IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH R. TILBURY,
Appellant,
vs.
JOE R. LOYD A/K/A REX LOYD; KENNETH (KEN) MORAN; WILLIAM MORAN; THE LAND OFFICE; PAULA GLIDDEN; AND CARRICK MASTERSON,
Respondents.

No. 46557

FILED

JUL 0 3 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order dismissing a real property action under NRCP 41(e). Fifth Judicial District Court, Nye County; Robert W. Lane, Judge.

Appellant filed a district court complaint on September 22, 2003, against the sellers, the real estate broker for both appellant and the sellers, and the broker's agents (collectively "respondents"), regarding his purchase of an allegedly defective home. All respondents filed their answers and cross-claims by December 2003. An early case conference was held on March 29, 2004. An incomplete joint case conference report was filed on August 27, 2004, and an amended joint case conference report was filed on December 22, 2004.

Except for a service of summons, no further activity took place in the case below until September 15, 2005, when appellant filed a request



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to set the case for trial. On September 21, 2005, the district court indicated that the trial date would be determined on October 24, 2005. On October 18, 2005, however, respondents opposed the request for a trial date and the sellers filed a motion to dismiss on the basis that the action had not been brought to trial within two years, as allowed under NRCP 41(e).[1] Appellant opposed the motion to dismiss.

At the hearing on the dismissal motion, the district court asked appellant's counsel why there had been no activity in the case for the past year. Appellant's counsel replied, "Well, it had just been one of those things that [the case] got dropped in its lap, you know. I had some other criminal matters and what not. It didn't get pressed as hard as it should[.]"

On December 1, 2005, the district court entered an order granting the motion to dismiss, expressly finding that appellant did not conduct discovery "because the case 'fell through the cracks,' and they are not ready to go to trial." The court also concluded that appellant's request for a trial setting was more properly viewed as a request to continue the NRCP 41(e) discretionary two-year trial deadline "so that counsel can begin discovery and get ready for a future trial." The court concluded that "[t]his violates the policy and purpose of NRCP 41(e)" and dismissed the entire action.

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[1]Respondents broker and agents joined in respondent sellers' motion to dismiss "the case."

Appellant appeals, arguing that he was not required to, and had no need to, conduct any further discovery, because he had already obtained a great deal of the documentation and witnesses needed to try the case by the time the amended joint case conference report was filed in December 2004. Appellant notes that he did not seek more time for discovery, and asserts that respondents were at fault for failing to conduct their own discovery, were not prejudiced by the delay, and were not ready to proceed to trial. Appellant contends that the district court abused its discretion in treating the trial setting motion as a motion to continue trial, when appellant made no such request and had instead demonstrated his intent to proceed, before NRCP 41(e)'s two-year deadline, with his claims. Appellant further asserts that the district court abused its discretion in dismissing his case when his allegedly dilatory conduct was not so egregious as to warrant the harsh remedy of dismissal, thereby denying him a trial on the merits.

NRCP 41(e) allows the district court, in its discretion, to dismiss any action for want of prosecution if the plaintiff has not brought his case to trial within two years after the complaint is filed. The policy underlying the rule is that "'once suit is commenced, it must be carried forward with reasonable diligence unless circumstances exist which excuse delay.'"[2] "'A claimant's right to a 'day in court' is subject to reasonable procedural requirements . . . and may be lost by the failure to comply with

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[2]Volpert v. Papagna, 85 Nev. 437, 440, 456 P.2d 848, 850 (1969) (quoting Dubin v. Harrell, 79 Nev. 467, 472, 386 P.2d 729, 731 (1963).

them.'"[3] It is the plaintiff's duty to act with reasonable diligence, and "a defendant need make no move until the law requires him to do so in response to the movements of the plaintiff at the various states of the litigation."[4] Nor is it incumbent upon a defendant to show prejudice from delay, as injury is presumed in the absence of excuse for plaintiff's delay in prosecution.[5]

This court has further stated that "when a case has been long neglected and no adequate excuse is offered for the neglect, an inference arises that the case lacks merit, and [an appellant] whose case is dismissed for lack of prosecution . . . must see to it that the record contains something substantial which will justify a reversal."[6] While there are no rigid timelines to determine whether a failure to prosecute is sufficiently serious to justify dismissal, this court has recognized that "the fact that a

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[3]Id. at 441, 456 P.2d at 850 (quoting Durbin, 79 Nev. at 472, 386 P.2d at 731 (internal citations omitted)).

[4]Hassett v. St. Mary's Hosp. Ass'n, 86 Nev. 900, 903, 478 P.2d 154, 156 (1970).

[5]Northern Ill. Corp. v. Miller, 78 Nev. 213, 217, 370 P.2d 955, 956 (1962).

[6]Id.

plaintiff has been stirred into action by a threat of dismissal is no excuse."[7] We review the district court's order for an abuse of discretion.[8]

In the present case, it is undisputed that the case was not brought to trial before the two-year period elapsed on September 22, 2005. Appellant failed to explain why he did not act sooner to bring the case to trial within the two-year period if, indeed, he was prepared to do so with sufficient evidence and witnesses as of December 2004 when the amended joint case conference report was filed. Had appellant timely acted after the amended joint case conference report was filed, he would have had sufficient time to begin trial before September 2005.[9] Instead, it appears that appellant was "stirred into action by the threat of dismissal," as he failed to prosecute the case for nine months after the amended joint case conference report was filed in December 2004 and requested a trial setting only one week before NRCP 41(e)'s two-year deadline under was to expire on September 22, 2005. Consequently, we conclude that the district court

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[7]Spiegelman v. Gold Dust Texaco, 91 Nev. 542, 546, 539 P.2d 1216, 1218 (1975) (quoting 9 C. Wright, Federal Practice & Procedure, § 2370).

[8]Hassett, 86 Nev. at 902, 478 P.2d at 155; see also Harris v. Harris, 65 Nev. 342, 350, 196 P.2d 402, 406 (1948) (stating that unless there has been a gross abuse of discretion, a trial court's dismissal of an action for lack of prosecution will not be disturbed on appeal).

[9]See Morgan v. Las Vegas Sands, Inc., 118 Nev. 315, 320, 43 P.3d 1036, 1040 (2002) (concluding that had the appellant resorted to the NRCP 16.1 procedures in a timely fashion, he would have had sufficient time to ensure placement upon the trial calendar before expiration of the five-year rule under NRCP 41(e)).

did not abuse its discretion in determining that appellant failed to act with reasonable diligence in bringing his case to trial within the two-year period and therefore dismissing the case with prejudice under NRCP 41(e).[10] Accordingly, we affirm the district court's dismissal order.

It is so ORDERED.

_____, J.
Hardesty

_____, J.
Parraguirre

_____, J.
Douglas

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[10]See Monroe, Ltd. v. Central Telephone Co., 91 Nev. 450, 456, 538 P.2d 152, 155-56 (1975) (finding no abuse of the district court's discretion in dismissing a case with prejudice because appellant provided no valid reason or explanation for delaying filing its application for a preferential trial setting until just before dismissal would have been required under NRCP 41(e)'s five-year rule).

Even if the district court mistakenly found that appellant was unprepared to go to trial due to the lack of discovery, we conclude that the district court did not abuse its discretion as the record supports its decision. Consequently, we will affirm the district court's order, even if "it reached the correct result, albeit for different reasons." Rosenstein v. Steele, 103 Nev. 571, 575, 747 P.2d 230, 233 (1987); see also Bongiovi v. Sullivan, 122 Nev. 556, 575 n.44, 138 P.3d 433, 447 n.44 (2006).

cc: Hon. Robert W. Lane, District Judge
Eugene Osko, Settlement Judge
David C. Polley
Deaner, Deaner, Scann, Malan & Larsen
Kravitz, Schnitzer, Sloane, Johnson & Eberhardy, Chtd.
Nye County Clerk