

IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANKI JO ELSEA,  
Appellant,  
vs.  
TRACY REYNOLDS,  
Respondent.

No. 46857

**FILED**

DEC 04 2007

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order granting a NRCP 12(b)(5) motion to dismiss. Eighth Judicial District Court, Family Court Division, Clark County; Cynthia Dianne Steel, Judge.

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

In April 2004, the parties entered into a joint petition for divorce, which was finalized with a decree of divorce in May 2004 (Case No. D317479). Then nine-months after the decree of divorce was entered, the appellant Franki Jo Elsea filed an independent action (Case No. D331366) against the respondent Tracy Reynolds to adjudicate assets omitted from the decree of divorce. It should be noted at this point that the record provides that Elsea made no attempt to set aside the underlying decree of divorce, pursuant to NRCP 60(b), within six-months of its entry.

In response to Elsea's independent cause of action, Reynolds filed a NRCP 12(b)(5) motion to dismiss for failure to state a claim upon which relief can be granted. Elsea responded with an opposition to Reynold's motion and a supporting affidavit. The district court issued an order dismissing Elsea's independent cause of action with prejudice. On

appeal, Elsea contends that the district court erred in refusing to acknowledge her independent action in equity for omitted assets. We disagree.

We have previously concluded that “[i]f a motion to dismiss . . . has been filed, and matters outside the pleadings are presented to and not excluded by the trial court, the motion shall be treated as a motion for summary judgment.”<sup>1</sup> Here, the district court was presented with matters outside the pleadings, which were not specifically excluded.<sup>2</sup> Therefore, we conclude that “[s]ince the [district] court in its order of dismissal, did not expressly exclude matters outside the pleadings from consideration (NRCP 12(b)), we shall treat the dismissal order as a summary judgment.”<sup>3</sup>

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<sup>1</sup>MacDonald v. Kassel, 97 Nev. 305, 307, 629 P.2d 1200, 1200 (1981) (noting that the district court treated and disposed of the respondents’ motion to dismiss as a Rule 56 motion for summary judgment when it “received and considered the affidavits of respondents and appellant”); see Cummings v. City of Las Vegas Mun. Corp., 88 Nev. 479, 481, 499 P.2d 650, 651 (1972).

<sup>2</sup>The matters presented to the district court that were outside the pleadings include Elsea’s affidavit supporting her opposition to Reynolds’ motion to dismiss.

<sup>3</sup>Paso Builders, Inc. v. Hebard, 83 Nev. 165, 169, 426 P.2d 731, 734 (1967).

“[I]t was incumbent upon [Elsea] to move to set aside the voidable decree within six-months after its entry, as allowed by NRCP 60(b)[3], upon the ground of [fraud].”<sup>4</sup> “This she failed to do.”<sup>5</sup> “Since a basis for an independent action does not exist, the summary judgment entered below is affirmed.”<sup>6</sup> Accordingly, we conclude that the district court was not obligated to entertain Elsea’s independent action due to her failure to set aside the original decree of divorce under NRCP 60(b).

NRCP 60(b)

In the independent action before the court, Elsea argued that her request for relief was not time-barred because Reynolds perpetrated fraud upon the court. Elsea contends that her request for relief from fraud upon the court could have been raised at anytime. We disagree.

NRCP 60(b) provides that a motion alleging fraud “shall be made . . . not more than 6 months after the proceeding was taken or the date that written notice of entry of the judgment or order was served.” NRCP 60(b) further provides that: “This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court.”

Accordingly, it was incumbent upon Elsea to move for relief under NRCP 60(b) from the underlying decree of divorce as to fraud in a timely manner. Instead, Elsea instituted an independent cause of action.

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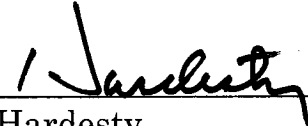
<sup>4</sup>Smith v. Smith, 82 Nev. 384, 387, 419 P.2d 295, 297 (1966).

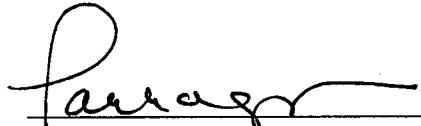
<sup>5</sup>Id.

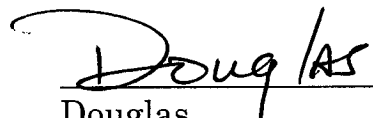
<sup>6</sup>Id.

“Since a basis for an independent action does not exist, [due to the perceived joint fraud,<sup>7</sup>] the summary judgment entered below is affirmed.”<sup>8</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Hardesty

  
\_\_\_\_\_, J.  
Parraguirre

  
\_\_\_\_\_, J.  
Douglas

cc: Hon. Cynthia Dianne Steel, District Judge, Family Court Division  
Lansford W. Levitt, Settlement Judge  
Mathew P. Harter  
Joseph W. Houston II  
Eighth District Court Clerk

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<sup>7</sup>The district court noted during the hearing on Reynolds’ motion that fraud was not present under these facts. Specifically, the district court noted that:

[S]aying that, he promised he’d get back together with me later, is not one of the things that should entice anyone to sign a decree of divorce . . . . So, it seems to me like . . . any fraud that was perpetrated on The Court was perpetrated by both parties when they said there was no community property if indeed there was any.

<sup>8</sup>Smith, 82 Nev. at 387, 419 P.2d at 297.