IN THE COURT OF APPEALS OF THE STATE OF NEVADA

STEFON MARSHAL; ASLEY RODRIGUEZ; AND GERMAN CARILLO-SERNA,
Appellants,
vs.
RALPH RODRIGUEZ; AND THE VONS COMPANIES, INC.,
Respondents.

No. 68478

FILED

MAY 18 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER AFFIRMING IN PART AND DISMISSING IN PART

This is an appeal from district court orders dismissing the complaint and denying a motion to set aside the dismissal in a personal injury action. Eighth Judicial District Court, Clark County; Rob Bare, Judge.

In a separate, earlier-filed Eighth Judicial District Court case from the one on appeal here, appellants Stefon Marshal, Asley Rodriguez, and German Carillo-Serna (collectively Marshal) sued respondent, The Vons Companies, Inc., due to one of Vons's employees allegedly rear-ending their vehicle (the first case). While the procedural posture surrounding the dismissal of the first case is somewhat unusual, the parties are in agreement that it was ultimately resolved through an involuntary dismissal of the complaint. Moreover, neither the dismissal order entered in the first case, nor the subsequent denial of Marshal's NRCP 60(b) motion to set aside that dismissal order were ever appealed.

In the case on appeal before this court (the second case), Vons moved to strike the complaint due to the identical complaint Marshal had

filed in the first case, which had since been dismissed.[1] The district court granted the motion to strike over Marshal's opposition and ordered the case dismissed with prejudice. Marshal then filed an NRCP 60(b) motion challenging that decision. Therein, Marshal argued that the involuntary dismissal of the first case was without prejudice to his ability to file a second complaint and that the underlying case should therefore be heard on the merits. Vons opposed this motion and the district court ultimately denied it. This appeal followed.

Now, on appeal from the dismissal of the second complaint and the district court's refusal to grant NRCP 60(b) relief as to that dismissal,[2] Marshal asserts that the involuntary dismissal of the first case was, or should have been, made without prejudice under NRCP 41(b). And based on this first argument, he further asserts that the district court should not have dismissed the second case based on the first case's dismissal. In response, Vons argues that because the district court in the first case did not state that its involuntary dismissal was without

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[1]On appeal, both parties present arguments regarding the Vons employee involved in the accident, respondent Ralph Rodriguez. Because Marshal never served Rodriguez and because he did not appear below, he is not a proper party to this appeal. *See Valley Bank of Nev. v. Ginsburg*, 110 Nev. 440, 448, 874 P.2d 729, 735 (1994) (explaining that a person who is not served with process and does not make an appearance in the district court is not a party to that action). As a result, we dismiss this appeal as to Ralph Rodriquez.

[2]Because Marshal's NRCP 60(b) motion was filed within ten days of service of the notice of entry of the dismissal order and requested a substantive change to that order, the motion is properly treated as an NRCP 59 motion that tolls the time to appeal. *See AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 585, 245 P.3d 1190, 1194-95 (2010) (treating a timely-filed motion to reconsider as an NRCP 59 motion). Accordingly, Marshal timely appealed both the dismissal order and the order denying NRCP 60(b) relief.

prejudice, that dismissal acts as an adjudication on the merits, and the second complaint was therefore properly dismissed on preclusion grounds. We agree with Vons.

Claim preclusion prevents a party from filing a second lawsuit based on the same set of facts as a previously filed lawsuit. *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1052, 194 P.3d 709, 711 (2008). For claim preclusion to apply, the parties must be the same, there must be a valid final judgment in the first action, and the second action must be based on the same claims as, or claims that could have been brought in, the first action. *Id.* at 1054-55, 194 P.3d at 713. Here, the parties in the two actions are the same and the claims are based on the same set of facts. Thus, the only remaining question is whether the dismissal of the first case constitutes a valid final judgment that would bar the claims set forth in the second case.

As discussed above, the parties are in agreement that the first case was involuntarily dismissed. When a district court involuntarily dismisses a complaint, that order "operates as an adjudication upon the merits," "[u]nless the court in its order for dismissal otherwise specifies." NRCP 41(b). In the first case, the involuntary dismissal order did not state that it was without prejudice to Marshal's right to bring another action. Thus, contrary to Marshal's assertion, because the order is silent as to whether the dismissal was without prejudice, it operates as an adjudication on the merits.[3] *See id.* And, as it is an adjudication on the merits, the involuntary dismissal order constitutes a valid final judgment.

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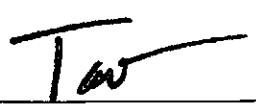
[3]To the extent that Marshal asserts that the involuntary dismissal of the first case should have been without prejudice, that argument is not properly before us in this appeal from the dismissal of the second case and the denial of NRCP 60(b) relief as to the dismissal of the second case. As a result, we do not consider this argument.

See Five Star Capital Corp., 124 Nev. at 1057-58, 194 P.3d at 715 (recognizing that by NRCP 41(b) designating a dismissal as one that "operates as an adjudication upon the merits," the order is meant to have preclusive effect, and treating the NRCP 41(b) dismissal order in that case as a valid final judgment satisfying the elements of claim preclusion). With all three elements of claim preclusion being met, the district court did not err in dismissing Marshal's second complaint and did not abuse its discretion in declining to grant Marshal's request for NRCP 60(b) relief as to the dismissal order. *See Alcantara ex rel. Alcantara v. Wal-Mart Stores, Inc.*, 130 Nev. ___, ___, 321 P.3d 912, 914 (2014) (reviewing a district court's decision regarding whether claim preclusion applies de novo); *Ford v. Branch Banking & Tr. Co.*, 131 Nev. ___, ___, 353 P.3d 1200, 1202 (2015) (reviewing an order denying NRCP 60(b) relief for an abuse of discretion).

In sum, for the reasons set forth above, we dismiss this appeal as to respondent Ralph Rodriguez and we affirm the district court's dismissal of Marshal's complaint and denial of Marshal's NRCP 60(b) motion in the underlying case.

It is so ORDERED.[4]

_____, C.J.
Gibbons



_____, J.
Tao

_____, J.
Silver

[4]In light of our resolution of this matter, Vons's request to dismiss this appeal based on Marshal's alleged failure to comply with certain rules of appellate procedure is denied as moot.

cc: Hon. Rob Bare, District Judge
Persi J. Mishel, Settlement Judge
David Lee Phillips & Associates
Backus, Carranza & Burden
Eighth District Court Clerk