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Electronically Filed
Dec 17 2015 02:48 p.m.
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IN THE SUPREME COURT OF THE STATE OF NEVADA

RAYMOND DELUCCHI and TOMMY
HOLLIS,

Appellants,

v.

PAT SONGER,

Respondents

Case No.: 68994
District Court Case No.: CV35969

**REPLY IN SUPPORT OF
MOTION TO DISMISS
UNTIMELY APPEAL**

I. Introduction

Appellants' Response, a mere recitation of procedural facts, fails to establish how the district court's superfluous judgment revised or disturbed either parties' legal rights or obligations. In fact, Appellants failed to even address the substantive arguments against the legal efficacy of the September 15, 2015, order—which is the basis of this motion to dismiss the untimely appeal. This superfluous judgment is not a final judgment in this matter as the Order Awarding Attorney's Fees and Costs entered December 29, 2014, is the final judgment. As a result, this Court should dismiss this untimely appeal.

II. Appellants' concede the September 15, 2015, order is superfluous

Courts throughout the state recognize that the lack of points and authorities in an opposition constitutes consent to granting of the motion. "Failure of the opposing party to serve and file his written opposition may be construed as an

admission that the motion is meritorious and consent to granting the same.” DCR 13(3). “Failure of the opposing party to serve and file written opposition may be construed as an admission that the motion and/or joinder is meritorious and a consent to granting the same.” EDCR 2.20(e). “The failure of the opposing party to file points and authorities in response to any motion shall constitute a consent to granting the same.” D. Nev. 7-2(d). This failure-to-oppose rule does not apply solely to failure to file a physical document, but also when a party fails to assert arguments which oppose those presented in the motion. *See, e.g., Duensing v. Gilbert*, 2013 U.S. Dist. LEXIS 47649 (D. Nev. Mar. 1, 2013)(failing to respond to defendant’s arguments on the issue constituting consent to the granting of the motion); *Schmitt v. Furlong*, 2013 U.S. Dist. LEXIS 14778 (D. Nev. Feb. 1, 2013)(failure to argue against substantive due process violations indicated consent to granting summary judgment); *Gudenavichene v. Mortgage Elec. Registration Sys.*, 2012 U.S. Dist. LEXIS 47509 (D. Nev. Apr. 4, 2012) (plaintiff’s failure to respond to any of the arguments raised in the motion to dismiss constituted consent to granting the motion).

Not once in Appellants’ Response do they make any arguments opposing Mr. Songer’s position that the September 15, 2015, is a superfluous judgment thereby making their appeal untimely. Thus, Appellants’ silence constitutes consent to granting Mr. Songer’s motion to dismiss this untimely appeal. On this basis alone, the Court should grant Mr. Songer’s motion and dismiss the untimely appeal for lack of jurisdiction.

III. The district court’s September 2015 order is a superfluous order

A simple review of the superfluous order shows none of the parties’ rights or obligations changed as a result of the district court’s order on September 15, 2015. *See*, Exhibit E to Motion to Dismiss. The Order of Dismissal lays out a procedural history and adds the court’s intention that read together the prior orders, “dismiss

this case in its entirety.” *Id.* This Court already determined the Order Awarding Attorney’s Fees and Costs constitutes a final judgment in this matter. *See*, Order Awarding Fees and Costs, Exhibit B to Motion to Dismiss; *See*, Order Re-Instating Briefing, filed September 16, 2015, Exhibit C to Motion to Dismiss. Thus, this Court already read the prior orders together and determined the district court’s intent without the need of the superfluous order.

The September order does nothing to change the posture of the parties and their legal rights or obligations. Thus, an appeal cannot arise from this order. Appellants opportunity to keep their appeal alive failed and they cannot be allowed a second-bite at the appellate apple. As the district court’s September 15, 2015, order is superfluous, this Court should dismiss the appeal as untimely and for lacking jurisdiction.

IV. Allowing Appellants’ untimely appeal to go forward will encourage superfluous orders and abuse of the appellate system

Appellants have no issue blaming others for the procedural issues in this matter, yet the issues are of their own making. The Order dismissing Appeal No. 66858 undeniably shows Appellants failed to carry their burden of showing this Court it had jurisdiction and pointed out “Appellants have not provided a copy of the order awarding fees and costs.” *See*, Order Dismissing Appeal No. 66858, June 1, 2015, fn.1. Appellants should have heeded this Court’s Order to Show Cause by “submit[ing] documentation that established this court’s jurisdiction including, but not limited to, a copy of any written district court order dismissing the case against Pat Songer.” *See*, Order to Show Cause, Case No. 66858, April 14, 2015. Appellants failed to submit the documentation supporting jurisdiction. Appellants should have filed for relief of the dismissal of No. 66858 under NRAP 40, but instead chose creating procedural chaos and seeking a superfluous judgment from the district court. Appellants have not followed the rules governing

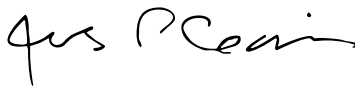
appellate practice and should not expect this Court to retain jurisdiction simply because Appellants' will it so.

Appellants' delays have prejudiced Mr. Songer causing unnecessary expenses, delayed the resolution of this matter, and kept the entire litigation unstable posture for far too long. Appellants' actions have also caused undue burden on this Court and its docket. This Court has consistently dismissed appeals where the appellants' procedural delays have caused harm and necessitated dismissal. *Huckabay Props. v. NC Auto Parts*, 130 Nev. Adv. Op. 23, 332 P.3d 429, 433-434 (2014). If this appeal goes forward, it will send a message that anyone can circumvent the appellate rules and simply ask the district court for a new "do over" superfluous order to pursue an appeal. The Court should not encourage superfluous orders.

V. Conclusion

Appellants' Response misses the mark entirely and fails to oppose Mr. Songer's argument regarding the district court's order issued September 15, 2015. This appeal is not from a final judgment, but from a superfluous order which fails as a final judgment and fails to revise or disturb the legal rights and obligations of the parties. As a result, Mr. Songer asks this Court to dismiss this appeal as untimely and for a lack of jurisdiction.

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By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of December, 2015, service of the foregoing **REPLY IN SUPPORT OF MOTION TO DISMISS UNTIMELY APPEAL** was made by the Supreme Court's electronic filing system to the email address registered to:

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