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Hunter v. Gang, 132 Nev. Adv. Op. 22 (April 7, 2016)

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CIVIL PROCEDURE: DISMISSAL

Summary

The Nevada Court of Appeals considered a consolidated appeal from a final district court order dismissing appellant's complaint with prejudice for a want of prosecution and a post judgment order awarding attorney fees and costs. The Court of Appeals determined the district court abused its discretion in dismissing the action without prejudice, reversed the district court's dismissal, vacated its award of fees and costs, and remanded.

Background

Appellant Richard Hunter acquired land in 1980 and sought his neighbor's permission to build a berm on her property to prevent flooding caused by water run-off from adjoining land. After receiving permission, Hunter built the berm in 1983 and asserts he subsequently maintained it. In 2002, Respondent William Gang acquired the same adjoining property.

But in 2009, Hunter unsuccessfully attempted to sell his property, purportedly because of the potential buyer's concerns regarding encroachments on Gang's property, including the berm. Hunter brought suit asserting claims to quiet title, adverse possession, and sought injunctive as well as declaratory relief over the portion of Gang's property where Hunter built the berm. After negotiations purportedly broke down, Gang asserted he still continued to send settlement correspondence to Hunter and Hunter's counsel, which were ignored.

In response, Gang moved to dismiss Hunter's action with prejudice for want of prosecution 20 months after Hunter filed his complaint. Gang's motion to dismiss cited the Court's express authority under NRCP 41(e) to dismiss an action a plaintiff has not brought to trial within two years as well as cases discussing the Court's inherent authority to dismiss an action for want of prosecution. Hunter claimed dismissal was premature, arguing the two-year time period in NRCP 41(e) had not yet passed and alternatively argued his ill health should excuse any delay. The district court ultimately granted Gang's motion to dismiss with prejudice, and Hunter appealed the dismissal. Gang also moved for attorney fees and costs, pursuant to NRS 18.010(2)(b) and NRS 18.020, which the district court granted in full. Hunter then appealed from that order; the two appeals were subsequently consolidated.

Discussion

Dismissal for want of prosecution

District courts in Nevada have two independent sources of authority to dismiss an

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action for want of prosecution: 1) *express* authority under NRC 41(e), permitting dismissal where the plaintiff fails to bring an action to trial within two years after the action is filed and requiring dismissal if the plaintiff does not bring the action to trial within five years, 2) *inherent* authority to dismiss an action for want of prosecution, “independent of any authority granted under statutes or court rules.”² Since the district court dismissed this action before the NRC 41(e) two-year time period elapsed, it must have dismissed Hunter's action using its inherent authority, which district courts may appropriately evoke without having to justify its use. However, a court’s inherent authority must be exercised with restraint and discretion; such authority should be exercised sparingly.³

Abuse of Discretion

But a district court’s decision to dismiss an action for want of prosecution will be disturbed on appeal only if the district court “grossly abused its discretion.”⁴ Importantly, a lack of due diligence on the part of the plaintiff individually, or through counsel, is an essential element to justify dismissal for failure to prosecute.⁵ Further, where—like here—a district court seeks to dismiss *with prejudice*, “its use must be tempered by a *careful* exercise of judicial discretion,” because it is a “harsh remedy” to be used only in “extreme situations.”⁶ Accordingly, when evoking this remedy, district courts must take into account additional factors, other than lack of diligence.

Dismissal with prejudice pursuant to inherent authority

While the Nevada Supreme Court has not yet decided what circumstances allow district courts to dismiss cases with prejudice pursuant to their inherent authority, it has identified several factors for district courts to consider when deciding whether to dismiss cases with prejudice under its express authority with regard to the the five-year provision of NRC 41(e)—the *Monroe* factors⁷. These factors include the following: 1) the underlying conduct of the parties, 2) whether the plaintiff offers adequate excuse for the delay, 3) whether the plaintiff’s case lacks merit, and 4) whether any subsequent action following dismissal would not be barred by the applicable statute of limitations.⁸

Here, the Nevada Court of Appeals decided to adopt the same *Monroe* factor test for district courts to consider in dismissing an action with prejudice under its inherent authority. The Court held that district courts should consider the four *Monroe* elements in addition to any other relevant considerations such as length and reasonableness of the delay.

² *Moore v. Cherry*, 90 Nev. 390, 393, 528 P.2d 1018, 1020 (1974)

³ *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991); *See United States u. Shaffer Equip. Co.*, 11 F.3d 450, 461 (4th Cir. 1993)

⁴ *Moore*, 90 Nev. at 395, 528 P.2d at 1021

⁵ *Id.*

⁶ *Id.* at 394, 528 P.2d at 1021; *Id.* at 393, 528 P.2d at 1021

⁷ *Monroe v. Columbia Sunrise Hosp. & Med. Ctr.*, 123 Nev. 96, 103, 158 P.3d 1008, 1012 (2007)

⁸ *Id.*

The District Court's findings of fact

On review of the record, the Nevada Court of Appeals concluded that evidence did not support nearly all the court's factual findings and that no evidence was presented to sustain the court's conclusions that Hunter failed to timely prosecute his case and that Hunter's claims lacked merit.

The Monroe factors in Hunter's action

The Court looked to the *Monroe* factors to determine whether the district court abused its discretion by dismissing Hunter's claim for want of prosecution. In considering the conduct of the parties, the Court considered whether the parties behaved in accordance with a reasonable and good faith belief that no court action was necessary.⁹ Because both parties—Hunter and Gang—failed to take court action, their conduct suggested settlement negotiations were ongoing. Consequently, this factor supported a determination that dismissal with prejudice was an abuse of the district court's discretion.

Noting that Hunter's wife's affidavit discussing his illness was vague and inconclusive, the Court held there was sufficient evidence supporting the district court's finding that Hunter's illness was inadequate to excuse the 20-month period in which he failed to take court action. The Court also noted Hunter's illness, even if adequate, would not necessarily extend to his attorney, who could have acted diligently by contacting opposing counsel or undertaking other legal remedies. However, the Court emphasized that a plaintiff's prolonged illness could be an adequate excuse for delay in prosecution under the right circumstances.¹⁰

Also, the district court inappropriately based its conclusion that Hunter's claims lacked merit on Gang's unsupported allegations of Hunter's manipulative behavior as well as Hunter's complaint and Hunter's wife's affidavit—neither of which, the Court of Appeals determined, could be viewed as sufficient and substantial evidence. Thus this factor, too, suggests dismissal with prejudice was an abuse of discretion.

Since neither the parties' briefs nor the record include any information about statutes of limitations applicable to Hunter's claims, the Court of Appeals refused to assess whether Statutes of Limitations issues would have served as basis for dismissal with prejudice.

Conclusion

The Nevada Court of Appeals found that the district court abused its discretion by dismissing the claims with prejudice, because the majority of the district court's factual

⁹ *Home Say. Ass'n*, 109 Nev. at 564, 854 P.2d at 854.

¹⁰ *See In re McGregor*, 56 Nev. 407, 411, 48 P.2d 418, 420 (1935) (Where illness of both plaintiff and wife was adequate excuse for delay)

and legal conclusions were unsupported by the record, and the evidence presented did not support dismissal with prejudice. Pursuant to the *Monroe* factors, the conduct of the parties and merits of the action weighed against dismissal with prejudice. Accordingly, the district court's decision to dismiss with prejudice is reversed, its order of attorneys fees and costs based on dismissal vacated, and the matter remanded to district court.