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IN THE SUPREME COURT OF NEVADA

DARRELL T. COKER,

Appellant,

v.

MARCO SASSONE,

Respondent.

Supreme Court No. 73863

Appeal from Case No. A-16-724853-C

Eighth Judicial District

DEPT. XXVIII

Hon. Rob Bare, Presiding

RESPONDENT MARCO SASSONE'S (1) OBJECTION TO DEFENDANT DARRELL T. COKER'S REQUEST TO FILE REQUEST FOR TRANSCRIPT OF PROCEEDINGS AFTER EXPIRATION OF TIME AND (2) MOTION TO DISMISS THE APPEAL

AFFIRMATIVE RELIEF REQUESTED

[1] Of counsel.

COMES NOW, Respondent and Plaintiff below, MARCO SASSONE ("Respondent"), by and through his counsel, Dominic P. Gentile, Esq., Clyde DeWitt, Esq. and Lauren E. Paglini, Esq., of the law firm of Gentile Cristalli Miller Armeni Savarese, PLLC and hereby opposes the Request of Appellant and Defendant below Darrell T. Coker ("Appellant") to file his Request for Transcript of Proceedings After Expiration of Time (filed in this court January 12, 2018); and, further, Respondent moves to dismiss the appeal.

SUMMARY

This is an appeal from a denied anti-SLAPP motion that asserted, in essence, that Plaintiff/Respondent's claim that Appellant was selling counterfeit fine-art pieces amounted to a SLAPP suit. The pending appeal automatically stays all discovery in the case, NEV. REV. STAT. § 41.660(3), thus effectively bringing the litigation in the district court to a grinding halt.

Appellant treats his request to enlarge time to request a transcript as inconsequential; in fact, it raises important policy considerations concerning potential abuse of anti-SLAPP appeals such as this one. Thus, this court must carefully scrutinize requests for additional time – especially retroactive requests – in the context of an anti-SLAPP appeal. This motion also calls for an interpretation of "good cause" in this especially sensitive context.

This court never has addressed those issues. And while the subject request is not for a protracted delay in the proceedings, standards governing requests for extra time in anti-SLAPP appeals should be established; and it is imperative that those standards be such as to hold anti-SLAPP appellant's "feet to the fire."

BACKGROUND

The Original Complaint in this case was filed September 2, 2016 charging primarily violation of Nevada's RICO statute for seriatim fraud by selling counterfeit artwork. After removal to federal court and remand to state court, Defendant-Appellant Coker filed a so-called anti-SLAPP motion pursuant NEV. REV. STAT. § 41.660.

After hearing on June 20, 2017 and taking the matter under submission, the district court, Hon. Rob Bare, denied the motion, issuing a detailed opinion setting forth the reasons for his decision. Defendant-Appellant gave timely notice of appeal on August 30, 2017, roughly a year after the filing of the complaint.

Under the Rule 9 of the Nevada Rule of Appellate Procedure, entitled "Counsel's Duty to Request Transcript," it says that "the ***appellant shall***" file an original transcript request form with the district court clerk ***no more than*** 15 days from the date that the appeal is docketed. NEV. R. APP. PROC. 9(a)(1)(B) (emphasis added). Notably, a party's failure to comply may result in the imposition of sanctions, including the dismissal of the appeal. NEV. R. APP. PROC. 9(a)(7).

Thus, according to Rule 9, the request would have been due 15 days after August 30, 2017 or September 14, 2017. Thus, ***Appellant had been in default for four months when he filed the subject request***!

The next day, on September 15, 2017, this court did enter an order that, *inter alia*, staying transcript requests and briefing pending mediation. But the transcript-request deadline had come and gone by then.

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On December 6, 2017, this court issued an order reactivating the appeal, including that the Appellant file the transcript on or before December 21, 2017. That, he did not do; nor did he request additional time to do so.

Rather, Appellant waited until January 11, 2018 to issue the request followed by a plea to retroactively extend the time for doing so by way of the subject "Request."[2] Appellant doubtfully claims that he has "good cause" and therefore should be retroactively granted extra time to request the transcript.

Appellant's supposed "good cause" is nothing more than the perfunctory statement that counsel was "unable to [file the required request] because of their holiday travel schedule."

ABUSE OF ANTI-SLAPP APPEALS

The ruling on Appellants "Request," while seemingly routine and inconsequential, raises an non-obvious but important issue. Anti-SLAPP motions, while serving a noble purpose to protect unfettered discourse over important public issues, they also open an enormous potential for abuse. It is for that reason that an anti-SLAPP appellant's feet should be "held to the fire."

Nevada's anti-SLAPP law is modeled after California's.[3] Against that background, the court should note the sharp criticism of the abuses of California's

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[2] Properly, the "Request" should be designated as a motion. Because their "request" is seeking an order allowing late filing, it is a motion. (NEV. R. APP. PROC. 27(a)(1): "An application for an order or other relief is made by motion unless these Rules prescribe another form. A motion must be in writing and be accompanied by proof of service.").

[3] "Because this court has recognized that California's and Nevada's anti-SLAPP "statutes are similar in purpose and language . . . we look to California law for guidance on this issue." *Shapiro v. Welt*, 133 Nev. Adv. Op. 6, 389 P.3d 262, 268 (2017).

Anti-SLAPP statute where appeals are concerned, well-summarized in *Grewal v. Jammu*,191 Cal.App.4th 977, 119 Cal.Rptr.3d 835 (1st Dist. 2011) ("*Grewal*").

Taking a step back, it is noteworthy that this case hardly can be said to have been "brought primarily to chill the valid exercise of the constitutional rights of freedom of speech [or] petition for the redress of grievances." Rather, it was brought to extinguish an ongoing series of fraudulent sales of counterfeit fine art and to obtain redress of Respondent's losses from the defendants' perpetration of them. It is not at all about public discourse of important issues.

Returning to what *Grewal* had to say about all of this, the court cited backlash from the abuse of Anti-SLAPP statutes noting, "Whatever the reason, concern quickly galvanized in the direction that the anti-SLAPP statute was being misused." *Grewal*, 191 Cal.App.4th at 996. The court cited two, then-recent legislative efforts to contain Anti-SLAPP litigation: one in 2000 that was vetoed;[4] and another that resulted in a new section 425.17.[5] Apparently, some of this legislative activity generated or was generated by a letter to the legislature from one of the two law professors who drafted the Anti-SLAPP statute in the first place:

> "Anti-SLAPP legislation is intended to 'provide citizens who are sued for speaking out with a speedy and relatively inexpensive defense mechanism against attacks on their First Amendment rights by SLAPPs.' [¶] How ironic and sad, then, that corporations in California have now turned to using meritless anti-SLAPP motions as a litigation weapon. This turns the original intent of one of the country's most comprehensive and effective anti-SLAPP laws on its head."

Grewal, *supra*, at 996, n.10.

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[4] Vetoed by Governor Gray Davis, who lost a recall election in 2003.

[5] CAL. C. CIV. PROC.

The court went on to quote some of the numerous judicial and other criticisms of the abuse of anti-SLAPP motions. One documented the exploding number of anti-SLAPP Motions.[6] Indeed, numbers proved as much:

> "There is precise evidence of this explosion in the record of anti-SLAPP filings that the Judicial Council is required to keep in accordance with the express directive of subdivision (j)(1) of section 425.16.12 That Judicial Council record shows the following filings of anti-SLAPP motions since 1999: 1999–55; 2000–327; 2001–302; 2002–543; 2003–587; 2004–542; 2005– 515; 2006–598; 2007–508; 2008–555; and 2009–558."

Id. at 998.

Of greatest concern to the court was the right to appeal, which gave rise to the automatic stay required by California law:

> "The right of a defendant to appeal a losing anti-SLAPP motion quickly became, like so much else of the anti-SLAPP procedure, the subject of criticism. Indeed, such criticism was acknowledged by the Legislature itself in 2003 when, in discussing Senate Bill 515, the Senate Judiciary Committee noted the claim by the proponent of the bill 'that current law is being used by defendants to unreasonably delay a case from being heard on the merits, thus adding litigation costs and making it more cumbersome for plaintiffs to pursue legitimate claims. . . . ***The filing of the meritless SLAPP motion by the defendant, even if denied by the court, is instantly appealable, which allows the defendant to continue its unlawful practice for up to two years, the time of the appeal.***"

Id. at 1001 (Emphasis added.).

The *Grewal* court noted that the court in *Varian Medical Systems, Inc. v. Delfino*, 35 Cal.4th 180, 192, 25 Cal.Rptr.3d 298, 106 P.3d 958 (2005) (finding that

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[6] "The statute went from a little-used statutory protection for environmental and other protestors ... [to a] ... veritable explosion in appellate court decisions dealing with the statute. Between 1992, when the statute was first enacted, and January 1, 2000 there were only 34 published appellate decisions on the statute. But between January 1, 2000 and September 25, 2003, there were 184 published and unpublished decisions. Of those decisions, 148 have been rendered from September 25, 2002 to September 25, 2003." Arkin, *Bringing California's Anti–SLAPP Statute Full Circle: To Commercial Speech and Back Again*, 31 W.ST.U.L.REV. 1, 22 (2003–04).

California statutory law required a complete stay of proceedings pending an appeal from denial of an anti-SLAPP motion) predicted the abuse that would result from its decision:

> "In light of our holding today, some anti-SLAPP appeals will undoubtedly delay litigation even though the appeal is frivolous or insubstantial. As the Court of Appeal observed and plaintiffs contend, such a result may encourage defendants to 'misuse the [Anti-SLAPP] motions to delay meritorious litigation or for other purely strategic purposes.'"

Id. at 1002.

Quoting an earlier decision that drives the point home, the *Grewal* court emphasized, "You don't just get the right to go to the appellate court, you also get a free time-out in the trial court." *Id.* In Nevada, that amounts to a 12-24-month "time-out"!

Because of the potential for abuse of anti-SLAPP appeals, setting the standard for delaying them is a serious matter.

"GOOD CAUSE"?

i.

Granted, different from NEV. R. CIV. PROC. 6(b), which requires "excusable neglect" to obtain a retroactive enlargement of time as opposed to only "good cause" for a timely request, NEV. R. APP. PROC. establishes a blanket "good cause" rule for any enlargement-of-time request. In interpreting its own rules, however, the court should give careful consideration to the issue of what amount of "cause" is sufficient to qualify as "good."

There should be implied an additional "good cause" requirement here because Rule 26 does not increase the required showing to "excusable neglect" as does Civil Procedure Rule 6. ***Specifically, not only should an appellant be required to show***

good cause for needing the extended time; the appellant also must establish good cause for not making the request in advance of the deadline. Otherwise, what sense do the rules make?

ii.

Appellant's supposed "good cause" is nothing more than the perfunctory statement that counsel was "unable to [file the required request] because of their holiday travel schedule." Appellant's Request at p. 2, *ll.* 10-12. The court should analyze that in context.

Although Appellant already had missed the September 14, 2017 deadline to order the transcript (as noted above), a new order setting the deadline was issued on December 6, 2017.

The fact that Christmas would fall on December 25 and New Years would fall on January 1 – each being a federal holiday observed by most everyone – should not have taken Appellant's counsel by surprise. Chanukah did not commence until December 12. Kwanzaa did not commence until December 26. To what holiday was Appellant making reference?

So the first question is this: Why could Appellant not have registered his request for extra time in advance of the December 21, 2017 deadline established by the court's order.

The second question is this: Why did Appellant not simply order the transcript? Exhibit 1 to Appellant's subject Request demonstrates that it was not a particularly tall order.

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"Good cause" does not mean the same thing in every context. E.g., *Nutton v. Sunset Station, Inc.*, 131 Nev. Adv. Op. 34, 357 P.3d 966, 971 (Nev. App. 2015) (Comparing NEV. R. CIV. PROC. 15(a) and 16(b)). In one context,

> "Generally, 'good cause' means a 'substantial reason; one that affords a legal excuse. In order to demonstrate good cause, a petitioner must show that an impediment external to the defense prevented him or her from complying with the state procedural default rules. An impediment external to the defense may be demonstrated by a showing that the factual or legal basis for a claim was not reasonably available to counsel, or that some interference by officials, made compliance impracticable."

Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503 (2003) (Footnotes and internal quotes omitted.).

> "'Good cause' is a relative and highly abstract term such that its meaning must be determined not only by the verbal context of the statute in which the term is employed, but also by the context of the action and procedures involved and the type of case presented. . . . [G]ood cause is frequently invoked and seldom defined and that its meaning is fixed by the verbal context as well as the actions and procedures involved."

Nunnery v. State, 127 Nev. 749, 764, 263 P.3d 235 (2011) (Internal quotes and citations omitted.)

In defining "good cause" in the present context, to avoid potential abuse of anti-SLAPP appeals, the court should include in it a definition that there be a showing of good cause both for post-deadline requests for additional time and then further god cause for needing the additional time. Additionally, there should be a requirement that the "good cause" facts be set forth with particularity. Otherwise, "I was busy" would suffice.

Appellant's claim fails on all fronts.

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THE APPEAL SHOULD BE DISMISSED

As noted, a party's failure to comply may result in the imposition of sanctions, including the dismissal of the appeal. NEV. R. APP. PROC. 9(a)(7).

To protect the public and the courts from abusive anti-SLAPP appeals, this appeal must be dismissed. Appellant's flimsy attempt to establish "good cause" should not be countenanced as it would set precedent for endless, abusive anti-SLAPP appeals, comparable to the disaster that is transpiring in California.

Dated: January 24, 2018.

Respectfully Submitted,

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By: */s/ Clyde DeWitt*
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CERTIFICATE OF SERVICE

The undersigned, an employee of Gentile Cristalli Miller Armeni Savarese, hereby certifies that on the 24th day of January, 2018, she served a copy of the foregoing document to all interested parties by electronic service and by placing said copy in an envelope, postage fully prepaid, in the U.S. Mail at Las Vegas, Nevada, said envelope addressed to:

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