

IN THE SUPREME COURT OF THE STATE OF NEVADA

THOMAS A. JURBALA, AN
INDIVIDUAL,

Appellant,

vs.

BRADLEY B. TALCOTT, AN
INDIVIDUAL, AND LINDA K.
CARICABURU, AN INDIVIDUAL,
Respondents.

No. 51557

FILED

SEP 12 2008

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

ORDER DISMISSING APPEAL

This is an appeal from a district court judgment and order granting in part and denying in part a motion for summary judgment, and denying a counter-motion for summary judgment.

On July 16, 2008, respondents filed a renewed motion to dismiss this appeal. Therein, respondents also request an award of attorney fees and costs pursuant to NRAP 38 and 39, and leave to file a reply to appellant's opposition to their motion, if any. On July 30, 2008, appellant filed an opposition to the motion.¹

In support of their renewed motion to dismiss, respondents assert that this court lacks jurisdiction over the instant appeal as the order and judgment appealed from is not a final judgment. See NRAP 3A(b)(1). Specifically, respondents assert that the order and judgment appealed from "did not dispose of all the issues in the underlying case," and was not properly certified under NRCP 54(b). See Lee v. GNLV Corp., 116 Nev. 424, 996 P.2d 416 (2000) (an order that resolves less than all of

¹The opposition purports to be filed on behalf of appellant, Thomas Reynolds and Mary Reynolds. However, Thomas Reynolds and Mary Reynolds are not parties to this appeal.

the claims or the rights and liabilities of all of the parties in an action is not appealable as a final judgment absent proper NRCP 54(b) certification by the district court).²

In his opposition, appellant does not dispute respondents assertion that this court lacks jurisdiction over the instant appeal pursuant to NRAP 3A(b)(1). Instead, appellant argues that “[t]he express language and cases interpreting NRAP 21 makes it abundantly clear that NRAP 21 provides jurisdiction for the instant appeal.” Further, appellant requests that this court issue a writ of mandamus in this appeal.

It appears that appellant has misunderstood this court’s procedural rules. NRAP 21 governs the filing of petitions for extraordinary writs, and does not provide an alternate basis for jurisdiction over an appeal. Such petitions are docketed as original proceedings in this court, and are wholly separate from appeals. If appellant is seeking the issuance of a writ of mandamus, he should have filed an original petition for such writ in this court, rather than filing a notice of appeal in the district court.

As it appears claims remain pending below, the order and judgment appealed from do not constitute a final judgment and this court, therefore, lacks jurisdiction over this appeal.³ Accordingly, respondent’s

²We note that an order denying a motion for summary judgment is not amenable to NRCP 54(b) certification. See KDI Sylvan Pools v. Workman, 107 Nev. 340, 810 P.2d 1217 (1991); Taylor Constr. Co. v. Hilton Hotels, 100 Nev. 207, 678 P.2d 1152 (1984).

³It appears that appellant’s counter-claims, the counter-claims of Thomas and Mary Reynolds, and the issue of damages remain pending below.

renewed motion to dismiss this appeal is granted. This appeal is dismissed.

Respondents argue that they are entitled to attorney fees pursuant to NRAP 38(a), as “[t]he appeal is unmistakably frivolous.” In support of their argument of frivolity, respondents state that the appeal “was filed in contravention of the district court’s express language” that the order appealed from was not a final judgment.⁴ Further, respondents note that appellant admitted in his docketing statement that claims remained pending below.

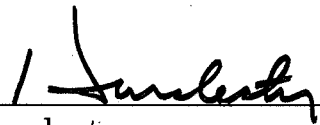
It appears that the instant appeal was filed as a result of appellant’s genuine misunderstanding of the rules of appellate procedure. Accordingly, and no sufficient cause appearing, respondents’ motion for attorney fees pursuant to NRAP 38(a) is denied.

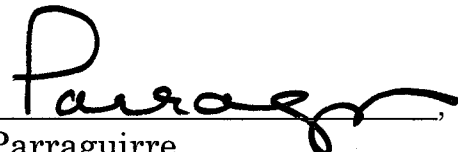
Respondents have also moved for costs on appeal pursuant to NRAP 39(a), which provides that, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise ordered. However, NRAP 39(c) states that only the cost of printing or otherwise producing copies of briefs or appendices, along with the cost of round trip transportation for one attorney attending oral argument are costs taxable in this court. As no briefs have been filed in this appeal and there has been no oral argument to attend, respondents’ motion for costs pursuant to NRAP 39 is

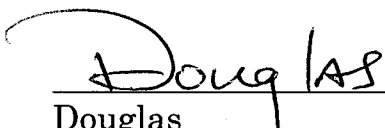
⁴The order and judgment appealed from specifically stated the following: “It is further ordered, adjudged and decreed that, as this Order does not fully adjudicate all rights and liabilities of the parties, execution of this Order and Judgment is stayed pending further order of this Court.”

denied. This denial is without prejudice to respondents' ability to file a motion for costs in the district court. See NRAP 39(e).

It is so ORDERED.⁵


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

cc: Hon. Susan Johnson, District Judge
Lansford W. Levitt, Settlement Judge
Pengilly Robbins Slater
Gordon & Silver, Ltd.
Eighth District Court Clerk

⁵Respondents' motion for leave to file a reply to appellant's opposition to the renewed motion to dismiss appeal is denied as moot.