

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CHASE L. SULZINGER; RONALD P.
SULZINGER; AND DEANNA L.
SULZINGER,
Appellants,
vs.
PNC BANK, NATIONAL
ASSOCIATION, SUCCESSOR IN
INTEREST TO NATIONAL CITY REAL
ESTATE SERVICES, LLC, SUCCESSOR
BY MERGER TO NATIONAL CITY
MORTGAGE, INC., FORMERLY
KNOWN AS NATIONAL CITY
MORTGAGE CO.,
Respondent.

No. 67020

FILED

MAY 27 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is a pro se appeal from a district court order dismissing a quiet title action.¹ Second Judicial District Court, Washoe County; Janet J. Berry, Judge.

On October 23, 2014, respondent filed a motion to dismiss appellants' quiet title action. The certificate of service for that document indicates that it was served on appellants, by mail, on that same day. The district court later granted the motion to dismiss as unopposed on November 12, 2014, concluding any opposition was due by November 5,

¹Although appellants' notice of appeal designates only the order dismissing their case as being challenged on appeal, their January 5, 2015, civil appeal statement also references the district court's denial of their motion to set aside the dismissal order. Because the motion to set aside sought a substantive alteration of the dismissal order and was filed within ten days of service of notice of entry of that order, that motion is treated as an NRCP 59(e) tolling motion, *see* NRAP 4(a)(4); *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 584-85, 245 P.3d 1190, 1194-95 (2010), which we review for an abuse of discretion on appeal from the dismissal order. *AA Primo Builders*, 126 Nev. at 589, 245 P.3d at 1197.

2014, but that no opposition had been filed. Thereafter, appellants filed an opposition to the motion to dismiss on November 14, 2014. Appellants then filed a motion to set aside the dismissal order, arguing the November 14 opposition was timely filed and questioning whether respondent actually served the motion to dismiss on October 23, 2014, because, among other things, appellants did not receive that motion until November 6. The district court ultimately denied the motion to set aside without addressing the issues appellants raised regarding the service of the motion to dismiss and when they received that document.² This appeal followed.

In challenging the dismissal of their complaint on appeal, appellants' civil appeal statement points to the district court's conclusion that their opposition was due November 5, 2014, and asserts they did not even receive the motion to dismiss until November 6, 2014. In addressing appellants' arguments, respondent asserts,³ among other things, that appellants' opposition was untimely filed and that appellants had sufficient time after they claimed to have received the motion to file and serve an opposition.

As detailed above, the district court held the opposition to the motion to dismiss was due by November 5, 2014, and on appeal, respondent advances this same date as being when appellants were required to have filed this document. The calculation of the applicable due date for appellants' opposition necessarily begins with WDCR 12(2), which

²The order denying the motion to set aside states that respondent opposed the motion even though no such opposition was filed. While it is possible that the district court may have treated respondent's reply to appellants' opposition to the motion to dismiss as an opposition to the motion to set aside, no explanation for the district court's conclusion in this regard is provided in that order.

³In this response, respondent addresses only the limited assertions contained in the case appeal statement appellants filed in the district court along with their notice of appeal on December 3, 2014, rather than the appellate arguments contained in their January 5, 2015, civil appeal statement, which constitutes their opening brief in this matter.

requires that an opposition to a motion be filed within ten days of service of the motion. In addition, when the time to oppose is less than 11 days, NRC 6(a) excludes intermediate Saturdays, Sundays, and nonjudicial days from the computation of time.

Thus, if the motion was served on October 23, 2014, ten days from that date would have fallen on November 7, 2014.⁴ Because the motion was served by mail, however, appellants had an additional three days, running from November 7, to file their opposition, such that this document was actually due on November 10, 2015. See NRC 6(e) (adding three days to the time to respond to documents served by mail); *Winston Prods. Co. v. DeBoer*, 122 Nev. 517, 134 P.3d 726 (2006) (explaining the method of calculation under NRC 6(a) and NRC 6(e)).

Here, the district court dismissed appellants' complaint based on their failure to oppose the motion to dismiss on November 12, 2014, one judicial day⁵ after the actual November 10 due date for appellants' opposition. Nonetheless, appellants did not file their opposition until November 14, several days after both the actual due date for that document and the district court's dismissal of their action. Ordinarily, the failure of a party to file and serve an opposition to a motion "may be construed as an admission that the motion is meritorious and a consent to granting the same." DCR 13(3). And the fact that a party is proceeding pro se does not excuse that party's failure to comply with applicable court rules. See *Lombardi v. Citizens Nat'l Trust & Sav. Bank*, 289 P.2d 823 (Cal. Ct. App. 1955).

In seeking to set aside the dismissal of their action, appellants asserted they did not receive the motion until November 6, 2014. While their discussion of this point was somewhat vague, appellants seemed to

⁴Nevada Day fell on October 31, 2014, and was therefore excluded from the computation as a nonjudicial day. See NRS 236.015(1) (providing that Nevada Day is observed on the last Friday in October).

⁵Veteran's Day is observed on November 11. NRS 236.015(1).

contend that respondent did not mail the motion to dismiss on the date stated in the certificate of service which, if true, might have tolled the time for them to file their opposition. Alternatively, any delay in their receipt of respondent's motion may have occurred for some other reason if respondent actually mailed that document on October 23, 2014, which may not have tolled the time for appellants to file their opposition. Despite appellants' allegations regarding their delayed receipt of respondent's motion to dismiss, however, the district court did not address this issue in denying the motion to set aside.


Given that the district court incorrectly held appellants' opposition was due on November 5, the fact that the order denying the motion to set aside does not even address appellants' argument they did not receive the motion to dismiss until one day after the date on which the court believed the opposition to be due is problematic. Under these circumstances, we conclude the district court abused its discretion in denying appellants' motion to set aside the dismissal order.⁶ *AA Primo Builders*, 126 Nev. at 589, 245 P.3d at 1197 (concluding that the denial of a timely, post-judgment motion seeking a substantive alteration in the final judgment is reviewed for an abuse of discretion on appeal from that judgment).

Determining when respondent actually served the motion to dismiss, when appellants received that document, and, if appellants did

⁶We note that the district court did not grant the motion to dismiss until a week after the date on which it believed the opposition to be due. Had the district court correctly determined the due date to be November 10 and waited an equivalent period beyond that date to grant the motion to dismiss, it would have had appellants' untimely opposition on hand and might have elected to consider that opposition and resolve the motion on its merits, although the decision as to whether the untimely opposition would be considered would rest within the district court's sound discretion. *See King v. Carlidge*, 121 Nev. 926, 927-28, 124 P.3d 1161, 1162 (2005) (concluding that the grant of a motion for summary judgment as unopposed where the opposing party filed an untimely opposition to the motion is reviewed for an abuse of discretion).

not receive the motion until November 6, why that delay occurred, however, necessarily involves the resolution of questions of fact which must be resolved by the district court in the first instance.⁷ See *Round Hill Gen. Improvement Dist. v. Newman*, 97 Nev. 601, 604, 637 P.2d 534, 536 (1981) (concluding that "an appellate court is not an appropriate forum in which to resolve disputed questions of fact"). Accordingly, we reverse the district court's denial of appellants' motion to set aside the order granting respondent's motion to dismiss and remand this matter to the district court for the purpose of reconsidering that motion consistent with this order.

It is so ORDERED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

⁷To support its argument that appellants had sufficient time to respond to the motion to dismiss, respondent points to appellants' assertion, made in the case appeal statement filed contemporaneously with their notice of appeal, that appellants did not receive the motion to dismiss "for a week after" the date respondent indicated it was mailed. While this assertion suggests they received the motion to dismiss sometime around October 30, which differs from the November 6 date on which they claimed to have received the motion to dismiss in their motion to set aside and their civil appeal statement, the determination of when appellants actually received that document is a factual issue that must be resolved by the district court in the first instance. See *Round Hill Gen. Improvement Dist. v. Newman*, 97 Nev. 601, 604, 637 P.2d 534, 536 (1981).

cc: Hon. Janet J. Berry, District Judge
Chase L. Sulzinger
DeAnna L. Sulzinger
Ronald P. Sulzinger
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Washoe District Court Clerk