

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

FRANK MILFORD PECK,
Appellant,
vs.
THE STATE OF NEVADA; THE STATE
OF NEVADA DEPARTMENT OF
CORRECTIONS; AND NDOC
DIRECTOR JAMES DZURENDA,
Respondents.

No. 75179-COA

FILED

DEC 05 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

Frank Milford Peck appeals from district court orders granting dismissal and summary judgment in a civil rights action. Eighth Judicial District Court, Clark County; Jerry A. Wiese, Judge.

Peck filed a civil rights complaint and two amended complaints against respondents, among other defendants who did not appear below, ultimately alleging five counts based upon the prison air conditioning system, the prison diet, an emergency call button, the prison grievance process, and issues relating to his legal documents and copying of such documents. Respondents filed a motion to dismiss count III pursuant to NRCP 12(b)(5), then a motion to dismiss or alternatively for summary judgment as to counts I and II, and subsequently, a motion to dismiss or alternatively for summary judgment as to counts IV and V. Over Peck's opposition, the district court granted dismissal of count III and summary judgment as to the remaining counts through three separate orders, one for each separate motion. This appeal followed.

An order granting an NRCP 12(b)(5) motion to dismiss is reviewed de novo. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). A decision to dismiss a complaint under NRCP 12(b)(5) is rigorously reviewed on appeal with all alleged facts in the

complaint presumed true and all inferences drawn in favor of the plaintiff. *Id.* Dismissing a complaint is appropriate “only if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief.” *Id.* at 228, 181 P.3d at 672. If, however, a party presents matters outside the pleadings, and the court does not exclude them, “the motion shall be treated as one for summary judgment and disposed of as provided in [NRCP] 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by [NRCP] 56.” NRCP 12(b).

With regard to the dismissal of count III, the district court considered documents presented by respondents, which were outside the pleadings. Here, the motion to dismiss was based upon NRCP 12(b)(5), and it appears dismissal was granted under this standard as the district court did not indicate anything to the contrary. Nonetheless, the basis for the disposition of count III is not entirely clear since the order simply states that the court found that prison experts determined that dietary needs were being met and that dismissal was granted. But because the district court considered matters outside of the pleadings, it generally would have been required to convert the motion to one for summary judgment and provide Peck an opportunity to present additional relevant materials, which it failed to do. *See* NRCP 12(b). And while, as respondents set forth in the district court, *Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 847, 858 P.2d 1258, 1261 (1993), allows the court to consider matters of public record in ruling on an NRCP 12(b)(5) motion to dismiss, the district court did not address whether this exception to the general rule was applicable or should apply in this matter.

Since the district court considered matters outside of the pleadings, failed to cite the standard it was deciding the motion under and failed to address the applicability of *Breliant* or properly convert the motion

to summary judgment, we cannot properly review the order under the dismissal or summary judgment standards. Accordingly, we must reverse the dismissal of count III and remand for further proceedings consistent with this order.

Turning to the orders granting summary judgment on counts I, II, IV and V, this court reviews them de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper if the pleadings and all other evidence on file demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Id.* When deciding a summary judgment motion, all evidence must be viewed in a light most favorable to the nonmoving party. *Id.* Additionally, pursuant to NRCP 56(c), when granting summary judgment, the district court's order "shall set forth the undisputed material facts and legal determinations on which the court granted summary judgment."

Here, as to the order granting summary judgment on counts I and II, the district court's order wholly fails to set forth any undisputed facts. And while the order set forth a few statements of law, it fails to actually set forth any determinations regarding that law as applied to the facts of the case. Further, the district court applied an improper standard for summary judgment. Specifically, while it properly stated that it viewed the evidence in a light most favorable to Peck, the district court found that there were no set of circumstances under which Peck could prevail "based upon the pleadings and allegations set forth in the Second Amended Complaint," thereby apparently focusing on the allegations of the complaint rather than determining whether there were genuine issues of material fact and respondents were entitled to judgment as a matter of law, as required for summary judgment. *See Wood*, 121 Nev. at 729, 121 P.3d at 1029. Because the order does not properly set forth the undisputed facts and legal

determinations as required by NRCP 56(c), and appears to be based on an improper standard, we necessarily reverse the grant of summary judgment as to counts I and II¹ and remand for further proceedings consistent with this order.² See NRCP 56(c) (requiring the court to state the legal and factual reasons for its grant of summary judgment); see also *ASAP Storage, Inc. v. City of Sparks*, 123 Nev. 639, 656-57, 173 P.3d 734, 746 (2007) (reversing and remanding a portion of a district court order granting summary judgment because the order failed to set forth the undisputed material facts and legal determinations supporting its decision).

The order granting summary judgment as to counts IV and V likewise fails to set forth the undisputed facts upon which it relied and again relies upon an improper standard to resolve the case. As such, we likewise necessarily reverse the grant of summary judgment as to counts IV and V and remand for further proceedings consistent with this order.³ See NRCP 56(c); see also *ASAP*, 123 Nev. at 656-57, 173 P.3d at 746.

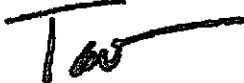
¹On appeal, Peck argues that the district court failed to resolve his allegations regarding the allegedly non-functional call button. From our review of the record, it does not appear that this issue was explicitly addressed. Thus, on remand, if the district court has, in fact, considered this issue, that should be made apparent in any future order. If the issue was not addressed, the district court should do so in resolving these issues on remand.

²We note that Peck sought discovery in his opposition and again on appeal asserts he should have been given discovery. This issue was not addressed in the district court's order and on remand, the district court should address whether Peck's request warranted a continuance under NRCP 56(f) in order for discovery to be had.

³We note that summary judgment as to counts IV and V was based upon the failure to exhaust administrative remedies as required by the Prison Litigation Reform Act, and Peck argued that administrative remedies were effectively unavailable to him; however, the order granting summary judgment did not explicitly address this issue. Any future order

Accordingly, for the reasons set forth above, we
ORDER the judgment of the district court REVERSED AND
REMAND this matter to the district court for proceedings consistent with
this order.⁴


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Jerry A. Wiese, District Judge
Frank Milford Peck
Attorney General/Carson City
Attorney General/Las Vegas
Eighth District Court Clerk

regarding summary judgment as to counts IV and V should address this
issue in order to facilitate any further appellate review.

We further note that Peck asserts on appeal that he was not allowed
to review a bankers box of his grievances that was presented to and
reviewed by the district court in relation to the summary judgment motion
on counts IV and V. If true, Peck should be given an opportunity to review
and respond to this evidence, if the district court actually relied upon it in
reaching its decision.

⁴Ordinarily we would direct respondents to file a responsive brief
prior to providing relief, *see* NRAP 46A(c); however, the subject orders are
facially deficient, thereby precluding a proper review. Accordingly, we
conclude a responsive brief is not warranted in this matter. In reversing
and remanding, we make no comment as to the merits of any of the grounds
set forth in support of dismissal and/or summary judgment that resulted in
these order.