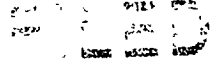


IN THE SUPREME COURT OF THE STATE OF NEVADA

MARK SEKULICH,
Appellant,
vs.
MARTHA SEKULICH,
Respondent.

No. 37500



SEP 25 2002

ORDER OF AFFIRMANCE

CLERK OF SUPREME COURT
BY *J. Richard*
CHIEF DEPUTY CLERK

This case concerns a probate contest between the decedent's son and the decedent's second wife. In 1998, appellant Mark Sekulich filed a complaint in the district court against respondent Martha Sekulich, alleging fraud and breach of fiduciary duty. Mark appeals the district court's order granting Martha's motion for summary judgment and levying sanctions against Mark pursuant to NRCP 11. We conclude that Mark's arguments are without merit, and accordingly, we affirm.

Mark contends that the district court abused its discretion when it determined first that Mark's complaint was filed after the statute of limitations had expired and second that the complaint was barred by res judicata and, accordingly, ordered summary judgment in Martha's favor. NRS 11.190(3)(d) provides a three-year statute of limitations for causes of action grounded in fraud. The action accrues at the time of the discovery of facts constituting fraud. Mark argues that he did not have sufficient factual knowledge to allege fraud in 1989, the year his father died, the year Martha had petitioned the district court for letters of administration and the year Mark petitioned to probate the decedent's will. Mark asserts that he only gained actual knowledge that the decedent's written will revocation was a forgery in 1996; prior to 1996 he merely believed the revocation was forged. Mark counts the three-year

limitation period from 1996 and argues therefore that his complaint filed in 1998 is not time-barred.

A litigant "discovers his legal injury when he knows or, through the use of reasonable diligence, should have known of facts that would put a reasonable person on inquiry notice of his cause of action."¹ Therefore, "[t]he focus is on the [litigant's] knowledge of or access to facts"² Dismissal based on the statute of limitations is "appropriate "when uncontroverted evidence irrefutably demonstrates [that the] plaintiff discovered or should have discovered" facts giving rise to the cause of action."³

Mark's 1989 affidavit in support of a petition to probate his father's will clearly alleged fraud. Further, Mark had, in 1989, access to facts that could have confirmed or refuted his suspicions of fraud, and he even stated that he should hire a handwriting expert to confirm his suspicions. Therefore, the statute of limitations for Mark's fraud claim accrued in 1989. Accordingly, the statute of limitations had expired by 1998, and Mark is time-barred from litigating the issue of fraud.

The doctrine of res judicata prohibits parties from relitigating a cause of action that a court has previously resolved through a final

¹Massey v. Litton, 99 Nev. 723, 728, 669 P.2d 248, 252 (1983).

²Id.

³Bemis v. Estate of Bemis, 114 Nev. 1021, 1025, 967 P.2d 437, 440 (1998) (quoting Nevada Power Co. v. Monsanto Co., 955 F.2d 1304, 1307 (9th Cir. 1992) (quoting Mosesian v. Peat, Marwick, Mitchell & Co., 727 F.2d 873, 877 (9th Cir. 1984)).

judgment.⁴ In determining whether res judicata applies, a court must consider three factors:

(1) whether the issue decided in the prior adjudication was identical with the issue presented in the action in question; (2) whether there was a final judgment on the merits; and (3) whether the party against whom the judgment is asserted was a party or in privity with a party to the prior adjudication.⁵

Applying these factors, we conclude that Mark's claim is barred by res judicata. Mark raised the very issues in his 1998 complaint as were raised in his 1989 objection to Martha's appointment as administratrix. Both Mark and Martha were parties to the probate case, and the district court reached a final judgment on the merits by ordering the estate set aside because Mark had not pursued his claims in six years. Accordingly, the doctrine of res judicata applies, and is a proper ground for dismissal of Mark's complaint.

The district court treated Martha's motion to dismiss as a motion for summary judgment, stating that the estate was closed without a motion for reconsideration or appeal and that there were no new claims presented in the complaint.⁶ The district court's grant of summary

⁴Horvath v. Gladstone, 97 Nev. 594, 596, 637 P.2d 531, 533 (1981).

⁵Id.

⁶When matters outside the pleadings are presented and not excluded by the court, the court may treat a motion to dismiss pursuant to NRCPC 12(b)(5) as a motion for summary judgment.⁶ In her motion to dismiss, Martha included Mark's 1989 affidavit. Since the affidavit was outside the pleadings and was not excluded, the district court properly treated the motion as one for summary judgment. See Stevens v. McGimsey, 99 Nev. 840, 841, 673 P.2d 499, 500 (1983).

judgment was appropriate because res judicata applied and the statute of limitations had expired.

Mark also appeals two of the district court's awards for sanctions against him. The district court granted Martha's motion for NRCP 11 sanctions against Mark, finding that Mark's claims were not warranted under existing law and that Mark failed to make a reasonable and competent inquiry into them. The district court also sanctioned Mark \$500.00 in attorney fees for repeatedly requesting trial continuances when Martha was prepared to defend herself at trial.

NRCP 11 permits a sanction against an attorney who signs a pleading in bad faith, a pleading that is not grounded in fact and existing law or is otherwise filed for an improper purpose, such as to harass. In determining whether a claim is frivolous, a court must analyze: "(1) . . . whether the pleading is 'well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law'; and (2) whether the attorney made a reasonable and competent inquiry."⁷

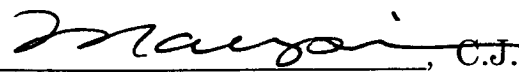
Based upon the conclusions made by the district court when it granted summary judgment to Martha, we now conclude that the district court acted within the proper exercise of its discretion by awarding NRCP 11 sanctions against Mark.

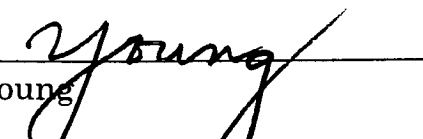
In addition, the district court ordered attorney fees pursuant to NRCP 37(b)(2) and EDCR 7.60. NRCP 37(b)(2) permits a court to sanction a party with attorney fees for failing to follow a court order.


⁷Bergman v. Boyce, 109 Nev. 670, 676, 856 P.2d 560, 564 (1993) (quoting Golden Eagle Distributing Corp. v. Burroughs Corp., 801 F.2d 1531, 1537 (9th Cir.1986).

EDCR 7.60(b)(2) and (3) permit a district court to sanction parties for failing to prepare or for unnecessarily multiplying the proceedings in a case. Here, Mark made a third request for a continuance so that he could attempt to comply with previous orders of the court. Since Martha was prepared to proceed, the district court simply required Mark to pay for Martha's attorney fees. Accordingly, the district court did not abuse its discretion in sanctioning Mark with attorney fees.⁸ Therefore, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Maupin


_____, J.
Young


_____, J.
Agosti

cc: Hon. Valorie Vega, District Judge
Bob Reeve
Jeffrey Ian Shaner
Clark County Clerk

⁸Martha has also requested sanctions against Mark for attorney fees and double costs pursuant to NRAP 38. It does not appear from the record that Mark pursued his appeal in an attempt to harass or delay Martha or otherwise misuse the appellate process. Therefore, we conclude that Mark's appeal was not frivolous, and accordingly, decline to impose NRAP 38 sanctions against Mark.