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Hung vs. Berhad, 138 Nev. Adv. Op. 50 (June 30, 2022)

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Recommended Citation

Mays, Candace, "Hung vs. Berhad, 138 Nev. Adv. Op. 50 (June 30, 2022)" (2022). *Nevada Supreme Court Summaries*. 1515.

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CIVIL PROCEDURE: LEAVE TO AMEND IS FUTILE WHERE IT WOULD NOT REMEDY
FATAL FLAWS

Summary

The Supreme Court of Nevada considered whether the district court erred in dismissing the appellants' complaint on procedural grounds without granting leave to amend so that they could remedy any deficiencies in their pleadings thus far. The Court held that neither the appellants' original complaint, first amended complaint, nor proposed second amended complaint, contained facts sufficient to show leave to amend would not be futile. Accordingly, the Court affirmed the district court's dismissal of the complaint.

Facts and Procedural History

The appellants commenced a civil action against the respondents, alleging wrongful death and negligence, after the death of their parents in the Resort World hotel. The complaint named several defendants, some of whom were not served notice of the lawsuit, even after an amended complaint was filed. At trial, three of the defendants moved to dismiss the complaint due to several procedural deficiencies. The motion was granted and the district court dismissed the appellants' claim for improper venue under NRCP 12(B)(2),² failure to state a claim under NRCP 12(b)(5),³ for insufficient service under NRCP 12(b)(6),⁴ and under *forum non conveniens*.

In their opening brief, the appellants challenged the dismissal on the grounds that it was improper under *forum non conveniens* and argued that the district court abused its discretion in not granting their second motion for leave to intervene so that they could have the opportunity to remedy deficiencies in their pleadings.

Discussion

An appellant must challenge each of the alternative grounds supporting the district court's ultimate ruling in his or her opening brief

On appeal, the appellant argued that the lower court improperly dismissed the complaint based on *forum non conveniens* and the respondent insisted that, since this was the only challenge raised by the appellant, this constituted a waiver of all other challenges. The Court, citing a plethora of cases to illustrate the point, noted that it is well established that in Nevada, failure to raise a challenge to some basis for a court's decision in or before the opening appellate brief will bar the matter from being considered on appeal.⁵ Therefore, since the appellants had only

¹ By Candace Mays.

² NEV. R. CIV. P. 12(b)(2).

³ NEV. R. CIV. P. 12(b)(5).

⁴ NEV. R. CIV. P. 12(b)(6).

⁵ See *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (establishing waiver of any issues not raised at the trial level); *Kahn v. Morse & Mowbray*, 121 Nev. 464, 480 n.24, 117 P.3d 227, 238 n.24 (2005) (explaining that even issues raised but done so improperly or in an untimely fashion may also be deemed waived).

challenged the district court's decision on the grounds of *forum non conveniens*, the alternative grounds for dismissing the complaint will stand as unopposed.

The district court did not abuse its discretion in denying the motion to amend

The appellants argue that pursuant to NRCP 15(a)(2), leave to amend should be interpreted in favor of granting leave to amend in a case like the present one, where "justice so requires."⁶ The respondents argue that, even under a presumption toward granting leave to amend, there is no obligation for the court to do so when the amendment would have been futile.

The Court, citing *Lorenz v. Beltio*,⁷ agreed that leave would have been futile since the proposed amended complaint would have still failed to plead facts sufficient to sustain an alter-ego liability claim in Nevada. Under the test set forth in *Lorenz*,⁸ the appellants would have been required to show "(1) [t]he corporation [is] influenced and governed by the person asserted to be its alter ego[;] (2) [t]here [is] such unity of interest and ownership that one is inseparable from the other; and (3) [t]he facts [are] such that adherence to the fiction of separate entity would, under the circumstances, sanction a fraud or promote injustice."⁹ The Court noted that the appellants' second proposed amendment contained no new factual allegations that would remedy the deficiencies the district court found in the former. Thus, the Court held, the district court did not abuse its discretion in denying the appellants' motion to amend.

Conclusion

The Court upheld the district court's dismissal of the appellants' complaint because, given the appellants' waiver of several challenges, the challenges remaining were not sufficient to show leave to amend would not have been futile. Thus, the district court did not abuse its discretion in denying the appellants' motion for leave to amend and remedy procedural deficiencies.

⁶ NEV. R. CIV. P. 15(a)(2).

⁷ *Lorenz v. Beltio, Ltd.*, 114 Nev. 795, 807, 963 P.2d 488, 496 (1998).

⁸ *Id.*

⁹ NEV. R. CIV. P. 15(a)(2).