

IN THE SUPREME COURT OF THE STATE OF NEVADA

LEHRER MCGOVERN BOVIS, INC.,
Appellant,
vs.
MAUI ONE EXCAVATING, INC.,
Respondent.

No. 49006

FILED

SEP 05 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY: *[Signature]*
DEPUTY CLERK

ORDER OF REVERSAL

This is an appeal from a district court judgment in a lien and contract action. Eighth Judicial District Court, Clark County; Jessie Elizabeth Walsh, Judge.

Appellant Lehrer McGovern Bovis, Inc. (Bovis) appeals from a district court judgment arguing that respondent Maui One Excavating, Inc. (Maui) failed to bring the underlying action to trial within five years as required by NRCP 41(e). Maui brought this action for lien foreclosure and unjust enrichment against Bovis on June 2, 1999. The district court administratively consolidated Maui's action with multiple others into In re Venetian Lien Litigation.

In July 2006, over seven years after Maui commenced its action, Bovis moved the district court to dismiss the action pursuant to NRCP 41(e). The district court denied Bovis's motion, finding that Maui's action had been stayed by two different district court orders and that five years from the date of commencement had therefore not expired. Bovis filed a motion for reconsideration, which the district court also denied. The parties entered mediation and stipulated to enter judgment in favor of Maui, but Bovis reserved the right to appeal the judgment on the ground that the action was time-barred by NRCP 41(e).

Under NRCP 41(e), any action not brought to trial within five years of its commencement must be dismissed.¹ NRCP 41(e)'s language is mandatory and leaves no room for discretion by the district court.² This court has held that the five-year period is tolled for any period during which the parties are subject to a court-ordered stay of district court proceedings.³ In this case, Maui argues that it was subject to two court-ordered stays that extended the five-year period by two years and seven months. We disagree.

First, Maui argues that Case Management Order (CMO) 10, dated May 17, 2001, "acted as a stay" pending this court's review of the propriety of appointing a special master in the primary In re Venetian Lien Litigation case. Maui admits that CMO 10 did not actually order a stay, but argues that CMO 10 "effectively precluded" the myriad lien claimants from litigating their cases.

¹NRCP 41(e) provides, in pertinent part:

Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of any party, or on the court's own motion, after due notice to the parties, unless such action is brought to trial within 5 years after the plaintiff has filed the action, except where the parties have stipulated in writing that the time may be extended.

²Morgan v. Las Vegas Sands, Inc., 118 Nev. 315, 320, 43 P.3d 1036, 1039 (2002).

³Boren v. City of North Las Vegas, 98 Nev. 5, 5, 638 P.2d 404, 405 (1982).

We reject this argument because CMO 10 did not, actually or in effect, stay Maui's action. While CMO 10 granted a limited stay with respect to certain proceedings and continued or reassigned others, it stated clearly, "The parties may continue to file demands for preferential lien hearings before the Court as provided in NRS 108.2421 and the relevant CMO's." Because CMO 10 expressly permitted lien claimants to seek hearing dates, we conclude that it did not constitute a court-ordered stay of Maui's action.


Second, Maui argues that CMO 12, dated August 6, 2001, prevented any lien claimants that had contractual relationships with Venetian and Bovis from setting a date for trial until the end of the primary trial in In re Venetian Lien Litigation. Thus, Maui argues that its action was stayed until the district court entered judgment on the jury's verdict on December 24, 2003, approximately two years and four months after the issuance of CMO 12. We reject this argument.

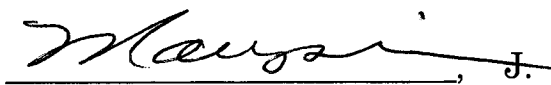
CMO 12 expressly instructed lien claimants that had contractual relationships with Venetian and Bovis to submit requests for trial settings and provided that the trial settings would follow the resolution of the primary trial: "Parties having claims against Venetian Casino Resort, LLC and Lehrer McGovern Bovis, Inc. may also submit a REQUEST FOR TRIAL SETTING . . . , but the Court will schedule these matters at a date following the July 29, 2002 trial for [the primary case]." CMO 12 does not contain any language staying any actions or even suggesting that lien claimants should wait until the resolution of the primary trial to request trial settings. Because Maui was a lien claimant that had a contractual relationship with Bovis, CMO 12 expressly and clearly permitted Maui to submit a request for a trial setting during the

pendency of the primary trial. We conclude that CMO 12 did not stay Maui's action.


We conclude that Maui's action was not subject to a court-ordered stay or any other recognized exception to the tolling of NRCP 41(e)'s five-year period. Five years from the date of the commencement of Maui's action expired on June 2, 2004. Because Maui failed to bring its action to trial by that date, dismissal is mandatory and the district court erred by entering judgment in favor of Maui. Accordingly, we

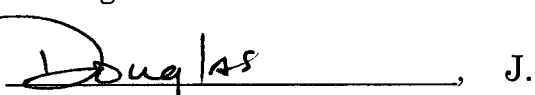
ORDER the judgment of the district court REVERSED.⁴



_____, C.J.
Gibbons


_____, J.
Maupin


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas


_____, J.
Saitta

⁴The Honorable Michael Cherry, Justice, voluntarily recused himself from participation in the decision of this matter.

cc: Hon. Jessie Elizabeth Walsh, District Judge
Jay Earl Smith, Settlement Judge
Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC
Clark Tatom, LLC
Eighth District Court Clerk