

MONROE, LTD., A CORPORATION, APPELLANT, v. CENTRAL TELEPHONE COMPANY, SOUTHERN NEVADA DIVISION, ET AL., RESPONDENTS.

No. 7627

538 P.2d 152

July 10, 1975

Appeal from an order denying appellant's motion for trial setting, entered on September 26, 1973, Eighth Judicial District Court, Clark County; William P. Compton, Judge; and from an order entered on October 24, 1973, vacating an order of voluntary dismissal and dismissing the action with prejudice, Eighth Judicial District Court, Clark County; Joseph S. Pavlikowski, Judge.

The Supreme Court, BATJER, J., held that entry of ex parte order granting plaintiff's motion for dismissal of action without prejudice, was error and vacating of such order was proper, that dismissal, with prejudice, of action which had been pending for more than five years was not abuse of discretion and that denial of plaintiff's application for preferential trial setting was not abuse of discretion.

**Affirmed.**

*Daryl Engebregson*, of Las Vegas, for Appellant.

*Neil J. Beller*, of Las Vegas, for Respondents.

1. DISMISSAL AND NONSUIT.

Words "at the plaintiff's instance" in rule providing that, except as provided in specified paragraph, an action shall not be dismissed at the plaintiff's instance save on order of court and on such terms and conditions as the court deems proper contemplate that plaintiff will present a motion to the trial court. NRCP 41(a)(2).

2. MOTIONS.

Purpose of motions requiring that, unless motion is made during a hearing or trial, it must be in writing and state with particularity the grounds therefor is to guarantee that adverse party be informed not only of pendency of motion but also basis on which movant seeks the order. NRCP 7(b)(1).

3. DISMISSAL AND NONSUIT.

Motion for dismissal under rule, which provides that, except as provided in specified paragraph, an action shall not be dismissed at plaintiff's instance save upon order of court and on such terms and conditions as court deems proper, may not be heard ex parte, but is a matter for exercise of sound discretion by trial court to either grant or refuse on facts presented. NRCP 41(a)(2).

4. DISMISSAL AND NONSUIT.

Entry of ex parte order granting plaintiff's motion for dismissal of action without prejudice was error and vacating of order was

proper where motion had not been in writing and on notice. NRCP 5(a), 7(b), 41(a)(2).

5. MOTIONS.

Failure to comply with court rules is a valid ground for vacating an order.

6. APPEAL AND ERROR.

Contention that rule, which provides that except as otherwise provided in specified subsection of rule, "when any district judge shall have entered upon the trial or hearing of any cause, proceeding or motion, or made any ruling, order or decision therein, no other judge shall do any act or thing in or about such cause, proceeding or motion, unless upon the written request of the judge who shall have first entered upon the trial or hearing of such cause, proceeding or motion" had been violated was not properly before Supreme Court where contention was not raised in district court. DCR 26.

7. DISMISSAL AND NONSUIT.

Dismissal of action pending for more than five years is mandatory in absence of written stipulation for an extension of time. NRCP 41(e).

8. DISMISSAL AND NONSUIT.

Dismissal, with prejudice, of action which had been pending for more than five years is not abuse of discretion, absent showing of circumstances excusing the delay. NRCP 41(e).

9. DISMISSAL AND NONSUIT.

Purpose of rule pertaining to dismissal of actions pending for more than five years is to compel reasonable diligence in prosecution of an action. NRCP 41(e).

10. DISMISSAL AND NONSUIT.

Where defendant, who seeks dismissal of action, has made a prima facie showing of unreasonable delay, plaintiff must show circumstances excusing delay. NRCP 41(e).

11. APPEAL AND ERROR; TRIAL.

Setting trial dates and other matters done in arrangement of a trial court's calendar is within discretion of that court, and in absence of arbitrary conduct will not be interfered with by Supreme Court.

12. DISMISSAL AND NONSUIT.

Dismissal, with prejudice, of action which had been pending more than five years was not abuse of discretion, absent showing of circumstances excusing the delay. NRCP 41(e).

**OPINION**

By the Court, BATJER, J.:

Appellant filed a complaint against Central Telephone Company, Southern Nevada Division, hereafter referred to as respondent, and one other party on October 11, 1968. The other party settled and the action was dismissed as to it by

district court order entered on December 2, 1968, pursuant to a stipulation. Respondent filed its answer on August 1, 1969. No other action was taken until September 12, 1973, when appellant filed a note for trial docket. On September 21, 1973, appellant moved for a trial setting before October 11, 1973, and attached to that motion an affidavit, in justification of the preferential setting, which explained that the five-year period since the filing of the complaint would expire on October 11, 1973. NRCP 41(e). The motion for trial setting was denied by Judge Compton on September 26, 1973.

1. Although the record does not include any written motion for dismissal filed by appellant, nor a certificate of service of such motion upon respondent, the *ex parte* order entered by Judge Compton on October 9, 1973, and filed on October 16, 1973 (NRCP 41(a)(2)),<sup>1</sup> dismissing appellant's complaint without prejudice recites that it was entered on the motion of appellant.<sup>2</sup>

[Headnote 1]

On October 12, 1973, respondent filed a motion to dismiss the action, with prejudice, for appellant's failure to prosecute, and on October 17, 1973, respondent filed a motion to vacate Judge Compton's *ex parte* order of dismissal. Both motions were served by mail. Respondent's motions were heard and granted on October 24, 1973, by Judge Pavlikowski. This appeal followed.

[Headnote 2]

NRCP 7(b)(1)<sup>3</sup> requires that a motion shall be in writing

<sup>1</sup>NRCP 41(a)(2): "Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice."

<sup>2</sup>Although the ambiguous phrase "at the plaintiff's instance" is used in NRCP 41(a)(2), those words contemplate that the plaintiff will present a motion to the trial court. *Diamond v. U.S.*, 267 F.2d 23, 25, (5th Cir. 1959), cert. denied, 361 U.S. 834 (1959).

<sup>3</sup>NRCP 7(b)(1): "An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion."

unless made during a hearing or trial, and NRCP 5(a)<sup>4</sup> mandates that every written motion other than one that may be heard *ex parte* shall be served upon each of the parties. No hearing or trial was in progress involving this case on October 9, 1973, when the *ex parte* order was entered.<sup>5</sup> The requirement of a written motion stating the grounds with particularity is intended to guarantee that the adverse party be informed not only of its pendency, but also the basis upon which the movant seeks the order.

[Headnote 3]

A motion for dismissal under NRCP 41(a)(2) may not be heard *ex parte*, but is a matter for the exercise of sound discretion by the trial court to either grant or refuse upon the facts presented. *Wilson & Co. v. Fremont Cake & Meal Co.*, 83 F.Supp. 900 (D.Neb. 1949); *Pratt v. Rice*, 7 Nev. 123 (1871); *Wright & Miller*, Federal Practice and Procedure: Civil § 912. Cf. *Larsen v. Switzer*, 183 F.2d 850 (8th Cir. 1950), cert. denied, 340 U.S. 911 (1951).

[Headnote 4]

Here respondent contends that it knew nothing of the motion until a copy of the *ex parte* order was received by mail several days after its entry. In *Maheu v. District Court*, 88 Nev. 26, 34, 493 P.2d 709 (1972), we reviewed this court's historical view of *ex parte* orders: "For a century, our settled law has been that any 'special' motion involving judicial discretion that affects the rights of another, as contrasted to motions 'of course,' must be made on notice even where no rule expressly requires notice to obtain the particular order sought, except only when this requirement is altered to meet extraordinary situations such as those concerned in NRCP 65(b). *Pratt v. Rice*, 7 Nev. 123 (1871); NRCP 6(d). It is also fundamental that although an order's subject matter would lie within the court's jurisdiction if properly applied for, it is void if entered without required notice. Our authorities establishing this principle are as old as *Wilde v. Wilde*, 2 Nev. 306

<sup>4</sup>NRCP 5(a) provides in pertinent part: ". . . [E]very written motion other than one which may be heard *ex parte*, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties. . . ."

<sup>5</sup>The type of hearing at which there is no need to reduce a motion to writing is one in which the proceedings are recorded. *Alger v. Hayes*, 452 F.2d 841 (C.A. 8th 1972).

(1866), and as recent as *Reno Raceway, Inc. v. Sierra Paving, Inc.*, 87 Nev. 619, 492 P.2d 127 (1971). It makes no difference that a void order may concern a matter committed to the court's discretion, such as 'discovery,' regarding which the court might have granted protective orders had a proper application been made. Cf. *Checker, Inc. v. Public Serv. Comm'n*, 84 Nev. 623, 446 P.2d 981 (1968); cf. *Ray v. Stecher*, 79 Nev. 304, 383 P.2d 372 (1963); cf. *Whitney v. District Court*, 68 Nev. 176, 227 P.2d 960 (1951); cf. *Abell v. District Court*, 58 Nev. 89, 71 P.2d 111 (1937)."

The failure of appellant to comply with the requirements of NRCP 7(b) and NRCP 5(a) deprived Judge Compton of authority to proceed to enter the order on October 9, 1973, dismissing the action without prejudice. The act of Judge Compton in entering the *ex parte* order was erroneous<sup>6</sup> since the motion should have been in writing and on notice.

[Headnote 5]

In its motion to vacate the *ex parte* order, respondent alleged as grounds appellant's failure to file and serve a notice of motion and motion to dismiss. Failure to comply with court rules is a valid ground for vacating an order. See *In the Matter of the Estate of Powell*, 62 Nev. 10, 135 P.2d 435 (1943). Cf. *F. C. Mortimer v. P.S.S. & L. Co.*, supra, and *Luc v. Oceanic Steamship Company*, supra, footnote 6. Whether the *ex parte* order was void or voidable is not material to this opinion because it was properly vacated by Judge Pavlikowski.

[Headnote 6]

Appellant registered no objection to Judge Pavlikowski's presiding at the hearing on October 24, 1973. Now, for the first time, it contends that DCR 26<sup>7</sup> was violated and error

<sup>6</sup>In *F. C. Mortimer v. P.S.S. & L. Co.*, 62 Nev. 142, 145 P.2d 733 (1944), this court held an order invalid because it had been made without notice and an opportunity for hearing. In *Luc v. Oceanic Steamship Company*, 84 Nev. 576, 579, 445 P.2d 870 (1968), we said: "The giving of notice is a jurisdictional requirement, and where a rule or statute prescribes the manner in which notice is to be given, that mode must be complied with or the proceeding will be a jurisdictional nullity." In *Turner v. Saka*, 90 Nev. 54, 518 P.2d 608 (1974), we considered an "Order to Show Cause" issued in the State of New Jersey void for want of notice.

<sup>7</sup>DCR 26: "1. Except as otherwise provided in subsection 2 of this rule, when any district judge shall have entered upon the trial or hearing of any cause, proceeding or motion, or made any ruling, order or decision therein, no other judge shall do any act or thing in or about such cause, proceeding or motion, unless upon the written request

committed. It is unnecessary to decide this point as it was not raised in the district court and is not properly before us. *Eagle Thrifty Drugs v. Incline Village*, 89 Nev. 575, 517 P.2d 786 (1973). Cf. *Cottonwood Cove Corp. v. Bates*, 86 Nev. 751, 476 P.2d 171 (1970).

After Judge Pavlikowski vacated the *ex parte* order, the matter was before him on respondent's motion to dismiss for lack of prosecution. At that time the case was viable, pending and ripe for dismissal. NRCP 41(e).<sup>8</sup>

[Headnote 7]

Dismissal of an action pending for more than five years is mandatory in the absence of written stipulation for an extension of time. *Lighthouse v. Great W. Land & Cattle*, 88 Nev. 55, 493 P.2d 296 (1972).

[Headnotes 8-10]

Judge Pavlikowski did not abuse his discretion in dismissing *with prejudice*. The purpose of Rule 41(a)(2) is to compel reasonable diligence in the prosecution of an action. Where a

of the judge who shall have first entered upon the trial or hearing of such cause, proceeding or motion.

"2. The judges in any judicial district having more than one judge shall adopt such rules as they deem necessary to provide for the division and disposal of the business of their judicial district."

<sup>8</sup>NRCP 41(e): "The court may in its discretion dismiss any action for want of prosecution on motion of the defendant and after due notice to the plaintiff, whenever plaintiff has failed for two years after action is filed to bring such action to trial. Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendant, after due notice to plaintiff or by the court upon its own motion, unless such action is brought to trial within five years after the plaintiff has filed his action, except where the parties have stipulated in writing that the time may be extended. When, in any action after judgment, a motion for a new trial has been made and a new trial granted, such action shall be dismissed on motion of defendant after due notice to plaintiff, or by the court of its own motion, if no appeal has been taken, unless such action is brought to trial within three years after the entry of the order granting a new trial, except when the parties have stipulated in writing that the time may be extended. When in an action after judgment, an appeal has been taken and judgment reversed with cause remanded for a new trial (or when an appeal has been taken from an order granting a new trial and such order is affirmed on appeal), the action must be dismissed by the trial court on motion of defendant after due notice to plaintiff, or of its own motion, unless brought to trial within three years from the date upon which remittitur is filed by the clerk of the trial court. A dismissal under this subdivision (e) is a bar to another action upon the same claim for relief against the same defendants unless the court otherwise provides."

defendant has made a *prima facie* showing of unreasonable delay, the plaintiff must show circumstances excusing delay. *Hassett v. St. Mary's Hosp. Ass'n*, 86 Nev. 900, 478 P.2d 154 (1970). Here appellant has failed to present a valid excuse.

2. In its challenge to the order of September 26, 1973, denying the motion for preferential trial setting, appellant contends that Judge Compton erred. However, it was appellant who delayed filing its application for a trial until just before dismissal would have been required under NRCP 41(e). The diligence required on the part of appellant and its counsel is absent in this record. No valid reason or explanation was given for the pendency of this case for some four years after it had been at issue.

[Headnotes 11, 12]

Setting trial dates and other matters done in the arrangement of a trial court's calendar is within the discretion of that court, and in the absence of arbitrary conduct will not be interfered with by this court. *Close v. District Court*, 73 Nev. 194, 314 P.2d 379 (1957). Cf. *State ex rel. Hamilton v. Dist. Ct.*, 80 Nev. 158, 390 P.2d 37 (1964). We find no error or abuse of discretion by Judge Compton in his order denying appellant a preferential trial setting. The orders of the district court are affirmed.

GUNDERSON, C. J., and MOWBRAY and THOMPSON, JJ., and GREGORY, D. J., concur.

....., A MINOR BOY, UNDER THE AGE OF  
18 YEARS, APPELLANT, v. STATE OF NEVADA,  
RESPONDENT.

No. 8128

July 11, 1975

537 P.2d 477

Appeal from a juvenile commitment order of the Fourth Judicial District Court, Elko County; Joseph O. McDaniel, Judge.

The Supreme Court, MOWBRAY, J., held that statutory mandates were satisfied when juvenile's mother was notified within approximately one hour of time that juvenile was taken into custody, that statutory provisions pertaining to dismissal of petition alleging delinquency if not filed within 10 days from date of complaint when child is in "detention or shelter care" were not applicable where juvenile had been released, that appearance of juvenile before juvenile court judge without first

appearing before a probation officer was not violative of statute requiring that juvenile be advised of his rights in his first appearance "at intake," that police officer had probable cause to arrest juvenile, that a formal declaration of arrest was not necessary under circumstances, that search conducted pursuant to arrest was not unreasonable, and that information provided police by minors who assisted in investigation of case was not violative of statutory provisions.

**Affirmed.**

[Rehearing denied August 26, 1975]

GUNDERSON, C. J., dissented.

*Manzonie & Hawley*, Elko, for Appellant.

*Robert List*, Attorney General, Carson City; *Robert C. Manley*, District Attorney, and *Gary E. DiGrazia*, Deputy District Attorney, Elko County, for Respondent.

1. INFANTS.

Petition to adjudicate juvenile a delinquent was not subject to dismissal on ground that juvenile's mother was not immediately notified after juvenile was taken into custody where maximum amount of time that could have elapsed from time that juvenile was placed in custody until his mother was notified was approximately one hour, all reasonable efforts were made to contact juvenile's parents, including his mother, and there was no evidence of any intentional delay. NRS 62.170, subd. 1.

2. INFANTS.

Term "detention or shelter care," within statute providing that a petition alleging delinquency or need of supervision shall be dismissed with prejudice if not filed within 10 days from date of referral of complaint when child is in detention or shelter care, refers to a physical form of restraint. NRS 62.128, subd. 4.

3. INFANTS.

Juvenile, who was immediately returned to custody of his mother upon his arrest for possession of a controlled substance, did not fall within statute requiring dismissal of petition alleging delinquency if not filed within 10 days from date of complaint when child is in "detention or shelter care." NRS 62.128, subd. 4.

4. INFANTS.

Provision of Juvenile Court Act that a juvenile must be advised of his rights in his first appearance "at intake" was not violated by fact that juvenile appeared before juvenile court judge without first appearing before a probation officer where there were no "intake" proceedings in that juvenile was released at school to his mother and juvenile was otherwise fully advised of his rights. NRS 62.193, subd. 2.

5. ARREST.

A peace officer may make an arrest without a warrant on a