

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

WESLEY RUSCH,

Appellant,

vs.

THE MARTIN CONDOMINIUM UNIT
OWNERS' ASSOCIATION,

Respondent.

No. 85821-COA
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**OPPOSITION TO APPELLANT'S APPLICATION AND
MOTION FOR SUMMARY JUDGMENT**

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

The present appeal arises out of entry of summary judgment in favor of Appellee The Martin Condominium Unit Owners' Association ("Martin CUOA") and against Appellant Wesley Rusch ("Rusch") and his partner, Oliver Longboy ("Longboy") (who is not an Appellant), in Rusch and Longboy's lawsuit against Martin CUOA in the District Court, Clark County, Nevada (Eighth Judicial District), Case No. A-21-840526-C, by the Honorable Judge Nancy L. Allf of Department 27. The parties had filed competing summary judgment motions. The lawsuit at issue in this appeal was the second lawsuit dismissed by Judge Allf, as she previously dismissed an identical lawsuit (Case No. A-20-826568-C) which Rusch and Longboy did not appeal. The two actions were consolidated by Judge Allf prior to finality of the first lawsuit due to their identicalness in alleged facts and claims. The appeal in the present action became fully-briefed as of July 5, 2023 (when Rusch filed his Reply Brief, which he later revised on July 21, 2023 without requesting leave).

As this Court is more than aware by now, rather than permitting this Court to complete its appellate review of the dismissal of his second lawsuit against Martin CUOA, Rusch has been serially filing motions he filed in the dismissed consolidated action in this Court. This Court has already denied two of these motions, the first

being an “Application and Motion for Default Judgment” and the second being a “Revised Application and Motion for Default Judgment”. *See* Orders entered on November 17, 2023 and December 4, 2023, respectively. On December 20, 2023, Rusch filed his latest motion, an “Application and Motion for Summary Judgment” (hereinafter “AMSJ”).

As noted in Martin CUOA’s last filing on December 20, 2023, Rusch was deemed to be a vexatious litigant by Judge Allf, who entered a Pre-Filing Order. *See* RA-2020-TWELVE-2704-2727. This Order resulted from Rusch’s constant filing of meritless documents and motions, Rusch’s failures to comply with Nevada civil procedure law, and Rusch’s serial filing of baseless lawsuits. *Id.* Rusch is now engaging in the same improper conduct by filing motions which are not properly filed in this Court. Unless and until this Court issues a directive to Rusch to stop his improper behavior, this Court will likely see continued fugitive filings by Rusch.

As will be demonstrated below, Rusch’s present AMSJ can summarily be disposed of and denied by this Court.

II.

ARGUMENT

Rusch’s AMSJ filed in this Court is an obvious end around of the Order entered by Judge Allf on June 30, 2022, entering summary judgment in favor of Martin CUOA and against Rusch and Longboy. As part of that Order, Judge Allf

denied Rusch and Longboy's counter-motion for summary judgment. Simply put, it is improper for Rusch to file his AMSJ in this Court, not only for the jurisdictional reasons discussed below, but also because summary judgment issues are under appellate review by this Court and Rusch does not get a "re-do" of those issues by sidestepping the district court and filing motions in this Court.

As previously briefed by Martin CUOA in this matter, it is not within the jurisdiction of this Court during the pendency of an appeal to entertain a re-filing of a motion which was denied by the lower court. The power to adjudicate requests/motions such as Rusch's Request only lies within the original jurisdiction of the District Courts in the several Judicial Districts in the State of Nevada. *See* Nevada Constitution, Article 6, Section 6, Subsection 1. This Court's jurisdiction is that of an appellate court having appellate jurisdiction in all civil cases arising in district courts. *See* Nevada Constitution, Article 6, Section 4, Subsection 1. *See, also, Stephens v. First Nat'l Bank*, 64 Nev. 292, 298-300, 182 P.2d 146, 149 (1947) (holding that an appellate tribunal has no power or jurisdiction to change or alter the record of the underlying case in any material particulars). Thus, Rusch's AMSJ should be denied, because this Court does not have jurisdiction to separately entertain a summary judgment motion where a district court's summary judgment order is under review. *See, e.g., Vizcaino v. Microsoft Corp.*, 120 F.3d 1006, 1016 (9th Cir. 1997) ("One of the fundamental precepts of appellate analysis is review

based on a closed record.”). This Court may only review the actions of the lower court permitted within its appellate jurisdiction subject to the applicable standard of review.

It is also within the inherent authority of this Court to control its docket. *See Maheu v. Eighth Judicial District Court*, 89 Nev. 214, 217, 510 P.2d 627, 629 (1973) (citing *Landis v. North American Co.*, 299 U.S. 248, 254-55 (1936)). Rusch is attempting to inject chaos in this Court by serially filing motions that he filed in the district court which were denied. This conduct is wholly improper. Just because Rusch is representing himself in proper person does not give him a license to abuse the appellate process. Rusch is subject to the same rules as parties represented by counsel. *See Rodriguez v. Fiesta Palms, LLC*, 134 Nev. 654, 659, 428 P.3d 255, 258-59 (2018) (citing *Bonnell v. Lawrence*, 128 Nev. 394, 404, 282 P.3d 712, 718 (2012) (holding procedural rules cannot be applied differently to pro se litigants)). Making Rusch’s conduct more egregious here is the fact that he is formerly a licensed attorney, a point which he himself has raised in his improper filing in this Court on November 28, 2023. *See* Rusch’s Revised Application and Motion for Default at pp. 2-3. Therefore, Rusch must know, or is at a minimum imputed as a former licensed attorney with the knowledge that, his conduct in filing previously denied motions by the district court in this Court is improper conduct. *See, e.g., Henco Energy-Rick Hendrix Energy LLC v. Power Rental Sols., LLC*, 2023 U.S.

Dist. LEXIS 62055, *2 (M.D. Tenn. March 30, 2023) (citing *Johansen v. Presley*, 977 F. Supp. 2d 871, 876-77 (W.D. Tenn. 2013) (noting an attorney proceeding *pro se* is not automatically subject to the leniency ordinarily afforded to pro se litigants because an attorney is presumed to have knowledge of the legal system); *Bennett v. FedEx Office & Print Servs.*, 2022 U.S. Dist. LEXIS 103454, *5 (2022) (citing *Lovitky v. Trump*, 308 F. Supp. 3d 250, 253 (D.D.C. 2018)) (noting an attorney proceeding as a *pro se* plaintiff is not entitled to the same level of solicitude often afforded non-attorney litigants because an attorney is presumed to have knowledge of the legal system.). Rusch's remedy for dismissal of his lawsuits against Martin CUA is the appellate process, not filing previously-filed district court motions in this Court, and his present appeal is already fully-briefed awaiting decision by the Court.

It follows that Rusch's filing of his AMSJ in this Court is clearly fatally-flawed. Rusch's AMSJ should be denied. This Court should also exercise its discretion to control its docket and prevent Rusch's ongoing misconduct.

IV.

CONCLUSION

As demonstrated above, Rusch's AMSJ is improperly filed in this Court and, therefore, defective as a matter of law. Rusch is a formerly licensed attorney. Rusch's conduct in filing in this Court motions which were denied by the district

court is clearly attempting to inject chaos into these appellate proceedings. This Court has inherent authority to control its docket and to address Rusch's improper conduct and should consider doing so.

WHEREFORE, Appellant Martin CUOA respectfully requests that Rusch's AMSJ be denied, and that this Court invoke its inherent authority to address Rusch's ongoing improper actions in serially filing motions denied in the lower court in this Court so as to return order to these appellate proceedings.

DATED this 27th day of December, 2023.

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