

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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Elizabeth A. Brown
Clark County District Court
Case No. A-21-850526-C
(consolidated with A-20-826568-C)

**OPPOSITION TO APPELLANT'S MOTION FOR JUDGMENT
ON THE PLEADINGS**

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

As this Court is aware from prior motion filings, 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).

Since appellate briefing concluded, rather than permitting this Court to complete its appellate review of the dismissal of his second lawsuit against Martin CUOA, Rusch (who is a former licensed attorney in multiple states) has been serially refiled in this Court motions or requests for relief he previously filed in the lower

district court as if this Court were not an appellate court. This Court has already denied two of Rusch's past 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. Rusch's "Application and Motion for Summary Judgment" (hereinafter "AMSJ"), which was filed on December 20, 2023, is fully-briefed and still pending before this Court. Now, on April 15, 2023, Rusch has filed an improper "Motion for Judgment on the Pleadings" (hereinafter the "MFJOP").

As previously brought to this Court's attention in Martin CUOA's opposition filings on December 20, 2023 and December 27, 2023, Rusch was deemed to be a vexatious litigant by Judge Allf, who entered a Pre-Filing Order. *See* RA-2020-TWELVE-2704-2727. The Pre-Filing Order was not appealed by Rusch in the present appeal and is final. The Pre-Filing 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. Rusch's filings are disruptive and an abuse of the appellate process. Unless and until this Court issues a directive to Rusch to stop his improper behavior, this Court will only see continued fugitive filings by Rusch.

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

II.

ARGUMENT

Rusch’s MFJOP filed in this Court is Rusch’s latest attempt as 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, and denying Rusch and Longboy’s counter-motion for summary judgment. Judge Allf entered no findings in Case No. A-21-840536-C that Martin CUOA was ever in default. The Clerk of Court never entered a default against Martin CUOA either. Rather, Martin CUOA filed a Motion to Dismiss, on the Alternative, Motion for Summary Judgment, which was granted by Judge Allf, which was a permissible response to the Complaint, per NRCP 12 and NRCP 56, rendering it impossible for a default status to be triggered. Therefore, it is impossible for Rusch to argue in his MFJOP that Martin CUOA was in default entitling him to judgment on the pleadings. In addition, a motion for judgment on the pleadings must be filed in the district court “[a]fter the pleadings are closed—but early enough not to delay trial.” *See* NRCP 12(c). The power to enter a default lies within the powers of a district court, not an appellate court. *See* NRCP 55; *Haas v. Chaiyaphakdiphon*, 2013 U.S. Dist. LEXIS

28339, 2013 WL 783046 (D. Nev. Feb. 28, 2013). Hence, Rusch's MFJOP is improperly filed in this Court.

In addition, it is not within the jurisdiction of this Court to entertain an entirely new substantive motion. The power to adjudicate motions such as Rusch's MFJOP 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 MFJOP should summarily be denied, because this Court does not have jurisdiction to separately entertain a new dispositive motion where a district court's summary judgment order dismissing a case 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.

Finally, it must be pointed out that it is within the inherent authority of this Court to control its docket, which this Court should do so at this time. *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 continually attempting to inject chaos in this Court by serially filing new motions arguing points of fact and law which were denied by the lower district court. 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 in this Court previously denied motions by the district court or new motions raising points of fact or law rejected by the district court is wholly 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 CUOA is letting the appellate process play out now that his appeal is fully briefed, not continuously filing new motions in this Court which are fatally flawed because they could only fall under the original jurisdiction of the district courts. If an appellant is engaging in improper conduct, appellate courts have the power to impose pre-filing orders. *See, e.g., Karnazes v. The Lauriedale Homeowners Ass’n*, 314 Cal. Rptr. 3d 288, 292 (Cal. Ct. App. 2023) (citations omitted).

It follows that Rusch’s filing of his MFJOP in this Court is clearly fatally-flawed. Rusch’s MFJOP should be denied. This Court should also exercise its discretion to control its docket and enter an order preventing further misconduct by Rusch.

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IV.

CONCLUSION

As demonstrated above, Rusch's MFJOP is improperly filed in this Court and, therefore, defective as a matter of law. Rusch is a formerly licensed attorney. Rusch's conduct in serially filing improper motions in this 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 as soon as possible to keep order in this Court prior to this Court issuing its decision on Rusch's appeal.

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CERTIFICATE OF SERVICE

I certify that I am an employee of Lewis Brisbois Bisgaard & Smith LLP, and that on this 18th day of April, 2024, I did cause a true copy of the foregoing **OPPOSITION TO APPELLANT’S MOTION FOR JUDGMENT ON THE PLEADINGS** to be served via the Court’s electronic filing system. In addition, I emailed and sent by U.S. Mail a copy to the following:

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By /s/ Irma Murillo
An Employee of Lewis Brisbois Bisgaard
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