

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAN W. PARKINSON,
Appellant,
vs.
RIO PROPERTIES, INC.,
Respondent.

No. 41691

FILED

APR 25 2005

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

ORDER OF AFFIRMANCE

This is an appeal from a district court order granting respondent's motion to dismiss for lack of prosecution under NRCP 41(e). Eighth Judicial District Court, Clark County; David Wall, Judge.

Appellant filed his complaint in the underlying personal injury action on April 22, 1998. Respondent then filed a third-party complaint against Marnell Corrao Associates on May 9, 2001. In August of 2002, at the request of Marnell, a stipulation to continue the trial was signed by all parties. This stipulation was filed in the district court on August 26, 2002. The court subsequently reset the trial for October 13, 2003. On April 29, 2003, respondent filed a motion to dismiss under NRCP 41(e) for want of prosecution. A similar motion was filed by Marnell on May 1, 2003. Appellant opposed both motions. The district court subsequently granted both motions, and this appeal followed. Appellant has voluntarily dismissed his appeal from the order dismissing Marnell; thus, this appeal challenges only the dismissal of respondent Rio Properties.

On appeal, appellant contends that the August 2002 stipulation and order to continue trial was sufficient to defeat respondent's motion to dismiss pursuant to NRCP 41(e), which requires dismissal if an

action is not brought to trial within a five-year period. We disagree. The August 2002 stipulation states that the October 14, 2002 trial date should be vacated and continued. The stipulation then states that the parties agree that the trial date will be reset at a time convenient to the court. No mention is made of the potential expiration of the NRCP 41(e) five-year period. The situation here is analogous to that addressed by this court in Prostack v. Lowden.¹ In Prostack, this court held that where an oral stipulation to continue the trial was reached, but the stipulation was silent as to the expiration of the NRCP 41(e) five-year period, and the judge who heard the motion to continue the trial was not made aware of the potential NRCP 41(e) problem, the stipulation did not estop the defendants in the underlying case from asserting the NRCP 41(e) mandatory dismissal rule.²

In the instant case, as in Prostack, the parties' stipulation makes no mention of the potential expiration of the five-year period. Moreover, appellant has not indicated that any effort was made to bring this issue to the attention of either the other parties to the underlying case or the judge, who approved the stipulation to continue the trial. Appellant attempts to distinguish Prostack by arguing that, in the instant case, there was never a hearing held to address the stipulation to continue the trial. This argument is not persuasive. Appellant could have refused to agree to the stipulation unless the five-year rule was extended, or could have agreed only on the condition that trial was scheduled before the five-year period expired.

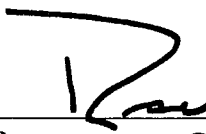
¹96 Nev. 230, 606 P.2d 1099 (1980).


²Id.

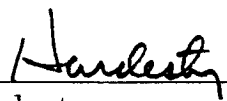
Appellant's argument that the language providing that the trial should be reset to a time convenient to the court was sufficient to prevent respondent from asserting the five-year rule is equally unpersuasive. This language does not address the NRCP 41(e) five-year period; it merely leaves the decision as to when trial will commence to the district court's discretion. The stipulation is silent with regard to the five-year period. Accordingly, based on this court's decision in Prostack, we conclude that the August 2002 stipulation did not estop respondent from asserting the NRCP 41(e) mandatory five-year dismissal rule.³

As noted above, the complaint in the underlying case was filed on April 22, 1998. Pursuant to the five-year rule, appellant was therefore required to bring his case to trial by April 22, 2003. He failed to do so. As the stipulation between the parties was not sufficient to toll the five-year period appellant had to bring his case to trial, we conclude that the district court properly dismissed appellant's complaint pursuant to NRCP 41(e). We therefore affirm the district court's order dismissing the complaint.

It is so ORDERED.


_____, J.

Rose

_____, J.
Gibbons


_____, J.
Hardesty

³Id.

cc: Hon. David Wall, District Judge
Edward M. Bernstein & Associates/Las Vegas
Thorndal Armstrong Delk Balkenbush & Eisinger/Las Vegas
Clark County Clerk