

IN THE SUPREME COURT OF THE STATE OF NEVADA

5550 PAINTED MIRAGE RD., LLC,

Appellant

v.

TRAVELERS PROPERTY CASUALTY COMPANY OF
AMERICA

Respondent

MOTION TO DISMISS APPEAL

Supreme Court Case No. 83413

On Review from The Eighth Judicial District Court

County of Clark, Case No. A803425, Hon. Veronica Barisich

CLYDE & CO US LLP

AMY M. SAMBERG (NV Bar No. 10212)

amy.samberg@clydeco.us

LEE H. GORLIN (NV Bar No. 13879)

lee.gorlin@clydeco.us

3960 Howard Hughes Parkway, Suite 500

Las Vegas, Nevada 89169

Telephone: 213-358-7600

Facsimile: 213-358-7650

Attorneys for Respondent

Electronically Filed
Sep 09 2021 10:58 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

I. INTRODUCTION

This is an appeal of an Order to enforce settlement and dismissing Respondent Travelers Casualty Company of America (“Travelers”) from a third-party claim arising from a suit to foreclose a mechanics lien against Appellant 5550 Painted Mirage Rd., LLC (“Painted Mirage”). Travelers and Painted Mirage mediated Painted Mirage’s third-party claim and reached a settlement agreement.

Subsequent to the mediation and execution of the settlement term sheet, Painted Mirage terminated the law firm of Poli, Moon, & Zane, PLLC (“PMZ”) and continued to retain Law Office of Mitchell Stipp.¹ After being terminated, PMZ filed a notice of lien in the action below. Painted Mirage threatened to renege on the settlement term sheet and refused to execute the formal release it had agreed to execute pursuant to the executed settlement term sheet if Travelers included PMZ’s name on the settlement checks. Travelers moved to enforce settlement and offered to deposit the settlement funds with the District Court while the Court adjudicated PMZ’s lien. The District Court granted Travelers’ Motion, ordered Travelers to deposit the settlement funds, and dismissed Travelers upon said deposit. The Court entered and electronically served its Order on July 20, 2021. This appeal follows.

¹ Prior to its termination, PMZ was counsel of record for Painted Mirage’s third-party claims and the Law Office of Mitchell Stipp was counsel of record for Painted Mirage’s defense of the mechanic’s lien foreclosure.

Painted Mirage filed its notice of appeal on August 20, 2021, thirty-one (31) days after the Court entered the Order which Painted Mirage appeals. Painted Mirage's notice of appeal is untimely, and this Court lacks jurisdiction to adjudicate it. The appeal must be dismissed.

Additionally, when filing the notice of appeal, Painted Mirage neglected to remit the required filing fee. On August 24, 2021, this Court ordered that Painted Mirage was required to pay the required fee and that its "failure to comply with this notice within 10 days will result in DISMISSAL OF THIS MATTER." (capitalization in original). The 10-day deadline was Friday, September 3, 2021. Painted Mirage failed to pay its fee by that deadline, thus this appeal must be dismissed on this ground as well, pursuant to this Court's August 24, 2021, Order.

II. STATEMENT OF RELEVANT FACTS

On July 20, 2021, the District Court signed and entered its Order Granting Travelers' Motion to Enforce Settlement and Directing Travelers to Deposit Settlement Funds with the Court. The District Court filed the Order the same day, with e-service to all parties, including Painted Mirage.²

Thirty-one (31) days later, on August 20, 2021, Painted Mirage filed its Notice of Appeal with the District Court, attaching the District Court's July 20, 2021, Order

² In compliance with local practice, Travelers filed and served a Notice of Entry of the Court's Order on July 21, 2021, despite all parties receiving written notice of the Court's Order when the Court filed it on July 20, 2021.

as the Order from which it is appealing. Notably, Painted Mirage did not remit its \$250.00 filing fee at this time.

On August 24, 2021, this Court filed and served a Notice of Potential Dismissal for Failure to Pay Supreme Court Filing Fee. In this Notice, the Court informed the parties that Painted Mirage had, failed to pay its filing fee and directed Painted Mirage to do so post haste. More importantly, the Court instructed Painted Mirage that its “failure to comply with this notice within 10 days will result in DISMISSAL OF THIS MATTER.” (Capitalization in original, other emphasis added). The Court did not say failure “may” result in dismissal, but failure “will” result in dismissal. The ten-day deadline to pay the filing fee was Friday, September 3, 2021.

September 3, 2021 came and went and Painted Mirage neither paid its filing fee nor requested an extension to do so. On September 7, 2021, four days after its deadline to do so, Painted Mirage paid its fee in contravention of the Court’s August 24, 2021, Notice.

III. LAW AND ARGUMENT

A. Painted Mirage’s Appeal Should Be Dismissed as Untimely Pursuant to NRAP 4

Nevada Rule of Appellate Procedure 4 provides in pertinent part:

RULE 4. APPEAL – WHEN TAKEN

(a) Appeals in Civil Cases.

(1) Time and Location for Filing a Notice of Appeal. In a civil case in which an appeal is permitted by law from a district court, the notice of appeal required by Rule 3 shall be filed with the district court clerk. Except as provided in Rule 4(a)(4), a notice of appeal **must be filed after entry of a written judgment or order, and no later than 30 days after the date that written notice of entry of the judgment or order appealed from is served.** If an applicable statute provides that a notice of appeal must be filed within a different time period, the notice of appeal required by these Rules must be filed within the time period established by the statute.

...

(3) Entry Defined. A judgment or order is entered for purposes of this Rule **when it is signed by the judge or by the clerk, as the case may be, and filed with the clerk.** ...

NRAP 4(a) (1), (3) (emphasis added). While the rule provides that an appeal shall be filed “no later than 30 days after the date that written notice of entry of the judgment or order appealed from is served,” it also defines “entry” for the purposes of this rule as “when [Judgment or order] is signed by the judge or by the clerk, as the case may be, and filed with the clerk.” *Id.*

For the purposes of Rule 4, a party receives notice of entry of a judgment or order when it is signed by the judge and the party is served. *Matter of Est. of Herrmann*, 100 Nev. 1, 24, 677 P.2d 594, 609 (1984). The Court’s filing and service is the triggering event. *Id.* A subsequent notice of entry of order or judgment filed by a prevailing party does not affect the time to appeal. *Id.* at 25, 677 P.2d at

609. The proper and timely notice of appeal is jurisdictional. *In re Duong*, 118 Nev. 920, 922, 59 P.3d 1210, 1212 (2002). In other words, an appellant's failure to comply with this rule deprives this Court of jurisdiction to hear the appeal. This is the case here.

Pursuant to Rule 4, as well as the *Hermann* case, Painted Mirage's deadline to file a Notice of Appeal was August 19, 2021, thirty (30) days after the District Court signed the Order, filed it, and served it upon Painted Mirage. Nonetheless, Painted Mirage filed its Notice of Appeal a day late (and \$250 short) on August 20, 2021.

Because Painted Mirage failed to meet its deadline to appeal, this Court is deprived of its jurisdiction to determine the appeal on its merits. Accordingly, this Court must dismiss this appeal for lack of jurisdiction and Travelers respectfully requests that this Court do so.

B. Painted Mirage's Appeal Should Be Dismissed Due to its Failure to Comply with this Court's August 24, 2021 Notice Within the Stated Timeframe

Additionally, when Painted Mirage filed its untimely Notice of Appeal, it also failed to remit the required \$250 filing fee. This Court notified Painted Mirage of its failure on August 24, 2021. Included in this Notice was a mandate that Painted Mirage pay its fee within 10 days (by Friday, September 3, 2021), or else the Court "will" dismiss the appeal. Notably, the Court did not state that it "might" or "may"

dismiss the appeal, but that the appeal “will” be dismissed if the payment was not made within the 10-day deadline.

Painted Mirage failed to make its payment within the 10-day deadline. As such, and pursuant to this Court’s own admonition, this appeal is to be dismissed, notwithstanding the jurisdictional defect explained above. Accordingly, Travelers respectfully requests that this Court dismiss the appeal.

IV. CONCLUSION

Because Painted Mirage’s untimely Notice of Appeal deprives this Court of jurisdiction and because Painted Mirage failed to comply with this Court’s instruction to pay within 10 days or else the appeal will be dismissed, Travelers respectfully requests that this honorable Court dismiss this appeal for lack of jurisdiction.

Dated: September 9, 2021

CLYDE & CO US LLP

By: /s/ **Lee H. Gorlin**

Amy M. Samberg

Lee H. Gorlin

3960 Howard Hughes Parkway, Suite 500

Las Vegas, NV 89169

Attorneys for Respondent

CERTIFICATE OF SERVICE

I certify that on the 9th day of September 2021, I served a copy of this Motion to Dismiss Appeal upon all counsel of record by electronic means pursuant to NEFCR 9 and NRAP 25(c)(1)(E) via this Court's electronic filing system.

DATED this 9th day of September 2021

/s/ *Regina Brouse*
An employee of Clyde & Co LLP