

IN THE SUPREME COURT OF THE STATE OF NEVADA

FAGEN DEVELOPMENT, LLC, A
NEVADA LIMITED LIABILITY
COMPANY,
Appellant/Cross-Respondent,

vs.

JAMES R. ISERN, AN INDIVIDUAL,
AND ELIZABETH A. ISERN, AN
INDIVIDUAL,
Respondents/Cross-Appellants.

No. 51018

FILED

JUL 3 1 2009

TRAGIE K. LINDEMAN
CLERK OF SUPREME COURT
BY J. Alvarado
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal and cross-appeal from a district court judgment, certified as a final judgment under NRCP 54(b), in a collection action. Fifth Judicial District Court, Nye County; John P. Davis, Judge.

Appellant/Cross-Respondent Fagen Development, LLC (Fagen) purchased debt owed to creditors of Isern Oil, LLC (Isern Oil). Isern Oil is owned by Respondents/Cross-Appellants James Isern and Elizabeth Isern.

Fagen filed a complaint in district court against both Isern Oil and the Iserns to certify the debt and to have the assignment of that debt to Fagen adjudged lawful. After Fagen filed its first complaint, the Iserns' counsel withdrew and the Iserns chose to proceed in proper person. The district court certified the debt owed by Isern Oil to Fagen and ruled that the assignment of that debt to Fagen was valid. Further, the district court ruled that the Iserns were not proved to be the alter ego of Isern Oil and that a transfer of property in Gabbs, Nevada (the Gabbs Property) by Isern Oil to Elizabeth for \$300 was fraudulent. The parties are familiar

with the facts, and we do not recount them in more detail here except as necessary to our disposition.

On appeal, Fagen argues that the district court abused its discretion in failing to impose discovery sanctions other than monetary sanctions. On cross-appeal, the Iserns argue that the district court erred in not addressing the issue of statute of limitations.¹ We conclude that the district court abused its discretion when it failed to impose discovery sanctions beyond monetary sanctions, but reject the Iserns' contentions that the district court failed to address their claims regarding the statute of limitations. We will now address each of these issues in turn below.

Discovery sanctions

Fagen filed a motion for an order compelling the Iserns to appear for depositions and to comply with Fagen's outstanding discovery requests. The district court granted Fagen's requested order. After trial, the district court found that Fagen was entitled to recover \$7,683.52 in costs and attorney fees due to the Iserns' failure to appear for depositions and because Fagen had to file a motion to compel.

Fagen argues that the district court abused its discretion by failing to impose discovery sanctions beyond monetary sanctions when the

¹Fagen also argues that the district court erred in: (1) finding that the Iserns were not the alter ego of Isern Oil, and (2) limiting the monetary sanctions to a lien on the Gabbs Property. Additionally, the Iserns argue that the district court erred in: (1) failing to require Fagen to show receipts for legal work and (2) finding that the transfer of the Gabbs Property was fraudulent. Because we conclude that the district court abused its discretion by only imposing monetary discovery sanctions on the Iserns, and that a new trial is warranted after discovery is completed, we conclude that these issues are moot.

Iserns failed to comply with the district court's order compelling discovery. We agree.

The imposition of discovery sanctions is within the power of the district court, and we will not disturb such a determination absent a showing of an abuse of discretion. GNLV Corp. v. Service Control Corp., 111 Nev. 866, 869, 900 P.2d 323, 325 (1995).

NRCP 37(b)(2) states, in pertinent part, that

If a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order.

"In general, a district court may impose sanctions only when there has been willful noncompliance with the discovery order or willful failure to produce documents as required under NRCP 16.1." Clark Cty. Sch. Dist. v. Richardson Constr., 123 Nev. 382, 391, 168 P.3d 87, 93 (2007). "It is well settled that the appropriate sanction is to be determined in the context of the particular facts of the case, with the Court's discretion guided by the standard of the sanction which is just in light of the facts." Perry v. Golub, 74 F.R.D. 360, 364 (N.D. Ala. 1976). Discovery sanctions are needed and should be imposed in situations where a party willfully disregards a court's order "to deter those who might be tempted to such conduct in the absence of such a deterrent." National Hockey League v. Met. Hockey Club, 427, U.S. 639, 643 (1976).

We conclude that the district court abused its discretion in failing to impose discovery sanctions on the Iserns beyond monetary sanctions because the Iserns' failure to provide discovery to Fagen prevented it from obtaining the information it needed to properly pursue its alter ego claim against the Iserns. The fact that the Iserns were pro se defendants does not give them the right to fail to comply with a discovery order and did not give the district court proper reason to impose merely a monetary discovery sanction, which was not appropriate in light of the Iserns' failure to comply with its order. Thus, we conclude that the district court abused its discretion in only imposing a monetary sanction on the Iserns for failing to comply with its order compelling discovery and reverse the order of the district court on this issue. Further, we remand this case to the district court for a new trial after the Iserns have complied with the district court's order compelling discovery and have provided Fagen with the discovery information it requested.

Statute of limitations


The Iserns contend that the district court considered the statute of limitations regarding the fraudulent transfer and the alleged debt. Further, the Iserns contend that this issue was not resolved by the district court in accordance with applicable statutes. The Iserns thus ask this court to review the issue on appeal. Because we conclude that this issue was waived, we decline the Iserns' request to address this issue.

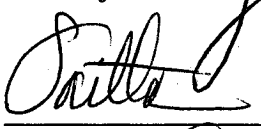
"NRCPC 8(c) states which defenses a party must plead affirmatively. Specifically, a party must affirmatively plead '... statute of limitations ...'" Clark Cty. Sch. Dist. v. Richardson Const., 123 Nev. 382, 392, 168 P.3d 87, 94 (2007).

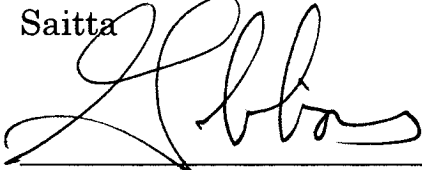
We conclude that this issue was waived because the Iserns failed to affirmatively plead the issue of statute of limitations in their first

responsive pleading. Therefore, we conclude that the district court did not err in failing to address the issue of statute of limitations and that we do not need to address this issue as it was waived. In light of the foregoing discussion, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Hon. John P. Davis, District Judge
Brooke Shaw Zumpft
Elizabeth A. Isern
James R. Isern
Nye County Clerk