

IN THE SUPREME COURT OF THE STATE OF NEVADA

JSJBD CORP, d/b/a Blue Dogs Pub, a) Case No.: 80849
Nevada corporation, STUART VINCENT,)
JEFFREY VINCENT, and JEFF) (Dist. Ct. No. A-18-78331-B)
WHITE)
)
Appellants,)
)
vs.)
)
TROPICANA INVESTMENTS, LLC, a)
California limited liability company,)
)
Respondent.)
_____)
)
AND CROSS-APPEAL.)
_____)

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Clerk of Supreme Court

**APPELLANTS / CROSS-RESPONDENTS’ REPLY IN SUPPORT OF
MOTION FOR EXTENSION / LEAVE TO FILE COMPLETED REPLY
BRIEF AND ANSWERING BRIEF ON CROSS-APPEAL**

Appellants / Cross-Respondents (collectively, “JSJBD”) reply in support of their request for an extension, and leave, for filing Appellants / Cross-Respondents’ Reply Brief And Answering Brief on Cross-Appeal (“Reply / Answering Brief”).

The Reply / Answering Brief has already been filed. It was filed on December 31, 2020. Under the Court’s present procedure wherein filings are effectuated upon submission, there does not appear to be need for an “extension” or “leave to file.” The present motion was respectfully submitted out of an abundance of caution.

“It is the policy of this state that cases be heard on the merits, whenever possible.” *Schulman v. Bongberg-Whitney Elec., Inc.*, 98 Nev. 226, 227, 645 P.2d

434, 435 (1982). JSJBD has long since filed its Opening Brief. After obtaining a one-month extension, Respondent Tropicana Investments, LLC (“Tropicana”) filed its Answering Brief on Appeal and Opening Brief on Cross-Appeal. Out of professional courtesy, JSJBD did not oppose the request. Thus, Tropicana received more of an additional period than JSJBD has received for either of its briefs.

In light of the Reply / Answering Brief already having been filed, what Tropicana actually requests is that an already-filed brief be stricken. As far back as 1956, this Court reasoned that appellate briefs should not be stricken absent a finding of actual prejudice. This Court stated:

The delay was but for one week. (By previous stipulations extensions totaling three weeks had been granted.) No prejudice has been shown to have resulted to the respondent. Had application been made to this court for an extension of time for the reasons stated in appellant's affidavit it undoubtedly would have been granted.

Henry McCleary Timber Co. v. Sewell, 72 Nev. 72, 92 P.2d 197, 198 (1956) (superseded, regarding “extensions,” by later rule stating, “extensions of time in briefing beyond 60 days be by court order upon application showing good cause”).

Tropicana fails to identify any prejudice whatsoever. Tropicana does not address the month-long extension it received. Meanwhile, Tropicana makes arguments about the filing of the Opening Brief, which was filed months ago. Tropicana largely ignores that it actually received the filed Reply / Answering Brief from JSJBD on December 31, 2020. No prejudice has been identified by Tropicana.

Tropicana cites cases that have no application. For example, it cites *Huckabay Props. v. NC Auto Parts*, 130 Nev. 196, 203, 322 P.3d 429, 434 (2014) without reference to its strikingly different facts. In *Huckabay Properties*, the appellant failed to file any opening brief even after three months of delay. Further, involved failure to file within an initial period, failure to file within a one-month extension period, failure to file within a second month of requested extension, admonitions from this Court that went ignored, failure to file within yet another 11-day period, failure to file after respondent filed a motion to dismiss appeal, and continued failure to file even after a certificate of service was filed that incorrectly certified that the opening brief had been filed.

In this case, the Reply / Answering Brief had already been filed, and served, for five days by the time Tropicana made the arguments in its opposition.

Similar to this Court's reasoning in *Henry McCleary Timber*, the federal system requires an analysis of "the danger or prejudice to the other party, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, and whether the movant acted in good faith." *Uche-Uwakwe v. Shinseki*, 349 Fed. Appx. 136, 137 (9th Cir. 2009) (ellipsis, brackets omitted), citing *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd.*, 507 U.S. 380, 395 (1993). While the case relates to Rule 60 motion, its analysis applies with equal force to whether to strike a substantial and already-filed motion briefing without addressing the merits. The court stated:

Having already filed his reply to Uche-Uwakwe's opposition, the Secretary will suffer no prejudice beyond the loss of a quick victory. *See Bateman v. U.S. Postal Serv.*, 231 F.3d 1220, 1224-25 (9th Cir. 2000) (losing a quick victory is insufficient prejudice to justify denying a Rule 60(b)(1) motion). On the date the district court submitted the Secretary's summary judgment motion on the moving papers, Uche-Uwakwe's opposition was only thirteen days late—a minimal delay in light of three years of litigation. *See Pincay v. Andrews*, 389 F.3d 853, 855 (9th Cir. 2004) (en banc). Additionally, the district court failed to discuss what impact the delay had, or will have, on the judicial proceedings.

Id. Here, JSJBD's second-filed brief was both a Reply Brief in support of its Opening Brief, as well as an Answering Brief to Tropicana's Cross-Appeal. The delay was short; indeed, shorter than the extension obtained by Tropicana.

While Tropicana downplays the time-consuming nature of drafting and finalizing the briefing in this matter, Tropicana presented precisely the same reasoning when applying for its own month-long extension in this appeal.

When it comes to the merits, JSJBD's Reply / Answering Brief addresses Tropicana's arguments directly. For example, the brief points out that Tropicana has conceded that the district court erred as a matter of law in its decision on attorney fees, that the district court failed to find a prevailing party, and that attorney fees cannot be awarded without such prevailing party determination. *See, e.g.*, Reply Br. at 1 (citing Ans. Br. at 44, 45). Tropicana concedes that the de novo standard applies to the attorney fee determination. *See* Reply Br. at 3-4 (citing Ans. Br. at 5, 45). The district court's attorney fee errors involve awards of hundreds of thousands of dollars, dwarfing the principal damage amounts in this case. JSJBD's Reply /

Answering Brief also directly addresses how Tropicana has avoided addressing substantial issues, such as the district court's mis-application of the Mirror Image Rule of contract law. *See* Reply Br. at 21-29.

No prejudice has been caused to Tropicana or its counsel. Tropicana has the time for filing its final brief on appeal. The filing did nothing to place Tropicana in an unfair appeal posture. The time period in question was a holiday time period, which means that Tropicana will not be impacted, as it otherwise would have been, by the holiday period in question. There is no impact upon the judicial proceedings. There was no pending motion or emergency proceeding. There is no special proceeding in the district court.

JSJBD and its counsel have acted in good faith. Review of the briefs submitted by JSJBD show substantial brief on the merits that directly addresses the arguments presented in Tropicana's briefing.

DATED: January 8, 2021.

LOVATO LAW FIRM, P.C.

/s/ Mario Lovato

MARIO P. LOVATO

Nevada Bar No. 7427

7465 W. Lake Mead Blvd. Ste 100

Las Vegas, NV 89129

(702) 979-9047

mpl@lovatolaw.com

Attorney for Appellants

