IN THE SUPREME COURT OF THE STATE OF NEVADA

COPELCO CREDIT CORPORATION, A DELAWARE CORPORATION
Appellant,
vs.
NATHAN LEWIS, D/B/A DENTAL DELIVERY SYSTEMS,
Respondent.

No. 36347

NATHAN LEWIS, D/B/A DENTAL DELIVERY SYSTEMS,
Appellant,
vs.
COPELCO CREDIT CORPORATION,
Respondent.

No. 36856

FILED

NOV 21 2002

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

ORDER OF AFFIRMANCE

These are consolidated appeals from district court orders granting summary judgment in respondent Nathan Lewis' favor, denying Lewis' request for attorney fees and granting appellant Copelco Credit Corporation's motion to retax costs. The underlying matter involved a breach of contract action pertaining to two lease agreements for copier equipment leased by Copelco to Lewis, d/b/a Dental Delivery Systems (DDS).7

Lewis entered a partnership agreement with Sandy Porter to provide managed care dental services via DDS. In the course of that partnership, Lewis signed one lease agreement, assertedly on behalf of DDS, for copier equipment from Copelco. A second lease agreement was entered wherein Lewis asserted his signature stamp was used without his knowledge or authorization. Lewis failed to make monthly payments on the leases.

02-20058

Copelco filed a complaint on June 2, 1994, asserting trespass to chattels and unjust enrichment. Copelco argued default on the obligation and the right to accelerate the terms of the leases pursuant to the language of the agreements. Lewis did not respond after being served via publication. A default judgment in the amount of $55,882.34 was entered against him. Copelco garnished Lewis' bank account in the amount of $28,000.00. Thereafter, on October 17, 1995, the district court set aside the default judgment upon Lewis' motion.

Multiple trial dates were set and vacated. On May 10, 1999, both parties filed a stipulation with the district court indicating an intent to waive trial and submit competing motions for summary judgment. Following a hearing, the district court denied both motions for summary judgment on the grounds that credibility issues existed and trial was required. Copelco filed a motion for rehearing on the issue of summary judgment. In his opposition to the motion, Lewis addressed application of NRCP 41(e) regarding dismissal for want of prosecution within five years.[1]

On April 24, 2000, the district court, without explanation, granted the motion for rehearing, denied Copelco's motion for summary judgment, and granted Lewis' motion for summary judgment under NRCP

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[1]NRCP 41(e) states, in relevant part:

> Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of any party, or on the court's own motion, after due notice to the parties, unless such action is brought to trial within five years after the plaintiff has filed his action, except where the parties have stipulated in writing that the time may be extended. . . .

41(e). On May 31, 2000, Lewis filed a memorandum of costs. On June 6, 2000, Copelco filed a motion to re-tax costs. On June 19, 2000, Lewis filed a motion for attorney fees. On July 3, 2000, the district court granted Copelco's motion to re-tax costs and denied Lewis the right to recover costs based on the failure to timely file a memorandum of costs. Lewis' motion for attorney fees was denied on August 30, 2000.

First, Copelco argues the district court erred in granting summary judgment based on NRCP 41(e). Copelco contends that, because a written stipulation waiving the five-year rule was made, dismissal for want of prosecution is improper in this case. However, even if the provisions of 41(e) apply to this case, Copelco argues that the time for calculating the five-year period should not begin to run until the date the district court set aside the default judgment (i.e., September 29, 1995). Copelco submits that determination by summary judgment satisfies NRCP 41(e)'s brought to trial requirement.

Lewis argues that absent a written stipulation between the parties specifically addressing NRCP 41(e), dismissal for want of prosecution is mandatory pursuant to NRCP 41(e). Lewis contends that there is no dispute that the parties stipulated to submit competing motions for summary judgment in lieu of trial, but adamantly denies that the stipulation executed by the parties was a waiver of the five-year rule enunciated in NRCP 41(e). Moreover, Lewis argues that Copelco was required to bring its action to trial within five years of filing the complaint, or June 2, 1999. Lewis states that Copelco did not file its motion for summary judgment until January 26, 2000, almost six years after the initial complaint was filed. Therefore, Lewis argues that dismissal pursuant to NRCP 41(e) is proper and words or conduct, short of

a written stipulation, cannot estop him from asserting the mandatory dismissal rule. We agree.

Summary judgment should be entered where there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[2] A genuine issue of material fact exists where the evidence is such that "a reasonable jury could return a verdict for the non-moving party."[3] The proof offered to the lower court must be construed in the light most favorable to the non-moving party.[4] This court conducts a de novo review of an order granting summary judgment.[5] On appeal, this court must determine whether the district court erred in concluding that an absence of genuine issues of material fact justified the granting of summary judgment.[6]

Regarding the district court's ability to dismiss a case pursuant to NRCP 41(e) for want of prosecution, this court has stated:

> "Inherent in courts is the power to dismiss a case for failure to prosecute or comply with its orders. To prevent undue delays and to control their calendars, courts may exercise this power within the bounds of sound judicial discretion,

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[2]See NRCP 56; see also Dermody v. City of Reno, 113 Nev. 207, 210, 931 P.2d 1354, 1357 (1997).

[3]Dermody, 113 Nev. at 210, 931 P.2d at 1357 (quoting Valley Bank v. Marble, 105 Nev. 366, 367, 775 P.2d 1278, 1282 (1989)).

[4]Id. (citing Hoopes v. Hammargren, 102 Nev. 425, 429, 725 P.2d 238, 241 (1986)).

[5]See Tore, Ltd. v. Church, 105 Nev. 183, 185, 772 P.2d 1281, 1282 (1989).

[6]See Bird v. Casa Royale West, 97 Nev. 67, 68, 624 P.2d 17, 18 (1981).

independent of any authority granted under statutes or court rules."[7]

This court has concluded mandatory dismissal for failure to bring an action to trial within five years from the filing of the complaint can only be avoided by a written stipulation between the parties extending the time.[8] Oral stipulations are the equivalent of a written stipulation where: (1) entered into in open court; (2) approved by the judge; and (3) reflected in the minutes of the court.[9] However, "[w]ords and conduct . . . short of a written stipulation" cannot estop a defendant from asserting the mandatory dismissal rule.[10] This court noted that it is the plaintiffs who have a duty of reasonable diligence to bring a case to trial within the period specified by the rule.[11] An action is commenced when a complaint is filed.[12]

In the present case, the order of the district court granting summary judgment on behalf of Lewis and denying summary judgment for Copelco provides no conclusions of law or findings of fact. However, the

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[7]Moore v. Cherry, 90 Nev. 390, 393, 528 P.2d 1018, 1020 (1974).

[8]Prostack v. Lowden, 96 Nev. 230, 231, 606 P.2d 1099, 1099-100 (1980) (emphasis added).

[9]Id.

[10]Id. (quoting Thran v. District Court, 79 Nev. 176, 181, 380 P.2d 297, 300 (1963)).

[11]Id.; see also Volpert v. Papagna, 85 Nev. 437, 440, 456 P.2d 848, 850 (1969).

[12]Johnson v. Harber, 94 Nev. 524, 527, 582 P.2d 800, 801 (1978) (concluding that the filing of an amended complaint did not act to renew the period within which to calculate the relevant time period pursuant to NRCP 41(e)); see also NRCP 3.

district court minutes indicate that the district court considered Rule 41(e) when it issued its order. Moreover, the district court minutes indicate that the district court viewed the stipulation to submit competing motions for summary judgment as an inadequate agreement to waive the five-year rule. The court concluded that the stipulation provided no language indicating an intent to waive the five-year rule, but simply stated the parties' intent to submit competing motions for summary judgment.

Therefore, dismissal of the complaint was mandatory since Copelco failed to exercise reasonable diligence in bringing the case to trial. Specifically, the district court was required to dismiss the case pursuant to NRCP 41(e).[13] The fact that Copelco relied to its detriment on the assumption that Lewis had agreed to waive the five-year rule is irrelevant. The language of the rule is mandatory, and this court has held that a court is not required to examine the equities involved.[14] Moreover, the stipulation to submit competing motions for summary judgment is insufficient to constitute a waiver of the five-year rule. Finally, even if the NRCP 41(e) time period was tolled during the pendency of the default judgment, the five-year period expired prior to the request for a NRCP 41(e) dismissal. Thus, the district court did not err in granting summary judgment on behalf of Lewis.

Second, Lewis argues the district court erred in denying his motion for attorney fees and costs. Lewis argues that attorney fees were available to him both by statute and by the terms of the lease agreements. Lewis contends that the district court had the discretion to award Lewis

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[13]Allyn v. McDonald, 117 Nev. ___, ___, 34 P.3d 584, 587 (2001).

[14]Id.

fees pursuant to NRS 18.010(2)(b)[15] where Copelco brought suit without reasonable grounds, knowing that the lease agreements had been modified and that the equipment had been returned. Further, Lewis contends that he is entitled to attorney fees under the doctrine of mutuality where the terms of the lease agreement[16] allow Copelco the right to recover attorney fees. We disagree as to both arguments.[17]

Attorney fees are available when authorized by a "rule, statute, or contract."[18] Because claims for attorney fees are fact intensive, a district court's grant or denial of a prevailing party's request will not be

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[15]NRS 18.010(2) provides:

> In addition to the cases where an allowance is authorized by specific statute, the court may make an allowance of attorney's fees to a prevailing party:
>
> . . . .
>
> b) Without regard to the recovery sought, when the court finds that the claim, counterclaim, cross-claim or third-party complaint or defense of the opposing party was brought without reasonable ground or to harass the prevailing party.

[16]Referencing subsection 10(d)(vi), of the lease agreements which provide:

> [Default and Remedies: Copelco has the right] to charge you for all expenses incurred in connection with the enforcement of any and all remedies including all costs of collection, reasonable attorneys fees and costs.

[17]Because we conclude that the five-year period had expired, we do not address the merits of Copelco's Motion for Summary Judgment.

[18]Flamingo Realty v. Midwest Development, 110 Nev. 984, 991, 879 P.2d 69, 73 (1994).

disturbed absent an abuse of discretion.[19] Similarly, a district court's determination regarding an award or denial of costs is reviewed for an abuse of discretion.[20] For attorney fees purposes, the prevailing party is the one who succeeds on any significant issue in litigation and achieves some benefit.[21]

First, despite the fact that Lewis was the "prevailing party", there is no evidence in the record suggesting that Copelco brought its action in bad faith, without reasonable grounds or for frivolous reasons where a contractual agreement had been breached by a failure to render timely payment. Second, this court has concluded that, without factual or legal support (e.g., a request to reform a contract to reflect the true intention of the parties or a court's acknowledgement of the right to reformation), the doctrine of mutuality cannot be extended to imply a reciprocal right to attorney fees where a contract includes an express provision for attorney fees if the contracting party breaches the agreement and litigation is required for the purpose of enforcing the agreement.[22]

In the present case, Lewis has construed the language of the lease agreements, which allow the lessor to recover attorney fees in the event of default on the agreement, to allow him to recover attorney fees under the doctrine of mutuality. There is no evidence suggesting that it

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[19]Bergmann v. Boyce, 109 Nev. 670, 674, 856 P.2d 560, 563 (1993) (internal citation omitted); see also Nelson v. Peckham Plaza Partnerships, 110 Nev. 23, 26, 866 P.2d 1138, 1139-40 (1994).

[20]Valladares v. DMJ, Inc., 110 Nev. 1291, 1294, 885 P.2d 580, 582 (1994); see also NRS 18.110(1).

[21]Sack v. Tomlin, 110 Nev. 204, 214, 871 P.2d 298, 305 (1994).

[22]Rowland v. Lepire, 99 Nev. 308, 316, 662 P.2d 1332, 1337 (1983).

was the intent of the parties to allow for the application of the mutuality doctrine, nor did the parties, both sophisticated business entities, include any language suggesting that the contract be reformed to reflect that intent. Therefore, Lewis' argument is without merit and the district court did not err in denying attorney fees or costs.[23]

Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Shearing

_____, J.
Leavitt

_____, J.
Becker

cc: Hon. James C. Mahan, District Judge
Mirch & Mirch
Kerr & Associates
Clark County Clerk

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[23]Regarding Lewis' motion for costs, the district court's order was filed on Friday, May 19, 2000. Lewis filed his memorandum of costs on Wednesday, May 31, 2000, approximately seven days later. See NRCP 6(a). Lewis was required pursuant to NRS 18.110(1) to file his memorandum of costs within five days of entry of the order.