

IN THE SUPREME COURT OF THE STATE OF NEVADA

RON BRADY, SR.; AND PREMIER
MANAGEMENT SERVICES, INC.,
Appellants,
vs.
BANK OF AMERICA, N.A. SUCCESSOR
IN INTEREST TO LASALLE BANK,
N.A.; DOTAN Y. MELECH,
(PERSONALLY AND IN HIS
FIDUCIARY CAPACITY AS
"RECEIVER"); UNITED ASSET
MANAGEMENT SERVICES, INC.;
NORTON CONSULTING AND
INVESTIGATIONS, LLC, A NEVADA
LIMITED LIABILITY COMPANY; DLS
RP, LLC, A NEVADA LIMITED
LIABILITY COMPANY; AND
PREFERRED PROPERTY
MANAGEMENT, LLC,
Respondents.

No. 59858

FILED

MAR 26 2014

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

*ORDER AFFIRMING IN PART, REVERSING IN PART, AND
REMANDING*

This is an appeal from a district court order dismissing a complaint in a tort action. Eighth Judicial District Court, Clark County; Kathy A. Hardcastle, Judge.

Appellants Ron Brady, Sr. and his company, Premier Management Services, Inc. (PMS), claim to have had a purchase arrangement with the original owners of an apartment complex, whereby the property would be quitclaim deeded to Brady, and Brady would assume the payments on the preexisting mortgage note held by Bank of

America (BofA).¹ Pursuant to this agreement, Brady assumed control of the apartment complex and made the mortgage payments for four years. During this time, Brady, on behalf of the apartment complex, entered into a personal lease with himself to store several pieces of personal and PMS business equipment on the property. After the apartment complex increased in value, the original owners would no longer go through with the sale without renegotiating the terms. Consequently, Brady stopped paying the mortgage while he filed suit to determine ownership.

During Brady's suit against the original owners, BofA foreclosed on the property and Dotan Melech was appointed as the receiver. Brady and PMS's attorney advised Melech of their personal lease for the storage of Brady's personal items and items owned by PMS and provided him with a copy of the contract. After making numerous requests for the property, providing documentation, and being denied access, appellants filed a notice of personal property on premises with the Clark County recorder's office. The apartment complex was subsequently sold at a foreclosure sale to a third party who in turn sold it to DLS RP, LLC (DLS). During clean up, DLS allegedly began to dispose of or convert to their own use some of the contested property. After Brady delivered a list of his personal property and a copy of the recorded notice of personal property, some of the contested property was returned.

¹On appeal from a dismissal, we consider the allegations in the complaint as true. *Sanchez v. Wal-Mart Stores*, 125 Nev. 818, 823, 221 P.3d 1276, 1280 (2009).

Appellants sued respondents BofA; Melech; United Asset Management Services, Inc. (UAMS); Norton Consulting and Investigations, LLC (NCI)²; DLS; and Preferred Property Management, LLC (PPM), asserting damages in excess of \$10,000. Respondents separately moved to dismiss the complaint, with the parties attaching various documents to their motions and oppositions. The district court determined that Brady abandoned the property but might have an action if appellants could establish the existence of the lease. The court also explained that because respondents stated that the property had been returned and ownership had not been established in the receivership, Brady would only have a small-claims action and would need to go back to the receivership first. The district court ultimately dismissed the case without prejudice and instructed appellants to return to the court that oversaw the receivership before pursuing their claims.

On appeal, appellants argue, among other things, that the district court: (1) improperly converted the motion to dismiss into a motion for summary judgment; (2) failed to correctly apply *Anes v. Crown Partnership, Inc.*, 113 Nev. 195, 932 P.2d 1067 (1997), when it found that appellants needed to and failed to seek permission to file against the receiver in the appointing department; and (3) improperly dismissed NCI. We discuss each contention in turn.

²Melech contracted with NCI to act as his agent to perform security services on the property.

Conversion of the motion to dismiss

We rigorously review a district court order granting an NRCP 12(b)(5) motion to dismiss, accepting all of the plaintiff's factual allegations as true and drawing every reasonable inference in the plaintiff's favor to determine whether the allegations are sufficient to state a claim for relief. *Sanchez v. Wal-Mart Stores, Inc.*, 125 Nev. 818, 823, 221 P.3d 1276, 1280 (2009). A complaint should be dismissed for failure to state a claim "only if it appears beyond a doubt that it could prove no set of facts, which, if true, would entitle it to relief." *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008). We review the district court's legal conclusions de novo. *Id.*

Under NRCP 12(b), if matters outside of the pleadings are presented to and not excluded by the district court, a motion made under 12(b)(5) shall be treated as a motion for summary judgment "and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." In this case, the district court relied on matters outside of the pleadings in rendering its decision without informing the parties that it was converting the motion into one for summary judgment. In failing to inform the parties, the district court failed to allow the parties to present any additional relevant materials. Moreover, appellants pointed out to the court that discovery needed to commence before it could decide the factual issues. *See* NRCP 56(c) (stating that summary judgment is proper only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact"). The court then inappropriately considered the attached documents and made factual findings absent discovery while still purportedly deciding the case under the motion to

dismiss standard. Because the district court improperly considered matters outside the pleadings we cannot review the district court's order as granting a motion to dismiss, and its failure to adequately convert the motion to dismiss to a motion for summary judgment precludes us from properly reviewing the order under a summary judgment standard. Accordingly, we conclude that the district court's order must be reversed and remanded for the district court to allow for a full briefing of the issues as a motion for summary judgment, except as to respondent NCI as explained further below.

However, there are two issues that we still need to address to facilitate the proceedings on remand.

Jurisdiction and personal liability

Appellants contend that the district court clearly erred when it determined that Melech's appointing court retained jurisdiction over the action filed against Melech when he was acting outside of his authority and jurisdiction. They argue that *Anes*, 113 Nev. 195, 932 P.2d 1067, controls this case and points out that it states that when a receiver exceeds the limits of his authority, obtaining leave from the court is unnecessary and that the receiver may be held personally liable.

We conclude that the district court misapplied *Anes* in the prior proceeding and clarify the application of *Anes* to assist the district court in re-addressing this issue on remand. As a receiver, Melech "must not exceed the limits of the authority granted by the court and must act for the benefit of all persons interested in the property." *Anes*, 113 Nev. at 202, 932 P.2d at 1071 (internal quotation marks omitted). "[A] receiver has no right ordinarily through summary proceedings, or in a summary manner, to take into custody property found in the possession of strangers to the suit, claiming adversely." Annotation, *Right of receiver to take*

property in summary manner or by summary proceedings from strangers to the record, 40 A.L.R. 903, 904 (1926). If Melech obtained property purportedly belonging to Brady personally or to PMS, a nonparty, Melech had two options. Either he could have proceeded by suit against appellants or he could have made them a party to the initial suit and asked the court to extend the receivership to the contested property. See *Wheaton v. Daily Tel. Co.*, 124 F. 61, 62 (2d Cir. 1903); *Musgrove v. Gray*, 26 So. 643, 644 (Ala. 1899); *McAfee v. Bankers' Trust Co. of Muskegon*, 235 N.W. 807, 808 (Mich. 1931); *State ex rel. Parsons Mining Co. v. McClure*, 133 P. 1063, 1069 (N.M. 1913); *Parker v. Browning*, 8 Paige Ch. 388, 391 (N.Y. Ch. 1840); *Keyser v. Erickson*, 211 P. 698, 700-01 (Utah 1922); 75 C.J.S. *Receivers* § 100 (2013); 75 C.J.S. *Receivers* § 106.

Accordingly, if appellants' allegations are true and Melech chose neither course of action, then Melech may have acted outside the bounds of the receivership by exceeding the limits of the authority granted by the court and by failing to behave neutrally. *Anes*, 113 Nev. at 202, 932 P.2d at 1071. This conduct would permit appellants to file this suit without leave of the receivership court. *Id.* at 200, 932 P.2d at 1070 (“[W]here the receiver acts beyond the scope of its court-derived authority such that it may be sued as an individual, leave of the court is unnecessary.”). Thus, the district court will need to reassess this factual issue on remand to determine if Melech acted outside the scope of his authority.³

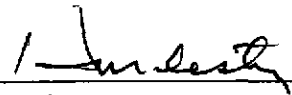
³At this time, we decline to grant Melech's request to sanction appellant's counsel. However, we remind counsel that violations of the Nevada Rules of Appellate Procedure (NRAP) may result in sanctions. NRAP 28(j) (“Briefs that are not in compliance may be disregarded or
continued on next page...”)

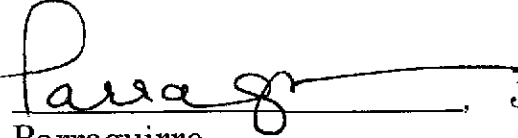
Dismissal of NCI

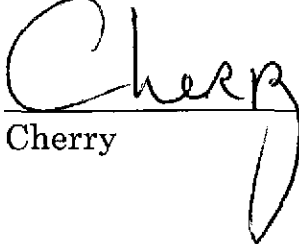
We also address the dismissal of NCI. Because the complaint fails to allege any wrongdoing on NCI's part, we conclude that the district court properly removed NCI from the case. Under either the motion to dismiss or the summary judgment standards, appellants failed to allege a case against NCI.

Accordingly, we⁴

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


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Cherry

...continued

stricken, on motion or sua sponte by the court, and the court may assess attorney fees or other monetary sanctions against the offending lawyer.”).

⁴All other issues on appeal either lacked merit or were rendered moot by this disposition.

cc: Eighth Judicial District Court Dept. 4
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