

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

LAMARR ROWELL,
Appellant,
vs.
MARIBELLE HENRY,
Respondent.

No. 65585

FILED

APR 15 2015

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

ORDER OF AFFIRMANCE

This is a pro se appeal from a district court order denying a motion for NRCP 60(b) relief from the dismissal of a civil rights action. Sixth Judicial District Court, Pershing County; Richard Wagner, Judge.

Appellant Lamar Rowell, an inmate, filed a 42 U.S.C. § 1983 action against respondent Maribelle Henry, the culinary food manager at Lovelock Correctional Center. Thereafter, Henry moved to dismiss the complaint, arguing that Rowell had failed to exhaust his administrative remedies as required by 42 U.S.C. § 1997e(a). In response, Rowell filed a non-opposition indicating that he did not oppose having his case dismissed, without prejudice, on exhaustion grounds, and the district court subsequently dismissed the case without prejudice. Shortly thereafter, Rowell filed an NRCP 60(b) motion to set aside the dismissal order, which Henry opposed. The district court denied the motion and this appeal, which challenges only the denial of the NRCP 60(b) motion, followed.


On appeal, Rowell argues, as he did below, that NRS 41.0322(3) required the district court to stay his action while he exhausted his administrative remedies, rather than dismiss the case. While Rowell acknowledges that he filed a non-opposition to the motion to dismiss, he contends that Henry's motion misrepresented the law and that he was not aware of NRS 41.0322(3) when he filed the non-opposition to her motion.


NRS 41.0322 governs actions brought by individuals in the custody of the Department of Corrections seeking "to recover compensation for the loss of [their] personal property, property damage, personal injuries or any other claim arising out of a tort pursuant to NRS 41.031." Rowell's complaint, however, was brought under 42 U.S.C. § 1983 and alleged violations of the Eighth and Fourteenth Amendments to the United States Constitution, rather than any of the claims delineated in NRS 41.0322.

Under these circumstances, even if we were to put aside the fact that Rowell expressly consented to the dismissal of his complaint, *see* DCR 13(3) (providing that the failure to oppose a motion "may be construed as an admission that the motion is meritorious and a consent to granting the same"), Rowell's assertion that NRS 41.0322(3) required the district court to stay his action until his administrative remedies were exhausted, rather than dismiss it, is without merit. *See McCoy v. Goord*, 255 F. Supp. 2d 233 (S.D.N.Y. 2003) (concluding that "[i]n the context of § 1983 and the PLRA . . . courts have squarely held that the district court may not stay the action pending exhaustion, as Congress eliminated the authority to do so by enacting the PLRA. Pre-suit exhaustion is thus required." (citation omitted)). Thus, we conclude that the district court

did not abuse its discretion in refusing to set aside the dismissal of Rowell's complaint, *see Stoecklein v. Johnson Elec., Inc.*, 109 Nev. 268, 271, 849 P.2d 305, 307 (1993) (providing that an order denying NRCP 60(b) relief is reviewed for an abuse of discretion), and we therefore

ORDER the judgment of the district court AFFIRMED.¹


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Sixth Judicial District Court, Dept. One
Lamarr Rowell
Attorney General/Carson City
Pershing County Clerk

¹Because the transcript Rowell requested is not necessary to our resolution of this matter, we deny Rowell's transcript request.