IN THE SUPREME COURT OF THE STATE OF NEVADA

LARRY BEASINGER, Appellant, vs. HANJIN SHIPPING CO., LTD., Respondent.	No. 42805
LARRY BEASINGER, Appellant, vs. CONTAINER FREIGHT EXPRESS INTERMODAL TRANSPORT, A DIVISION OF CONTAINER FREIGHT, EIT, LLC; HANJIN SHIPPING CO., LTD.; AND TOTAL TERMINALS, INC., Respondents.	No. 43542

FILED

JUL 06 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF DEPUTY CLERK

12-29-06
Order:
Corrected
decision
in No. 43542
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ORDER OF REVERSAL AND REMAND (NO. 42805) AND AFFIRMING IN PART, REVERSING IN PART AND REMANDING (NO. 43542)

These are consolidated appeals from district court orders granting motions to dismiss in separate personal injury actions. Eighth Judicial District Court, Clark County; Michael A. Cherry, Judge.

The parties are familiar with the facts, and we do not recount them except as pertinent to our disposition.

Docket No. 42805: Statute of limitations defense by foreign corporations

In the first of these consolidated appeals, appellant Larry Beasinger seeks reversal of the district court order dismissing his second

06-13970

complaint[1] against respondent Hanjin Shipping Company, Limited (Hanjin) based on expiration of the applicable statute of limitations.

"When the defense of the statute of limitations appears from the complaint itself, a motion to dismiss is proper."[2]

However, under NRCP 12(b), if a district court permits and considers matters outside the pleadings when hearing a motion to dismiss, the motion "shall be treated as one for summary judgment[.]" The district court here considered matters outside the pleadings, including when, at the hearing, it took judicial notice of and asked questions about the prior litigation.

Although it is error for the district court to grant a motion to dismiss when it should have treated that motion as one for summary judgment, reversal is not mandatory, but this court may review the dismissal order as if it were a summary judgment.[3]

This court reviews an order granting summary judgment de novo, and without deference to the lower court's findings.[4] Summary judgment will be upheld when, after reviewing the record in a light most

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[1]We note that this appeal, Docket No. 42805, resulted from the dismissal of a second complaint filed by Beasinger, after his original complaint was dismissed for failure to timely serve the defendants. The appeals of the separate dismissals will be addressed in the order in which they were docketed with this court.

[2]Manville v. Manville, 79 Nev. 487, 490, 387 P.2d 661, 662-63 (1963).

[3]Schneider v. Continental Assurance Co., 110 Nev. 1270, 1271, 885 P.2d 572, 573 (1994).

[4]Caughlin Homeowners Ass'n v. Caughlin Club, 109 Nev. 264, 266, 849 P.2d 310, 311 (1993).

favorable to the non-moving party, there remain no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.[5]

Beasinger relies on an old Nevada case and a statute to make his argument that if Hanjin was not properly registered as a foreign corporation, the statute of limitations was tolled.

In Nevada-Douglas Consolidated Copper Co. v. Berryhill, a 1938 case, this court strictly enforced the statute that precluded a foreign corporation from availing itself of a statute of limitations defense when that foreign corporation had not complied with Nevada's foreign corporation statutory scheme.[6]

That statute, now encoded at NRS 80.090, provides that a foreign corporation is entitled to benefit from statutes of limitations if the corporation "maintains and keeps in the State a resident agent" and files the required "papers, records and instruments required by" Nevada's foreign corporation statutes. NRS 80.095 mandates suspension of the statute of limitations benefit during any period when a corporation is in default of the filing requirements of NRS 80.090.

Hanjin argues that the NRS 80.090 tolling period should not apply here, since Hanjin is known to Beasinger and subject to service of process. This court has restricted the application of NRS 11.300, which

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[5]Wood v. Safeway, Inc., 121 Nev. ___, ___, 121 P.3d 1026, 1031 (2005).

[6]58 Nev. 261, 268, 75 P.2d 992, 994 (1938) (holding that "[t]he right of foreign corporations to avail themselves of the statute of limitations is subject to" compliance with a statute requiring a resident agent and the filing of articles of incorporation).

provides for the statute of limitations to be tolled when an individual defendant is out of the state.[7] In Simmons v. Trivelpiece, this court held that the statutory tolling of the statute of limitations "does not apply when the absent defendant is otherwise subject to service of process."[8] It is this court's decision in Simmons that Hanjin uses to argue that the limited application of the tolling statute as to individual defendants should be extended here to foreign corporation defendants and the concomitant tolling statute.

Importantly, under NRS 80.010, Nevada's foreign corporation filing requirements only apply to corporations doing business in this state. NRS 80.015(m) expressly lists "transacting business in interstate commerce" as an activity that does not "constitute doing business in this state." Thus, Nevada's foreign corporation filing requirements expressly exclude nonresident corporations engaged in interstate commerce.

Hanjin briefly mentioned to the district court, in its reply to Beasinger's opposition to Hanjin's motion of dismissal, that "Hanjin Shipping does not and has not ever conducted business in Nevada. As a result, it is not required to keep or maintain a resident agent in Nevada."

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[7]NRS 11.300 reads as follows:

> If, when the cause of action shall accrue against a person, he be out of the State, the action may be commenced within the time herein limited after his return to the State; and if after the cause of action shall have accrued he depart the State, the time of his absence shall not be part of the time prescribed for the commencement of the action.

[8]98 Nev. 167, 168, 643 P.2d 1219, 1220 (1982) (extending the limitation on the tolling statute from actions in personam to actions in rem).

According to Hanjin, this assertion was seemingly supported by Beasinger's complaint, which alleged that Hanjin Shipping was a California company authorized to conduct business in Nevada, and further alleged that Hanjin was negligent in loading the cargo container on a semi-truck without ever identifying where that loading occurred.

However, no evidence was presented to establish whether Hanjin was or was not "doing business" in Nevada, nor did the district court make a finding as to that issue. At the hearing, Beasinger argued first that Hanjin had just raised the issue in the reply, then argued that Hanjin was not dismissed out on similar grounds from the workers' compensation recovery lawsuit brought by the Riviera. Finally, Beasinger asked for time to respond if the district court intended to accept the argument that Hanjin was not doing business here such that NRS 80.090 did not apply.

The district court did not reply to Beasinger's plea for more time to respond to that argument; instead, the district court simply granted Hanjin's motion to dismiss, noting that he thought that "the statute's run on this case." The district court did not make a finding as to why Hanjin was exempt from NRS 80.090.

Viewing the record in a light most favorable to Beasinger, we conclude that there remains a genuine issue of fact as to whether Hanjin was transacting business in interstate commerce, or was not "doing business" in Nevada, and is therefore exempt from NRS 80.090 and NRS 80.095. As the issue of whether NRS 80.090 and NRS 80.095 even apply here must be determined before we may consider whether Berryhill should be revisited and a more flexible standard should be used, we reverse the district court's summary judgment and remand Docket No. 42805 to the

district court for a factual determination of Hanjin's status relative to Nevada's foreign corporation statutes.

Docket No. 43542: Dismissal for failure to timely serve

In the second of these consolidated appeals, Beasinger argues that the district court abused its discretion in dismissing his original complaint naming Hanjin, Container Freight Express Intermodal Transport (CFE) and Total Terminals, Inc. (Total). Beasinger contends that there were excusable delays in service, based primarily on difficulty in locating the defendants, as well as personal difficulties experienced by his attorney that delayed action on the case.

This court reviews a district court's decision to dismiss a complaint for untimely service of process for an abuse of discretion.[9]

"This court has held that good public policy dictates that cases be adjudicated on their merits."[10] NRCP 4(i) provides for service of process within 120 days, but also permits a party to move for an enlargement of time upon a showing of good cause.

In Scrimer v. District Court, this court listed ten considerations that may govern a district court's good cause determination under NRCP 4(i):[11]

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[9]Domino v. Gaughan, 103 Nev. 582, 584, 747 P.2d 236, 237 (1987).

[10]Kahn v. Orme, 108 Nev. 510, 516, 835 P.2d 790, 794 (1992).

[11]116 Nev. 507, 516, 998 P.2d 1190, 1196 (2000) (noting that no single consideration is controlling).

(1) difficulties in locating the defendant,

(2) the defendant's efforts at evading service or concealment of improper service until after the 120-day period has lapsed,

(3) the plaintiff's diligence in attempting to serve the defendant,

(4) difficulties encountered by counsel,

(5) the running of the applicable statute of limitations,

(6) the parties' good faith attempts to settle the litigation during the 120-day period,

(7) the lapse of time between the end of the 120-day period and the actual service of process on the defendant,

(8) the prejudice to the defendant caused by the plaintiff's delay in serving process,

(9) the defendant's knowledge of the existence of the lawsuit, and

(10) any extensions of time for service granted by the district court.

Beasinger points out that all three defendants had knowledge of Beasinger's injuries, since all had been named as defendants in the workers' compensation recovery action by the Riviera Hotel.

As to Container, Beasinger simply contends that no prejudice resulted from the late service, since Container was aware of Beasinger's injuries due to its participation in the Riviera action.

As to Total, Beasinger contends that six days late should be excused, considering the difficulties encountered in locating a company that no longer existed, and whose assets had been purchased by another company.

Beasinger declines to accuse Hanjin of attempting to evade service, but contends that he acted with diligence under the circumstances, and that Hanjin could be said to have been served within the time allowed, since the first attempt at service, apparently wrongly accepted by CT, was timely.

We conclude that the district court did not abuse its discretion in determining that Beasinger had no legitimate excuse for late service of Container. Despite the difficulties in finding the defendant, the district court was generous in permitting two enlargements of time, and the eventual service was long past the enlarged time to serve. We therefore affirm that portion of the district court's order dismissing Beasinger's original complaint as to Container.

As to Total, we note that the asset purchase by a different entity complicated Beasinger's efforts to locate the proper defendant. However, the letter expressing these difficulties from the investigator is dated after the expiration of time for service, making it difficult to conclude that Beasinger was diligent in trying to locate the proper parties. Therefore, we conclude that the portion of the district court's dismissal order pertaining to Total should also be affirmed.

As to Hanjin, however, we conclude that the portion of the district court's order dismissing for failure to timely serve should be reversed. Beasinger did serve CT before the expiration of the enlargement of time, and although CT eventually turned out to be the wrong resident agent, it twice accepted service, and eventually transmitted the documents to Hanjin. All that argues in favor of Beasinger; despite serving the wrong resident agent, that service did eventually result in Hanjin being served, and the original service was timely. Additionally, there is no evidence of

prejudice to Hanjin from the delay in service, nor did Hanjin argue such prejudice to this court or the district court. ~~Given this court's public policy preference that a party's action be heard on its merits, we reverse that portion of the district court's order dismissing Hanjin for untimely service and remand Docket No. 43542 for further proceedings.~~

IT IS SO ORDERED.

Douglas, J.
Douglas

Becker, J.
Becker

Parraguirre, J.
Parraguirre

cc: Hon. Michael A. Cherry, District Judge
Hon. Michelle Leavitt, District Judge
Curiale Dellaverson Hirschfeld & Kraemer, LLP
Greenman Goldberg Raby & Martinez
Kummer Kaempfer Bonner & Renshaw/Las Vegas
Lewis & Associates, LLC
Clark County Clerk