

IN THE SUPREME COURT OF THE STATE OF NEVADA

GLENN R. WAITE, M.D., AN
INDIVIDUAL,
Appellant,

vs.

HMC MEDICAL CENTER, LLC, D/B/A
HARMON MEDICAL CENTER;
HARMON PRIMARY CARE, LLC, D/B/A
HARMON MEDICAL GROUP; AND
TIBI ELLIS, AN INDIVIDUAL,
Respondents.

No. 53685

FILED

SEP 28 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER AFFIRMING IN PART,
REVERSING IN PART AND REMANDING

This is a proper person appeal from a district court order denying appellant's motion under NRCP 60(b). Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Appellant, through counsel, filed a complaint in the district court against respondents HMC Medical Center, LLC, and Tibi Ellis. HMC moved to dismiss the complaint under NRCP 12(b)(5) and Ellis joined in the motion. After a hearing, at which appellant did not appear, the district court, finding that appellant had been properly served with the motion and joinder but nevertheless failed to file an opposition, granted the motion and joinder, and thus dismissed appellant's complaint on August 21, 2007. On September 18, 2007, appellant filed a substitution of attorney and appearance in proper person.

Appellant then filed an amended motion to proceed in proper person for the purpose of filing an amended complaint once as a matter of course under NRCP 15(a). The district court denied the motion on November 28, 2007, finding that the matter had been dismissed with

prejudice on August 21. Appellant nevertheless filed the amended complaint, naming as a new defendant respondent Harmon Primary Care, LLC (HPC), along with HMC and Ellis. Appellant later filed several motions under NRCP 59, NRCP 60, NRCP 7(b), and EDCR 2.20, seeking to set aside the August and November orders, and asking for appellate costs.¹ The court denied the motions, struck the amended complaint, and set aside a default filed against HPC. This appeal followed.

On appeal, appellant argues that the district court's August 2007 dismissal order was not final because the court did not expressly rule on the argument presented in Ellis's joinder to HMC's motion to dismiss, and thus the court did not adjudicate all parties' rights and liabilities. He next argues that Ellis's joinder was not properly noticed under EDCR 2.20(a), and therefore, the order dismissing his complaint is void. According to appellant, Ellis's joinder is likewise defective under former EDCR 2.20 because that rule did not address joinders to motions, and regardless, he was not "legally served" under NRCP 5(b), since Ellis served the joinder on appellant's attorney of record, despite knowing that appellant had discharged that attorney and retained a new one. Appellant also asserts that because the district court's order did not state that the dismissal was with prejudice, his NRCP 15(a) right to amend the complaint remained in tact. He thus appears to argue that his amended

¹Appellant filed a notice of appeal in this court after the district court determined that it lacked jurisdiction to consider appellant's motions for relief from the August and November orders. On appeal, this court reversed and remanded the matter to the district court to decide the motions. See Waite v. HMC Medical Center, Docket No. 51609 (Order of Reversal and Remand, September 5, 2008).

complaint should not have been stricken by the court as a rogue document. Appellant asks this court to reverse the district court's orders (1) denying his NRCP 60(b) motion for relief from the August 2007 dismissal order; (2) denying his amended motion to set the August 2007 order aside, striking his amended complaint, and setting aside the default; and (3) denying his motions for relief from the November 2007 order and for costs on appeal.

“Motions under NRCP 60(b) are within the sound discretion of the district court, and this court will not disturb the district court's decision absent an abuse of discretion.” Deal v. Baines, 110 Nev. 509, 512, 874 P.2d 775, 777 (1994).

In ruling on the NRCP 60(b) and other motions for relief from the August and November 2007 orders, the district court found that appellant did not identify any reasons for not responding to HMC's motion to dismiss and Ellis's joinder thereto, such that the orders should be set aside under the rules. We perceive no abuse of discretion in the district court's decision. Appellant acknowledged that he knew about the motion to dismiss hearing, and although he asserts that he discharged his attorney and retained a new one at some point before the hearing, nothing in the record shows that appellant's first attorney withdrew before the hearing or that the second attorney ever entered a notice of appearance.

We likewise conclude that the district court properly rejected appellant's arguments regarding the impropriety of Ellis's joinder and the noticing and service thereof under EDCR 2.20, since nothing in former EDCR 2.20 prevented joinder to a motion and service was properly completed on appellant's attorney of record, with notice of the hearing date and time. The court also did not abuse its discretion by denying appellant's motion to appear in proper person for the purpose of filing an

amended complaint, because the August 2007 order dismissed the complaint against the named defendants and the court based the dismissal on appellant's failure to oppose the motion to dismiss and joinder thereto and failure to appear at the hearing, treating the failures as an admission to the motion and joinder's merits. The August 21 order was an appealable, final judgment.² Because the district court acted within its discretion in rejecting appellant's post-judgment motions for relief under NRCP 60(b), NRCP 7(b), and EDCR 2.20, it also properly denied appellant's request to amend the already-dismissed complaint and properly struck the erroneously filed amended complaint.³ See SFPP, L.P. v. Dist. Ct., 123 Nev. 608, 612, 173 P.3d 715, 717-18 (2007) (noting that a complaint cannot be amended unless the final judgment is first set aside or vacated under civil procedure rules). And because the default against Harmon Primary Care was entered based on its failure to answer appellant's amended complaint, the default was properly set aside since appellant was not granted leave to file the amended complaint.⁴

Finally, the district court erred by denying appellant's motion for costs on appeal since appellant prevailed in his appeal from the district

²Appellant's argument that the dismissal order was not final lacks merit, as the order dismissed the complaint as to all named defendants.

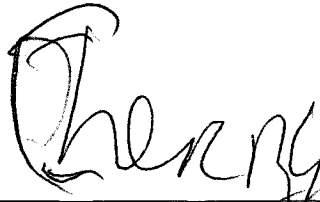
³Although the district court denied appellant's various requests for relief from the August and November 2007 orders, it does not appear from the record that appellant's NRCP 59 motion was directly resolved.

⁴Appellant's argument that he should have been permitted to file an amended complaint under NRCP 15(a) once as a matter of course lacks merit because he did not file the amended complaint until after the district court entered its order dismissing the action.

court's order concluding that it lacked jurisdiction to decide appellant's post-judgment motions for relief from the dismissal orders, and because the filing fee costs appellant sought were taxable only in the district court. See NRAP 39(e)(5) (providing that appellate filing fees are taxable in the district court); cf. NRAP 39(c) (providing what specific costs (which do not include filing fees) are taxable in the supreme court).

Accordingly, we

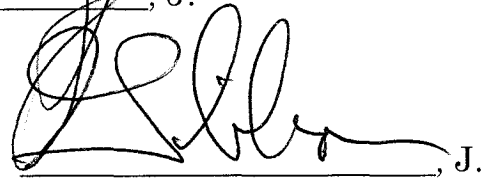
ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART, for reconsideration of appellant's motion for costs on appeal, AND REMAND this matter to the district court.⁵



Cherry



Saitta



Gibbons

cc: Hon. Michelle Leavitt, District Judge
Glenn R. Waite, M.D.
Hutchison & Steffen, LLC
Patti, Sgro & Lewis
Eighth District Court Clerk

⁵To the extent that appellant asks this court to sanction Ellis's attorney for failure to file an attorney's certificate with a supplemental response, the request is denied. See NRAP 28.2(a) (requiring briefs to be submitted with an attorney's certificate).