

IN THE SUPREME COURT OF THE STATE OF NEVADA

LILLIE LEVY,

No. 36842

Appellant,

vs.

METROPOLITAN PROPERTY AND
CASUALTY INSURANCE COMPANY,

Respondent.

FILED

NOV 14 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order dismissing the action that appellant Lillie Levy brought against respondent Metropolitan Property and Casualty Insurance Company.

On appeal Levy first contends that the district court erroneously dismissed her various causes of action stemming from Metropolitan's handling of her insurance claims. These were causes of action that Levy had re-filed after the district court – following our instructions – had dismissed once the mandatory five-year, failure-to-prosecute period under NRCP 41(e) had expired.

After Levy re-filed her action, the district court granted Metropolitan's motion to dismiss, concluding that the statute of limitations had passed on all of her re-filed causes of action. Levy does not dispute the district court's actual calculation of the relevant limitations periods, but instead argues that the district court should have equitably tolled the statute of limitations in her favor.¹ In rare and extraordinary circumstances, we have recognized that the statute-of-limitations defense is an affirmative defense that is subject to equitable remedies such as equitable tolling.² But we have not before stated whether the equitable-

¹Metropolitan argues that we should reject Levy's equitable tolling argument because she did not present the argument to the district court. We note, however, that Levy argued in her opposition to Metropolitan's motion to dismiss that public policy favors tolling of the statute of limitations, which is, in essence, a plea for equitable tolling.

²See, e.g., *O'Lane v. Spinney*, 110 Nev. 496, 874 P.2d 754 (1994) (recognizing that there could be a basis for using equitable tolling to preserve the validity of a former judgment in a receivership case, but
continued on next page . . .

tolling doctrine will save an action that has been dismissed for failure to prosecute.

We leave that question for another day, however, and simply observe here that, even if we were to allow equitable tolling to apply to actions dismissed for failure to prosecute, the circumstances of this case would not call for such equity. The equity-seeker's diligence and any deception on the part of the opposing party are some of the factors considered in deciding whether equitable relief is appropriate.³

Here, Levy acknowledges that – due to her own “clerical error” – the NRCP 41(e) period lapsed without Levy having secured an additional stipulation from Metropolitan to extend the time to bring the matter to trial. Further, she provides no evidence that the mandatory period passed due to any deception or false assurances from Metropolitan. Accordingly, we conclude that the district court did not err in refusing to equitably toll the statute of limitations in Levy's favor.⁴

Levy next contends that the district court erroneously dismissed her claim for malicious prosecution, a claim that was not among those raised in her original cause of action. In ruling on Metropolitan's

... continued

remanding to allow the district court to make the appropriate findings); Copeland v. Desert Inn Hotel, 99 Nev. 823, 673 P.2d 490 (1983) (recognizing equitable tolling in the context of Nevada's antidiscrimination laws where an administrative agency had misled the plaintiff regarding the time allowed to file an administrative action).

³Copeland, 99 Nev. at 826, 673 P.2d at 492.

⁴Because we conclude that the district court properly dismissed Levy's re-filed actions on statute-of-limitations grounds, we need not address the issue of whether the district court properly dismissed the re-filed actions on the additional ground that the limitation provision in the insurance contract precluded her claims.

Likewise, we need not address Levy's argument that she sufficiently pleaded her re-filed causes of action. The district court dismissed Levy's re-filed causes of action on statute-of-limitations grounds, not for failure to properly plead the claims. Thus, the argument is irrelevant.

Finally, Levy's argument that Metropolitan's denial of her claim is a continuing offense that tolls the statute of limitations is misguided. She relies on Perelman v. State for the proposition. 115 Nev. 190, 192, 981 P.2d 1199, 1200 (1999). Perelman, however, addresses the statute of limitations applicable to the crime of insurance fraud and, therefore, does not apply to this civil matter.

motion to dismiss this claim, the district court considered evidence outside of the pleadings; therefore, we will review it as a motion for summary judgment.⁵

In order to survive Metropolitan's motion under summary judgment standards, Levy had to, "by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial . . ."⁶ Specifically, Levy carried the burden of demonstrating that Metropolitan, in reporting information to the State,⁷ lacked probable cause and acted with malice, as well as demonstrating that she prevailed in her criminal action and suffered damages.⁸

We conclude that Levy failed to show that Metropolitan lacked probable cause.⁹ In a civil action for malicious prosecution, probable cause is defined as "such a state of facts in the mind of defendant as would lead a person of ordinary caution and prudence to believe . . . that plaintiff had committed a crime."¹⁰ Here, Metropolitan presented evidence of the facts that prompted it to report Levy to the Insurance Commissioner. Specifically, Metropolitan provided the deposition testimony of Moshe Perelman who testified regarding Levy's acts of destroying her own property and inflating its appraised value through bribery. Levy does not challenge Perelman's testimony or the district court's consideration of it.

⁵See NRCP 12(b).

⁶Posadas v. City of Reno, 109 Nev. 448, 452, 851 P.2d 438, 442 (1993).

⁷Metropolitan argues that it cannot be held liable for malicious prosecution because the State, not Metropolitan, commenced the criminal proceedings against Levy. But this is incorrect because, as noted in Lester v. Buchanen, simply giving information that ultimately leads to prosecution can be grounds for liability if done without probable cause and with malice. 112 Nev. 1426, 1429, 929 P.2d 910, 912-13 (1996) (quoting Restatement (Second) of Torts, §653 cmt. g (1977)).

⁸See Dutt v. Kremp, 111 Nev. 567, 571-72, 894 P.2d 354, 357 (1995).

⁹Although the district court did not expressly make this conclusion, we are in a position to do so: "When there is no dispute concerning the facts upon which an attorney acted in filing the prior action, the question of whether there was probable cause to institute the prior action is purely a legal question to be answered by the court." See id. at 572, 894 P.2d at 357. The question is one that we will answer where the record is developed. See id. at 574, 894 P.2d at 358-59.

¹⁰Black's Law Dictionary at 835 (6th ed. abridged, 1991).

Although Levy contends that Metropolitan acted maliciously in reporting her, she does not point us to any evidence in the record tending to show that Metropolitan lacked probable cause. For instance, Levy first asserts that Metropolitan provided facts to the prosecutor that Metropolitan knew to be false. This, however, is a bare allegation supported only by a reference to the same allegation found in the copy of her complaint in the record.

She next asserts that Metropolitan paid its attorney for the time he was involved in Levy's criminal trial. But she provides no authority indicating that this was improper. For its part, Metropolitan explains that its attorney simply provided information that the prosecutors requested and attended trial in order to obtain facts useful in defending against Levy's civil action.

Levy also alleges that Metropolitan submitted an altered version of the insurance contract to the court at the outset of this action in 1993. Again, she provides no reference to the record supporting this. In any event, even if accepted as true, this allegation has little bearing on the question of whether Metropolitan had probable cause to report Levy to the Insurance Commissioner.

Absent specific facts demonstrating the existence of a genuine issue for trial, Metropolitan's strong evidence that Levy submitted a fraudulent insurance claim was sufficient to support the conclusion that Metropolitan had probable cause to report her. Thus, we conclude that the district court properly granted Metropolitan's motion for summary judgment.¹¹

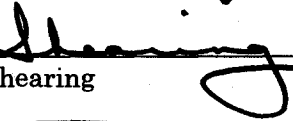
We conclude that all of Levy's contentions lack merit. Accordingly, we

¹¹We need not address Metropolitan's alternative argument that it was immune from liability under NRS 679B.157.


ORDER the judgment of the district court AFFIRMED.



Young J.



Shearing J.



Rose J.

cc: Hon. Lee A. Gates, District Judge
Frank J. Cremen
Barker Brown Busby Chrisman & Thomas
Clark County Clerk