

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

GLENN R. WAITE, M.D.,
Appellant,

vs.

DAVID M. ZANIEL, ESQ., OF RANALLI
& ZANIEL, LLP; AND RANALLI &
ZANIEL, LLP,
Respondents.

No. 72319

FILED

JUN 08 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

Glenn R. Waite, M.D., appeals from a district court order dismissing an amended complaint with prejudice. Eighth Judicial District Court, Clark County; Jessie Elizabeth Walsh, Judge.

In the underlying proceeding, Waite filed a complaint against respondent David Zaniel and after more than one year of inactivity, the district court filed a form order statistically closing the case, checking the box marked "Involuntary Dismissal" and citing Eighth Judicial District Court Rule (EDCR) 2.90 (hereinafter the "statistical closure order"). Waite subsequently filed a notice of entry for this order and then filed a motion to vacate the statistical closure order, which the district court denied by way of a minute order. Waite then filed an amended complaint. Zaniel responded by moving to dismiss the amended complaint, arguing that it should be dismissed because there was no operative complaint to amend as the original complaint was dismissed pursuant to EDCR 2.90. The district court granted the motion, dismissing the entire case with prejudice,

apparently concluding that because the district court previously entered the order statistically closing the case pursuant to EDCR 2.90, Waite could not file an amended complaint.¹ This appeal followed.

This court reviews an order granting an NRCP 12(b)(5) motion to dismiss de novo. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008); see also *Alcantara v. Wal-Mart Stores, Inc.*, 130 Nev. 252, 256, 321 P.3d 912, 914 (2014). A decision to dismiss a complaint under NRCP 12(b)(5) is rigorously reviewed on appeal with all alleged facts in the complaint presumed true and all inferences drawn in favor of the complaint. *Buzz Stew*, 124 Nev. at 227-28, 181 P.3d at 672. Dismissing a complaint is appropriate “only if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief.” *Id.* at 228, 181 P.3d at 672. All legal conclusions are reviewed de novo. *Id.*

We first note that the form order that the district court entered to statistically close the case after the original complaint was filed indicates the case was to be closed due to “Involuntary Dismissal” and pursuant to EDCR 2.90, but contrary to the parties’ arguments below and on appeal, and the district court’s conclusions below, this order did not actually dismiss the case. Form statistical closure orders, such as the one entered here,

¹The district court’s order dismissing the case with prejudice fails to explain on what basis it granted the motion to dismiss. Because the order references the briefing and arguments by the parties, it appears that the district court based its decision on the reasons set forth in Zaniel’s motion to dismiss.

contemplate the entry of a prior, separate order disposing of the case and their only effect is to direct the district court clerk “to statistically close the case based on the reason indicated by the checked box.” *Brown v. MHC Stagecoach, LLC*, 129 Nev. 343, 346, 301 P.3d 850, 852 (2013). And here, there was no prior dismissal order. Accordingly, the order statistically closing the case only served “to direct the statistical closure of [the] case rather than to resolve any claims pending in [it]” and it was therefore not a final judgment that disposed of the case. *Id.* at 347 n.1, 301 P.3d at 852 n.1.

Given that the district court subsequently dismissed the case in its entirety, apparently based on the erroneous belief that it had previously dismissed the first complaint under EDCR 2.90 through the statistical closure order, we note that even if the form order statistically closing the case could be considered a final order resolving the case based on the rules indicated therein, for the reasons discussed below, the district court would have been required to reopen the case on Waite’s motion. EDCR 2.90 provides that the district court may dismiss a civil case, without prejudice, if it has been pending for more than 12 months and there has been no action in the case for more than 6 months. EDCR 2.90(a). The rule goes on to state that “[w]ritten notice of the entry of a dismissal pursuant to this rule must be given to each party who has appeared in the action, or to the attorney for that party.” EDCR 2.90(b). And once a case has been dismissed pursuant to EDCR 2.90, the rule requires that the case be reinstated if a party requests the same “within 30 days of the date of service of written notice of the entry of the dismissal.” EDCR 2.90(c).


Below, Zaniel argued that Waite received notice of the dismissal upon filing of the statistical closure order and, therefore, his motion to vacate the order was untimely; it appears that the district court agreed. But EDCR 2.90 requires service of a separate written notice of entry of the order. EDCR 2.90(b) (requiring written notice of the order to be served); EDCR 2.90(c) (indicating that a party can request the case be reopened within 30 days of the written notice of the entry of the order); *In re Duong*, 118 Nev. 920, 922–23, 59 P.3d 1210, 1211–12 (2002) (interpreting similar language requiring written notice of the entry of [an] order as requiring written notice separate from the order itself, and explaining the purpose of this formal requirement). Therefore, Waite’s time to file his motion to reopen the case pursuant to EDCR 2.90(c) did not begin until the formal notice of entry of the statistical closure order, which he filed on December 10, 2015. Thus, his motion to vacate the statistical closure order, filed on January 5, 2016, was timely, and pursuant to EDCR 2.90(c), the district court was required to reopen the matter based on Waite’s motion.


As noted above, following entry of the statistical closure order and the district court’s denial of Waite’s request to reopen the matter, Waite filed an amended complaint. Following Zaniel’s motion to dismiss the amended complaint, the district court dismissed the entire case, with prejudice, apparently based on its erroneous conclusion that the original complaint was dismissed pursuant to EDCR 2.90. Because the district court failed to provide any other reason for dismissing the case, and because we see no other basis upon which an NRC 12(b)(5) dismissal was appropriate,


we must conclude that dismissal of the case with prejudice was improper. See *Buzz Stew*, 124 Nev. at 227-28, 181 P.3d at 672.

Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.²


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Elizabeth Gonzalez, Chief District Judge
Eighth Judicial District Court, Department X
Glenn R. Waite, M.D.
Ranalli Zaniel Fowler & Moran, LLC/Reno
Eighth District Court Clerk

²We note that Zaniel also argues that the district court had inherent authority to dismiss the case for want of prosecution, but it does not appear that he presented the same argument below. Thus, that issue is not properly before us. See *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (a point not raised below is waived and will not be considered on appeal).