

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KENNETH BERBERICH, TRUSTEE,
ON BEHALF OF 4499 WEITZMAN
PLACE TRUST, A NEVADA TRUST,
AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,

Appellant,

vs.

SOUTHERN HIGHLANDS
COMMUNITY ASSOCIATION, A
NEVADA NONPROFIT
CORPORATION; MTC FINANCIAL
INC., A CALIFORNIA CORPORATION
REGISTERED IN NEVADA; OLYMPIA
MANAGEMENT SERVICES, LLC, A
NEVADA LIMITED LIABILITY
CORPORATION; OLYMPIA GROUP,
LLC, A NEVADA LIABILITY
CORPORATION; AND FEDERAL
HOME LOAN MORTGAGE
CORPORATION, A FEDERALLY
CHARTERED CORPORATION,
Respondents.

No. 72689

FILED

APR 20 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF REVERSAL

Kenneth Berberich appeals from a district court's order of dismissal with prejudice. Eighth Judicial District Court, Clark County; Joanna Kishner, Judge.

4499 Weitzman Place Trust ("the Trust") owns a home located within the Southern Highlands Community Association.¹ In February 2016, the Trust filed a derivative action against Southern Highlands

¹We do not recount the facts except as necessary to the disposition.

Community Association (“SHCA”), MTC Financial Inc., Olympia Management Services, LLC, Olympia Group, LLC, and Federal Home Loan Mortgage Corporation.² Thereafter the district court granted leave for the Trust to amend its complaint to substitute proper party plaintiff Kenneth Berberich as trustee on behalf of the Trust (collectively “Berberich”).³

On August 1, 2016, Berberich submitted to chambers a proposed order for voluntary dismissal pursuant to NRCP 41(a)(1)(i), which the district court signed and filed on August 2, 2016. The filed order also contained superfluous language such as “the parties to this action to bear their own costs and fees.” That same day, SHCA moved to set aside the order pursuant to NRCP 60(b), arguing SHCA never agreed to bear its own attorney fees and costs, and critically, the voluntary dismissal was improper because Berberich had not repaid all defendants’ filing fees as required by NRCP 41(a)(1). The district court granted SHCA’s motion to set aside the order, striking the August 2, 2016 order of dismissal.⁴ Thereafter, on September 6, 2016, Berberich repaid all filing fees to defendants below.

²The complaint asserted causes of action for interference with prospective business advantage, breach of contract, breach of fiduciary duty, negligence, quiet title/declaratory relief, slander of title, preliminary and permanent injunction, breach of covenant of good faith and fair dealing, fraud, intentional misrepresentation, concert of action, and violation of NRS 107.028 (detailing the obligations of a deed of trust trustee).

³The amended complaint removed Olympia Group LLC, from the listed defendants.

⁴Thereafter, Berberich filed for writ relief from the supreme court requesting that the court reinstate the struck August 2, 2016 order of dismissal; that request was ultimately denied. *See Berberich v. The Eighth Judicial Dist. Ct.*, Docket No. 71235 (Order Denying Petition for Writ of Mandamus and Prohibition, Oct. 17, 2016).

On November 7, 2016, SHCA filed a motion to dismiss Berberich's amended complaint, scheduling the hearing for December 8, 2016. But, the district court continued the matter to January 10, 2017, due to Berberich's unavailability. On December 21, 2016, the district court issued an order to show cause for Berberich's failure to comply with scheduling an early case conference and also set this hearing for January 10, 2017.

On December 22, 2016, Berberich filed a Second Voluntary Dismissal of Action pursuant to NRCP 41(a)(1)(i). On January 10, 2017, the district court presided over a hearing on its order to show cause and SHCA's motion to dismiss without Berberich's presence. And, on February 24, 2017, the district court filed a written order dismissing Berberich's complaint with prejudice.

On appeal, Berberich argues that the district court exceeded its jurisdiction after December 22, 2016, because he filed an NRCP 41(a)(1)(i) notice of voluntary dismissal,⁵ and that the district court erred by

⁵Berberich also argues that he properly voluntarily dismissed the underlying case on August 2, 2016. But, this argument is without merit because Berberich had not repaid all defendants' filing fees when the August 2, 2016 order was filed, *see* NRCP 41(a)(1). Most importantly, the Nevada Supreme Court previously concluded that the district court did not abuse its discretion in setting aside the August 2, 2017 order of dismissal. *See Berberich v. Eighth Judicial Dist. Ct.*, Docket No. 71235 (Order Denying Petition for Writ of Mandamus and Prohibition Oct. 17, 2016) ("it does not appear that petitioner was aggrieved by the district court's decision to strike its August 2, 2016, order, as the district court's apparent intent in doing so was simply to put petitioner in the same position he was in before that order was entered.") *see also Deal v. Baines*, 110 Nev. 509, 512, 874 P.2d 775, 777 (1994) ("Motions under NRCP 60(b) are within the sound discretion of the district court, and this court will not disturb the district court's decision absent an abuse of discretion."). As an intermediate appellate court, our

“reopening” the case and entertaining other matters, ultimately dismissing Berberich’s case with prejudice.⁶ We agree.

We review questions regarding the scope of a district court’s jurisdiction upon the filing of voluntary dismissal notice, de novo. See *Emerson v. Eighth Judicial Dist. Court*, 127 Nev. 672, 677, 263 P.3d 224, 227 (2011). Under 41(a)(1)(i), a plaintiff may dismiss an action upon repayment of the defendants’ filing fees by filing a notice of dismissal any time before an adverse party files an answer or moves for summary judgment. A notice filed under NRCP 41(a)(1)(i) terminates the district court’s jurisdiction over the merits of the action. *Emerson*, 127 Nev. at 677, 263 P.3d at 227 (citing *Jeep Corp. v. Second Judicial Dist. Ct.*, 98 Nev. 440, 443–44, 652 P.2d 1183, 1186 (1982)); *Harvey L. Lerer, Inc. v. Eighth Judicial Dist. Ct.*, 111 Nev. 1165, 1170, 901 P.2d 643, 646 (1995).

Our review of the record reflects that Berberich’s December 22, 2016, notice of voluntary dismissal divested the district court of jurisdiction because no defendant had filed an answer or moved for summary

freedom of action in resolving a particular case constrained by existing precedent of the Nevada Supreme Court under principles of stare decisis. *Hubbard v. United States*, 514 U.S. 695, 720 (1995) (Rehnquist, C.J., dissenting) (noting stare decisis “applies a fortiori to enjoin lower courts to follow the decision of a higher court”).

⁶Berberich further argues the district court abused its discretion in ruling on other matters prior to his filing of the notice of voluntary dismissal on December 22, 2016. But, we need not address these arguments as they are moot in light of Berberich’s ultimately filing a voluntary dismissal of the action. See *Personhood Nevada v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010) (holding that appellate courts will only address live controversies).

judgement, and Berberich repaid all of the defendants' filing fees.⁷ See NRCP 41(a)(1); see also *Emerson*, 127 Nev. at 677, 263 P.3d at 227 (opining “jurisdiction over matters related to the merits of a case terminates upon dismissal.”)

We next determine the propriety of the district court's actions following a proper notice of voluntary dismissal. An NRCP 41(a)(1) voluntary dismissal is considered a final judgment under our appellate procedural rules. NRAP 4(a)(3); see also *Valley Bank of Nev. v. Ginsburg*, 110 Nev. 440, 445, 874 P.2d 729, 733 (1994)(noting that an NRCP 41(a)(1) dismissal notice “would unquestionably have constituted a final judgment”). “[O]nce a final judgment is entered, the district court lacks jurisdiction to reopen it, absent a proper and timely motion under the Nevada Rules of Civil Procedure.” *SFPP, L.P. v. Second Judicial Dist. Ct.*, 123 Nev. 608, 612, 173 P.3d 715, 717 (2007). Moreover, “[u]nless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice.” NRCP 41(a)(1).


Because Berberich's notice of voluntary dismissal filed December 22, 2016, amounted to a final judgment, we conclude the district court erred by holding hearings on pending motions affecting the merits, and thereafter dismissing the case with prejudice. See *Harvey L. Lerer, Inc.*, 111 Nev. at 1170, 901 P.2d at 646 (“Rule 41(a)(1) is the shortest and surest route to abort a complaint when it is applicable There is nothing the defendant can do to fan the ashes of that action into life *and the court has*

⁷However, we take no position on any collateral matters currently pending before the district court. See *Emerson*, 127 Nev. at 679, 263 P.3d at 229 (holding the district court retains jurisdiction over collateral matters, including attorney fees and costs, following a voluntary dismissal).

no role to play.") (internal quotations omitted) (emphasis in original); see also *Duke Energy Trading & Mktg., L.L.C. v. Davis*, 267 F.3d 1042, 1049 (9th Cir. 2001) ("Once the [Rule 41(a)(1)] notice of dismissal has been filed, the district court loses jurisdiction over the dismissed claims and may not address the merits of such claims *or issue further orders pertaining to them.*") (emphasis added). Accordingly, we

ORDER the February 24, 2017 order of the district court REVERSED as Berberich's notice of voluntary dismissal dated December 22, 2016, effectively divested the district court of jurisdiction.


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Joanna Kishner, District Judge
Brauer, Driscoll, Sun and Associates LLC
Aldridge Pite, LLP
Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP/Las Vegas
Burke, Williams & Sorensen, LLP
Kemp, Jones & Coulthard, LLP
Eighth District Court Clerk