IN THE SUPREME COURT OF THE STATE OF NEVADA

EDWARD S. COLEMAN, ESQ., AND COLEMAN LAW ASSOCIATES, A NEVADA PROFESSIONAL CORPORATON, Appellants, vs. FRANK ROMANO AND MARIA ROMANO, Respondents.	No. 58597
FRANK ROMANO AND MARIA ROMANO, Appellants, vs. EDWARD S. COLEMAN, ESQ., AND COLEMAN LAW ASSOCIATES, A NEVADA PROFESSIONAL CORPORATION, Respondents.	No. 59257

FILED

FEB 10 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER AFFIRMING IN PART AND REVERSING IN PART

Consolidated appeals from a district court summary judgment, an order dismissing complaint, and post-judgment orders denying a motion to alter or amend and a motion for reconsideration in an attorney fees and legal malpractice action. Eighth Judicial District Court, Clark County; Susan Johnson, Judge.

Docket No. 59257

Appellants Frank and Maria Romano filed a legal malpractice complaint against respondent Edward Coleman, Esq., following Coleman's failure to timely renew a federal bankruptcy court judgment. The judgment expired in 2001, and the Romanos did not file their malpractice complaint until 2008. Coleman pursued federal appeals from the order

declaring the judgment unenforceable, which were resolved in 2008. The district court dismissed the Romanos' claims due to the running of the statute of limitations for attorney malpractice actions under NRS 11.207. Because we conclude that the Romanos' legal malpractice action was not barred by the statute of limitations, we reverse in part the district court's order granting the motion to dismiss.

Standard of review

This court reviews a district court's order granting a motion to dismiss de novo. *Munda v. Summerlin Life & Health Ins. Co.*, 127 Nev. ___, ___, 267 P.3d 771, 774 (2011). Such an order will be upheld where "'it appears beyond a doubt that the plaintiff could prove no set of facts . . . [that] would entitle him [or her] to relief.'" *Id.* (third alteration in original) (quoting *Vacation Vill., Inc. v. Hitachi Am., Ltd.*, 110 Nev. 481, 484, 874 P.2d 744, 746 (1994)).

The district court erred in concluding that the statute of limitations barred the Romanos' malpractice claim

On appeal, the Romanos assert that the malpractice action against Coleman did not accrue until the Ninth Circuit Bankruptcy Appellate Panel rejected their appeal of the bankruptcy court's judgment in 2008. Coleman, on the other hand, argues that the cause of action accrued upon the actual occurrence of the legal harm: his failure to properly renew the judgment in 2001. The district court agreed with Coleman's argument.

NRS 11.207(1) provides that a plaintiff must initiate a legal malpractice action against an attorney within four years of suffering damages or two years after the plaintiff discovers or should have discovered through reasonable diligence the facts underlying the cause of action. In a legal malpractice action where the alleged error arises in the course of litigation, damages accrue upon the resolution of the underlying

legal action. *Hewitt v. Allen*, 118 Nev. 216, 221, 43 P.3d 345, 348 (2002). This litigation malpractice tolling rule also extends to appeals of the underlying litigation, thus the malpractice cause of action does not accrue until after an adverse ruling on appeal. *Id.*; *see also Semenza v. Nevada Med. Liab. Ins. Co.*, 104 Nev. 666, 668, 765 P.2d 184, 186 (1988) (The purpose of the litigation malpractice tolling rule is to prevent malpractice litigation where the underlying damage is speculative or remote, since "'[a]pparent damage may vanish with successful prosecution of an appeal and ultimate vindication of [the] attorney's conduct by an appellate court.'" (first alteration in original) (quoting *Amfac Distrib. Corp. v. Miller*, 673 P.2d 795, 796 (Ariz. Ct. App. 1983))).

This court recently held that non-adversarial bankruptcy proceedings do not constitute litigation and thus do not toll NRS 11.207(1)'s statute of limitations. *Moon v. McDonald, Carano & Wilson, LLP*, 129 Nev. ___, ___, 306 P.3d 406, 409-10 (2013). *Moon* notes that "'[t]here is a bright-line test to distinguish between the non-adversarial and adversarial portions of a bankruptcy proceeding: adversarial proceedings begin when a creditor files a complaint in a bankruptcy action.'" *Id.* at ___, 306 P.3d at 409 (alteration in original) (quoting *Cannon v. Hirsch Law Office, P.C.*, 213 P.3d 320, 328 (Ariz. Ct. App. 2009) (citing Fed. R. Bankr. P. 7003)). In *Cannon*, the Arizona appeals court stated that "[a]dversary proceedings are characterized as ones 'having opposing parties' and that are 'contested, as distinguished from an ex parte hearing or proceeding.'" 213 P.3d at 326 (quoting *Black's Law Dictionary* 52 (6th ed. 1990)). We conclude that unlike *Moon*, this case involves an adversarial proceeding.

First, the record demonstrates that the hearing surrounding the failure to renew the judgment was filed under the same case number as the adversarial proceeding initiated by the complaint filed by the Romanos. Second, the proceeding included opposing parties and was contested, unlike the transactional proceeding in *Moon*. In 2002, Coleman filed a motion to renew the judgment against Rudolph LaVecchia and Rudolph M. LaVecchia, which was uncontested by the LaVecchias. In 2008, Coleman sought to renew the judgment a second time. In response, the LaVecchias filed a motion to vacate the judgment on the ground that the 2002 motion was filed after the 2001 deadline. Although the bankruptcy court ruled in 2008 that the judgment was no longer valid after 2001 when the deadline for renewing the judgment passed, the Romanos assert that Coleman sought to collect on the judgment without a challenge by the LaVecchias in the intervening time. Because the hearing was contested by opposing parties and the case number under which the hearing fell was initiated by a complaint, the hearing was adversarial under *Moon* and *Cannon*.

NRS 11.207's limitations period begins to run when the injury accrues, and we have held that the injury accrues upon the conclusion of an unsuccessful appeal. *Hewitt*, 118 Nev. at 221, 43 P.3d at 348. Here, the appeal was decided in 2008 and the malpractice complaint was filed three months later. Thus, we conclude that Coleman's argument that damages accrued in 2001 upon his failure to renew the judgment is unpersuasive.

Next, Coleman argues that the Romanos should have discovered the legal harm through due diligence well before its actual discovery in 2008 and that NRS 11.207(1)'s limitations period begins two years after the plaintiff should have discovered an injury occurred, regardless of whether there is ongoing litigation.

Prior to 1997, NRS 11.207 provided that the limitations period began to run when the damages occurred *and* the plaintiff discovered or should have discovered the material facts to support a malpractice claim. In 1997, the Legislature amended NRS 11.207 to provide that a plaintiff has four years to bring an action following the accrual of damages, or two years following discovery of the injury, "whichever occurs earlier." 1997 Nev. Stat., ch. 184, § 2, at 478. Thus, the four year period begins upon the accrual of damages, but the two year period begins upon the discovery of the material facts supporting a claim of legal malpractice, and the start of the limitations period is based upon "whichever occurs earlier." NRS 11.207(1).

As the concurrence stated in *Kopicko v. Young*, "'[w]here there has been no final adjudication of the client's case in which the malpractice allegedly occurred, the element of injury or damage remains speculative and remote, thereby making premature the cause of action for professional negligence.'" 114 Nev. 1333, 1338, 971 P.2d 789, 792 (1998) (Springer, C.J., concurring) (quoting *K.J.B., Inc. v. Drakulich*, 107 Nev. 367, 369, 811 P.2d 1305, 1306 (1991)). Thus, the two-year discovery period does not start until after the final adjudication of the client's case, because the damage or injury element of the legal malpractice cause of action is not established until the underlying litigation is final. In this case, that occurred in October 2008, three months before the Romanos filed a malpractice complaint and thus well within the two year limitations period of NRS 11.207(1).

Therefore, we conclude that Coleman's argument that damages accrued in 2001 upon his failure to renew the judgment is unpersuasive.

Accordingly, we reverse the district court's order granting Coleman's motion to dismiss.[1]

Docket No. 58597

Coleman filed a counterclaim against the Romanos and the company the Romanos owned, U.S. Rent-A-Car (USRAC), for unpaid attorney fees. In a motion for summary judgment, the Romanos argued that Coleman's claims for unpaid fees were barred by NRS 11.190's statute of limitations and that Coleman's claim for fraud in the inducement did not create a genuine issue of material fact. Coleman countered that the Romanos had reaffirmed the debt through multiple oral agreements. The district court granted the Romanos' motion for summary judgment. Coleman then filed a motion for reconsideration, seeking to admit, under NRCP 56(f), evidence of a novation by USRAC of its obligations under the fee agreement. The district court denied Coleman's motion.

In his counterclaim, Coleman argues that a reaffirmation of the Romanos' agreement to pay fees to Coleman tolled the statute of limitations, that a genuine issue of fact remains regarding whether the Romanos committed fraud in the inducement, and that the district court abused its discretion by refusing Coleman's motion for reconsideration because further discovery under NRCP 56(f) would have permitted Coleman to create a genuine issue of fact. We find Coleman's arguments unpersuasive and affirm the district court's orders granting summary judgment and denying Coleman's motion for reconsideration.

---

[1]Because the district court erred on these grounds, we need not consider the Romanos' alternate arguments that Nevada should adopt the continuous litigation rule or that the district court erred in denying their motion to alter or amend the judgment following the motion to dismiss.

Standard of review

"This court reviews a district court's grant of summary judgment de novo." *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Looking at the evidence in a light most favorable to the nonmoving party, this court affirms a grant of summary judgment "when the pleadings and other evidence on file demonstrate that no 'genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law.'" *Id.* (alteration in original) (quoting NRCP 56(c)).

The statute of limitations ran on Coleman's fee claims against the Romanos

Coleman argues that a material issue of fact remained regarding whether a 2008 email written by Frank Romano in response to an email from Coleman about unpaid fees constituted a writing sufficient under NRS 11.390 to revive the debt. As the district court noted in its order, the USRAC cases for which Coleman sought the unpaid fees were resolved in 2002. Because the record shows that there was no written fee agreement, the applicable statute of limitations period is four years. NRS 11.190(2)(c). Thus, the district court correctly concluded that the email, even if sufficient under NRS 11.390, could not renew the now-barred claim for breach of contract. *Havas v. Long*, 85 Nev. 260, 262, 454 P.2d 30, 31 (1969), *superseded on other grounds by amendments to NRCP 12 as stated in Fritz Hansen A/S v. Eighth Judicial Dist. Court*, 116 Nev. 650, 653, 656, 6 P.3d 982, 983, 985 (2000).

The district court properly dismissed Coleman's motion for reconsideration and Coleman's fraud-in-the-inducement claim

Coleman argues that the district court improperly granted summary judgment regarding claims for USRAC's fees because the Romanos guaranteed the fee claims against USRAC. Coleman also

contends that a novation of USRAC's fees occurred. Specifically, he claims that he brought a check the Romanos wrote him in 2008 to the court's attention in a motion to reconsider the order granting summary judgment. According to Coleman, if he were allowed to produce that check, he would be able to raise a genuine issue of fact regarding whether a novation occurred in 2008.

"A district court may reconsider a previously decided issue if substantially different evidence is subsequently introduced or the decision is clearly erroneous." *Masonry & Tile Contractors Ass'n of S. Nev. v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997). Coleman does not explain why this additional evidence was previously unavailable or why he did not bring it to the court's attention until after the order granting the motion for summary judgment. Accordingly, the district court did not abuse its discretion by denying the motion for reconsideration.[2]

Because Coleman pleads no facts supporting his allegation of fraud other than the promise to pay and the resulting failure to fulfill that promise, the district court properly granted summary judgment in regard

---

[2]Coleman also argues that the district court abused its discretion because, under NRCP 56(f), a party should be granted a continuance on a motion for summary judgment if further discovery is needed to justify the party's opposition. Coleman did not seek a continuance under NRCP 56(f) until his motion for reconsideration, and we know of no authority for seeking such a continuance *after* a motion for summary judgment has been decided. *See Aviation Ventures, Inc. v. Joan Morris, Inc.*, 121 Nev. 113, 118, 110 P.3d 59, 62 (2005); *Ameritrade, Inc. v. First Interstate Bank of Nev.*, 105 Nev. 696, 700, 782 P.2d 1318, 1320 (1989); *Bakerink v. Orthopaedic Assocs., Ltd.*, 94 Nev. 428, 431, 581 P.2d 9, 11 (1978). Accordingly, NRCP 56(f) is not the correct vehicle for Coleman to proffer new evidence after the motion for summary judgment was decided.

to Coleman's fraud-in-the-inducement claims. *Bulbman, Inc. v. Nev. Bell*, 108 Nev. 105, 112, 825 P.2d 588, 592 (1992). ("The mere failure to fulfill a promise or perform in the future . . . will not give rise to a fraud claim absent evidence that the promisor had no intention to perform at the time the promise was made.").

Having determined that the district court erred in granting Coleman's motion to dismiss the Romanos' complaint and did not err in granting summary judgment dismissing Coleman's complaint, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART.

_____, C.J.
Gibbons

_____, J.
Pickering

_____, J.
Hardesty

_____, J.
Parraguirre

_____, J.
Douglas

_____, J.
Cherry

_____, J.
Saitta

cc: Hon. Susan Johnson, District Judge
Stephen E. Haberfeld, Settlement Judge
Coleman Law Associates
Olson, Cannon, Gormley, Angulo & Stoberski
Mincin Law, PLLC
The McKnight Law Firm, PLLC
Eighth District Court Clerk