IN THE SUPREME COURT OF THE STATE OF NEVADA

NICHOLAS WILLIAM PARADISE, JULIA ANN PARADISE, WILLIAM MICHAEL PARADISE, JULIE ANN PARADISE, AND EDWARD DONALD "BUD" KUBALL,

Appellants,

vs.

MARLENE ZYCHOWICZ AND TRANS WORLD AIRLINES,

Respondents.

No. 35672

FILED

AUG 10 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order dismissing the complaint for failure to bring the case to trial within three years after remand. Appellants also challenge the district court's order denying summary judgment.

On appeal, appellants contend that the bankruptcy stay involving TWA has never been lifted. Therefore, the district court was prohibited from dismissing appellants' claim under NRCP 41(e) since appellants were not yet able to proceed against TWA or Marlene Zychowicz so long as the stay remained in effect. We disagree, and accordingly, we affirm the determination of the district court.

"Pursuant to NRCP 41(e), a court must dismiss an action 'unless such action is brought to trial within five years after the plaintiff has filed his action, except where the parties have stipulated in writing that the time may be extended.'"[1] "The five-year rule is intended to compel expeditious determinations of legitimate claims."[2] "Dismissal after five years is mandatory and the only discretionary

[1]Baker v. Noback, 112 Nev. 1106, 1110, 922 P.2d 1201, 1203 (1996) (citing NRCP 41(e)).

[2]Id. (citing C.R. Fedrick, Inc. v. Nevada Tax Comm'n, 98 Nev. 387, 389, 649 P.2d 1372, 1374 (1982)).



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aspect of the dismissal is whether it is with or without prejudice."[3]

In addition to the five-year mandatory prosecution rule, NRCP 41(e) also addresses prosecution of a case following remittitur. Specifically, the rule holds that "[w]hen in an action after judgment, an appeal has been taken and judgment reversed with cause remanded for a new trial . . . the action must be dismissed by the trial court . . . unless brought to trial within three years from the date upon which remittitur is filed."[4] Although the language in this regard addresses the situation in which a cause of action is remanded for a new trial, this court has "held that a district court may accord the same three-year limit in which to bring an action to trial in the first instance after remand."[5] The standard of review for a rule 41(e) dismissal is that of abuse of discretion.[6]

In this instance, we conclude that the district court did not abuse its discretion in dismissing appellants' claim as to either TWA or Zychowicz. Appellants were afforded five years from the date of June 1, 1988 - or three years from the date of our remand on December 20, 1990 - to bring its case to trial against respondents. Under either rule, they failed to bring this action by the prescribed date.

As to TWA - although 11 U.S.C. § 362 provided for an automatic stay when TWA declared bankruptcy in 1992, we

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[3]Id. (citing Home Sav. Ass'n v. Aetna Casualty & Sur. Co., 109 Nev. 558, 563, 854 P.2d 851, 854 (1993)).

[4]NRCP 41(e) (emphasis added).

[5]Bell & Gossett Co. v. Oak Grove Investors, 108 Nev. 958, 961, 843 P.2d 351, 353 (1992) (citing McGinnis v. Consolidated Casinos Corp., 97 Nev. 31, 623 P.2d 974 (1981)).

[6]See Northern Illinois Corp. v. Miller, 78 Nev. 213, 370 P.2d 955 (1962).

disagree with appellants that all proceedings were halted on account of this declaration. To the contrary, appellants could have adjudicated their claim in bankruptcy court;[7] they could have adjudicated their claim in Nevada state court after entering a stipulation to that effect;[8] or they could have renewed their claim during the 30-day window following the close of TWA's bankruptcy.[9] But instead of engaging in any of these options, appellants did nothing.

Nevada has no tolling period regarding time limitations under NRCP 41(e) unless the parties are "prevented from bringing an action to trial by reason of a court-ordered stay."[10] Because appellants had viable options for bringing their action to trial as provided for in the bankruptcy court orders, any tolling period of NRCP 41(e) does not apply. As to respondent Zychowicz, we conclude that TWA's automatic stay had no bearing on appellants' ability to prosecute their case against the therapist.[11] Accordingly, appellants were required to bring their case to trial against Zychowicz no later than December 20, 1993.

Appellants contend that the filing of a summary judgment motion against Zychowicz constituted bringing the case to trial, thereby satisfying the three-year remand rule.

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[7]11 U.S.C. § 157(c).

[8]The bankruptcy court entered an order in June 1992 establishing procedures to modify the automatic stay with respect to litigation on insured claims. Appellants were made known of this order on two separate occasions, but they failed to sign a stipulation that would have enabled them to litigate the claim in Nevada district court.

[9]11 U.S.C. § 108(c).

[10]Baker, 112 Nev. at 1110, 922 P.2d at 1203 (citing Boren v. City of North Las Vegas, 98 Nev. 5, 638 P.2d 404 (1982)).

[11]See Sav-A-Trip, Inc. v. Belfort, 164 F.3d 1137 (8th Cir. 1999) (holding that, absent unusual circumstances, the automatic stay of § 362 does not extend to co-defendants).

However, we conclude that this contention is without merit. Specifically, this court has held that "the denial of a motion for summary judgment merely involves a finding that there remain triable issues of fact."[12] Thus, losing a motion for summary judgment "is not a trial."[13] Conversely, "the submission of a motion for summary judgment which is subsequently granted constitutes bringing an action to trial."[14]

Here, the motion for summary judgment against Zychowicz was denied by the district court. Therefore, appellants' pre-trial efforts against Zychowicz were insufficient to confer "trial" status on the proceeding.

Having considered all other issues raised on appeal by appellants, and having determined those issues are without merit, we

ORDER the judgment of the district court AFFIRMED.

Young, J.

Leavitt, J.

Becker, J.

cc: Hon. Valorie Vega, District Judge
Kossack Law Offices
Seyfarth, Shaw, Fairweather & Geraldson,
Denton & Lopez, Ltd.
Marlene Zychowicz
Clark County Clerk

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[12]United Ass'n of Journeymen v. Manson, 105 Nev. 817, 820, 783 P.2d 955, 957 (1989).

[13]Id.

[14]Id. at 817, 783 P.2d at 956.