IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CHAD E. SEEFELDT,
Appellant,
vs.
DONALD L. GRIFFIE; AND D&R HYDRANT, INC.,
Respondents.

No. 76595-COA

ORDER OF REVERSAL AND REMAND

Chad E. Seefeldt appeals from an order granting a motion to dismiss in a contract and breach of fiduciary duty action. Eighth Judicial District Court, Clark County; Timothy C. Williams, Judge.

Seefeldt alleges that, in 2010, Donald Griffie promised to give him stock of D&R Hydrant, Inc., by 2012. In exchange, Seefeldt earned certifications in furtherance of the business, and in 2014, became a 25-percent co-owner of the corporation. In 2017, Seefeldt sued Griffie and D&R Hydrant, Inc. (collectively "Griffie"), for breach of contract and breach of fiduciary duties. Seefeldt obtained a default against Griffie and a hearing was set to determine the amount of damages in a default judgment. Without first seeking or obtaining a court order to set aside the default, Griffie filed an NRCP 12(b)(5) motion to dismiss. The motion alleged both technical deficiencies in the complaint and that the claims were time barred by the applicable statutes of limitations.[1]

At the hearing on the motion to dismiss, Seefeldt noted that he attempted to amend his complaint but did not understand that he had to request leave to amend. The district court stated several times that it was

[1]We do not recount the facts except as necessary to our disposition.

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not concerned with the technicalities of the complaint and instead focused on whether the statute of limitations barred Seefeldt's claims. Seefeldt argued that (1) the contract was oral, (2) Griffie had verbally modified the agreement to allow performance later than 2012, (3) Griffie transferred 25 percent of the promised shares in 2014, but thereafter gave him no additional shares, (4) Griffie failed to pay Seefeldt corporate profits from 2014 to 2016, and (5) Seefeldt discovered the alleged breach of fiduciary duty in 2017. The district court explained that Seefeldt's causes of action were time barred under the statute of limitations—for either oral or written contracts—because contract formation had occurred in 2010, and Seefeldt filed his complaint in 2017.

The district court dismissed the complaint with prejudice based on the statute of limitations. On appeal, Seefeldt argues that the district court erred by misapplying the statute of limitations and abused its discretion by dismissing his claims with prejudice. We agree, and also conclude that the district court plainly erred in allowing Griffie to contest his liability before setting aside the default that had been entered against him.

The district court erred by not first setting aside the default before considering Griffie's motion to dismiss

"[I]f an error is apparent on the record, we may take cognizance of plain error *sua sponte* to consider and correct that error." *High Noon at Arlington Ranch Homeowners Ass'n v. Eighth Judicial Dist. Court*, 133 Nev. 500, 511, 402 P.3d 639, 648 (2017) (internal quotations omitted). When a

party fails to plead or defend, "the clerk shall enter th[at] party's default." NRCP 55(a).[2]

> A party may obtain entry of default [under NRCP 55(a)] against a party that fails to file a responsive pleading within the time mandated. Entry of default acts as an admission by the defending party of all material claims made in the complaint. Entry of default, therefore, generally resolves the issues of liability and causation and leaves open only the extent of damages.

Estate of Lomastro ex rel. Lomastro v. Am. Family Ins. Grp., 124 Nev. 1060, 1068, 195 P.3d 339, 345 (2008) (footnotes omitted); *accord VLM Food Trading Int'l, Inc. v. Ill. Trading Co.*, 811 F.3d 247, 255 (7th Cir. 2016) ("[U]pon default, the well-pleaded allegations of a complaint relating to liability are taken as true." (internal quotations omitted)); *Taylor v. City of Ballwin, Mo.*, 859 F.2d 1330, 1333 n.7 (8th Cir. 1988) ("[I]t is the law that once a default is entered, a defendant on default has no further standing to contest the factual allegations of plaintiff's claim for relief." (internal quotations omitted)).

Here, the district court allowed Griffie to contest his liability—in the form of a motion to dismiss for failure to state a claim upon which relief can be granted—before Griffie moved to set aside the default that had been entered against him. Based upon the authorities cited above, we conclude that the district court erred in allowing Griffie to contest his liability before the court set aside the default. Thus, upon remand, we note

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[2]The Nevada Rules of Civil Procedure were amended effective March 1, 2019, and we note that the word "shall" in NRCP 55(a) was amended to "must." *Compare* NRCP 55(a) (2005) *with* NRCP 55(a) (2019).

that Griffie will be required to move to set aside the default and the court must formally rule on it before Griffie defends the case.[3]

The district court erred in dismissing Seefeldt's claims with prejudice

An order granting a 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.* A dismissal is proper when the action is barred by the statute of limitations. *Holcomb Condo. Homeowners' Ass'n v. Stewart Venture, LLC*, 129 Nev. 181, 186, 300 P.3d 124, 128 (2013). The statute of limitations is six years for a written contract and four years for an oral contract. NRS 11.190(1)(b), (2)(c). The statute of limitations for a breach of contract action accrues when the plaintiff knows or should know of a breach. *Bemis v. Estate of Bemis*, 114 Nev. 1021, 1025, 967 P.2d 437, 440 (1998). A breach of fiduciary duty claim has a three-year statute of limitations and accrues at the time the breach is discovered or should have been discovered. *In re Amerco Derivative Litig.*, 127 Nev. 196, 228, 252 P.3d 681, 703 (2011).

"Dismissal on statute of limitations grounds is only appropriate when uncontroverted evidence irrefutably demonstrates [the] plaintiff discovered or should have discovered the facts giving rise to the cause of action." *State Dep't of Transp. v. Eighth Judicial Dist. Court*, 133 Nev. 549, 556, 402 P.3d 677, 683 (2017) (internal quotations omitted); *see also Winn v. Sunrise Hosp. & Med. Ctr.*, 128 Nev. 246, 253, 277 P.3d 458, 463 (2012)

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[3]Both parties acknowledged the continuing existence of Griffie's default and were presented with the opportunity to address it during oral argument.

("[T]he appropriate accrual date for the statute of limitations is a question of law only if the facts are uncontroverted." (internal quotations omitted)).

Here, the district court erred by using the date of contract formation as the starting point for calculating the statute of limitations for Seefeldt's claims rather than using the date Seefeldt knew or should have known of the alleged breaches. Further, the court did not address the breach of fiduciary duty claims in its order, which were separate claims that required an individualized analysis.[4] Finally, we note that the question of whether the statute of limitations had accrued was not a question of law because the parties disputed the date of the breach, and therefore, the trier of fact was required to determine the appropriate date of the discovery of the breach; thus, it was improper to dismiss these claims as a matter of law.

Because the district court erred by misapplying the statute of limitations and dismissing the complaint with prejudice,[5] we conclude that reversal is warranted.

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[4]Seefeldt alleged that Griffie breached fiduciary duties under NRS 78.138, NRS 78.257, and NRS 78.310. These claims required an individualized analysis by the district court separate from Seefeldt's contract claim.

[5]The district court apparently dismissed the complaint with prejudice because it believed that the case was time-barred; the court rejected Griffie's argument to dismiss the complaint on technical grounds and stated that those deficiencies could have been corrected had the statute of limitations not been violated. We note that a party may seek leave to amend during a hearing, *see Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1, 22, 62 P.3d 720, 734 (2003), and that leave to amend should be freely granted, NRCP 15(a)(2); *see also Nutton v. Sunset Station, Inc.*, 131 Nev. 279, 289, 357 P.3d 966, 973 (Ct. App. 2015) ("[L]eave to amend, even if timely sought, need not be granted if the proposed amendment would be 'futile.' A proposed amendment may be deemed futile if the plaintiff seeks to amend the complaint in order to plead an impermissible claim, such as one which would not survive a motion to dismiss under NRCP 12(b)(5) . . . ." (internal citations omitted)).

Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for further proceedings.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Timothy C. Williams, District Judge
Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP/Las Vegas
TMR Law Group, PC
Eighth District Court Clerk