

IN THE SUPREME COURT OF THE STATE OF NEVADA

FOX AND MALL, LTD., A NEVADA
PROFESSIONAL CORPORATION
D/B/A COMPREHENSIVE PRIMARY
CARE,
Appellant,
vs.
JEREMY R. AUSTIN, M.D.,
Respondent.

No. 56093

FILED

JUN 21 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *Anderson*
DEPUTY CLERK

ORDER AFFIRMING IN PART, VACATING IN PART AND
REMANDING

This is an appeal from a district court order dismissing the complaint in a contracts action. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Appellant Fox and Mall (F&M) filed a breach-of-contract complaint against its former employee, respondent Jeremy Austin.¹ After the case had been pending in district court for nearly seven years, Austin filed a motion to dismiss on the ground that F&M failed to abide by NRCP 41(e), which requires a plaintiff to bring a case to trial within five years of filing the complaint. The district court granted Austin's motion and dismissed F&M's complaint with prejudice.

On appeal, F&M contends that the dismissal should have been without prejudice. Because we are unable to conclude based upon the record before us whether a dismissal without prejudice would have been proper, we vacate the district court's determination that the dismissal be

¹The parties are familiar with the facts, and we do not recount them further except as necessary to our disposition.

with prejudice and remand this case so that the district court may make the appropriate inquiry.

The district court may have erred in dismissing F&M's complaint with prejudice

Initially, we note that the district court properly dismissed F&M's complaint under NRCP 41(e), as dismissal is mandatory when a plaintiff fails to bring a case to trial within five years of filing the complaint.² However, the district court may have erred in dismissing with prejudice.

We review a district court's decision to dismiss with prejudice under NRCP 41(e) for an abuse of discretion. Monroe v. Columbia Sunrise Hosp., 123 Nev. 96, 102-03, 158 P.3d 1008, 1012 (2007). In exercising its discretion, the district court should consider several factors: "[(1)] the underlying conduct of the parties, [(2)] whether the plaintiff offers adequate excuse for the delay, [(3)] whether the plaintiff's case lacks

²This court has recognized only two exceptions that toll NRCP 41(e)'s five-year window, neither of which applies here. Morgan v. Las Vegas Sands, Inc., 118 Nev. 315, 320, 43 P.3d 1036, 1039 (2002) (describing the two exceptions).


F&M's attempt to analogize this case to one of those exceptions is unavailing. In Boren v. City of North Las Vegas, 98 Nev. 5, 638 P.2d 404 (1982), we adopted the following exception: "Any period during which the parties are prevented from bringing an action to trial by reason of a stay order shall not be computed in determining the five-year period of Rule 41(e)." 98 Nev. at 6, 638 P.2d at 405 (emphasis added).


In this case, the only hurdle preventing F&M from bringing its case to trial was its own failure to follow the district court's instructions. Thus, even if the district court had issued a formal stay order pursuant to NRS 38.221(6), the stay would have been lifted in a matter of weeks once the district court "render[ed] a final decision" on Austin's motion to compel arbitration. As such, F&M was not "prevented from" bringing its case to trial "by reason of a stay order" in the manner contemplated by Boren.

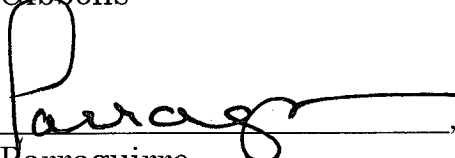
merit, and [(4)] whether any subsequent action following dismissal would not be barred by the applicable statute of limitations.” Id. at 103, 158 P.3d at 1012 (footnote omitted).

Here, the record indicates that the district court considered only one factor: whether F&M had an adequate excuse for the delay. To be sure, F&M’s failure to provide the district court with the requested briefing did not constitute an adequate excuse for the delay. Nonetheless, the district court’s failure to consider the remaining relevant factors constituted an abuse of discretion. Cf. Jitnan v. Oliver, 127 Nev. ___, ___, 254 P.3d 623, 629 (2011) (“Without an explanation of the reasons or bases for a district court’s decision, meaningful appellate review, even a deferential one, is hampered because we are left to mere speculation.”). Accordingly, on remand, we instruct the district court to consider all the relevant factors in determining whether dismissal with prejudice is appropriate.

Consistent with the foregoing, we ORDER the judgment of the district court AFFIRMED IN PART AND VACATED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.


_____, J.
Douglas


_____, J.
Gibbons


_____, J.
Parraguirre

cc: Hon. Michelle Leavitt, District Judge
Thomas J. Tanksley, Settlement Judge
Gage Law Firm, PLLC
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Eighth District Court Clerk