

NC-DSH, Inc. v. Garner, 125 Nev. Adv. Op. No. 50 (October 29, 2009)¹

CIVIL PROCEDURE – VACATING JUDGMENT FOR FRAUD UPON THE COURT

Summary

Appeal from a district court order vacating a stipulated final judgment under NRCP 60(b) for fraud on the court.

Disposition/Outcome

The Court affirmed the order of the district court to vacate the stipulated judgment, holding that Respondents' attorney committed a fraud upon the court, which is not subject to a limitation period under NRCP 60(b)(3). Furthermore, the Court found the Respondents' attorney lacked the authority to make a settlement, and Respondents did not ratify the settlement.

Factual and Procedural History

The Gardners hired attorney Lawrence Davidson to represent them in a malpractice suit against Valley Hospital for their father's wrongful death. Without the Gardners' knowledge or approval, Davidson settled the case with Valley Hospital by accepting \$160,000 and forging the settlement papers before absconding with the money. The district court recognized that Davidson was the Gardners' hired agent, albeit a dishonest agent, and credited Valley Hospital for \$160,000 against any eventual recovery by the Gardners. However, the district court found Davidson's fraudulent actions to be so intolerable that it ordered the stipulated judgment to be set aside.

Valley Hospital appealed the district court order, arguing that Davidson's misconduct was "intrinsic fraud," and that Davidson had actual and apparent authority to settle the Garners' claims. Moreover, Valley hospital contended that the Garners' motion was filed beyond six months from when the stipulated judgment was entered, and thus, the motion was barred under NRCP 60(b)(3).² Finally, Valley Hospital argued that the Garners should have proceeded by independent action to aside the judgment, and regardless, the Garners had ratified the settlement.

Discussion

NRCP 60(b)(3) is not applicable

The Court held that irrespective of whether Davidson's fraud was "intrinsic" or "extrinsic," the six-month limitation under NRCP 60(b)(3) did not apply to the Garners' motion because NRCP 60(b)(3) only applies to fraud "of an adverse party." In this case, Davidson victimized both Valley Hospital as well as the Garners, and thus, the Garners' motion was based on fraud upon the court, as opposed to fraud of an adverse party.

Moreover, rejecting Valley Hospital's argument that the Garners' should have brought an independent action, the Court found it appropriate to treat a motion as an independent action, or

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² NEV. R. CIV. P. 60(b)(3) states, "On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for . . . fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party." Furthermore, NRCP 60(b) specifies that a motion must be made "not more than 6 months after the proceeding was taken or the date that written notice of entry of the judgment or order was served." However, NRCP 60(b) also contains a "savings clause" that gives the court the authority to entertain an independent action for relief, but does not specify a time limit for motions seeking relief for "fraud upon the court."

vice versa. In *Murphy v. Murphy*, the Court interpreted NRCP 60(b)'s "savings clause" to allow a party to seek a vacated judgment due to fraud on the court by bringing either a motion or an independent action.³ Thus, the Court ruled that the Garners' motion was not limited or barred under NRCP 60(b)(3).

Davidson's conduct constituted "fraud upon the court" pursuant to NRCP 60(b)

While a final judgment is normally not subject to challenge once entered, the Court asserted that it is necessary to set aside a judgment when justice has not been served. "Fraud upon the court" is an act that compromises the integrity of the court, and may be committed by an officer of the court.⁴ The Court reasoned that an attorney is an officer of the court, and because Davidson's conduct departed from the standard of honesty, Davidson's conduct constituted fraud on the court. Acting as an officer of the court, Davidson fraudulently forged the Garners' signatures, obtained a signature from Valley Hospital's lawyer on the stipulated judgment, and brought it to a district judge to enter the judgment, thus closing the Garners' case forever. Accordingly, Davidson brought fraud on the court by misrepresenting a fraudulent settlement to the district court.

Davidson's conduct was not in accordance with a lawyer's authority to act as an agent

The Court affirmed that while a client who hires a lawyer establishes an agency relationship, the lawyer will not be held as an agent when he agrees to a settlement that binds the client.⁵ Furthermore, the Court asserted that a lawyer has the authority to handle procedural matters for a client, but does not possess the authority to settle a client's case.⁶

Also, the Court noted that although the Garners' retainer agreement with Davison included a "power of attorney" provision, Davidson did not actually use his power of attorney when he committed the fraud. Specifically, Davidson did not sign the settlement papers acting as a representative of the Garners, but forged his clients' signatures and a notary's signature. Consequently, the Court concluded that the district court was correct in finding that Davidson did not possess express, implied, or apparent authority to act on behalf of the Garners to settle with Valley Hospital.

Ratification and laches

Valley Hospital further alleged that the Garners ratified Davidson's fraudulent settlement because the Garners attempted to negotiate a settlement after discovering Davidson's fraud, and the negotiated amount was equivalent to the amount that Davidson stole. However, the Court rejected this argument and distinguished the Garners' case from *Navrides v. Zurich Insurance Company*, stating that while in *Navrides*, the defrauded client sued to enforce the unauthorized

³ *Murphy v. Murphy*, 103 Nev. 185, 186, 734 P.2d 738, 739 (1987).

⁴ *Demjanjuk v. Petrovsky*, 10 F.3d 338, 352 (6th Cir. 1994) (citing 7 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 60.33 (2d ed. 1978) (now at 12 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 60.21[4][a] (3d ed. 2009)); *Kupferman v. Consolidated Research & Mfg. Corp.*, 459 F.2d 1072, 1078 (2d Cir. 1972) (noting the Second Circuit adopted Moore's formulation); *In re Intermagnetics America, Inc.*, 926 F.2d 912, 916 (9th Cir. 1991) (also adopting Moore's formulation); *see Occhiuto v. Occhiuto*, 97 Nev. 143, 146 n.2, 625 P.2d 568, 570 n.2 (1981) (citing this section of Moore's but without referring to the passage quoted in *Demjanjuk*).

⁵ Grace M. Giesel, *Client Responsibility for Lawyer Conduct: Examining the Agency Nature of the Lawyer-Client Relationship*, 86 NEB. L. REV. 346, 348 (2007).

⁶ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 27 cmt. d, 22(1) (2000).

settlement, here, the Garners never ceased to protest Davidson's fraudulent settlement.⁷ Moreover, refuting Valley Hospital's argument that the Garners were barred by laches because they waited 18 months before filing their NRCP 60(b) motion, the Court held that a party seeking relief from a judgment due to fraud upon the court is not subject to any time limitations.⁸ Therefore, the Court held it was appropriate for the district court to vacate the stipulated judgment for fraud upon the court.

Conclusion

NRCP 60(b)(3) does not impose time constraints on parties who seek a motion or independent action to vacate a judgment because of fraud upon the court. A lawyer who commits fraud upon the court is not acting within the agency relationship he established with a client, and such fraud warrants setting aside a judgment under NRCP 60(b).

⁷ Navrides v. Zurich Insurance Company, 488 P.2d 637, 640, (Cal. 1971).

⁸ Price v. Dunn, 106 Nev. 100, 104, 787 P.2d 785, 787 (1990) (allowing motion even though 19 months had passed between entry of judgment and application to vacate); see *Murphy*, 103 Nev. at 185-86, 734 P.2d at 739 (allowing application "[n]early a year" after judgment was entered); *Savage v. Salzmann*, 88 Nev. 193, 495 P.2d 367 (1972) (remanding order dismissing independent action to vacate judgment filed 16 months after judgment was entered).