

IN THE SUPREME COURT OF THE STATE OF NEVADA

KENNETH WAYNE DORSEY,
Appellant,

vs.

CITY OF RENO; CITY OF RENO POLICE
DEPARTMENT; PATRICIA ALLEN;
DAVID DELLA; SCOTT HOPKINS;
CHARLES KENDRIX; BRUCE KIRBY;
ROBERT KNIGHT; LARRY LODGE; C.T.
NIELSON; REED THOMAS; JERRY
HOOVER; KRISTIN ERICKSON;
THOMAS BARB; WASHOE COUNTY;
AND RICHARD A. GAMMICK,
Respondents.

No. 50640

FILED

NOV 19 2008

TRAGIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *Angela*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from a district court summary judgment. Second Judicial District Court, Washoe County; Brent T. Adams, Judge.

Apparently after appellant Kenneth Wayne Dorsey obtained a writ of habeas corpus and a burglary charge against him was dismissed, he filed a district court complaint against respondents asserting civil rights claims under 42 U.S.C. § 1983 and several tort claims such as intentional infliction of emotional distress and negligent infliction of emotional distress.

Although a default was initially entered against respondent Washoe County, the district court refused to enter a default judgment and later granted Washoe County's motion to set aside the default. Thereafter, the district court dismissed Washoe County from the action. The court also granted summary judgment on Dorsey's claims against respondents Washoe County District Attorney Richard Gammick and deputy district attorneys Thomas Barb and Kristin Erickson, concluding

that they were entitled to prosecutorial immunity.¹ The remaining respondents (collectively, “the City of Reno”) also moved for summary judgment, contending that Dorsey could not prove his claims and that discretionary and qualified immunity applied. Ultimately, after resolving some discovery disputes, the district court determined that Dorsey had failed to file an opposition and granted summary judgment to the City of Reno as well. Dorsey has appealed.

On appeal, Dorsey argues that the district court abused its discretion in setting aside the default entered against Washoe County and erred in granting summary judgment to Gammick, Barb, and Erickson, as well as to the City of Reno.

Setting aside the default against Washoe County

Dorsey contends that the district court abused its discretion in setting aside the default against Washoe County because service was properly effected on a Washoe County administrative secretary, and Washoe County had actual notice of his summons and complaint. Washoe County contends, however, that Dorsey’s service was improper and that given the policy of resolving cases on the merits when possible,² the district court did not abuse its discretion in setting aside the default.

We review the district court’s decision to set aside a default, for good cause under NRCP 55(c), for an abuse of discretion.³ Having

¹Because Gammick, Barb, and Erikson attached additional materials to their motions to dismiss, the district court properly treated the motions as for summary judgment. NRCP 12(b).

²See Hotel Last Frontier v. Frontier Prop., 79 Nev. 150, 155, 380 P.2d 293, 295 (1963).

³See Hanley v. Tobler, 73 Nev. 214, 217, 313 P.2d 1110, 1111 (1957).

considered the parties' arguments, we conclude that district court did not abuse its discretion in setting aside the default.⁴

Summary judgment with respect to Gammick, Barb, and Erickson

Dorsey contends that the district court erred in determining that Gammick, Barb, and Erickson were entitled to prosecutorial immunity and therefore granting them summary judgment.

We review an order granting summary judgment de novo.⁵ Summary judgment is appropriate when no genuine issue as to any material fact remains, so that the moving party is entitled to judgment as a matter of law.⁶

A district attorney is immune from suit for damages arising out of his performance of the criminal prosecutorial function.⁷ Because Dorsey's allegations arise directly from Gammick's, Barb's, and Erickson's traditional prosecutorial functions, the district court correctly concluded that they were entitled to immunity. Consequently, no genuine issue of material fact remains with respect to Dorsey's claims against these

⁴See *id.*; NRCP 4(d)(5) (explaining that service on a county may be effected on the board of commissioner's chairperson or "other head of the legislative department"); NRS 12.105 (providing that service may be made upon the county clerk or secretary).

⁵*Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

⁶*Id.*; see also NRCP 56(c).

⁷See *County of Washoe v. District Court*, 98 Nev. 456, 457, 652 P.2d 1175, 1176 (1982) (applying the "widely recognized doctrine of common law immunity" to a district attorney's performance of civil obligations); see also *Botello v. Gammick*, 413 F.3d 971, 976 (9th Cir. 2005) (recognizing that "it is well established that a prosecutor has absolute immunity for the decision to prosecute a particular case").

respondents, and therefore the district court properly granted them summary judgment.

Summary Judgment with respect to the City of Reno

With respect to the summary judgment in favor of the City of Reno, Dorsey argues that additional discovery would have revealed evidence sufficient to defeat the City of Reno's motion, such as evidence of a conspiracy to violate his civil rights. The City of Reno contends, however, that immediately after a discovery conference, Dorsey was provided with the requested discovery materials. The City of Reno further points out that Dorsey never filed any document that specified any additional discoverable information.

The district court has wide discretion in controlling pretrial discovery⁸ and in determining whether a continuance for additional discovery is warranted under NRCP 56(f).⁹ Here, the record reflects that the district court conducted a telephonic conference in response to Dorsey's request for additional time to oppose the City of Reno's motion for summary judgment. As a result of that conference, the district court granted Dorsey an approximately two-week extension to file an opposition and directed the City of Reno to provide Dorsey with his requested discovery. In its order granting the City of Reno's motion for summary judgment, the district court noted that the City of Reno had provided to Dorsey the answers to interrogatories and other materials that he sought immediately after the telephonic conference. The order also provided that

⁸See MGM Grand, Inc. v. District Court, 107 Nev. 65, 70, 807 P.2d 201, 204 (1991).

⁹Bakerink v. Orthopaedic Associates, Ltd., 94 Nev. 428, 431, 581 P.2d 9, 11 (1978).

Dorsey had not specified any outstanding discoverable items that were material to the issues raised in the City of Reno's motion. The district court's findings are supported by the record, and Dorsey has not identified any particular discoverable information that would have been pertinent to the summary judgment motion. Accordingly, the district court did not abuse its discretion in overseeing discovery and in denying any further continuance.¹⁰

Second, Dorsey argues that the district court abused its discretion in implicitly denying his motion for a "stay" of the summary judgment proceedings pending the resolution of a request that he had filed for sanctions against the City of Reno for alleged failure to comply with pretrial orders and the discovery rules. In light of our conclusion above that the district court did not abuse its discretion in its oversight of discovery in this matter, we conclude that this argument lacks merit.

Lastly, Dorsey argues that the district court erred in treating the City of Reno's summary judgment motion as unopposed and that the disposition of his criminal case in his favor should act as res judicata and collateral estoppel on the question of whether there was probable cause to arrest him.

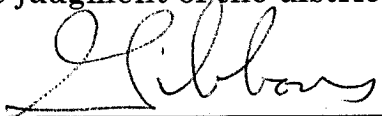
Under District Court Rule 13(3), the district court has discretion to treat the opposing party's failure to file an opposition as "an admission that the motion is meritorious and a consent to granting the motion."¹¹

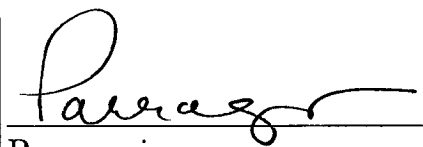
¹⁰See MGM Grand, Inc., 107 Nev. at 70, 807 P.2d at 204; Bakerink, 94 Nev. at 431, 581 P.2d at 11.

¹¹King v. Cartlidge, 121 Nev. 926, 927, 124 P.3d 1161, 1162 (2005).

In this case, Dorsey failed to oppose the City of Reno's summary judgment motion, and thus the district court properly deemed that failure an admission and consent under DCR 13(3). Moreover, to the extent that Dorsey argues that his motion to stay the proceedings and impose sanctions should be treated as an opposition, that motion did not set forth material facts showing that there is a genuine issue for trial. Consequently, the district court did not err in granting summary judgment.¹² For the above reasons, we

ORDER the judgment of the district court AFFIRMED.¹³


_____, C.J.
Gibbons


_____, J.
Parraguirre


_____, J.
Douglas

cc: Hon. Brent T. Adams, District Judge
Kenneth Wayne Dorsey
Reno City Attorney
Washoe County District Attorney Richard A. Gammick/Civil
Division
Washoe District Court Clerk

¹²Additionally, res judicata and collateral estoppel, alone, would not necessarily preclude summary judgment because, for example, these doctrines require identical, or privity between, parties, See Five Star Capital Corp. v. Ruby, 124 Nev. ____, __ P.3d ____ (Adv. Op. No. 88, October 30, 2008).

¹³As transcripts were not necessary for our review of this matter, Dorsey's request for transcripts is denied.