

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

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3
4 GABRIEL J. DALEY

5 Appellant,

6 Vs.

7 ENCORE GROUP OF PROFESSIONALS, LLC,

8 ENCORE GROUP OF CALIFORNIA, LLC

9 ENCORE GROUP OF NEVADA, LLC

10 ENCORE GROUP OF TEXAS, LLC

11 ENCORE GROUP OF HAWAII, LLC

12 JOHN JACKSON;

13 TERRY JACKSON;

14 Respondents.

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Jul 11 2022 05:07 p.m.
Elizabeth A. Brown
Clerk of Supreme Court
Supreme Court No. 84745
District Court No. A713

15 **OPPOSITION TO MOTION TO DISMISS APPEAL FOR LACK OF SUBJECT**
16 **MATTER JURISDICTION AND FOR AWARD OF SANCTIONS, ATTORNEYS FEES**
17 **AND COSTS**

18 COMES NOW, Appellants, Gabriel J. Daley, by and through his attorney of record, Timothy P.
19 Thomas, Esq. of the LAW OFFICE OF TIMOTHY P. THOMAS, LLC, and hereby opposes
20 Respondent's Motion to Dismiss Appeal for Lack of Subject Matter Jurisdiction and for Award of
21 Sanctions, Attorney Fees and Costs. This motion is made and based upon the following points
22 and authorities and all pleadings on file herein.

23 A. Statement of Facts.

- 24 1. On January 10, 2022, the parties to the above action began a jury trial to determine the
25 causes of actions, counterclaims, cross claims and third-party claims between the
26 parties. The issues in the case involved Defendant's ownership rights in the Plaintiff
27 and the termination of the Defendant Gabriel Daley.
28 2. On January 12, 2022, after selection of a jury and presentation of opening statements,

1 the parties began to negotiate a potential settlement of the claims. Both parties and
2 their respective counsel met and presented to the Court, the outline of the structure of
3 a settlement, including Defendant Daley signing a promissory note in the amount of
4 accumulated fees incurred by Plaintiff and Third-Party Defendants. The parties
5 presented that if Defendant Daley were to pay the sum of \$25,000 by the end of year
6 2022, the balance of the promissory note would be forgiven. In consideration for the
7 resolution, Defendant Daley would release any claims to any interest in the corporate
8 and limited liability entities in the action. This basic understanding was placed on the
9 court record and the jury was released.

- 10 3. The parties acknowledge in off-record discussions that Plaintiff Encore Group et al.
11 would receive a tax benefit from such an agreement and that Defendant Daley could
12 have a tax liability from the forgiveness of the promissory note, although the tax effect
13 of the resolution would be unknown without further information and further tax advice
14 from outside professionals.
- 15 4. Subsequent to the release of the jury and discussions with outside professionals,
16 Defendant Plaintiff provided the amount of the attorney's fees and Defendant Daley
17 determined from the outside professionals that he would be unable to obtain the relief
18 from the Promissory Note without incurring substantial tax liabilities.
- 19 5. Daley was unable to reach an agreement on the terms of the Promissory Note, including
20 interest rate, the maturity date of the Promissory Note, and other terms, and settlement
21 documents were not able to be executed.
- 22 6. The Respondents filed a Motion to Enforce Settlement, asking the Court to recognize
23 the terms placed upon the records and to supply the missing terms to the settlement
24 documents that had not been agreed upon by the parties.
- 25 7. Defendant Daley opposed the motion on the grounds that the terms of settlement were
26 incomplete and not sufficiently agreed upon to constitute a complete contract, and that
27 the settlement agreement was reached upon the mutual understanding that Daley
28 needed to consult with an accountant and tax counsel to determine the tax consequence

1 of the agreement was acceptable and that due to the mutual mistake of the parties, the
2 agreement failed to reflect the parties understanding.

3 8. On March 31, 2022, Judge Barisich's written memorandum opinion granted the Motion
4 to Enforce in part and denied the motion in part. The judge found a settlement was
5 sufficiently precise to contain all necessary terms and directed the parties to negotiate
6 the remaining terms in good faith using commercially reasonable terms. The District
7 Court noted that the settlement agreement did not include all terms and that Defendant
8 Daley had meritorious objections to executing the documents. The Court denied the
9 motion for attorney's fees and costs in bringing the motion.

10 9. On April 17, 2022, the Order Granting in Part and Denying in Part the Plaintiff and
11 Third Parties Motion to Enforce Settlement Agreement and for Fees and Costs was
12 entered. The Notice of Entry was filed on April 20, 2022.

13 10. On May 16, 2022, Appellant filed the Notice of Appeal based upon the entry of the
14 Order Granting in Part and Denying in Part Defendant's Motion to Enforce Settlement
15 Agreement.

16 **B. Statement of Law.**

17 1. Finality of the appealed order.

18 Under NRAP 3, an appeal may be taken by filing a notice of appeal with the district court clerk
19 within the time set forth in NRAP 4, i.e. 30 days from notice of entry of the order. Pursuant the
20 NRAP 3A, an appeal may be taken from judgments or orders of a district court in a civil action
21 that are:

22 (1) A final judgment entered in an action or proceeding commenced in the court
in which the judgment is rendered.

23 ...

24 (10) An interlocutory judgment in an action for partition that determines the rights
25 and interests of the respective parties and directs a partition, sale or division.

26 In the instant case, Appellant asserts that the Order granting the Enforcement of Settlement
27 is a final determination of the case in that the order did not require further determination of the
28 factual merits by the fact finder, the jury in this case. This is not a case that involved a final pleading

1 that would be labeled as a “judgment”. Therefore, the question of the finality of the determination
2 of the Court is questionable. The determination must dispose of all of the issues presented to the
3 in the case and leave nothing for further determination of the court.

4 The Court ordered the parties to supply the terms and the Court did not indicate that any
5 further decision was necessary from the Court. The lack of the terms constitutes the basis of the
6 appeal and the failure to agree to unilateral terms or the supplying of such terms by the Court
7 would undermine Defendant’s argument that the agreement is incomplete and insufficient to
8 enforce.

9 Further, the Court’s order required that Defendant Daley execute and agreement that
10 included terms that he was not in agreement with that were supplied by the opposing party or the
11 Court. Defendant Daley did not believe that he could be required to complete such an agreement.

12 In the Court's Order, the second sentence states, "The Parties are directed enter into final
13 settlement agreements..." The motion before the district court was a motion to enforce a
14 settlement agreement. If the order responding to the motion to enforce a settlement agreement
15 directs the parties to enter into a final settlement agreement, then the original "settlement
16 agreement" cannot be final or complete. In *Callie v. Near* (at 890), the Court stated that "the
17 district court may enforce only *complete* settlement agreements." If this court's order seeks to
18 enforce anything other than a final/complete settlement agreement, it is an incomplete settlement
19 agreement and is unenforceable. Additionally, in *Roth v. Scott*, 921 P.2d 1262 (Nev. 1996) (the
20 court noted that their "agreement" anticipated terms "*plus something more*" (*Id.* at 1265). In our
21 case, this "*plus something more*" was the promissory note. In the *Roth* case, the Court noted that
22 this meant that there was no meeting of the minds despite "the parties adamantly contend(ing)
23 that their respective, essential conditions were clearly understood". Citing *Keddie v. Beneficial*
24 *Ins., Inc.*, 94 Nev. 418, 421, 580 P.2d 955, 956 (1978) (Batjer, J., concurring) (stating that all
25 contracts require mutual assent, agreement, or meeting of the minds as to all essential elements).
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1 The original record shows, and the court found that, there were no specific terms for the
2 promissory note offered. The court directed the parties to negotiate the terms and *then* enter into a
3 "final agreement(s)" and the courts wording in part C that stating that if a party was "unwilling to
4 negotiate the final settlement documents" demonstrates that original lack of agreement and failure
5 of a meeting of the minds as to the terms of the promissory note. The issue on appeal before the
6 Appeals court is a legal question. The lower court is directing the parties to enter into an
7 agreement. Direction of a party to do something against their will is the very definition of coercion.
8 While a court can certainly coerce a party to do many things, our question to the appeals court is
9 whether the court has the authority to coerce a party to enter into contract terms that were not
10 previously determined.
11

12 While the district court record has not dismissed the case, it does not determine if there is
13 any remaining resolution remaining from the district court. The Respondent is subject to
14 irreparable harm by having the Court determine and dictate the terms of settlement that were not
15 part of the agreement. As a practical matter, the dismissal of this appeal and remand to the district
16 court to supply the missing term to the agreement is a waste of resources as that determination by
17 the court would be subject to a duplicate appeal and mandatory settlement process. The remand of
18 this issue to district court determination exposes Defendant Daley to potential sanctions and
19 awards of attorney's fee liability prior to being able to address the direct issue of this appeal.
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21 This Court has jurisdiction to entertain an appeal only where an appeal is authorized by
22 statute or court rule. *Valley Bank of Nevada v. Ginsberg*, 110 Nev. 440 (1994) stated that a district
23 court's order approving settlement can be seen as a final judgment, although the pleadings do not
24 state that wording. The functional view of finality to promote judicial economy by avoiding
25 piecemeal appeals has been recognized in multiple cases. *Taxicab Authority v. Greenspun*, 109
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1 Nev. 1022, 862 P.2d 423 (1993); *Hallicrofters Co. v. Moore*, 102 Nev. 526, 728 P.2d 441 (1986).

2 Finality of an order must dispose of the issues presented in the case. In this case, the merits
3 of the case are not the subject of the settlement order. *Bank of Nevada v. Ginsburg, Id.* at 445 citing
4 *Taylor v. Barringer*, 75, Nev. 409, 344 P.2d 676 (1959). The order to enforce settlement must find
5 that a settlement is, in itself, complete, in order to terminate the case. The lack of terms is the very
6 heart of the appeal, that a party cannot be coerced or ordered to complete terms, and act in good
7 faith to do so, if those terms are not part of the settlement.
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9 2. Issuance of Sanctions.

10 In order to award attorney's fees and costs against Appellant as a sanction, the Court must find
11 that the appeal is frivolous, and taken only for the purpose of causing delay. NRAP 38.
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13 The issue on appeal involves the Court's authority to insert and determine terms of settlement
14 that have not been agreed to by the parties. In order to answer this question, the appeal was filed
15 prior to the insertion of such terms. The creation of the unsupplied terms, involves mixed questions
16 of law and fact as to the intent and actual agreement of the parties. The determination of the terms
17 by the district court would have included a potential award of attorney's fees and costs as well.
18 Defendant Daley determined that the issue of appeal was ripe based upon the status of the record.
19 This determination and assertion was not done frivolously and without consideration. Within the
20 Order on the Motion to Enforce, the district court determined that the underlying case and its merits
21 had reached a final stage and would not be determined. The district court determined that the
22 underlying case was determined to be resolved by the settlement. The jury was dismissed. This
23 motion is therefore "post-trial" and order should be considered to be final.
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THEREFORE, Appellant Daley asserts that the appeal is justiciable and presents a valid issue of fact for the Court to determine on appeal. The Appellant requests that the Court deny the motion and the request for sanctions and allow the parties to proceed to briefing in this appeal and grant such other relief as is appropriate in the circumstances.

DATED this 11th day of July, 2022.

LAW OFFICE OF TIMOTHY P. THOMAS, LLC

[Signature]

Timothy P. Thomas, Esq.
1771 E. Flamingo Rd., Suite 212B
Las Vegas, NV 89121
Counsel for Appellant.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 11th day of July 2022, I placed a true and correct copy of the foregoing Opposition to Motion to Dismiss Appeal for Lack of Subject Matter Jurisdiction and for an Award of Sanctions, Attorney Fees and Costs by electronic service addressed to:

Kent P. Woods, Esq.
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Las Vegas, NV 89104

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EMPLOYEE, LAW OFFICE OF TIMOTHY
P. THOMAS, LLC