


IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DOUGLAS A. HICKS,
Appellant,
vs.
BROWNSTONE HOLDINGS, LLC;
LYNN GOODFELLOW; CALIFORNIA
BUSINESS ENTITY #200107810016;
AND PINE CREEK MINE, LLC,
Respondents.

No. 74676-COA

FILED

DEC 20 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

*ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING*

Douglas A. Hicks appeals from a district court order dismissing a contract and tort action. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge.

Hicks filed suit against respondents alleging various causes of action related to issues surrounding the Pine Creek Mine and Hicks' role as employee, agent, and/or partner of some or all of the respondents. Respondents moved, as relevant here, to dismiss the action pursuant to the first-to-file rule because there was already a matter pending in California, filed by respondent California Business Entity #200107810016 (Actual Bishop Tungsten Development, LLC, hereinafter, "Actual Bishop") against Hicks related to issues surrounding Hicks' involvement with the Pine Creek Mine and Actual Bishop. The district court granted the motion over Hicks'

opposition, finding that the California action was filed first, the parties were substantially similar, the issues to be litigated were substantially similar and none of the exceptions to the first-to-file rule applied. The district court dismissed the matter with prejudice. Hicks filed a motion to alter or amend, which the district court denied. This appeal followed.

The doctrine of comity “is a principle of courtesy by which the courts of one jurisdiction may give effect to the laws and judicial decisions of another jurisdiction out of deference and respect.” *Gonzales–Alpizar v. Griffith*, 130 Nev. 10, 18, 317 P.3d 820, 826 (2014) (internal quotation marks omitted). Comity is appropriately invoked according to the sound discretion of the trial court. *Mianecki v. Second Judicial Dist. Court*, 99 Nev. 93, 98, 658 P.2d 422, 424–25 (1983). The first-to-file rule¹ is a doctrine of comity providing that “where substantially identical actions are proceeding in different courts, the court of the later-filed action should defer to the jurisdiction of the court of the first-filed action by either dismissing, staying, or transferring the later-filed suit.” *SAES Getters S.p.A. v. Aeronex, Inc.*, 219 F. Supp. 2d 1081, 1089 (S.D. Cal. 2002). The two actions need not be identical, only substantially similar. *Inherent.com v. Martindale–Hubbell*, 420 F. Supp. 2d 1093, 1097 (N.D. Cal. 2006). Exceptions to the first-to-file

¹To the extent that Hicks argues on appeal that the first-to-file rule does not apply when the two courts involved are of different states, we conclude his argument lacks merit.

rule include filing the first action in bad faith, filing the first action in anticipation of the second, and filing the first action to engage in forum shopping. *Id.*

In this matter, the California action was filed first, and while Hicks argued below that the Nevada action was technically filed first because the California filing was not valid due to issues with Actual Bishop's license status, he failed to raise that argument on appeal and therefore, has waived it. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (stating that issues not raised in appellant's opening brief are waived). Likewise, Hicks failed to challenge the district court's determinations that the parties and claims in both actions were substantially similar and that no exceptions to the first-to-file rule applied and therefore, has waived any such challenge. *Id.* Therefore, we affirm the district court's decision to apply the first-to-file rule and dismiss the matter. *See Mianeki*, 99 Nev. at 98, 658 P.2d at 424–25.

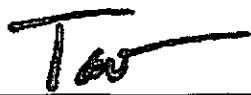
However, the dismissal here was with prejudice, and our review of the relevant case law indicates that dismissal should be without prejudice.² *See Long v. CVS Caremark Corp.*, 695 F. Supp. 2d 633, 637-38 (N.D. Ohio 2010) (stating that dismissals based upon the first-to-file rule

²We note that while the respondents argued in support of the dismissal with prejudice in their opposition to Hicks' motion to amend, they did admit that the dismissal was not an adjudication on the merits.

are inherently without prejudice and noting that the court had only found one case where a district court had dismissed an action based upon the first-to-file rule with prejudice and that that holding was later found to be a clear abuse of discretion). As such, we reverse that portion of the district court's order and remand for entry of dismissal without prejudice.³

It is so ORDERED.⁴


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

³We likewise see no abuse of discretion in the district court's denial of Hicks' NRCP 59 motion, except to the extent it denied Hicks' request to have dismissal entered without prejudice, which we already addressed above. *See AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 584-85, 589, 245 P.3d 1190, 1194-95, 1197 (2010) (providing that an order denying an NRCP 59(e) motion is reviewed for an abuse of discretion on appeal from the challenged order or judgment). We note that although the Honorable Patrick Flanagan entered the order dismissing the matter, the order denying NRCP 59 relief was entered by the Honorable David Hardy.

⁴We have considered Hicks' remaining arguments and conclude they do not provide a basis for relief.

cc: Second Judicial District Court, Chief Judge
Second Judicial District Court, Department 8
Douglas A. Hicks
Robison, Sharp, Sullivan & Brust
Washoe District Court Clerk