

IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 77771

180 LAND CO LLC, a Nevada Limited Liability Company

Appellant,

v.

CITY OF LAS VEGAS, A POLITICAL SUBDIVISION OF
THE STATE OF NEVADA,

Respondent

Appeal From

District Court Case No.: A758528
Eighth Judicial District Court of Nevada

**REPLY IN SUPPORT OF
CITY OF LAS VEGAS' MOTION TO DISMISS
FOR LACK OF JURISDICTION**

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Mar 06 2019 02:37 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the City of Las Vegas is a governmental party. The following law firm had partners or associates who appeared on behalf of City of Las Vegas and are expected to appear on its behalf in this Court:

McDonald Carano LLP

These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

DATED this 6th day of March, 2019.

BY: /s/ Debbie Leonard

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INTRODUCTION

Despite the Developer's misrepresentations of the record below, the district court did not "sever" any claims under NRCP 21, but rather bifurcated them for separate trials under NRCP 42. During oral argument and in the order the Developer prepared, the district court referenced only NRCP 42, with no mention of NRCP 21. These rules are not interchangeable, and there is a distinction with a difference that is relevant here: severed claims against a party under NRCP 21 are immediately appealable, while bifurcated claims under NRCP 42 are not appealable until all claims have been resolved. For that reason, no appellate jurisdiction exists over any aspect of Developer's appeal.

LEGAL ARGUMENT

A. The District Court Cited Only NRCP 42, Clearly Intending Only to Bifurcate the Developer's Inverse Condemnation Claims From Its Petition for Judicial Review

The Developer would have this Court believe that the district court "severed" its claims pursuant to NRCP 21, but that misrepresents the plain language of the district court's statements at oral argument and in its order, which repeatedly invoked NRCP 42 and never mentioned NRCP 21:

Why can't a trial court ... just sever off claims pursuant to Rule 42?

* * *

I was looking at the rule.... But it says here separate trials. "The court in furtherance of convenience or to avoid prejudice, or when separate

trials will be conducive to the expedition and economy may order separate trials of any claims, cross claims, counter claims, third-party claims, or of any separate issue,” et cetera.

* * *

I just want to know why couldn't I do that as a trial judge. Because it does say here “the court in furtherance of convenience or to avoid prejudice.” There's pretty broad.

* * *

I do have to worry about, from what I can see, “in furtherance of convenience to avoid prejudice, or” --and understand that's an “or”. These are all disjunctive. It's not conjunctive. It's not an “and”. The Court can, you know, sever cases, you know, sever issues. They can do that. And that's -- and that's my question. And so if I severed them out, I'm trying to articulate where there would be a prejudice to the city....

* * *

... [W]e're going to sever off the inverse condemnation claims, and the Court will only -- and we're going to stay those.

Jan. 11, 2018 Trans. at 31:23-32:15, 33:8-25, 41:18-24, 48:11-13, attached hereto as Ex. 3. As is clear from these statements, the district court was referencing the language of NRCP 42(b).

At oral argument, the Developer's counsel acknowledged that the district court was discussing bifurcation under NRCP 42:

MR. LEAVITT: ... I'm glad you found Rule 42 because it flies in the face of Rule 42 and your jurisdiction to go ahead and split these up, which is what we've asked to do, your Honor.

Ex. 3, Jan. 11, 2018 Trans. at 44:22-25.

And in the order prepared by the Developer's counsel, the district court expressly referenced Rule 42 when deciding to hear the inverse condemnation claims separately from the petition for judicial review:

Nonetheless, according to N.R.C.P 42, this Court may order “a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury” “in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy.”

Jan. 25, 2018 Order Denying Motion to Dismiss and Countermotion to Stay Litigation at ¶7 at 3:10-14, attached as Ex. B to Developer's Opp.

The transcript and order make clear that the district court acted under the authority of NRCP 42, not NRCP 21. Indeed, NRCP 21 is not cited anywhere in the transcript or order. Yet in its opposition, the Developer only cites to NRCP 21 and fails to cite to NRCP 42, thereby misrepresenting the district court proceedings. No severance of claims within the meaning of NRCP 21 occurred.

B. The Court Has No Jurisdiction Where the Inverse Condemnation Claims Were Bifurcated Pursuant to NRCP 42

Because the Court may only review a final judgment of the district court, it cannot exercise appellate jurisdiction over the district court's denial of the Developer's petition for judicial review while the bifurcated inverse condemnation claims remain pending. Although this Court has not directly addressed the jurisdictional distinction between orders issued under NRCP 42 and 21, federal

courts have clearly explained that when a district court acts under Rule 42, an appeal cannot lie until the district court disposes of all claims. Such is the case here.

“Two types of severances or separations of claims are contemplated by the Federal Rules of Civil Procedure—one within the action itself, the other resulting in a second, or new action.” *Acevedo-Garcia v. Monroig*, 351 F.3d 547, 558 (1st Cir. 2003), *quoting Official Comm. of Unsecured Creditors v. Shapiro*, 190 F.R.D. 352, 354 (E.D.Pa.2000). “The procedure authorized by Rule 42(b) should be distinguished from severance under Rule 21.... Unfortunately, this distinction, clear enough in theory, often is obscured in practice since at times the courts talk of ‘separate trial’ and ‘severance’ interchangeably.” *Acevedo-Garcia*, 351 F.3d at 559, *quoting* 9 Wright & Miller, *Federal Practice and Procedure* § 2387.

Rule 21 of the Federal Rules of Civil Procedure furnishes the mechanism for separating a case into separate actions, i.e., severance ... Rule 42(b), on the other hand, authorizes courts to divide a single action into separate trials that remain under the umbrella of the original solitary action.

Acevedo-Garcia, 351 F.3d at 558–59 (internal citations and quotations omitted).

This distinction is critical for determining appellate jurisdiction. “A separate trial order under Rule 42(b) is interlocutory and non-appealable.” *Reinholdson v. Minnesota*, 346 F.3d 847, 850 (8th Cir. 2003); *accord Gaffney v. Riverboat Servs. of Indiana, Inc.*, 451 F.3d 424, 442 (7th Cir. 2006) (“The distinction between the two rules is jurisdictionally significant”); *Acevedo-Garcia*, 351 F.3d at 559 (“The

salient distinction between these two procedural devices concerns the appealability of an order terminating the proceedings in a partitioned piece of the litigation.”).

Here, the language of NRCP 42(b) cited by the district court at oral argument and in its order tracks FRCP 42 in all relevant respects. As a result, the federal courts’ interpretation of NRCP 42(b)’s federal counterpart is persuasive here. *See Nelson v. Heer*, 121 Nev. 832, 834, 122 P.3d 1252, 1253 (2005). The federal decisions are clear that no appellate jurisdiction exists where, as here, the district court invoked NRCP 42, not NRCP 21. The district court’s use of the word “sever” does not alter this conclusion. *See Acevedo-Garcia*, 351 F.3d at 559.

Because the district court relied on NRCP 42(b), the Developer’s citation to *Valdez v. Cox Commc'ns Las Vegas*, 130 Nev. 905, 907, 336 P.3d 969, 971 (2014), is immaterial. In *Valdez*, the Court did not need to distinguish NRCP 21 from NRCP 42 because, there, the district court had severed claims under NRCP 21. Nevertheless, the Court cited *Acevedo-Garcia* extensively, which confirms that appellate jurisdiction is absent here. *See Valdez*, 130 Nev. at 907-08, 336 P.3d at 971, *citing Acevedo-Garcia*, 351 F.3d at 559-60.

CONCLUSION

Because the district court bifurcated the Developer’s inverse condemnation claims from its petition for judicial review pursuant to NRCP 42(b), and the

inverse condemnation claims remain pending below, the Court lacks jurisdiction to consider the appeal.

DATED this 6th day of March, 2019

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CERTIFICATE OF COMPLIANCE

Pursuant to NRAP 27(d), I hereby certify that this reply complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point font, Century Schoolbook style. I further certify that this reply complies with the page limits of NRAP 27(d)(2) because it does not exceed 5 pages.

Pursuant to NRAP 28.2, I hereby certify that I have read this reply, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this motion complies with all applicable Nevada Rules of Appellate Procedure. I understand that I may be subject to sanctions in the event that this motion is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 6th day of March, 2019.

BY: /s/ Debbie Leonard

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano, LLP, and that on this 6th day of March, 2019, a copy of the foregoing **CITY OF LAS VEGAS' REPLY IN SUPPORT OF MOTION OF DISMISS FOR LACK OF JURISDICTION** was electronically filed with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court's E-Filing system (E-Flex). Participants in the case who are registered with E-Flex as users will be served by the EFlex system and others not registered will be served via U.S. mail as follows:

/s/ Pam Miller
An employee of McDonald Carano, LLP

EXHIBIT 3

EXHIBIT 3

1 CASE NO. A-17-758529-J

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DISTRICT COURT

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CLARK COUNTY, NEVADA

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180 LAND COMPANY LC,

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Plaintiff,

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vs.

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LAS VEGAS CITY OF,

)

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Defendant.

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REPORTER'S TRANSCRIPT

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OF

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MOTIONS

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BEFORE THE HONORABLE JUDGE TIMOTHY C. WILLIAMS

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DISTRICT COURT JUDGE

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DATED THURSDAY, JANUARY 11, 2018

22

23

24

REPORTED BY: PEGGY ISOM, RMR, NV CCR #541,

25

Peggy Isom, CCR 541, RMR

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11:28:38 1 them. The city council made a decision on 35 acres.
2 Beyond that, everything else is a matter of two
3 completely different sets of claims. Inverse
4 condemnation, which as your Honor pointed to, is a big
11:28:49 5 process, six elements, full-blown discovery,
6 constitutional issues. Or a quick judicial review of:
7 Was that decision supported by substantial evidence?

8 The idea that somehow they have to be together
9 is just a way for 180 Land Co to basically distract
11:29:08 10 from the fact that they filed an improper pleading
11 here, and we need to, basically, make it correct.

12 Thank you.

13 THE COURT: I have a question for you. What
14 am I to do then based upon the proposition that the
11:29:19 15 city's taking that they have to exhaust not just
16 administrative remedies, but all judicial remedies as a
17 condition precedent to filing an inverse condemnation
18 claim in district court? Because I think that's an
19 important factor to consider. Because I was -- I'm
11:29:36 20 thinking about this. And there's no question it's
21 unique. I don't mind handling cases and issues that
22 are unique.

23 Why can't a trial court that has potentially
24 jurisdiction based upon the statute, more specifically
11:29:51 25 NRS 278, but also the jurisdiction under the Nevada

11:29:58 1 Constitution and the appropriate statutes as far as, I
2 guess that would be, NRS 13.040 just sever off claims
3 pursuant to Rule 42? Why can't I just sever them off,
4 and they go by, and they're handled separately?

11:30:20 5 Because I'm just throwing that up for you to
6 think about. Because, I mean, I was thinking about
7 this. I was looking at the rule. And before I make
8 that decision, if I made a decision based upon this,
9 I'd give you an opportunity to, of course, brief that.

11:30:32 10 But it says here separate trials. The court in
11 furtherance of convenience or to avoid prejudice, or
12 when separate trials will be conducive to expedition
13 and economy may order separate trials of any claims,
14 cross claims, counter claims, third-party claims, or of
11:30:50 15 any separate issue, et cetera.

16 So I'm sitting here thinking about it. And
17 why -- especially under the facts of this case where
18 the city is saying, Look, you got to pursue not just
19 administrative remedies and exhaust them but also
11:31:09 20 judicial remedies. Why couldn't I just say, Okay,
21 Counsel, as far as your petition -- I should say first
22 amended petition for judicial review and alternative
23 verified claims of inverse condemnation, say, Clean it
24 up, make the petition a separate document, and file an
11:31:33 25 amended complaint, and move on? Why couldn't I do

11:31:37 1 that?

2 MR. DOROCAC: Well, with respect to that right
3 there --

4 THE COURT: And I realize it's new. I'm not
11:31:43 5 going to make a decision.

6 MR. DOROCAC: Right.

7 THE COURT: I just want to know why couldn't I
8 do that as a trial judge. Because it does say here the
9 court in furtherance of convenience or to avoid
11:31:52 10 prejudice. There's pretty broad.

11 MR. DOROCAC: To sever their claims would be
12 to suggest that their claims were brought properly.
13 Their claims were not brought properly. The judicial
14 review cannot -- it cannot be on a petition with
11:32:09 15 original claims.

16 THE COURT: Well, but see, in essence, and I'm
17 not really focusing on that, but assuming that is the
18 case, why can't the Court in light of the position the
19 city is taking just sever off the claims as it relates
11:32:28 20 to inverse condemnation? The city can file an answer.

21 And you can have a 16.1 and go down that road as far as
22 that is concerned. Then regarding the first amended
23 petition for judicial review, we can set a status check
24 for two weeks as it relates to a briefing schedule and
11:32:49 25 transmit the record and those types of things? Is

11:41:06 1 worked for Judge Earl and actually tried a few cases
2 with Judge Earl.

3 And, but anyway, it appeared to me that there
4 appeared to be an issue regarding notice and whether
11:41:19 5 notice was received as it related to the Nevada
6 Foreclosure Mediation Program, and that was a big
7 problem. So Judge Earl took a, appeared to me, a very
8 cautious approach and said, You know, maybe there
9 should be some discovery on that issue.

11:41:41 10 Now, I'm looking at this in a different light
11 in that, Okay, if I sever them out, the judicial review
12 petition there will be no discovery on that issue, and
13 it would be limited to the record on appeal, and I make
14 a decision as to whether the city council was arbitrary
11:42:05 15 and capricious in their decision or not. That's all.

16 But just as important from a safety
17 perspective and concern, and there's other issues too,
18 because I do have to worry about, from what I can see,
19 in furtherance of convenience to avoid prejudice, or --
11:42:25 20 and understand that's an "or". These are all
21 disjunctive. It's not conjunctive. It's not an "and".
22 The Court can, you know, sever cases, you know, sever
23 issues. They can do that. And that's -- and that's my
24 question.

11:42:46 25 And so if I severed them out, I'm trying to

11:45:08 1 decided instead of just filing a complaint, which they
2 admit they could have just done, there's no
3 preconditions. There's no preconditions. We can file
4 whenever. They decided, No, we're going to tack this
11:45:16 5 on to our petition. The other point is there are six
6 elements to inverse condemnation. That's a recent
7 case, Washoe County. It's within the last few years.

8 THE COURT: Okay. I'm not going to decide --

9 MR. DOROCAR: No, I know. I mean, in terms of
11:45:30 10 where --

11 MR. LEAVITT: Your Honor, again, I've heard no
12 prejudice. And if there's an issue with the day on
13 what the date should have been on the filing, we can
14 address that at a later time, your Honor. I mean,
11:45:38 15 that's not something that -- what he said is there
16 might be some prejudice to the city that we don't know
17 about now, and so we want you to take the
18 extraordinarily act of -- extraordinary act of
19 dismissing this claim and making us file it in a
11:45:51 20 different courtroom, which would be incredibly
21 inconvenient, which is not judicially efficient. And
22 frankly, your Honor, I'm glad you found Rule 42 because
23 it flies in the face of Rule 42 and your jurisdiction
24 to go ahead and split these up, which is what we've
11:46:05 25 asked to do, your Honor.

11:49:14 1 this department anyways. So, yeah, we're open to that.

2 THE COURT: All right.

3 MR. LEAVITT: Your Honor, you've done a good
4 job today.

11:49:22 5 THE COURT: That's what we'll do.

6 MR. LEAVITT: Okay.

7 THE COURT: So, in essence, what I'm going to
8 do as far as -- let me make sure I get this right.

9 Regarding the motion to dismiss, I'm going to deny

11:49:33 10 that. Regarding the strike, I'm going to deny that.

11 However, we're going to sever off the inverse

12 condemnation claims, and the Court will only -- and

13 we're going to stay those. And we're going to deal

14 specifically with the petition for judicial review.

11:49:53 15 And those will be the standards that shall be applied

16 for the petition for judicial review.

17 MR. DOROCAK: And an amended complaint will be
18 filed with the inverse condemnation claims?

19 THE COURT: Yes.

11:50:01 20 MR. DOROCAK: Okay.

21 MR. LEAVITT: We can go ahead and do that,
22 your Honor.

23 THE COURT: All right.

24 MR. LEAVITT: If you have no objection over

11:50:06 25 here.

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REPORTER'S CERTIFICATE

STATE OF NEVADA)

:SS

COUNTY OF CLARK)

I, PEGGY ISOM, CERTIFIED SHORTHAND REPORTER DO
HEREBY CERTIFY THAT I TOOK DOWN IN STENOGRAPHY ALL OF THE
PROCEEDINGS HAD IN THE BEFORE-ENTITLED MATTER AT THE
TIME AND PLACE INDICATED, AND THAT THEREAFTER SAID
STENOGRAPHY NOTES WERE TRANSCRIBED INTO TYPEWRITING AT
AND UNDER MY DIRECTION AND SUPERVISION AND THE
FOREGOING TRANSCRIPT CONSTITUTES A FULL, TRUE AND
ACCURATE RECORD TO THE BEST OF MY ABILITY OF THE
PROCEEDINGS HAD.

IN WITNESS WHEREOF, I HAVE HEREUNTO SUBSCRIBED
MY NAME IN MY OFFICE IN THE COUNTY OF CLARK, STATE OF
NEVADA.

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