

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARILEE BROWN AND MARILOU
BROWN,
Appellants,
vs.
KENNETH J. MCKENNA, ESQ.,
Respondent.

No. 46390

FILED

JUL 05 2006

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

ORDER OF AFFIRMANCE

This is a proper person appeal from a district court order dismissing appellants' complaint for legal malpractice. Second Judicial District Court, Washoe County; Janet J. Berry, Judge.

Having reviewed the record, appellants' proper person civil appeal statement, and the parties' briefs, we conclude that the district court did not err in dismissing appellants' complaint as premature.¹ At the time the order was entered, neither of the underlying actions in which respondent was alleged to have acted improperly had concluded. We have consistently held that damages in a legal malpractice action are

¹See NRCP 12(b)(5); Breliant v. Preferred Equities Corp., 109 Nev. 842, 845, 858 P.2d 1258, 1260 (1993) (noting that, in determining whether a claim has been stated, all inferences must be construed in favor of the non-moving party, and all factual allegations in the complaint must be accepted as true); Edgar v. Wagner, 101 Nev. 226, 227, 699 P.2d 110, 111 (1985) (stating that, in reviewing an order granting a motion to dismiss, this court's task is to determine whether the challenged pleading sets forth allegations sufficient to make out the elements of a right to relief).

speculative, and thus an action is premature, until the underlying litigation is concluded.²

Appellants insist that their action is not only for legal malpractice but also for breach of contract, relying on language in NRS 11.207(1). This statute is a statute of limitations, and states simply that, regardless of whether an action against a lawyer is characterized as one for breach of a legal duty (a tort), or as one for breach of contract, the same statute of limitations applies. Similarly, regardless of whether an action is characterized as one based on contract or legal duty, the amount of any damages is speculative until the underlying litigation is concluded. While some elements of damage may appear clear to appellants at this time, e.g., the retainer appellants allegedly paid to respondent, total damages can only be determined after the underlying case is concluded.

Also, we note that the district court's dismissal was without prejudice. Appellants are free to file a new complaint or complaints when their respective actions are concluded, so long as they do so within the time frame specified in NRS 11.207.

Appellants further assert that the district court should have granted their motion for default judgment, since respondent failed to timely answer or otherwise respond to their complaint; his motion to dismiss was filed two days late.³ We conclude that the district court did not abuse its discretion in refusing to grant a default judgment, when

²See Hewitt v. Allen, 118 Nev. 216, 43 P.3d 345 (2002); Semenza v. Nevada Med. Liability Ins. Co., 104 Nev. 666, 765 P.2d 184 (1988).

³See NRCP 12(a)(1) (requiring an answer within twenty days of the complaint's service).

appellants were not able to demonstrate any prejudice from the short delay.⁴

Having concluded that the district court neither abused its discretion in denying a default judgment nor erred in dismissing appellants' complaint, we

ORDER the judgment of the district court AFFIRMED.⁵

Becker, J.
Becker

Parraguirre, J.
Parraguirre

Shearing, Sr. J.
Shearing

⁴See Still v. Huntley, 102 Nev. 584, 587, 729 P.2d 489, 490 (1986) (stating that whether to grant a default judgment is within the district court's sound discretion, based on prompt action by the defendant, no intent to the delay the proceedings, good faith and a meritorious defense); Tahoe Village Realty v. DeSmet, 95 Nev. 131, 133-34, 590 P.2d 1158, 1160 (1979) (holding that the district court has discretion whether to characterize a defendant's neglect "excusable" in refusing to grant or setting aside a default judgment).

⁵We deny respondent's motion to dismiss this appeal based on technical shortcomings in appellants' opening brief. We note that respondent's answering brief suffered from its own shortcomings, notably its title of "Opening Brief of Appellant" and respondent's self-identification as "Counsel for Appellant." We further point out that had the district court adopted the strict rule enforcement argument now advocated by respondent, his late responsive pleading would have resulted in a default judgment entered against him.

The Honorable Miriam Shearing, Senior Justice, participated in the decision of this matter under a general order of assignment entered January 6, 2006.

cc: Hon. Janet J. Berry, District Judge
Marilee Brown
Marilou Brown
Kenneth J. McKenna
Washoe District Court Clerk