

IN THE SUPREME COURT OF THE STATE OF NEVADA

DWIGHT JORY,  
Appellant,  
vs.  
CAROL JORY,  
Respondent.

No. 42119

**FILED**

FEB 14 2005

ORDER OF REVERSAL AND REMAND

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

This is an appeal from a district court order granting a motion to dismiss a real property dispute with prejudice. Eighth Judicial District Court, Clark County; Gene T. Porter, Judge.

The underlying controversy stems from a lease option agreement between appellant Dwight Jory and respondent Carol Jory. Dwight filed two separate complaints against Carol, essentially seeking the same relief. Dwight's counsel failed to prosecute the first lawsuit, and Dwight hired another counsel to file a second lawsuit arising from the same underlying set of facts. Dwight apparently abandoned the first lawsuit. Carol never filed a responsive pleading and the Clark County Clerk's office closed the case administratively for lack of prosecution. There was no court order entered dismissing the case. After the Clerk closed the first case, Carol filed a motion to dismiss the second case with prejudice. Carol argued that the first case's closing was a dismissal with prejudice; and since both cases were based on the same facts and circumstances, a dismissal with prejudice was warranted in the second case as well. The district court agreed and granted Carol's motion. Dwight appealed the district court's ruling and subsequently filed an ex parte motion in the district court to reopen the first case for nunc pro tunc

proceedings. After the district court granted Dwight's motion, Dwight voluntarily dismissed the first case without prejudice.

On appeal, Dwight argues that the district court erred in concluding that the administrative closing constituted a dismissal with prejudice because NRCP 41(e) does not permit anyone but the parties or the district judge to move to dismiss a case with prejudice.

### FACTS

In 1994, Dwight and Carol entered into an agreement regarding real estate property Carol owned. Under the agreement, Dwight took possession of the property and began paying rent to Carol. The parties' understanding was that Dwight would repair and improve the property for resale purposes, and after resale, he would pay Carol a certain amount. Dwight was to retain the difference between the resale price and Carol's share as compensation for his labor and investment.

Apparently, the parties subsequently disagreed as to the amount of Carol's resale share and the rent Dwight paid to Carol. On February 25, 1997, Dwight filed a complaint for declaratory relief, seeking adjudication of the parties' respective rights. Unexplainably, Dwight's then counsel of record failed to pursue the claim and never served Carol with the complaint.

On May 9, 2000, Dwight filed a second complaint based on the same set of facts. The only difference between the two complaints was that the second complaint contained an additional ground for relief under an unjust enrichment theory.

On January 29, 2002, the Clark County Clerk's office closed the first case administratively for lack of prosecution. The record contains no evidence of a formal court order dismissing the case or a respective

motion by one of the parties. On July 30, 2003, Carol filed a motion to dismiss the second case with prejudice, which the district court granted. On September 29, 2003, Dwight appealed the district court's order dismissing the second case with prejudice.

On October 3, 2003, after filing the notice of appeal, Dwight filed an ex parte motion to reopen the first case for nunc pro tunc proceedings, which the district court granted. On October 6, 2003, Dwight voluntarily dismissed the first case without prejudice and subsequently moved to correct the record in the second case. On March 30, 2003, the district court entered an order expanding the record in the second case to include (1) Dwight's ex parte motion to reopen the first case for nunc pro tunc proceedings, (2) the order granting Dwight's motion to reopen the first case, and (3) Dwight's voluntary dismissal without prejudice. These documents are part of the record on appeal.

## DISCUSSION

### Motion requirement

Dwight argues that the district court improperly dismissed the second action based on its erroneous conclusion that the Clerk's office could dismiss the first case with prejudice absent a motion by one of the parties or an order by the judge. We agree.

Under NRCP 41(e),

[t]he court may in its discretion dismiss any action for want of prosecution on motion of any party or on the court's own motion and after due notice to the parties, whenever plaintiff has failed for two years after action is filed to bring such action to trial. Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of any

party, or on the court's own motion, after due notice to the parties, unless such action is brought to trial within five years after the plaintiff has filed his action, except where the parties have stipulated in writing that the time may be extended.

(Emphasis added.)

It is undisputed that prior to Dwight's voluntary dismissal, no party filed a motion to dismiss the first case, and there is no evidence of a court order to that effect. There is also no evidence of a stipulation by the parties to extend the NRCP 41(e) period for prosecution of the case. Thus, the question becomes whether the Clerk falls under the definition of "court" for NRCP 41(e) purposes.

Black's Law Dictionary defines a "court" as "[a] governmental body consisting of one or more judges who sit to adjudicate disputes" and "[t]he judge or judges who sit on such a governmental body."<sup>1</sup> The definition does not include the Clerk of the court or any other court staff. If NRCP(e) permitted dismissal by the Clerk, it would have expressly stated so.

In dismissing an action under NRCP 41(e), district courts have discretion to determine whether the dismissal should be with or without prejudice.<sup>2</sup> This discretion supports the above definition of "court" because to conclude otherwise would necessarily give the Clerk of the court judicial responsibilities. Cases discussing dismissals under NRCP

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<sup>1</sup>Black's Law Dictionary 378 (8th ed. 2004).

<sup>2</sup>Home Sav. Ass'n v. Aetna Cas. & Surety, 109 Nev. 558, 563-64, 854 P.2d 851, 854 (1993).

41(e) have involved district judges, not the Clerk or other court personnel.<sup>3</sup> “A dismissal under Rule 41(e), even where mandatory under the five-year rule, requires a motion to dismiss, either by a party or the court’s own motion.”<sup>4</sup> Absent such a motion, the first case could not have been validly dismissed under NRCP 41(e). Moreover, we conclude that the administrative closing of a case by the Clerk’s office did not amount to dismissing the case with prejudice because the Clerk of the court does not have authority to do so on its own motion.

Carol’s argument that the district court had discretion to determine that the first dismissal was with prejudice is inapposite. While a district court has discretion to determine whether to dismiss a case under NRCP 41(e) with or without prejudice,<sup>5</sup> the case at bar involves a different scenario. The district court was not making this determination in the context of its own motion to dismiss; the court was evaluating the Clerk’s decision to administratively close the first case. Since the Clerk had no right to close the case with prejudice, the district court also had no discretion to determine that the closing was with prejudice. Consequently, the district court erred in dismissing the second case with prejudice based

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<sup>3</sup>See Allyn v. McDonald, 117 Nev. 907, 34 P.3d 584 (2001); Deal v. Baines, 110 Nev. 509, 874 P.2d 775 (1994); Home Sav. Ass’n v. Aetna Cas. & Surety, 109 Nev. 558, 854 P.2d 851 (1993); United Ass’n of Journeymen v. Manson, 105 Nev. 816, 783 P.2d 955 (1989); Rudder v. Union Pac. R.R. Co., 93 Nev. 88, 560 P.2d 160 (1977); Hassett v. St. Mary’s Hosp. Ass’n, 86 Nev. 900, 478 P.2d 154 (1970); Lindauer v. Allen, 85 Nev. 430, 456 P.2d 851 (1969).


<sup>4</sup>Deal, 110 Nev. at 513, 874 P.2d at 778.


<sup>5</sup>Home Sav. Ass’n, 109 Nev. at 563-64, 854 P.2d at 854.

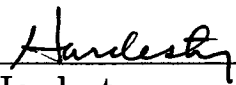
on its mistaken view that the administrative closing of the first case constituted a dismissal with prejudice.

Accordingly, we

ORDER the judgment of the district court REVERSED and REMAND this case for further proceedings consistent with this order.

  
\_\_\_\_\_, J.  
Rose

  
\_\_\_\_\_, J.  
Gibbons

  
\_\_\_\_\_, J.  
Hardesty

cc: Eighth Judicial District Court Dept. 1, District Judge  
Michael H. Schwarz  
Marquis & Aurbach  
Clark County Clerk