of these claims requires Tryke to show MM Development intended to accomplish an unlawful objective or a wrongful action that caused Tryke harm."). Despite that heightened requirement, Tryke failed to produce any competent evidence that MM Development intended to or actually did conspire with, or aid and abet, any rideshare driver's diversion. Much like its attenuated diversion allegations, Tryke failed to produce any competent evidence that MM Development was aware of and intended to interfere with any of Reef's prospective customers – let alone that MM Development specifically intended to accomplish any unlawful objective.

For the foregoing reasons, and as laid out in detail *infra*, the district court abused its discretion by granting the preliminary injunction when: (i) the preliminary injunction was not supported by competent evidence and (ii) Tryke is not likely to prevail on the merits of its derivative claims against MM Development which are based entirely upon third parties alleged wrongful acts.

II. THE EVIDENCE RELIED UPON TO SUPPORT THE PRELIMINARY INJUNCTION CONSISTS ALMOST ENTIRELY OF SPECULATION AND CONJECTURE

All of the evidence produced by Tryke, which formed the basis of all of the facts found by the district court in the order granting the preliminary injunction, was hearsay. In its Answering Brief, Tryke argued that the district court did not need to hold an evidentiary hearing to take testimony from live witnesses because a court may grant a preliminary injunction based only upon written statements. Ans. Br. at 35. While a court has discretion to grant a preliminary injunction absent an evidentiary hearing, the general rule is that a court should hold an evidentiary hearing, particularly when, as is the case here, the facts that the movant claims support the preliminary injunction are strongly disputed. The district court, therefore, abused its discretion by granting the preliminary injunction based only on Tryke's hearsay evidence and without holding an evidentiary hearing.

A. There is No Actual Evidence to Support Tryke's Claim for Intentional Interference with Prospective Contractual Relations

A claim for intentional interference with prospective business relations requires the plaintiff to prove each of five separate elements: 1) the existence of a prospective contractual relationship between the plaintiff and a third party; 2) the defendant's knowledge of the prospective contractual relationship; 3) the defendant intended to harm the plaintiff by preventing the contractual relationship; 4) the absence of a privilege or justification for the defendant's actions; and 5) actual harm to the plaintiff because of the defendant's actions. *See e.g.,* MM Development's Open Br. at 10. The evidence submitted by Tryke in support of its motion failed to demonstrate that MM Development actually intended to harm or interfere with Tryke through the Driver Compensation Program, and the evidence does not demonstrate that MM Development was aware of any actual prospective contractual relationship between Tryke and any actual rideshare passenger(s).

1. There is no competent evidence that MM Development ever intended to interfere with any actual Reef customer

To prove the necessary intent to interfere, Tryke must show, and the district court must find, that MM Development actually desired to interfere with Reef's customers by compensating rideshare drivers, or that MM Development actually knew that such interference was certain or substantially certain to occur as a result of its actions. *Las Vegas-Tonopah-Reno Stage Line, Inc. v. Gray Line Tours of S. Nev.*, 106 Nev. 283, 287–88 (1990). There is no such evidence in the record. In its Answering Brief, Tryke responds to this shortcoming by simply stating that "[t]here is ample evidence in the record that MM Development knows of the prospective business relationships between Reef and its customers … and intended to interfere with as many of those relationships as possible." Ans. Br. at 26. But, tellingly, Tryke does not include a single citation to anything in the record in support of its sweeping statement. *Id*. Tryke's mere allegation that evidence of intent may exist is simply not enough.

Tryke also appears to argue that MM Development's refusal to end its program after Tryke sent a demand letter somehow shows that MM Development formed an intent to interfere with Reef's customers at that time. Ans. Br. at 26–27. Of course, Tryke's erroneous opinion that tipping drivers is tantamount to interference with customers is disputed by MM Development, and simply stating that erroneous opinion does not convert it to fact.

In addition to a complete lack of evidence that MM Development intended to interfere with any Reef customers in general, there is also a complete lack of competent evidence that MM Development had any knowledge of any *actual* Reef customers who were diverted from Reef to Planet 13. Tryke's own purported knowledge of such actual diversions is based upon the slimmest of reeds, such as the quadruple hearsay evidence. According to the declaration of Tryke's Chief Marketing Officer, he was told by an unidentified employee, who was told by an

unidentified Reef security guard, that an unidentified customer was taken to Planet 13 instead of Reef by an unidentified rideshare driver. Appx. 142, ¶6; Appx. 157. That alleged evidence is far from competent. And, of course, Tryke provided no evidence to show that MM Development was aware of that episode, or that MM Development was aware of any other alleged diversions by rideshare drivers. Tryke's attempt to conflate the existence of potential diversion episodes – episodes that Tryke does not even allege MM Development was aware of – into evidence of MM Development's actual intent to interfere with prospective Reef customers cannot stand and must be rejected.

2. There is no evidence that MM Development was aware of an actual prospective contractual relationship between rideshare passengers and Reef

In addition to showing an actual intent to interfere with a prospective contractual relationship, to prevail on the merits of its intentional interference with prospective business advantage claim, Tryke must also show that MM Development was actually aware of a prospective contractual relationship between itself and a rideshare passenger who was diverted. *See e.g. Wichinsky v. Mosa*, 109 Nev. 84, 87–88 (1993) ("Liability for the tort of intentional interference with prospective economic advantage requires proof of the following elements: (1) a prospective contractual relationship between the plaintiff and a third party; (2) knowledge by the defendant of the prospective relationship"); *see also Rimini Street, Inc. v. Oracle Int'l Corp.*, 2017 WL 5158658, *8 (D. Nev. Nov. 7, 2017) ("Allegations that a defendant interfered with the plaintiff's relationship with an unidentified customer are not sufficient, nor are general allegations that the plaintiff had ongoing expectations in continuing economic relationships with current or prospective customers.").

Here, Tryke has not identified a single, actual third-party with whom it had a

prospective contractual relationship. It is, therefore, a logical impossibility for Tryke to have provided evidence that MM Development was aware of such an unidentified prospective contractual relationship. Tryke's bare allegation set forth in its demand letter to MM Development—that unspecified diversion occurred based on multi-layer hearsay—does not somehow impute the specific knowledge to MM Development necessary to satisfy this element of the claim. Essentially, no contract was ever even identified. Thus, Tryke had no logical way of showing that MM Development was aware of any actual prospective contractual relationship and the district court abused its discretion in finding that Tryke is likely to win on the merits of its claim for intentional interference with prospective business advantage.

B. There is No Actual Evidence to Support Tryke's Claims for Civil Conspiracy or Aiding and Abetting

The same lack of evidence that plagues Tryke's claim for intentional interference also plagues Tryke's derivative claims for civil conspiracy and aiding and abetting. Tryke's claims for conspiracy and for aiding and abetting are based upon Tryke's allegations that MM Development conspired with and aided and abetted rideshare drivers' alleged diversions of prospective customers from Reef to Planet 13. Ans. Br. at 29 (going so far as to allege MM Development "commissioned" rideshare drivers to engage in illegal diversion). But as described above, Tryke has not provided any competent evidence that any actual prospective customers were diverted by any actual, third-party rideshare drivers. Tryke has failed to meet, at the least, the third element of aiding and abetting, which requires it to show that MM Development "knowingly and substantially" assisted a rideshare driver in an alleged episode of diversion. *Dow Chemical Co. v. Mahlum*, 114 Nev. 1468, 1490–91 (1998). To show the requisite "substantial assistance" for MM Development to have aided and abetted a rideshare driver's diversion, Tryke must show a direct communication or close proximity between MM Development and the

alleged diverting rideshare driver. *Id*.

Tryke cannot satisfy the direct communication or close proximity element of the claim. Instead, Tryke argues that it can merely be *implied* that MM Development aided and abetting the rideshare drivers' alleged diversion based on irrelevant speculation about the location of the Reef dispensary, the size of the tips to rideshare drivers, and anonymous statements made on internet message boards. Ans. Br. at 29–30. None of that amounts to evidence of the necessary showing that MM Development had actual, direct communication with any actual rideshare driver intended to aid and abet any alleged diversion. There is simply not a shred of evidence that MM Development had any intent to help rideshare drivers divert passengers to Planet 13. Because there is no actual evidence that supports the district court's finding that MM Development aided and abetted or conspired with any actual rideshare driver, the district court abused its discretion by issuing the preliminary injunction.

C. There is No Competent Evidence to Support the District Court's Finding that Tryke is Threatened with Irreparable Harm

Understanding that purely economic harm is not irreparable and therefore cannot support a preliminary injunction, Tryke instead argues that it suffers irreparable harm because rideshare *drivers* are disparaging Reef to their passengers. Ans. Br. at 31. But the only evidence Tryke submitted to the district court of this alleged disparagement were the anonymous statements made by alleged, and unidentified, rideshare drivers on the internet. *Id*. Again, this multi-layer hearsay evidence is not sufficient to support a finding that Tryke is suffering irreparable harm.

Assuming arguendo that there could even be any harm to Reef under its theory of the case—which MM Development vehemently denies is possible—such purported harm is entirely monetary and not sufficient to support a preliminary

injunction. There is absolutely zero evidence presented by Tryke that *MM Development* has ever disparaged or attempted to demean Reef or Tryke in any manner. To the extent Tryke claims that it is harmed by statements that unknown and unidentified rideshare *drivers* may say about Reef, Tryke has not claimed, much less provided evidence, that MM Development has any control over the speech of unknown and unknowable drivers. The preliminary injunction therefore targets the wrong person. MM Development has no ability to control or police what rideshare drivers may discuss with their passengers or post online.

Tryke also did not address the argument made in MM Development's Opening Brief that any such statements by actual rideshare drivers to actual customers—assuming they were even made—were absolutely privileged because they were either statements of opinion or true. *See* Op. Br. at 16. Despite this evidentiary shortcoming, the district court found that Tryke was irreparably harmed by such statements of rideshare drivers, over which MM Development has absolutely no control – thereby placing a vague and ambiguous obligation on MM Development to monitor and control unknown third-parties' speech. PI Order, Appx. 520–21, 524. The district court abused its discretion in granting the preliminary injunction based on such general allegations and unproven claims. *K-2 Ski Co. v. Head Ski Co.*, 467 F.2d 1087, 1088–89 (9th Cir. 1992).

III. PROCEDURAL ISSUES – THE COURT FAILED TO HOLD AN EVIDENTIARY HEARING

The glaring deficiency in Tryke's evidence is that *all of it* was submitted based upon the declaration of a single person: its Chief Marketing Officer, Mr. Adam Laiken. *See* Appx. 136, 142. No other declarations were submitted by Tryke in support of the motion for a preliminary injunction. As his declaration makes clear, Mr. Laiken does not have personal knowledge of any of the facts he alleges in support of the preliminary injunction. *See e.g.,* Appx. 142, ¶6 ("*I was informed* that

a customer had alerted Tryke that he had summoned an Uber [to Reef], but, instead of taking him to Reef, the Uber driver took him to a nearby competitor") (emphasis added); *id*., ¶7 ("on a separate occasion, *I was notified* that an Uber driver informed Reef that another dispensary pays 'kickbacks'") (emphasis added); *id*., ¶8 ("*Reef has received* similar statements from other Lyft and Uber drivers") (emphasis added); Appx. 143, ¶¶10–12 (the alleged outcomes of the "secret shopper program" was witnessed by others); Appx. 151, ¶13 (the statements of two "non-Tryke" passengers, whose rideshare drivers attempted to divert them from Reef, were witnessed by others).

While a court may consider and even grant a preliminary injunction based only upon written testimony, that does not mean such written testimony need not comport with basin notions of fairness and due process. Here, the only evidence submitted by Tryke was a single declaration, from a person who describes the alleged incidents of diversion that he did not himself witness. All of Tryke's evidence is therefore the epitome of hearsay evidence, and it contains none of the hallmarks of the exceptions to the rule against hearsay necessary to alleviate the valid concerns about its veracity.

CONCLUSION

Because the district court abused its discretion when it granted Tryke's motion for a preliminary injunction, MM Development requests that this court reverse the district court's order so that the preliminary injunction may be dissolved.

Respectfully submitted July 23, 2021.

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NRAP 28.2 CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(3), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the Record on Appeal or Appendix where the matter relied on is to be found. I hereby certify that this brief also complies with NRAP 32(a)(4)– (6), that the typeface is Times New Roman in 14-point font and that it complies with the type-volume limitation of NRAP 32(a)(7) because it contains approximately 2,715 words. I understand I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Respectfully submitted July 23, 2021.

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CERTIFICATE OF SERVICE

I certify that on the 23rd day of July, 2021, I submitted the foregoing APPELLANT'S REPLY BRIEF for filing and service via the Court's eFlex electronic filing system

/s/ Ali Augustine
An employee of Kemp Jones, LLP