

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KK REAL ESTATE INVESTMENT
FUND, LLC, A NEVADA LIMITED
LIABILITY COMPANY,

Appellant,

vs.

CAPITAL ONE, N.A., SUCCESSOR BY
MERGER TO ING BANK, FSB, A
NATIONAL ASSOCIATION,

Respondent.

No. 75530-COA

FILED

NOV 14 2019

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

ORDER OF REVERSAL AND REMAND

KK Real Estate Investment Fund, LLC, appeals from a district court order dismissing a quiet title action for want of prosecution under NRCP 41(e).¹ Eighth Judicial District Court, Clark County; David M. Jones, Judge.

The original owners of the subject property failed to make periodic payments to their condominium association, and the association foreclosed on its delinquent-assessment lien. KK Real Estate Investment Fund, LLC (KK), purchased the property at the foreclosure sale and, on May 29, 2013, initiated the underlying quiet title action against respondent Capital One, N.A. (Capital One), the beneficiary of the first deed of trust on the property. Capital One moved to dismiss the complaint, which the district court granted, but the Supreme Court of Nevada ultimately

¹The Nevada Rules of Civil Procedure were amended effective March 1, 2019. See *In re Creating a Comm. to Update & Revise the Nev. Rules of Civil Procedure*, ADKT 0522 (Order Amending the Rules of Civil Procedure, the Rules of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules, December 31, 2018). Except as otherwise noted below, we cite the previous version of NRCP 41 herein, as it was the rule in effect at the time of the underlying proceedings.

reversed the dismissal. *KK Real Estate Inv. Fund, LLC v. Capital One, N.A.*, Docket No. 64185 (Order of Reversal and Remand, November 14, 2014). The remittitur from that appeal was filed in the district court on December 17, 2014. Later, in January of 2018, Capital One moved to dismiss the action under NRCP 41(e) on grounds that KK failed to bring the case to trial within three years after the remittitur from the prior appeal was filed in the district court. The district court granted Capital One's motion and dismissed the case without prejudice. This appeal followed.

On appeal, KK argues that the district court erred in applying the three-year rule instead of the general five-year rule, under which it still had time to bring the case to trial. We agree.

Generally, a district court must dismiss an action where the plaintiff failed to bring it to trial within five years after he or she filed the complaint. NRCP 41(e). But when "an appeal has been taken and judgment reversed with cause remanded for a new trial," the district court must dismiss the action "unless brought to trial within 3 years from the date upon which remittitur is filed by the clerk of the trial court." *Id.* Although the text of this part of NRCP 41(e) refers only to cases remanded for a new trial rather than a trial in the first instance, the supreme court has held that the three-year period nevertheless applies in cases remanded following reversal of a pretrial judgment or dismissal order. *See McGinnis v. Consol. Casinos Corp.*, 97 Nev. 31, 33, 623 P.2d 974, 975 (1981) ("[W]e think the policy considerations which underlie the rule in the former situation also control the latter."); *see also Carstarphen v. Milsner*, 128 Nev. 55, 62, 270 P.3d 1251, 1256 (2012) ("[W]e reaffirm *McGinnis's* holding that, when an erroneous judgment or dismissal entered before trial has commenced is reversed on appeal, on remand, the parties have three years from the date that the remittitur is filed in district court to bring the case to trial in the first instance . . ."); *Monroe v. Columbia Sunrise Hosp. & Med. Ctr.*, 123 Nev.

96, 102, 158 P.3d 1008, 1011-12 (2007) (“While the language of [NRC 41(e)] refers only to new trials, our jurisprudence indicates that reversal of [pretrial] order[s] on appeal also creates a new three-year time limit to bring the action to trial.”).

However, despite the fact that three years had passed in the underlying case from the time that the remittitur from the prior appeal was filed in the district court, there was still time remaining for KK to bring its case to trial under the general five-year rule. Although the supreme court’s opinions discussing the post-remittitur three-year rule have not addressed this specific situation, the language the court used in those opinions indicates that the rule was not meant to shorten the general five-year period, but instead operates as an extension of time. *See Monroe*, 123 Nev. at 102, 158 P.3d at 1012 (describing the post-remittitur rule as a “three-year extension”); *Massey v. Sunrise Hosp.*, 102 Nev. 367, 369, 724 P.2d 208, 209 (1986) (noting that the three-year rule “extends the ‘five-year’ rule when an appeal is taken”). And applying the three-year rule rather than the five-year rule under these circumstances would produce an unfair result that improperly penalizes KK for its successful appeal of the prior district court decision. *See Massey*, 102 Nev. at 370, 724 P.2d at 210 (stating that “[a] plaintiff cannot be penalized for exercising a right to challenge the trial judge[’s decision]”).

Although the pre-amendment version of NRC 41(e) controls this matter, the notion that the three-year rule was not meant to shorten the five-year rule is reinforced by the recent amendment to NRC 41, which provides that “[i]f two time periods requiring mandatory dismissal apply, the longer time period controls.” NRC 41(e)(5) (2019) & advisory committee’s note to 2019 amendment (noting that the new Rule 41(e)(5) “clarifies that if two time periods requiring mandatory dismissal apply, the longer period controls” (emphasis added)). Accordingly, while the district

court's ruling was understandable in light of precedent requiring dismissal when an action has not been brought to trial within three years following a remand, we nevertheless conclude that—under the circumstances of this case—the district court erred in applying the three-year rule in such a manner that it shortened the default time period in which KK could bring the case to trial in the first instance.

Based on the foregoing, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.²


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

²In light of KK's delay in bringing the case to trial, the district court, at its discretion, could have utilized its inherent authority to dismiss the case for want of prosecution. *See Hunter v. Gang*, 132 Nev. 249, 256, 377 P.3d 448, 453 (Ct. App. 2016) (noting that "Nevada district courts have inherent authority to dismiss an action for want of prosecution, which is independent of any authority granted under statutes or court rules" (internal quotation marks omitted)). Nevertheless, because it appears from the record on appeal that the district court applied the mandatory three-year rule and did not exercise any discretion in dismissing the case, we must reverse this matter based on the reasoning articulated above.

cc: Hon. David M. Jones, District Judge
Hong & Hong
Ballard Spahr LLP/Las Vegas
Ballard Spahr LLP/Washington DC
Eighth District Court Clerk