IN THE SUPREME COURT OF THE STATE OF NEVADA

JACK R. WHITEHORN AND MARY R. WHITEHORN, INDIVIDUALLY, AND AS HUSBAND AND WIFE, Appellants, vs. WESTPARK ASSOCIATES, LLC, A NEVADA LIMITED LIABILITY COMPANY, D/B/A WESTPARK LLC, D/B/A WESTPARK APARTMENTS, D/B/A WESTPARK II PARTNERS, LLC; REALTY MANAGEMENT, INC., A NEVADA CORPORATION; WESTPARK OWNERS' ASSOCIATION, A NEVADA CORPORATION; DAN K. SHAW, INDIVIDUALLY, OFFICER AND DIRECTOR OF WESTPARK OWNERS' ASSOCIATION; MARTIN EGBERT, INDIVIDUALLY, AND DIRECTOR OF WESTPARK OWNERS' ASSOCIATION; VICTOR G. BOWEN, INDIVIDUALLY, AND DIRECTOR OF WESTPARK OWNERS' ASSOCIATION; KRISTIN CEDERLIND, INDIVIDUALLY, AND DIRECTOR OF WESTPARK OWNERS' ASSOCIATION; TODD P. SOSEY, INDIVIDUALLY, AND DIRECTOR OF WESTPARK OWNERS' ASSOCIATION; MARLEY W. JACKSON, INDIVIDUALLY, AND DIRECTOR OF WESTPARK OWNERS' ASSOCIATION; CLAUDE DESROSIERS HASAN, INDIVIDUALLY, AND DIRECTOR OF WESTPARK OWNERS' ASSOCIATION; AND LARRY A. TREVELYAN, INDIVIDUALLY, AND DIRECTOR OF WESTPARK OWNERS' ASSOCIATION, Respondents.	No. 45767
JACK WHITEHORN AND MARY WHITEHORN, Appellants, vs.	No. 46311

FILED

JUL 06 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

07-14722

WESTPARK OWNERS ASSOCIATION,
A/K/A WESTPARK HOMEOWNERS
ASSOCIATION,
Respondent.

ORDER DISMISSING APPEAL IN PART AND AFFIRMING IN PART

These are consolidated proper person appeals from district court orders granting summary judgment and imposing sanctions under NRCP 11 (No. 45767) and denying a preliminary injunction (No. 46311). Eighth Judicial District Court, Clark County; Jessie Elizabeth Walsh, Judge. We directed respondents to file responses to appellants' civil proper person appeal statements, which several have done.

Initially, we conclude that we lack jurisdiction over the appeal in Docket No. 45767 as to respondents Victor G. Bowen and Claude Desrosiers Hasan, and as to respondents Todd P. Sosey, Marley W. Jackson and Larry A. Trevelyan in their individual capacities. The record reflects that appellants voluntarily dismissed their claims as to these defendants, and consequently they are not aggrieved by the dismissal.[1] Accordingly, we dismiss the appeal in Docket No. 45767 as to these respondents.

In Docket No. 45767, appellants challenge several district court orders: an order granting summary judgment to respondent Kristin Cederlind and imposing NRCP 11 sanctions in the form of Cederlind's attorney fees; an order granting summary judgment to respondents

[1]See NRAP 3A(a); Vinci v. Las Vegas Sands, 115 Nev. 243, 984 P.2d 750 (1999) (holding that appellant was not aggrieved by stipulated dismissal of her claims).

Westpark Associates, Realty Management, Dan Shaw, and Martin Egbert; and, an order granting summary judgment to respondent Westpark Owners Association and to respondents Todd P. Sosey, Marley W. Jackson and Larry A. Trevelyan, in their capacities as officers or directors of the association.

This court reviews orders granting summary judgment de novo.[2] Summary judgment was appropriate here if the pleadings and other evidence on file, viewed in a light most favorable to appellants, demonstrated that no genuine issue of material fact remained in dispute and that respondents were entitled to judgment as a matter of law.[3]

The district court's orders indicate that appellants' claims were barred by res judicata and the statute of limitations. Respondents argue that res judicata is appropriately applied because appellants' prior action, asserting nearly identical claims against nearly identical parties, was dismissed under NRCP 41(e) for failure to bring it to trial within five years. But the prior order of dismissal specifically states that the dismissal was without prejudice. Notably, NRCP 41(e) states that a dismissal for failure to prosecute is a bar to any subsequent action on the same claims "unless the court otherwise provides." Here, the court "otherwise provide[d]" by indicating that the dismissal was without

---

[2]See Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

[3]Id.

prejudice. Accordingly, neither res judicata nor NRCP 41 bars appellants' claim.[4]

The district court also relied on the statute of limitations period in granting summary judgment. NRS 11.190 sets forth generally applicable limitations periods, the longest of which is six years. Respondents assert that, at the latest, appellants' claims based on the allegedly improper formation of Westpark Owners Association accrued in January 1996, and thus the longest possible limitations period expired in January 2002. Appellants' complaint, filed in 2005, was therefore untimely.

Nevertheless, appellants argue that their claims arise from a continuing harm, and therefore the limitations period does not begin to run until the harm ends. Appellants have misconstrued the continuing harm or continuing tort doctrine. This doctrine applies when a plaintiff's injury arises from a course of conduct over a prolonged period, and not from any specific act during that period.[5] Here, appellants' alleged damage arises from actions taken to establish Westpark Owners Association from 1994 to 1996, not from a continuous course of action. Moreover, appellants' original complaint, filed in 1996, which is nearly identical to the complaint here, indicates that appellants were aware of

---

[4]See Trustees, Hotel Employers v. Royco, Inc., 101 Nev. 96, 98, 692 P.2d 1308, 1309 (1985) (recognizing that "[a] dismissal without prejudice is not a final adjudication on the merits" for res judicata purposes).

[5]See Parks v. Madison County, 783 N.E.2d 711, 719 (Ind. Ct. App. 2003); Beard v. Edmondson and Gallagher, 790 A.2d 541, 547-48 (D.C. 2002).

their claims at that time. The Indiana Court of Appeals has stated, "the critical event for purposes of determining whether an action was timely filed is the plaintiff's discovery of facts that alert him that he has a cause of action."[6] Even if the continuing harm doctrine applied, then, appellants' claims are barred. As the District of Columbia Court of Appeals has noted, "the plaintiff does not have 'carte blanche to defer legal action indefinitely if she knows or should know that she may have suffered injury and that the defendant may have caused her harm.'"[7]

Appellants also argue that the limitations period was somehow tolled by a combination of factors: (1) the order of dismissal in the first case was without prejudice, which according to appellants made no sense if the limitations period had already expired, in January 2002, when the dismissal occurred in February 2002; and (2) this court affirmed the district court's order dismissing the complaint without prejudice in December 2004, and so they had a reasonable period after the remittitur issued in the previous appeal to file a new complaint. This argument lacks merit. The dismissal without prejudice and our affirmance thereof simply meant that res judicata was not a bar to any subsequent action; the

---

[6]Parks, 783 N.E.2d at 719.

[7]Beard, 790 A.2d at 546 (quoting Hendel v. World Plan Executive Council, 705 A.2d 656, 661 (D.C. 1997)); see also Parks, 783 N.E.2d at 719 (stating that the plaintiff may not "sit idly by" and that "'the doctrine of continuing wrong will not prevent the statute of limitations from beginning to run when the plaintiff learns of facts which should lead to the discovery of his cause of action even if his relationship with the tortfeasor continues beyond that point'") (quoting C & E Corp. v. Ramco Industries, Inc., 717 N.E.2d 642, 645 (Ind. Ct. App. 1999)).

statute of limitations was not mentioned in either the district court's order or our own. We further approve the district court's determination that equitable tolling did not apply.[8] And we perceive no abuse of discretion in the district court's modest award of attorney fees to Cederlind, who had not served on Westpark Owners Association's board or even owned a unit there for several years before appellants' complaint was filed.[9]

In Docket No. 46311, appellants challenge the district court's denial of their motion for a preliminary injunction against respondent Westpark Owners Association's foreclosure sale of their condominium to collect unpaid assessments and other charges.

"'The denial of a preliminary injunction will be reversed only where the district court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact.'"[10] For a preliminary injunction to issue, the moving party must demonstrate that he (1) is reasonably likely to succeed on the merits, and (2) would be

---

[8]See Copeland v. Desert Inn Hotel, 99 Nev. 823, 826, 673 P.2d 490, 492 (1983) (listing factors to be considered in determining whether equitable tolling could apply).

[9]See Simonian v. Univ. & Cmty. Coll. Sys., 122 Nev. 187, 196, 128 P.3d 1057, 1063 (2006) (reviewing a district court's imposition of NRCP 11 sanctions for an abuse of discretion).

[10]Attorney General v. NOS Communications, 120 Nev. 65, 67, 84 P.3d 1052, 1053 (2004) (quoting U.S. v. Nutri-cology, Inc., 982 F.2d 394, 397 (9th Cir. 1992)).

subject to irreparable harm, for which there is no adequate legal remedy, if the nonmoving party's conduct continued.[11]

Appellants argue that Westpark is not a valid association, and so it cannot charge assessments or institute foreclose proceedings to collect them. Appellants also argue that Westpark failed to timely institute proceedings to enforce the lien, relying on NRS 116.3116(5). Therefore, according to appellants, they were entitled to injunctive relief.

Appellants' first argument, concerning Westpark's validity, is barred by the statute of limitations, as discussed above. We therefore consider it waived and decline to address it.[12]

NRS 116.3116(5) provides that an assessment lien is extinguished "unless proceedings to enforce the lien are instituted within 3 years after the full amount of the assessments becomes due." Appellants argue that most of the amount sought by Westpark became due more than three years earlier, and thus the lien had been extinguished. NRS 116.31162(1)(a) provides that "proceedings to enforce the lien" are commenced when an association serves, by certified or registered mail, return receipt requested, a notice of delinquent assessment to the unit's owner. Our review of the record indicates that Westpark took such action

---

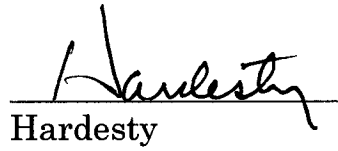
[11]State, Dep't of Conservation v. Foley, 121 Nev. 77, 80, 109 P.3d 760, 762 (2005).

[12]See Hudson v. Horseshoe Club Operating Co., 112 Nev. 446, 457, 916 P.2d 786, 792 (1996) (holding that the waiver of a right may be inferred when a party engages in conduct so inconsistent with an intent to enforce the right as to induce a reasonable belief that the right has been relinquished); McKeeman v. General American Life Ins., 111 Nev. 1042, 1048, 899 P.2d 1124, 1128 (1995) (same).

in 1995, 1998, 2003, and 2005, and that appellants paid assessments and arrearages in 1995, 1997, and 1998. Thus, even if some portion of the amount sought by Westpark accrued more than three years before the next succeeding notice of delinquent assessment was served, the record reflects that Westpark's lien was still likely effective for the bulk of the amount sought, and thus the district court did not abuse its discretion in concluding that appellants failed to demonstrate that injunctive relief was warranted.

Accordingly, we dismiss the appeal in No. 45767 as to respondents Victor G. Bowen and Claude Desrosiers Hasan, and as to respondents Todd P. Sosey, Marley W. Jackson and Larry A. Trevelyan in their individual capacities, and we affirm the district court's orders in all other respects.

It is so ORDERED.



_____, J.
Hardesty

_____, J.
Parraguirre

_____, J.
Douglas

cc: Hon. Jessie Elizabeth Walsh, District Judge
Hon. Valorie Vega, District Judge
Jack R. Whitehorn
Mary R. Whitehorn
Bruce I. Flammey
Hampton & Hampton
Matthew L. Johnson
Law Offices of Robert P. Spretnak
Santoro, Driggs, Walch, Kearney, Johnson & Thompson
Eighth District Court Clerk