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Summary of *Nutton v. Sunset Station, Inc.*, 131 Nev. Adv. Op. 34 (June 11, 2015)

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CIVIL PROCEDURE: RELATIONSHIP BETWEEN NRCP 15(a) AND NRCP 16(b)

Summary

The Court determined the proper relationship between NRCP 15(a) and NRCP 16(b), and explored whether a proposed amendment under NRCP 15(a) can be deemed “futile” because it is unsupported by, or contradicts, factual evidence produced during discovery.

Factual and Procedural History

Appellant Brandon Nutton slipped and fell while bowling at Sunset Station Hotel & Casino, shattering his right patella. At the time of the injury, Nutton was wearing street shoes, rather than the bowling shoes he rented from Respondent Sunset Station. Nutton filed a personal injury claim against Sunset Station, alleging that he had slipped on a layer of lane oil that extended past the bowling lane, and that the oil was so thick that it permeated his clothes on impact. During his deposition, Nutton admitted he had rented bowling shoes from Sunset Station, but he failed to put them on because no employee of Sunset Station had specifically instructed him to do so. Nutton denied that his footwear played any role in the fall, saying “I don’t find that bowling shoes would have been a factor in my slipping and ... I feel as though I would have fallen in the same fashion whether I was wearing my own shoes or the shoes [Sunset Station] provide[d].”

The parties were unable to locate any other person who saw or felt excessive lane oil on the floor. To the contrary, Sunset Station produced an expert report and surveillance video recorded on the night of the incident revealing no evidence of a foreign substance on the floor. The surveillance video also showed other patrons bowling in the same approach as Nutton immediately before his arrival. Moreover, Nutton retained his own expert who agreed that “Nutton did not slip and fall from oil residue on the approach.” The expert opinions and surveillance video were prepared before the expiration of the deadline to motion for leave to amend pleadings.

Roughly three weeks after the deadline to amend pleadings, Nutton filed a motion with the district court seeking leave to amend his complaint pursuant to NRCP 15(a). Conceding that lane oil did not cause his fall, he sought to amend his theory of liability to plead that his street shoes caused his fall; he asserted that Sunset Station had negligently failed to ensure that he wore his rented bowling shoes when he bowled. He also asserted that Sunset Station possessed superior knowledge regarding the risks to bowling in street shoes, and failed to warn him of the danger. In addition to filing his motion to amend his complaint almost three weeks after the deadline, Nutton’s motion was also filed after the statute of limitations period for asserting a negligence claim.

Finding that Nutton’s motion proposed amending his complaint to a “totally different theory of [the] case,”² and that the motion had been filed “too close to trial,”³ the district court denied the motion. Shortly after the court denied Nutton’s motion, Sunset Station filed a motion

¹ By Joseph Meissner.

² *Nutton v. Sunset Station, Inc.*, 131 Nev. Adv. Op. 34 (June 11, 2015).

³ *Id.*

for summary judgment on the theory of negligence pleaded in the original complaint. The court granted summary judgement in favor of Sunset Station and Nutton appealed.

Discussion

The Court decided two issues in this case. The first centered on the correct application of NRCP 15(a) and NRCP 16(b), as they relate to one another. The second issue the court decided set out when a proposed amendment under NRCP 15(a) can be considered futile because it is either unsupported by, or contradicts, facts previously established during discovery.

NRCP 15(a) states that when a party motions for leave to amend its pleading, “leave shall be freely given when justice so requires.”⁴ While NRCP 15(a) does not explicitly state whether leave must be requested before or after discovery, or before or after any other deadline by the court, the rule cannot be read in a vacuum; the rules of civil procedure must be contemplated together.⁵ NRCP 16(b) often overlaps with NRCP 15(a). Among other things, NRCP 16(b) requires the district court to set deadlines for various events in each case, including deadlines for discovery and various types of motions. Importantly, NRCP 16(b) specifically requires the court to set a deadline for motions seeking to amend pleadings and states that the deadline “shall not be modified”⁶ except “upon a showing of good cause.”⁷ Therefore, when a party motions to amend a pleading after the deadline set for such motion under NRCP 16(b) has already expired, the motion implicates both NRCP 16(b) and NRCP 15(a) because the party effectively seeks a deadline extension to allow the motion to be considered.

In determining whether “good cause” exists under NRCP 16(b), the trial court must decide whether a particular filing deadline cannot be reasonably met despite the diligence of the motioning party. Courts have identified four, non-exclusive, factors that may aid in deciding whether a party exercised diligence in trying, but failing, to meet a deadline: “1) the explanation for the untimely conduct, 2) the importance of the requested untimely action, 3) the potential prejudice in allowing the untimely conduct, and 4) the availability of a continuance to cure such prejudice.”⁸ Of the four factors, the first is the most important, and can be decisive by itself. Importantly, a lack of diligence may be found when a party is aware of information pertinent to its amendment before the deadline, but the party failed to seek the amendment before it expired.

Here, the record demonstrates that, before the deadline to motion to seek to amend pleadings had expired, Nutton was aware that his initial theory, that regarding lane oil, was incorrect by both parties’ experts and the surveillance video. The record also demonstrates that, before the deadline, Nutton was aware of Sunset Station’s footwear requirement and, until almost three weeks after the deadline had passed, had expressly disclaimed this theory as a contributing factor. Thus, the Court found that Nutton had not acted diligently, and denied his motion under NRCP 16(b).

Next, the Court focused on the futility element of NRCP 15(a). Under Rule 15(a), leave to amend, even where timely sought, need not be accommodated by the court if the proposed amendment would be “futile.” A trial court may find a proposed amendment futile if the plaintiff

⁴ NEV. R. CIV. PRO. 15(a).

⁵ See generally *Rosen v. Dick*, 639 F.2d 82, 94 (2d. Cir. 1980).

⁶ NEV. R. CIV. PRO. 16(b).

⁷ *Id.*

⁸ *Nutton*, 131 Nev. Adv. Op. 34 citing with approval *S&W Enterprises v. SouthTrust Bank of Alabama*, 315 F.3d 533, 534 (5th Cir. 2003).

seeks to plead an impermissible claim, or a “last second amendment ... alleging meritless claims in an attempt to save a case from summary judgment.”⁹ The Court explained that few Nevada cases explain how the futility exception is properly applied. Ultimately, the exception is intended to disallow an amendment if such an amendment will inevitably be a waste of time and resources on which the party has no realistic chance of prevailing on at trial. But the Court found that in practical application, this is a difficult standard for a court to apply. It held that improper application of the futility exception can create an “irreconcilable conflict between the loose pleading standards of NRCP 8, which governs what must be pleaded, and the more demanding evidentiary standards of NRCP 56, which governs whether what has been pleaded is entitled to proceed at trial.”¹⁰

Here, the Court held that the district court had not determined whether Nutton’s proposed amendment was futile on its face, rather, it determined that the amendment was unlikely to prevail at trial “given the results of the discovery already conducted.”¹¹ According, the district court’s futility analysis in this case was flawed. However, Nutton still failed to demonstrate “good cause” permitting the district court to even consider the merits of his motion to amend. Therefore, the district court’s error was harmless.

Conclusion

Although the district court did not determine whether “good cause” existed under NRCP 16(b) before reviewing the merits of Nutton’s motion under NRCP 15(a), the error was inconsequential because, under the circumstances, the motion would have been properly denied under the standards of NRCP 16(b). The district court did not err in granting summary judgment in favor of Sunset Station and awarding attorney’s fees and costs. Affirmed.

⁹ Nutton, 131 Nev. Adv. Op. 34 citing with approval *Soebbing v. Carpet Barn, Inc.*, 847 P.2d 731, 736 (1993).

¹⁰ Nutton, 131 Nev. Adv. Op. 34.

¹¹ *Id.*