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Summary of AA Primo Builders, LLC v. Washington, 125 Nev. Adv. Op. No. 61

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AA Primo Builders, LLC v. Washington, 125 Nev. Adv. Op. No. 61 (December 30, 2010)[1]
BUSINESS LAW

Summary

An appeal from summary judgment that was granted on the theory that a Nevada LLC whose charter is revoked loses its capacity to sue.

Disposition/Outcome

Summary judgment overturned because revocation of an LLC's charter does not dissolve its capacity to sue.

Facts

AA Primo Builders, LLC ("Primo"), sued the Washingtons to recover money due for having remodeled the Washingtons' patio in 2005. After two years of litigation and after Primo failed to file required files and pay fees, the Secretary of State revoked AA Primo's charter to do business as an LLC. The district court found that without a charter Primo could not maintain a suit against the Washingtons. Primo requested time to allow them to reinstate their charter, but the district court refused and granted the Washingtons' summary judgment motion.

After the district court dismissed its suit, AA Primo filed a 'motion to amend order' that asked to vacate the dismissal. In the motion, AA Primo included proof that its charter had been restored and noted that NEV. REV. STAT. § 86.276(5) (2009) states that if an administrative agency reinstates a revoked charter, the reinstatement "relates back to the date on which the company forfeited its right to transact business . . . as if such right had at all times remained in full force and effect." The district court denied their motion, and Primo filed a notice of appeal.
Issue 1: Whether a 'motion to amend order' tolled the time to file a motion of appeal, thus, granting the Nevada Supreme Court jurisdiction.

Holding: Primo's 'motion to amend order' tolled the time to file their motion of appeal. "So long as a post-judgment motion for reconsideration is [1] in writing, [2] timely filed, [3] states its ground with particularity, and [4] 'request[s] a substantive alteration of the judgment, not merely the correction of a clerical error, or relief of a type wholly collateral to the judgment,' . . . there is no reason to deny it [NEV. R. CIV. P. 59(e)] status, with tolling effect under [NEV. R. APP. P. 4(a)(4)(C)]."[2]

Discussion

Primo claimed that its 'motion to amend order' was a NEV. R. CIV. P. 59(e) motion that tolled the time required to file a notice of appeal. The Washingtons argued that Primo's 'motion to amend order' did not toll the time to file a notice of appeal because it was really a 'motion for reconsideration,' and under EIGHTH DIST. CT. R. 2.24(b) and Nevada case law, a motion for reconsideration does not toll the time required to file a notice of appeal.

Disposing of certain listed motions, including a NEV. R. CIV. P. 59(e) motion to alter or amend the judgment, tolls the 30 days' time to file a notice of appeal.[3] The Court defined a "motion to amend the judgment" through statutes. Per Nev. R. Civ. P. 59(e), a motion to amend "[must] be filed no later than 10 days after service of written notice of entry of the judgment,"

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[1] By Michael Roche
[2] AA Primo Builders, LLC v. Washington, 125 Nev. Adv. Op. No. 61, 9 (December 30, 2010).
[3] NEV. R. APP. P. 4(a)(4).

and per Nev. R. Civ. P. 7(b), it must be "in writing, . . . state with particularity [its] grounds [and] set forth the relief or order sought." The Court stated that, "echo[ing]" its federal counterpart, Nev. R. Civ. P. 59(e) broadly included many types of motions, such as a motion to vacate a judgment, motions "correct[ing] manifest errors of law or fact,' 'newly discovered or previously unavailable evidence,' the need 'to prevent manifest injustice,' or a 'change in controlling law,'" and that "the only real limitation on the type of motion permitted [was] that it must request a substantive alteration of the judgment, not merely correction of a clerical error, or relief of a type wholly collateral to the judgment."[4]

The Court then found that AA Primo's 'motion to amend order' qualified as a Nev. R. Civ. P. 59(e) motion because it was in writing, it "invoked"[5] Nev. R. Civ. P. 59, it "asked to vacate the judgment of dismissal,"[6] and it argued that the dismissal was the result of an error of law.

Next, the Court addressed the Washingtons' argument that the "motion to amend order" was really a motion for reconsideration.

EIGHTH DIST. CT. R. 2.24(b)

Under EIGHTH DIST. CT. R. 2.24(b), a motion for reconsideration "does not toll the 30-day period for filing a notice of appeal." However, the Court found that the first sentence of EIGHTH DIST. CT. R. 2.24(b) excludes several motions, including Nev. R. Civ. P. 59(e), from EIGHTH DIST. CT. R. 2.24(b)'s other provisions, and so EIGHTH DIST. CT. R. 2.24(b) does not render a proper Nev. R. Civ. P. 59(e) motion non-tolling.[7] The Court noted that the court rule had to be read this way so as not to be inconsistent with the Nevada Rules of Appellate Procedure. Otherwise, an inconsistency between the Nevada Rules of Appellate Procedure and the Eighth District Court Rules would arise in violation of NEV. R. CIV. P. 83 and 91(a).[8]

Nevada Common Law and Motions for Reconsideration

The Court began by acknowledging that Nevada case law had distinguished motions for reconsideration from motions to alter or amend, and that the former did not toll the time to file a notice of appeal.[9] However, the purpose of the distinction was no longer necessary in light of NRAP 4(a)(6), and was no longer good law in light of *Winston Products Co. v. DeBoer*.[10] The current NRAP 4(a)(4) dissolved the need for a distinction by loosening the requirements to make a timely appeal, and *Winston* stated that NRAP 4(a)(4) should not be used as a trap for unwary draftsmen.[11]

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[4] AA Primo Builders, LLC, 125 Nev. Adv. Op. No. 61, 4-5 (citing 11 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2810.1, at 119 (2d ed. 1995)).
[5] AA Primo Builders, LLC, 125 Nev. Adv. Op. No. 61, at 5.
[6] *Id.*
[7] EIGHTH DIST. CT. R. 2.24(b) begins: "A party seeking reconsideration of a ruling of the court, other than any order which may be addressed by motion pursuant to [NEV. R. CIV. P.] 50(b), 52(b), 59 or 60 . . . ." (emphasis added).
[8] NEV. R. CIV. P. 83 prohibits the Eighth District Court Rules from contradicting the Nevada Rules of Appellate Procedure, while NEV. R. CIV. P. 91(a) states that the Nevada Rules of Appellate Procedure control appeals. If the Court were to allow the Eighth District Court Rules to render this motion non-tolling where the Nevada Rules of Appellate Procedure render it tolling, the two would be in contradiction and in violation of NEV. R. CIV. P. 83.
[9] Able Electric, Inc. v. Kaufman, 104 Nev. 29, 31-32, 752 P.2d 218, 220 (1998); Alvis v. State, 99 Nev. 184, 186 n.1, 660 P.2d 980, 981 n.1 (1983); Nardozzi v. Clark Cnty. Sch. Dist., 108 Nev. 7, 8 n.1, 823 P.2d 285, 286 n.1 (1992).
[10] 122 Nev. 517, 134 P.3d 726 (2006).
[11] *Id.* at 526, 134 P.3d at 732.

Issue 2: "Whether a Nevada limited liability company whose charter is revoked, then reinstated, may litigate a pending suit to conclusion."[12]

Holding: "[Y]es, for three separate, independently sufficient reasons. First, the right to "transact business" that is forfeited on charter revocation does not normally include an LLC's capacity to sue and be sued. Second, reinstatement restores the entity's capacity to conduct itself as a limited liability company retroactively to the date of revocation; this includes the right to litigate pending cases to conclusion. Finally, dismissal should not be ordered in cases of this kind without giving the entity a brief stay, if requested, to pursue reinstatement of its charter."[13]

DiscussionThe Court first noted that questions of entity capacity are reviewed de novo.

Next, the Court acknowledged that under NEV. REV. STAT. § 86.274(2), an LLC may not transact business while its charter is revoked. However, the Court turned to a 9th Circuit case[14] that interpreted "transact business" using Merriam-Webster's Collegiate Dictionary. The Nevada Supreme Court then found that the "business" that NEV. REV. STAT. § 86.274(2) referred to was the business the LLC was primarily engaged in. For law firms, "business" could include suing and being sued, but business is not so for construction companies. Therefore, NEV. REV. STAT. § 86.274(2)'s prohibition on "transact[ing] business" did not reach Primo's ability to sue.

Next, the Court affirmed its holding by reaching the same result through application of NEV. REV. STAT. § 86.274, which states that an entity whose charter was revoked could follow the same proceedings with respect to its assets as a dissolved entity. Because a dissolved entity could sue and be sued under NEV. REV. STAT. § 86.505, an LLC with a revoked charter could also sue and be sued.

The Washingtons argued that Primo ceased to exist when it lost its charter, and so it could not sue or be sued. They argued that even if Primo did not cease to exist, their right to sue or be sued died under application of NEV. REV. STAT. § 86.281(1), which (they asserted) provides that "only 'organized and existing' companies may 'sue and be sued.'"[15] Lastly, the Washingtons argued that revoking the right to sue and be sued would deter future companies from allowing their charters to be revoked.

To the Washingtons' first argument, the Court replied that businesses do not really cease to exist when their charters are revoked. The Court cited several statutes and cases that allowed dissolved or revoked entities to continue or resume activities.[16]

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[12] AA Primo Builders, LLC v. Washington, 125 Nev. Adv. Op. No. 61, 9-10 (December 30, 2010).
[13] *Id.* at 10.
[14] In re Krause, 546 F.3d 1070 (9th Cir. 2008).
[15] AA Primo Builders, LLC, 125 Nev. Adv. Op. No. 61, 14.
[16] For example, the Court cited NEV. REV. STAT. § 86.505 (permitting dissolved entities to wind up their affairs); NEV. REV. STAT. § 86.580 (permitting permanently revoked entities to be revived); Nev. Rev. Stat. § 86.276(5) (permitting revoked entity's charter to be retroactively reinstated); Penasquitos, Inc. v. Superior Court 812 P.2d 154, 160 (Cal. 1991) (stating that an entity's dissolution is not "its death, but merely . . . its retirement.").

To the Washingtons' second argument, the Court replied that the Washingtons misstated NEV. REV. STAT. § 86.281(1) by inserting the word 'only.' NEV. REV. STAT. § 86.281(1) is really a list of permitted activities for Nevada LLCs.

To the Washingtons' third argument, the Court replied that refusing to allow a company with a revoked charter to sue or be sued is too harsh a punishment for not filing required documents or paying their fee. NEV. REV. STAT. § 86 sets forth penalties for operating with a revoked charter, and the penalties are relatively light when compared to punishments for companies who were never chartered.

Finally, the Court added that the district court should have allowed Primo time to reinstate its charter because it would have avoided the unnecessary delay and expense of dismissal, post-judgment motion practice, and appeal.