

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARY MARTINEZ,
Appellant,

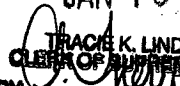
vs.

WILLIAM J. SHEEHAN; BOYER 1992
IRREVOCABLE TRUST; BOYER FAMILY
1996 DISCRETIONARY TRUST; AND
HANEY, WOLOSON & MULLINS,
Respondents.

No. 48353

FILED

JAN 13 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

This is a proper person appeal from a district court summary judgment in a trust action. Eighth Judicial District Court, Clark County; Michael A. Cherry, Judge.

Appellant Mary Martinez, who was represented at the time by respondent Haney, Woloson & Mullins ("Haney firm"), filed a district court complaint against respondent William J. Sheehan, trustee of respondents the Boyer 1992 Irrevocable Trust and the Boyer Family 1996 Discretionary Trust (collectively referred to as "Sheehan"). The complaint alleged breach of trust, bad faith, violations of NRS Chapters 163 and 164, breach of fiduciary duties, and intentional infliction of emotional distress. On June 6, 2006, Sheehan moved for summary judgment, and Martinez was given until August 9, 2006, to file her opposition.

On August 9, however, attorney Patrick Clary, who also represented Martinez, moved to withdraw as counsel, to extend the time for Martinez to file and serve her summary judgment opposition, to continue the hearing on the summary judgment motion and trial, and for an order shortening time under EDCR 2.26. Clary's motion was granted in a written order filed on August 29, 2006, and served on September 6, 2006. The order directed Martinez to file any opposition to the summary

judgment motion by September 18, 2006, and set the summary judgment hearing for October 9, 2006.

Meanwhile, on August 16, 2006, the Haney firm joined in Clary's motion to withdraw as counsel and for time extensions, and the firm also moved to reduce its attorney's lien to judgment. The Haney firm's motions, which stated that the matter would be heard on August 23, 2006, were purportedly served upon Martinez by mail on August 16. Also on August 16, the Haney firm sent to Martinez a notice of attorney's lien under NRS 18.015, claiming a lien for \$111,727.43 and stating that the lien provided the firm "an interest in any judgment rendered in this case in favor of [Martinez]." On August 23, the Haney firm filed and served Martinez, by mail, with notice that the hearing on its motions had been rescheduled for August 30, 2006.

Martinez did not file any opposition to the Haney firm's motions or attend the August 30 hearing, and the district court orally granted the firm's motions. On September 18, 2006, the district court entered a written order allowing the Haney firm to withdraw as counsel. The court also determined that the firm had a valid, perfected attorney's lien under NRS 18.015(2) for \$111,727.43 and entered judgment against Martinez for that amount, plus post-judgment interest at the legal rate. The order was served by mail upon Martinez on September 20, 2006.

Martinez failed to file any opposition to Sheehan's summary judgment motion by the September 18 filing deadline or thereafter, and she also failed to attend the October 9 summary judgment hearing. The district court entered an order granting summary judgment on October 17, 2006, which noted that since no opposition was filed, under EDCR 2.20(c), Martinez was deemed to have admitted that the motion was meritorious. Nevertheless, the court stated that it had considered the motion's merits

and concluded that substantial bases in law and fact existed for granting the summary judgment. Proceeding in proper person, Martinez has timely appealed, challenging the September 18, 2006, attorney fees judgment and the October 17, 2006, summary judgment.

Attorney fees judgment

With respect to the September 18 attorney fees judgment, Martinez contends on appeal, among other things, that she did not receive proper notice of the hearing on the Haney firm's motion to reduce its attorney's lien to judgment.¹ In response, the Haney firm argues that it provided sufficient notice under NRS 18.015(4) and that any technical deficiency in notice was harmless error.

NRS 18.015(4) provides that the district court may adjudicate rights under and enforce an attorney's lien upon five-days' notice to the parties. In calculating any period of time prescribed by statute, NRCP 6(a) excludes the day of the act and also excludes the last day of the period if it is a nonjudicial day. When the period of time prescribed by a statute is less than 11 days, NRCP 6(a) further excludes intermediate weekend and nonjudicial days. Additionally, NRCP 6(e) adds three days to the prescribed period when service is by mail.

Since the Haney firm purportedly mailed its hearing notice on Wednesday, August 23, that day, and two intervening weekend days, should have been excluded under NRCP 6(a), and then three days should have been added for mailing under NRCP 6(e). Winston Products Co. v.

¹Martinez also argues that the Haney firm breached its contract, that certain provisions of the fee agreement were against public policy and unenforceable, and that the fee dispute should have been arbitrated. In light of this order, however, we need not address these other issues.

DeBoer, 122 Nev. 517, 134 P.3d 726 (2006). Because the last day of the mailing period fell on Saturday, September 2, and Monday, September 4, was the Labor Day holiday, the district court should not have adjudicated the Haney firm's lien before Tuesday, September 5. The hearing, however, was held on August 30, and Martinez thus received insufficient notice thereof. Moreover, under NRS 18.015, an attorney's lien cannot be enforced until it has attached to a judgment or settlement in the underlying case. Michel v. Dist. Ct., 117 Nev. 145, 152, 17 P.3d 1003, 1007 (2001) (requiring the district court to determine whether the amount claimed stems from a judgment or settlement before enforcing an attorney's charging lien under NRS 18.015); Morse et al. v. District Court, 65 Nev. 275, 282, 195 P.2d 199, 202 (1948) (distinguishing between a charging lien and retaining lien, and recognizing that a charging lien "attaches to the judgment or proceeds for services performed in the particular action only"). Consequently, as no judgment or settlement had been rendered here, the district court erred in reducing the Haney firm's attorney's lien to judgment.

To the extent that the Haney firm contends that it sought a personal judgment against Martinez for attorney fees based on its contractual claims, NRS 18.015(4)'s notice requirements for attorney's liens are inapplicable. Instead, under the local court rules, specifically, EDCR 2.20(a), all motions contain "a notice of motion setting the same for hearing . . . not less than 21 days from the date the motion is served and filed." Under EDCR 2.26, an order shortening the notice of a hearing to less than ten days may not be served by mail and must be supported by a showing of good cause. Notably, here, there was no specific request by the Haney firm for an order shortening time for the August 30 hearing, and

the firm could not rely upon the order shortening time for Clary's motion that was heard on August 21.²

Here, Martinez was given, at most, only 14 calendar days between the service of the motion on August 16 and the actual hearing date on August 30. Additionally, since the August 16 motion incorrectly stated that the hearing was to be held on August 23, when notice of the rescheduled August 30 hearing was sent to her by mail on August 23, the hearing was only a few days away. Accordingly, Martinez was not given sufficient notice of the hearing on the Haney firm's motion to withdraw and to reduce its attorney's lien to judgment; nor was she given sufficient opportunity to respond to those motions. Therefore, the portion of the district court's September 18, 2006, order purporting to reduce the attorney's lien to judgment and awarding attorney fees, costs, and interest is vacated as void.

Additionally, upon remand, if attorney fees are awarded to the Haney firm, then there must be substantial evidence showing that the attorney's services were rendered in the underlying case. See generally Morse et al. v. District Court, 65 Nev. 275, 282, 195 P.2d 199, 202 (1948) (stating that a charging lien "attaches to the judgment or proceeds for services performed in the particular action only"). Also, an award of attorney fees must be reasonable. See Nevada Rules of Professional Conduct 1.5; Gordon v. Stewart, 74 Nev. 115, 234 P.2d 234 (1978) (considering the amount of fees awarded by the district court to be

²Although the Haney firm joined in the Clary's motions to withdraw, for an extension of time to oppose the summary judgment motion, and to continue the summary judgment hearing and trial, the Haney firm sought different and additional relief—to reduce its attorney's lien to judgment.

reasonable); cf. Matter of Estate of Bowlds, 120 Nev. 990, 102 P.3d 593 (2004) (remanding a probate case for a determination of whether the customary percentage fee charged pursuant to an attorney-client fee agreement was reasonable compensation).

Summary judgment

Although Martinez does not contest the Haney firm's ultimate withdrawal, she challenges its timing, on the same day that her opposition to Sheehan's summary judgment motion was due. Martinez contends that she was prejudiced by the district court's order allowing the Haney firm to withdraw because she had insufficient time to oppose the summary judgment motion thereafter.

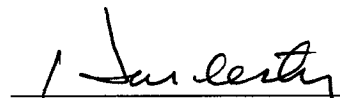
In this case, the Haney firm had represented Martinez for two years since filing the complaint in 2004, should have been prepared to act on her behalf when Clary withdrew from the case. See Nevada Rules of Professional Conduct 1.16(d) (requiring a lawyer, upon termination of representation, to take reasonably practicable steps "to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, [and] surrendering papers and property to which the client is entitled"); cf. Benson v. Benson, 66 Nev. 94, 98-99, 204 P.2d 316, 318 (1949) (recognizing the general rule that an attorney's withdrawal, on the eve of trial, was not necessarily a ground for continuance, and that if multiple counsel are engaged, then the lack of preparedness by one is not a ground for continuance if the other attorneys have been connected with the case for some time). The Haney firm remained her counsel until the district court entered its September 18 written order granting the firm's motion to withdraw. See State, Div. Child & Fam. Servs. v. Dist. Ct., 120 Nev. 445, 451, 92 P.3d 1239, 1243 (2004) (recognizing that a court's oral rulings generally are ineffective for

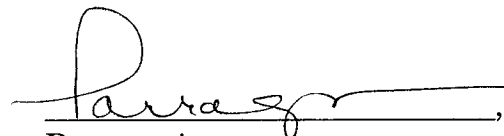
cc: Eighth Judicial District Court Dept. 17, District Judge
Mary Martinez
Foley & Foley
Haney, Woloson & Mullins
Lewis & Roca, LLP/Las Vegas
Eighth District Court Clerk

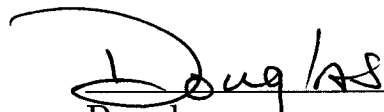
any purpose). The withdrawal order, however, was not mailed to Martinez until September 20, after her summary judgment opposition was due. Therefore, Martinez's concerns with the firm's failure to file an opposition to the summary judgment motion on her behalf are not without merit. Nonetheless, EDCR 2.20(c) authorizes the district court to treat non-opposition to a motion for summary judgment as "an admission that the motion . . . is meritorious and a consent to granting the same." Thus, regardless of any claims that Martinez may have against the Haney firm, in light of her failure to oppose the summary judgment in any manner or to seek an extension of time in which to do so, the district court properly exercised its authority to grant Sheehan's motion for summary judgment under EDCR 2.20(c).

Accordingly, we affirm the October 17, 2006, district court summary judgment. As stated earlier, we reverse the portion of the September 18, 2006, order purporting to reduce the Haney firm's attorney's lien to judgment and awarding attorney fees, costs, and interest, and we remand the matter to the district court for further proceedings.

It is so ORDERED.


Hardesty, C.J.


Parraguirre, J.


Douglas, J.