

IN THE SUPREME COURT OF THE STATE OF NEVADA

STEPHEN J. HUGHES,
Appellant,
vs.
DYKE KAUFFMANN,
Respondent.

No. 43187

FILED

DEC 22 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. R. Wade*
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

This is an appeal from a district court order dismissing a partnership case under NRCP 41(a)(2). Second Judicial District Court, Washoe County; Brent T. Adams, Judge.

Dyke Kauffmann filed a complaint in district court seeking a declaration that a partnership known as Alpine Investments, owned by Kauffmann and Stephen J. Hughes, was terminable at will. In addition, Kauffmann sought dissolution of the partnership if the court determined that the partnership was terminable at will. Hughes filed an answer and alleged counterclaims for wrongful dissolution of the partnership, breach of the implied covenant of good faith and fair dealing, and breach of fiduciary duty. Hughes also filed a motion for an accounting, alleging that one was necessary if the court allowed the dissolution of the partnership and that Kauffmann had taken more than his rightful share of the profits of the partnership. Kauffmann filed a motion to dismiss his complaint and Hughes' counterclaims. The district court denied Hughes' motion for an accounting and granted Kauffmann's motion to dismiss, finding that Hughes' claims were not yet ripe because they were premised upon the dissolution of the partnership and the partnership had not been dissolved. Hughes appeals these decisions contending that the district court erred by

granting Kauffmann's motion to dismiss.¹ The parties are familiar with the facts, and we do not recount them except as is necessary for our disposition.

Hughes contends that the district court erred in dismissing this case under NRCP 41(a)(2) because his counterclaims could not remain pending for independent adjudication. We have previously noted that dismissal under NRCP 41(a)(2) "is a matter for the exercise of sound discretion by the trial court to either grant or refuse upon the facts presented."² NRCP 41(a)(2) sets forth the requirements for voluntary dismissal and states:

[A]n action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court.

¹To the extent that Hughes challenges the denial of his motion for reconsideration, which sought leave to amend the counterclaims and the imposition of terms and conditions on the dismissal, we lack jurisdiction to consider these matters and therefore we will not address these arguments on appeal. NOLM, LLC v. County of Clark, 120 Nev. 736, 745, 100 P.3d 658, 664 (2004) (citing Alvis v. State, Gaming Control Bd., 99 Nev. 184, 660 P.2d 980 (1983)).

²Monroe, Ltd. v. Central Telephone Co., 91 Nev. 450, 453, 538 P.2d 152, 154 (1975).

When describing “independent adjudication,” this court has stated that independent adjudication can be made by dismissal, if no claim for relief is stated, or other adjudication that may be had during the proceedings.³

At the outset, we conclude that the district court properly granted dismissal of Kauffman’s complaint for declaratory relief requesting a determination of whether the partnership was terminable at will, and if terminable at will, dissolution of the partnership. While questions concerning dissolution may have to be answered before the partnership is dissolved, the directive of NRS 41(a)(2) is unambiguous. Kauffmann’s motion to dismiss his own complaint was properly granted.⁴

Regarding Hughes’ counterclaims, we first conclude that the district court properly granted dismissal of Hughes’ claims for wrongful dissolution because the partnership was not dissolved.⁵ However, Hughes’ claims for breach of the implied covenant of good faith and fair dealing

³City of Reno v. District Court, 84 Nev. 322, 325, 440 P.2d 395, 397 (1968).

⁴Hughes also argues that the district court abused its discretion by dismissing Kauffmann’s complaint because it failed to award Hughes his and costs as a term and condition of dismissal. The district court has discretion to award attorney fees and costs, and we conclude that the district court did not abuse its discretion.

⁵Hughes contends that dismissal of his claims is improper because of the prejudice resulting from the expense of litigation and the prospect of having to file another lawsuit. We conclude that these contentions are unpersuasive. See Hamilton v. Firestone Tire & Rubber Co., Inc., 679 F.2d 143, 145 (1982) (noting that voluntary dismissals should be granted unless the defendant can show that he will suffer some plain legal prejudice and stating, “[p]lain legal prejudice, however, does not result simply when defendant faces the prospect of a second lawsuit or when plaintiff merely gains some tactical advantage”).

and breach of fiduciary duty were based on Kauffmann's allegedly improper attempts to dissolve the partnership. Those claims are, therefore, not dependent upon whether Kauffmann actually achieved the dissolution of the partnership, and are ripe for adjudication. Thus, the district court abused its discretion by dismissing Hughes' counterclaims, and we reverse and remand the matter to the district court for adjudication of the claims.

Additionally, regarding Hughes' motion for an accounting, we conclude that the sale of the property did not resolve the issue of whether an accounting was appropriate. Hughes provided some evidence that Kauffmann had recently committed two indiscretions with partnership funds. Therefore, Hughes reasoned that an accounting was appropriate. As this court has noted, "[a] partner's right in partnership property is a mere chose in action, and carries with it a right to an accounting."⁶ Here, Hughes contends in his motion for an accounting that Kauffmann mishandled the funds of the partnership. Hughes asserts that he was entitled to a determination of whether the circumstances surrounding the motion for an accounting made it just and reasonable to obtain an accounting. We agree. Thus, the district court erred in determining that the need for an accounting was premature because Hughes did not base his motion for an accounting solely upon the dissolution of the partnership.

Accordingly, we

⁶State v. Elsbury, 63 Nev. 463, 469, 175 P.2d 430, 433 (1946); see NRS 87.220(4) (stating that a partner has the right to a formal accounting "[w]henver other circumstances render is just and reasonable.").

ORDER the district court's grant of the motion to dismiss
AFFIRMED IN PART AND REVERSED IN PART AND REMAND to the
district court for proceedings consistent with this order.

Douglas, J.
Douglas

Rose, J.
Rose

Parraguirre, J.
Parraguirre

cc: Hon. Brent T. Adams, District Judge
David Hamilton
Goedert & Michaels
Washoe District Court Clerk