BRIAN URLACHER CROSS COUNTRY AUTO SALES, L.L.C. V. EASTBURG

BRIAN URLACHER CROSS COUNTRY AUTO SALES, L.L.C., a New Mexico limited liability company,
Plaintiff-Appellant,
v.
RANDY EASTBURG and LISA EASTBURG, individually, CROSS COUNTRY AUTO SALES, LLC, CROSS COUNTRY AUTO SALES II, LLC, CROSS COUNTRY AUTO SALES CAC, LLC, CROSS COUNTRY AUTO SALES OF SANTA FE, LLC, CROSS COUNTRY AUTO SALES WESTSIDE, LLC, CROSS COUNTRY AUTO WHOLESALE, LLC, SOUTHWEST AUTO WHOLESALE, LLC, JOHN T. RILEY, individually and as principal of Southwest Auto Wholesale, LLC, MIKE CHIADO and JOHN CHIADO, individually, and BEDO, LLC,
Defendants-Appellees.

No. 33,040

COURT OF APPEALS OF NEW MEXICO

December 18, 2013

APPEAL FROM THE DISTRICT COURT OF LEA COUNTY, Jane Shuler Gray, District Judge

COUNSEL

Templeman and Crutchfield, PA, Barry C. Crutchfield, Lovington, NM, for Appellant

Jane B. Yohalem, Santa Fe, NM, for Appellees

JUDGES

MICHAEL E. VIGIL, Judge. WE CONCUR: RODERICK T. KENNEDY, Chief Judge, MICHAEL D. BUSTAMANTE, Judge

AUTHOR: MICHAEL E. VIGIL

MEMORANDUM OPINION

VIGIL, Judge.

{1} Plaintiff Brian Urlacher Cross Country appeals the district court's order granting summary judgment in favor of Defendants John Chiado, John T. Reilly, and Bedo, LLC. In our notice of proposed summary disposition, we proposed affirm. In response to this Court's notice, Plaintiff has filed a memorandum in opposition and Defendants have filed a memorandum in support, both of which we have duly considered. As we do not find Plaintiff's arguments to be persuasive, we affirm.

EXCLUSION OF EVIDENCE OBTAINED IN VIOLATION OF THE RULES OF PROFESSIONAL CONDUCT

{2} In this Court's notice of proposed summary disposition, we proposed to hold that the district court did not abuse its discretion in refusing to consider evidence obtained in violation of the Rules of Professional Conduct. In Plaintiff's memorandum in opposition, it argues that there was no violation where the Defendants elected to speak with, not Plaintiff's attorney himself, but two men acting as agents in this case for Plaintiff's attorney. [MIO unnumbered page 5] Plaintiff argues that the rule announced in *In re Herkenhoff*, 1993-NMSC-081, ¶ 13, 116 N.M. 622, 866 P.2d 350, that "[t]he proscriptions of Rule 16-402 apply equally to situations where the party represented by another attorney may initiate the contact with opposing counsel," do not apply when the represented party initiates contact with opposing counsel's agent. Plaintiff cites no authority in support of this position, and we may therefore presume that there is none. *See In re Adoption of Doe*, 1984-NMSC-024, ¶ 2, 100 N.M. 764, 676 P.2d 1329. The Rules of Professional Conduct provide that an attorney is responsible for the conduct of his non-attorney employees and independent contractors if the attorney orders the conduct, ratifies the conduct, or knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action. *See* Rule 16-503 NMRA. Accordingly, we hold that the district court did not abuse its discretion in refusing to consider this evidence.

SUMMARY JUDGMENT

{3} In our notice of proposed summary disposition, we proposed to hold that the district court did not err in granting summary judgment. We stated that, absent the evidence obtained in violation of the Rules of Professional Conduct, there was no evidence of any conduct for which Defendants, as investors in the LLC, could be held personally liable. We said that other than the excluded statements by the Defendants, the only remaining statement that would have supported Plaintiff's claim was made by

non-party Joe Chiado, but that the district court properly refused to consider it because it was inadmissible hearsay. In Plaintiff's memorandum in opposition, it argues that the Court misconstrued the affidavit and that the statement was not made by non-party Joe Chiado, and was instead made by Defendant John Chiado. [MIO unnumbered pages 8-9] However, if the statement was made by Defendant John Chiado, then it was properly excluded as obtained in violation of the Rules of Professional Conduct as described above. Accordingly, the district court did not err in concluding that there was no evidence raising an issue of material fact as to Defendants' liability.

{4} Therefore, for the reasons stated here and in our notice of proposed summary disposition, we affirm.

{5} IT IS SO ORDERED.

MICHAEL E. VIGIL, Judge

WE CONCUR:

RODERICK T. KENNEDY, Chief Judge

MICHAEL D. BUSTAMANTE, Judge