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***Brent G. Theobald Constr. v. Richardson Constr.*, 122 Nev. Adv. Op. 98
(Dec. 7, 2006)¹**

CIVIL PROCEDURE – RES JUDICATA

Summary

The Court confirmed that a lawsuit dismissed under NRCP 41(e), unless dismissed without prejudice, is res judicata to a future lawsuit between the same plaintiff and defendant involving the same claims for relief. The Court determined that the district court correctly dismissed Theobald’s second lawsuit based on res judicata, and clarified its previous holding in *Home Savings Ass’n v. Aetna Casualty & Surety*.²

Disposition/Outcome

Affirmed district court’s dismissal of second lawsuit, as it was subject to res judicata.

Factual And Procedural History

Procedure:

Appellant Brent G. Theobald Construction, Inc. filed a lawsuit that was dismissed by the district court under N.R.C.P. 41(e) for failure to prosecute, without that court’s clarification of whether the dismissal was with or without prejudice. A second suit by Theobald Construction was dismissed based upon the principle of res judicata. Theobald cited *Home Savings Ass’n v. Aetna Casualty & Surety*³ for the proposition that the second suit was not barred by res judicata.

Facts:

Respondent Richardson Construction, Inc., was a general contractor on a project for the White Pine County School District. Richardson subcontracted with Theobald to provide labor, materials, equipment, and other services for the project. The subcontract provided that “[t]he Final payment of retention will be paid to Subcontractor 30 days after receipt of retention from the Owner.” During construction, additional costs were allegedly incurred as a result of extras, changes, delays, failures to provide access, and changes in the scope of the project. As a result, White Pine refused to pay Richardson the final payment and retention, and Richardson refused to pay Theobald until White Pine paid Richardson.

Theobald sued Richardson in April 1995 for breach of contract and unjust enrichment. Richardson, however, chose to arbitrate its dispute with White Pine and moved for a stay of litigation with Theobald while it pursued the arbitration. The district court denied Richardson’s motion for a stay of litigation in March 1997.

¹ By Michelle L’Hommedieu

² 109 Nev. 558; 854 P.2d 851 (1993).

³ *Id.*

Instead of pursuing its claims, Theobald cooperated with Richardson in Richardson's arbitration with White Pine. Theobald then waited for the arbitration between Richardson and White Pine to be resolved so that Richardson could pay Theobald. Theobald and Richardson did not agree to extend the time for Theobald to bring the action to trial under NRCP 41(e). Richardson and White Pine settled in December 1997. In February 2002, Theobald, now aware of the settlement, requested payment from Richardson, which refused to pay. In March 2003, nearly eight years after it filed its complaint, Theobald moved for summary judgment against Richardson. Richardson moved to dismiss the lawsuit based on NRCP 41(e) for failure to prosecute. As the lawsuit had not been prosecuted within NRCP 41(e)'s five-year requirement, the district court dismissed the lawsuit. The district court did not indicate whether it dismissed the lawsuit under NRCP 41(e) with or without prejudice.

Theobald did not appeal or ask for modification of that order. Instead, it filed a second complaint against Richardson in July 2003. Theobald again alleged breach of contract and unjust enrichment.

Discussion

NRCP 41(e) mandates dismissal of an action five years from the date it was filed if trial has not commenced,⁴ and the district court has discretion to dismiss the case with or without prejudice.⁵ However, unless the district court states in its order that dismissal is without prejudice, dismissal with prejudice is presumed⁶ and "is res judicata and bars any other suit on the same claim."⁷

Theobald filed its first lawsuit against Richardson in April 1995. Theobald failed to prosecute the lawsuit until March 2003, eight years later, and the district court dismissed the case under NRCP 41(e) without mentioning prejudice. Under NRCP 41(e), dismissal with prejudice must be presumed. Theobald failed to appeal or to seek clarification of this order.⁸ Instead, in July 2003, Theobald filed its complaint in the present litigation with the same claims against the same defendant. NRCP 41(e)'s express language rendered this second complaint res judicata, and the district court dismissed the complaint.

The Court distinguished this case from *Home Savings*, upon which Theobald based its argument that when a case is dismissed under NRCP 41(e) and a subsequent lawsuit is filed by the same plaintiff against the same defendant involving the same claims, the court in the second case can review the NRCP 41(e) dismissal and may allow the second case to proceed if the NRCP 41(e) dismissal should have been granted without prejudice.

The procedural history of *Home Savings*, disproves the interpretation by Theobald. In a bifurcated trial, the plaintiff H.S. proceeded against the defendant Aetna while the other plaintiff Home Savings awaited the outcome. H.S. prevailed at trial in October 1984 and on appeal in

⁴ *Id.* at 563, 854 P.2d at 854.

⁵ *Id.* at 563-64, 854 P.2d at 854.

⁶ *See* Erickson v. One Thirty-Three, Inc., 104 Nev. 755, 758, 766 P.2d 898, 900 (1988).

⁷ *Id.*; NEV. R. CIV. P. 41(e).

⁸ *See Home Savings*, 109 Nev. at 563-64, 854 P.2d at 854.

February 1987. Home Savings then sought summary judgment against Aetna in October 1988.⁹ After Home Savings sought summary judgment against the defendant Aetna. in the first case, Home Savings and H.S. filed a second complaint against Aetna in November 1988 seeking the same declaratory relief and other damages.

Without mentioning prejudice, the district court granted Aetna's NRCP 41(e) motion to dismiss Home Savings from the first case. Home Savings immediately appealed the district court's NRCP 41(e) dismissal, which was determined to be premature because the cases had been consolidated and no final judgment for the combined case had been entered. Eventually, the district court entered partial summary judgment against Home Savings in the second case based on res judicata and dismissed the case upon the parties' stipulation for dismissal. Home Savings and H.S. then appealed this final judgment, challenging the earlier NRCP 41(e) dismissal order.

Therefore, both the NRCP 41(e) dismissal of Home Savings' first complaint and the subsequent order finally resolving both cases were before this Court in Home Savings. Consequently, it had jurisdiction to consider whether the district court abused its discretion when it did not dismiss the first case without prejudice.

This case has a different procedural posture. The two district court actions were not consolidated. And, Theobald did not appeal the district court's NRCP 41(e) dismissal order in its first case. Because that dismissal was not before the Court, it had no jurisdiction to consider whether the district court abused its discretion by not dismissing the case without prejudice.

Conclusion

Home Savings timely appealed the district court's dismissal of its case under NRCP 41(e). Here, however, Theobald did not appeal the district court's order dismissing, under NRCP 41(e), its first case. Therefore, the Nevada Supreme Court has no jurisdiction to consider whether the district court abused its discretion when it did not dismiss the first case without prejudice. Thus, under NRCP 41(e), Theobald is barred from bringing the same claims against Richardson, and the district court did not abuse its discretion when it granted Richardson's motion to dismiss. Accordingly, we affirm the district court's order was affirmed.

⁹ *Id.* at 560-61, 854 P.2d at 852-53.