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Gonor v. Dale, 134 Nev. Adv. Op. 109 (Dec. 27, 2018) (en banc)

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CIVIL PROCEDURE: SUBSTITUTION OF DECEASED PARTY

Summary

The Court found that the 90-day period in which a deceased party's successor or representative must seek to substitute for the deceased plaintiff begins when a party files a suggestion of death on the record, not on the actual date of death. But, because appellants failed to identify the proper party to maintain the survival action within 90 days, the Court affirmed the district court's dismissal of the suit with prejudice.

Background

Irwin Gonor filed an intentional interference of contractual relations suit against respondents. But, on June 2, 2016, before the case's resolution, Gonor passed away. Without notifying respondents of his client's death, Gonor's attorney engaged in settlement negotiations with respondents at the direction of Gonor's mother and sole heir, Shirley Hoffner. After reaching an agreement, Gonor's attorney returned respondent's proposed settlement agreement with Hoffner's signature. Respondents became aware of Gonor's death after inquiring about Hoffner's signature.

On October 26, 2016, respondents filed a suggestion of death with the district court. On November 19, 2016, Gonor's attorney filed a motion to amend the complaint, seeking to appoint Hoffner as plaintiff because she was Gonor's sole heir, or in the alternative, to allow an additional 120 days under NRCP 6(b)² to open Gonor's estate. Respondents then filed an opposition and a countermotion to dismiss the case as untimely pursuant to NRCP 25(a)(1)³ and for failing to propose a proper party for substitution under NRS 41.100.⁴ Following a hearing, the district court denied plaintiff's motion to amend and granted respondent's motion to dismiss, finding Gonor's attorney failed to file a motion to substitute within 90 days of Gonor's date of death.

On January 24, 2017, Gonor's attorney filed a second motion to amend the complaint, asking to substitute the estate of Gonor as plaintiff. On February 27, 2017, the probate court appointed appellant Robert Womble as special administrator to Gonor's estate. On March 28, 2017, the district court noted it considered the second motion to amend to be a motion for reconsideration, denied it, and dismissed the case with prejudice. This appeal followed.

Discussion

NRCP 25

The district court erred in concluding that Gonor's date of death triggered the 90-day period to file a motion for substitution. The Court agreed with appellant that the 90-day period is triggered

¹ By Esteban Hernández.

² NEV. R. CIV. P. 6(b).

³ NEV. R. CIV. P. 25(a)(1).

⁴ NEV. REV. STAT. § 41.100 (2017).

when the suggestion of death is filed on the record. A plain reading of NRCP 25(a)(1) requires that the 90-day period begins when the suggestion of death is filed on the record.⁵

Further, a plain reading of NRCP 25(a)(1) details that the 90-day period is not triggered until the party who files a suggestion of death serves the suggestion to parties and/or nonparties. However, this Court has previously indicated that in situations where a plaintiff dies, and the defendant files the suggestion of death, said filing of the defendant is enough to trigger the 90-day period.⁶ Thereafter, the deceased party's successor or personal representative has the responsibility to move for substitution within that timeframe because tasking this duty to the defendant would unfairly force the defending party to speculate on and subsequently locate the deceased party's successor or personal representative.⁷

Here, the 90-day term began when respondents filed the suggestion of death on the record and served it to Gonor's attorney on October 26, 2016. The remaining issue is whether Gonor's attorney's two motions to amend sought to substitute the proper party under NRS 41.100.

NRS 41.100

The Court agreed with respondents that the motions to amend did not identify the proper party under NRS 41.100. NRCP 25(a)(1) allows the court to order substitution of the proper parties. Under NRS 41.100(1), the decedent's executor or special administrator may maintain the decedent's survival action.⁸ Pursuant to NRS 132, the proper party who may substitute the deceased party may either be an "executor,"⁹ a person named in the will of the deceased party and appointed by the court to administer the estate, or an "administrator,"¹⁰ someone appointed by the court to accomplish the same.

Here, the motions to amend failed to establish the proper party. Because Gonor died intestate, the proper party would be a special administrator appointed by the court. The first motion sought to substitute Gonor's mother and also conceded a special administrator had not yet been appointed. The second motion incorrectly sought to substitute the estate of Gonor instead of substituting the proper party: the administrator of the estate.¹¹ Further, because the 90-day period expired before a special administrator was appointed for Gonor's estate,¹² the Court held that, pursuant to NRS 41.100(1), appellants did not timely pursue substitution of the proper party.

Conclusion

The Court held that although the district court erred in holding that the motions to amend were untimely based on Gonor's date of death, its dismissal was proper because appellants failed to timely move to substitute the proper party. Accordingly, the Court affirmed the district court's holding.

⁵ *Moseley v. Eighth Judicial Dist. Court*, 124 Nev. 654, 659, 188 P.3d 1136, 1140 (2008).

⁶ *Id.* at 657, 188 P.3d at 1139.

⁷ *Id.* at 657, 661, 188 P.3d at 1139, 1141.

⁸ NEV. REV. STAT. § 41.100(1) (2017); *See also Jones v. Las Vegas Metro. Police Dep't*, 873 F.3d 1123, 1128 (9th Cir. 2017).

⁹ NEV. REV. STAT. § 132.130 (2017).

¹⁰ NEV. REV. STAT. § 132.040 (2017).

¹¹ *See Jones*, 873 F.3d at 1128.

¹² The Court did not consider whether the 90-day term could have been extended under NRCP 6(b)(2) if excusable neglect is shown because appellants failed to address this argument on appeal. *See* NRCP 6(b)(2).