

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALBERT WINEMILLER, INC.; ALBERT
WINEMILLER TRUST; XENEZ, INC.; DEBRA
A. WINEMILLER REVOCABLE TRUST; RAMI
AMIR; FREDERICK TREDUP; ZIONA TREDUP;
LOUIS PRIMEAU; SANDRA PRIMEAU;
HELTZEL FAMILY TRUST; JAMES M.
HELTZEL DMD, PSP & TRUST; AND
KOEHLER FAMILY TRUST,

Appellants,

vs.

TIMOTHY W. CLARK; W. MARK BUCSIS;
JOHN M. KEILLY; JO M. KEILLY; JMK
INVESTMENTS, LTD.; KEILLY FAMILY
LIMITED PARTNERSHIP; JMK
INVESTMENTS, INC. DEFINED BENEFIT
PENSION PLAN; KEILLY CHARITABLE
GRANTOR TRUST INVESTORS MORTGAGE
CORPORATION, A NEVADA CORPORATION;
RICHARD J. ANDERSON; DAN K. SHAW;
CHICAGO TITLE AGENCY OF NEVADA, INC.
F/K/A UNITED TITLE OF NEVADA, INC., A
NEVADA CORPORATION; AL WHALEN; THE
WHALEN GROUP; JAMES B. HOEPPNER;
HOEPPNER & ASSOCIATES, LTD.; GOOLD,
PATTERSON, DEVORE & RONDEAU;
THOMAS J. DEVORE; BRYAN K. DAY; JOHN
E. HAM; MIKE HANLEY; CARLSBAD COVE
APARTMENTS I, LLC; MONT BLANC
APARTMENTS VI (PROPERTY)
MANAGEMENT, INC., A TEXAS
CORPORATION; MONT BLANC APARTMENTS
XI (PROPERTY) MANAGEMENT, INC.; A
TEXAS CORPORATION; MONT BLANC
APARTMENTS IX (PROPERTY)
MANAGEMENT, INC.; A TEXAS
CORPORATION; OCEAN COLINAS
INVESTORS, INC.; A NEVADA

No. 48140

FILED

FEB 06 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

CORPORATION; MONT BLANC LIMITED PARTNERSHIP; A TEXAS LIMITED PARTNERSHIP; WMB HOLDINGS (1995), INC., AN ONTARIO CANADA COMPANY; WMB INVESTMENTS (USA) 1996, INC., A NEVADA CORPORATION; CANTERBURY ESTATES SERVICES, INC., A TEXAS CORPORATION; 4068 INVESTMENTS LIMITED PARTNERSHIP, A BRITISH COLUMBIA, CANADA CORPORATION; 4068 INVESTMENTS, LTD.; 4069 INVESTMENTS, LTD., A BRITISH COLUMBIA, CANADA CORPORATION; MONT BLANC LIMITED PARTNERSHIP; MONT BLANC MANAGEMENT CORP.; MONT BLANC APARTMENTS (ISSUER) MANAGEMENT, INC.; MONT BLANC APARTMENTS VI LIMITED PARTNERSHIP; MONT BLANC APARTMENTS VIII LIMITED PARTNERSHIP; MONT BLANC APARTMENTS VIII (PROPERTY) MANAGEMENT, INC.; MONT BLANC APARTMENTS IX LIMITED PARTNERSHIP; CANTERBURY ESTATES LIMITED PARTNERSHIP; FLOWER HILL LIMITED PARTNERSHIP; 4068 INVESTMENTS LIMITED PARTNERSHIP; FLOWER HILL SERVICES, INC.; WMB HOLDINGS (1995), INC.; LOMA PORTAL APARTMENTS I, LLC; LOMA PORTAL APARTMENTS SERVICES, INC., A CALIFORNIA CORPORATION; LOMA PORTAL REAL ESTATE HOLDINGS, LLC; OCEAN VIEW TERRACE APARTMENTS, LLC (NV); OCEAN VIEW TERRACE APARTMENT SERVICES, INC.; SEAHORSE APARTMENTS I, LLC; AND CANAL INVESTMENT CORP., Respondents.

SCOTT WALL; RAMI AMIR; GUIBALA AVANTS; MARILYN JOYCE COLBERT TRUST; JON DAVIS; DARA DAVIS; GASTE MUSIC PUBLISHING COMPANY; ENGEL MANAGEMENT, LTD. PSP; JACQUELINE GASTE A/K/A LINE RENAUD; PHILLIP & ADELLE ENGEL FAMILY TRUST; PHILLIP ENGEL FAMILY PARTNERSHIP; LORRAINE A. ENGEL FAMILY TRUST; PHILIP & ADELE ENGEL GRANDCHILDREN L.P.; ROBERT FLEISCHMAN; RICHARD GETZ; HELTZEL FAMILY TRUST; ED KLUTH; JOSETTE KLUTH; KOEHLER FAMILY TRUST; HEIDI MEYER; JERRY MINAS; PASQUALE TITO FAMILY TRUST; LOUIS PRIMEAU; SANDRA PRIMEAU; DANIAL D. READE; LINDA R. READE; SHELLY B. TORREALBA; LEONARD J. TORREALBA; FREDERICK TREDUP; ZIONA TREDUP; ALBERT WINEMILLER TRUST UTA; ALBERT WINEMILLER, INC. AND DEBRA ANN WINEMILLER REVOCABLE FAMILY TRUST,

Appellants,

vs.

JOHN KEILLY; JMK INVESTMENTS, LTD.; JO M. KEILLY; U.S. MORTGAGE CORPORATION INC.; KEILLY FAMILY LIMITED PARTNERSHIP; JMK INVESTMENTS, INC. DEFINED BENEFIT PENSION PLAN; KEILLY CHARITABLE GRANTOR TRUST; DIAMOND KEY HOMES, INC.; GLADDEN FARMS, LLC; JOHN BROUWERS; DAVID DEL ZOTTO; RANDAL EDWARDS; STEVEN PORTNOFF; CHICAGO TITLE AGENCY OF NEVADA, INC.; AL WHALEN; THE WHALEN GROUP; WHALEN-RUSSO FAMILY TRUST; JAMES B. HOEPPNER AND HOEPPNER & ASSOCIATES, LTD.,

Respondents.

ORDER OF REVERSAL AND REMAND

These consolidated appeals challenge district court orders dismissing appellants' complaints. Eighth Judicial District Court, Clark County; Kathy A. Hardcastle, Judge.

Appellants instituted the underlying actions, District Court Case Nos. A517730 and A517930, against respondents, alleging, among other things, damages resulting from respondents' breach of contract, breach of fiduciary duties, conversion, fraud, deceptive trade practices, and negligence as it relates to various loans made by appellants to respondents. At the time that appellants filed the underlying actions, other actions pending in the district court involved some of the same parties. Those actions are: Diversified/Engel v. Keilly (consolidated), District Court Case Nos. A453965 and A488019; Wall v. Shaw, District Court Case No. A447899; and Torrealba v. Keilly, District Court Case No. A515441. It appears that those other actions may have raised some of the same claims or involved some of the same facts as the actions at issue in these consolidated appeals.

In the underlying actions, respondents moved the district court to dismiss appellants' claims, with the exception of the breach of contract claims, on the basis that the statutes of limitations had expired on the remaining claims asserted against respondents. Appellants opposed the motions.

Without reaching the merits of respondents' motions to dismiss, the district court dismissed appellants' complaints in their entirety in both actions, without prejudice, finding that because some or all of the appellants had filed multiple district court actions involving the same claims, appellants had engaged in forum shopping. The district court's orders also instructed appellants to seek leave to file an amended

complaint in the pending district court case that had the lowest case number so that a determination of whether the statute of limitations had run could be made. Appellants timely filed this appeal.

This court has held that courts possess inherent equitable powers to dismiss actions for abusive litigation practices. Lane v. Allstate Ins. Co., 114 Nev. 1176, 1181, 969 P.2d 938, 941 (1998). Thus, this court will not disturb a district court's dismissal on such grounds absent an abuse of discretion. Id. Further, when identical causes of action are pending, involving the same parties and arising from the same incident, this court has determined that a trial court may properly dismiss the second action. Fitzharris v. Phillips, 74 Nev. 371, 376-77, 333 P.2d 721, 724 (1958), abrogated on other grounds by Lee v. GNLV Corp., 116 Nev. 424, 996 P.2d 416 (2000); see also Fernandez v. Infusaid Corp., 110 Nev. 187, 871 P.2d 292 (1994). Dismissal of a second action is also proper, generally, when a plaintiff's cause of action is indivisible, meaning a plaintiff cannot file suit for one part of the defendant's wrong and a second action for a second part of the defendant's wrong that arises from the same incident. See Smith v. Hutchins, 93 Nev. 431, 432-33, 566 P.2d 1136, 1137 (1977) (providing that a single cause of action may not be split in order to maintain separate suits). Because the defendant's wrongful act creates the plaintiff's cause of action, all forms of damages resulting from that act must be pursued in a single action. Id. at 432, 566 P.2d at 1137.

Judge shopping, generally, occurs when a litigant who obtains an unfavorable ruling seeks to have a second judge consider the same issue in hopes of having a more favorable outcome. Moore v. City of Las Vegas, 92 Nev. 402, 404, 551 P.2d 244, 246 (1976). It can also occur when, shortly after a lawsuit is filed and assigned to a particular judge, the plaintiff voluntarily dismisses or fails to prosecute the action, electing

instead to file a second identical complaint for assignment to a different judge. Hernandez v. City of El Monte, 138 F.3d 393 (9th Cir. 1998).

Having considered the parties' appellate arguments and reviewed the appendices submitted in both appeals, we conclude that the district court abused its discretion in dismissing both complaints in their entirety. In particular, the record reflects that multiple appellants were not parties to any other actions that were pending when the district court dismissed appellants' complaints. For example, in Docket No. 48140, appellants Ramir Amir, Frederick and Ziona Tredup, and the Heltzel Family Trust were not parties to any other actions that were pending at the time that the district court dismissed the underlying complaints. Similarly, in Docket No. 48141, appellants Guisala Avants, Jon and Dara Davis, the Lorraine Engel Family Trust, Heidi Meyer, Philip and Adele Engel Grandchildren, L.P., Robert Fleischman, and the Pasquale Tito Family Trust were not plaintiffs in any other pending action. Because these individuals and entities had not previously filed suit and are not required to join the other parties' lawsuits, as instructed by the district court, it was an abuse of discretion for the district court to dismiss their complaints. Cf. Cummings v. Charter Hospital, 111 Nev. 639, 896 P.2d 1137 (1995) (affirming portion of the court's order that severed plaintiffs' action after declining class certification because the complaint's claims were unique to each individual plaintiff and involved different incidents with various physicians and employees). Likewise, in Docket No. 48141, the district court improperly dismissed the claims of appellants Engel Management, Ltd., PSP, Jacqueline Gaste a/k/a Line Renaud, and Phillip and Adele Engel Family Trust, as these individuals and entities were not required to join in the Diversified/Engel matter in order to assert their claims against various respondents.

A more difficult question is presented concerning the claims of those appellants who were in one or more of the other actions, because the record does not reflect whether these claims were based on the same allegedly wrongful acts of the defendants. No abuse of discretion occurred if the actions at issue here involve the same causes of action, plaintiffs, and defendants that were pending in the Torrealba, Diversified/Engel or Wall matters. See Smith, 93 Nev. at 432-33, 566 P.2d at 1137. But claims that are based on different allegedly wrongful acts were improperly dismissed. We are unable to discern from the record which category the dismissed claims fall within because the transactions are described differently in the different complaints and the district court did not make any findings in this regard. Accordingly, the orders dismissing both complaints in their entirety must be reversed and the matters remanded to the district court. On remand, the district court must determine which causes of action were duplicates of those asserted in other actions, and were therefore properly dismissed, and which were new claims that should not have been dismissed.

Accordingly, we

ORDER the judgments of the district court REVERSED AND REMAND these matters to the district court for proceedings consistent with this order.

Cherry, J.
Cherry

Saitta, J.
Saitta

Gibbons, J.
Gibbons

cc: Hon. Kathy A. Hardcastle, District Judge
Howard Roitman, Settlement Judge
Thomas J. Tanksley, Settlement Judge
Law Office of Charles J. Lybarger
Ryan & Ciciliano, LLC
Gerrard Cox & Larsen
Goold Patterson Ales & Day
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Lewis Brisbois Bisgaard & Smith, LLP
McDonald Carano Wilson LLP/Las Vegas
John H. Pilkington
Rooker Mohrman Rawlins & Bailey LLP
Sklar Warren Conway & Williams, LLP
Eighth District Court Clerk