

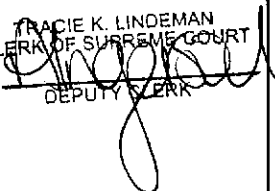
IN THE SUPREME COURT OF THE STATE OF NEVADA

KEVIN LYNN FERNANDEZ,  
Appellant,  
vs.  
JEFFREY S. BLANCK,  
Respondent.

No. 61066

**FILED**

**FEB 13 2014**

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY  DEPUTY CLERK

*ORDER OF REVERSAL AND REMAND*

This is a proper person appeal from a district court order denying a motion to amend a complaint and granting a motion for summary judgment in a tort action. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge. As directed, respondent has filed a response, and appellant filed a reply.

In the underlying action, appellant filed a complaint, asserting a single claim for respondent to return all of appellant's files to him, pursuant to NRS 7.055, which sets forth the duty of a discharged attorney to return a client's papers, pleadings, and other documents. After respondent filed an answer, appellant moved the district court to amend his complaint to add two additional defendants, respondent's law firm and his paralegal, and four new causes of action for breach of contract, legal malpractice, breach of fiduciary duty, and failure to train or supervise based on respondent's representation of appellant in a federal court case. Subsequently, respondent filed a motion for summary judgment addressing only the claim for the return of appellant's files and the proposed breach of contract claim. The district court denied appellant's motion to amend and granted respondent summary judgment.

As to the motion to amend, the district court denied it based on the pending motion for summary judgment, but not on any alleged undue delay, bad faith, or dilatory motive on the part of appellant. See

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*Burnett v. C.B.A. Sec. Serv., Inc.*, 107 Nev. 787, 789, 820 P.2d 750, 752 (1991) (recognizing delay, bad faith, and dilatory motive as valid reasons for denying a motion to amend). In the absence of bad faith or an improper motive on appellant's part, we conclude that respondent's filing of a motion for summary judgment was not a proper basis to deny appellant leave to amend the complaint. *See id.*


Additionally, while the district court found that amendment would be futile as to the law firm because respondent and his law firm were legally the same entity, the district court did not address whether amendment would be futile as to the four new causes of action or as to the addition of respondent's paralegal as a party. *See Halcrow, Inc. v. Eighth Judicial. Dist. Court*, 129 Nev. \_\_\_, \_\_\_, 302 P.3d 1148, 1152 (2013) (explaining that if a proposed amended complaint pleads only impermissible claims, it is futile and the court should not grant leave to amend). Thus, even assuming that the court's conclusion regarding the law firm was correct, the district court abused its discretion in denying the motion to amend without considering appellant's additional proposed claims and defendant. *See Univ. & Cmty. Coll. Sys. v. Sutton*, 120 Nev. 972, 988, 103 P.3d 8, 19 (2004) (recognizing that an order granting a motion to amend a complaint is reviewed for an abuse of discretion).

As to summary judgment, the district court relied on a federal court's conclusion that respondent had represented that he sent the file to conclude that respondent was not required to do anything further. But the federal court's conclusion that respondent had returned the documents was based solely on respondent's representation, rather than based on a hearing and evidence. Thus, we conclude that the federal court's decision on the matter does not have a preclusive effect in this case. *See Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1052, 194 P.3d 709, 711 (2008) (requiring that an issue be "*actually and necessarily litigated*" for issue


preclusion to apply) (internal citation omitted). In his opposition to the motion for summary judgment, appellant provided an affidavit identifying documents that were missing from his file and letters he sent to respondent requesting those specific documents. Viewing this evidence in the light most favorable to appellant, it created a genuine issue of material fact with regard to whether respondent actually returned appellant's entire file. Therefore, summary judgment was not appropriate as to this claim. *See* NRCP 56(c); *Wood v. Safeway, Inc.* 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (providing that this court reviews summary judgment de novo and summary judgment is not appropriate if there remains a genuine issue of material fact).

For the reasons discussed above, we reverse the district court's order denying leave to amend and granting respondent summary judgment, and we remand this matter to the district court for further proceedings consistent with this order.<sup>1</sup>

It is so ORDERED.

  
\_\_\_\_\_, J.  
Pickering

  
\_\_\_\_\_, J.  
Parraguirre

  
\_\_\_\_\_, J.  
Saitta

<sup>1</sup>In light of our decision here, we need not reach appellant's argument that the district court abused its discretion by denying appellant's motion to continue summary judgment to allow for additional discovery.

Having considered appellant's January 7, 2014, motion to strike respondent's response, we deny the motion. Also, as that motion indicates that appellant received a copy of the response, we deny as moot appellant's December 27, 2013, motion to serve a copy of the response on appellant.

cc: Second Judicial District Court Dept. 10  
Kevin Lynn Fernandez  
Jeffrey S. Blanck  
Washoe District Court Clerk