

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MARLENE ROGOFF,

Appellant,

vs.

JAMES MARSH; KEITH E. GALLIHER,  
JR.; AND THE GALLIHER LAW FIRM,

Respondents.

No. 80870-COA

**FILED**

MAR 22 2021

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Marlene Rogoff appeals from a district court order dismissing a tort action. Eighth Judicial District Court, Clark County; Kerry Louise Earley, Judge.

In the underlying case, Rogoff filed a complaint for abuse of process against respondents James Marsh, Keith E. Galliher, Jr., and the Galliher Law Firm, alleging that Galliher, who represented Marsh in another civil matter, committed an abuse of process when he requested a continuance of an arbitration hearing in the earlier case. In particular, Rogoff alleged that Galliher had an ulterior motive to cause delay when he told the arbitrator that he was unavailable for six weeks, and that he created an unconscionable delay when he sought to reopen discovery for the limited purpose of introducing a handwriting expert. Rogoff later filed a first amended complaint, in which she added allegations of seven more instances where Galliher purportedly committed abuse of process while representing Marsh, including allegations that Galliher made false or

defamatory statements to the court during the course of the proceedings in the prior matter.

In response, the Galliher defendants and Marsh each filed NRCP 12(b)(5) motions to dismiss the complaint, which Rogoff opposed. Rogoff also filed a second amended complaint, albeit without first requesting leave to do so. At the subsequent hearing, the district court orally denied both motions without prejudice. The district court also struck Rogoff's second amended complaint because Rogoff had failed to request leave to file that document under NRCP 15(a)(2). The court thereafter instructed Rogoff to file a motion for leave to file her second amended complaint by September 5, 2019, and scheduled a hearing on that motion for October 1, 2019. But when Rogoff failed to file her motion within the time set by the district court, the court vacated the hearing.<sup>1</sup>

Galliher, his law firm, and Marsh later renewed their requests to dismiss Rogoff's complaint under NRCP 12(b)(5). And this time, the district court granted the motions, concluding that Rogoff failed to state a claim for abuse of process, as she failed to establish that Galliher, the Galliher Law Firm, or Marsh "did anything outside of the regular conduct of the proceedings" in the earlier civil action. Rogoff now appeals.

This court reviews an order granting an NRCP 12(b)(5) motion to dismiss de novo, accepting all factual allegations in the complaint as true, and drawing all inferences in the plaintiff's favor. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). Further,

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<sup>1</sup>Rogoff later filed a motion for leave to amend on October 16, 2019, two weeks after the deadline set by the district court.

the supreme court has explained that dismissal is appropriate when the allegations contained in a complaint do not meet the elements of a claim. *Stockmeier v. State, Dep't of Corr.*, 124 Nev. 313, 316, 183 P.3d 133, 135 (2008).

To support a claim for abuse of process, a plaintiff must show: “(1) an ulterior purpose by the [party abusing the process] other than resolving a legal dispute, and (2) a willful act in the use of the legal process not proper in the regular conduct of the proceeding.” *Land Baron Invs., Inc. v. Bonnie Springs Family Ltd. P'ship*, 131 Nev. 686, 697-98, 356 P.3d 511, 519 (2015) (alteration in original) (internal quotation marks omitted).

Having considered Rogoff's arguments and the record on appeal, we conclude that the district court properly dismissed Rogoff's first amended complaint. In that complaint, Rogoff failed to allege any facts that would support a conclusion that Galliher, his law firm, or Marsh had committed “a willful act in the use of the legal process not proper in the regular conduct of the proceeding.” *See id.* at 698, 356 P.3d at 519 (internal quotation marks omitted). Indeed, the acts alleged in Rogoff's complaint—requesting continuances, subpoenaing witnesses, filing a complaint, and advancing the client's theory of the case—were routine and proper in the course of litigation.<sup>2</sup> *Id.* at 698, 356 P.3d at 520 (stating that “the majority

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<sup>2</sup>Additionally, Rogoff's first amended complaint only addressed Galliher's actions and did not contain any allegations specific to Marsh or the Galliher Law Firm. *See Land Baron*, 131 Nev. at 698, 356 P.3d at 519 (stating that “the claimant must provide facts, rather than conjecture, showing that the party intended to use the legal process to further an ulterior purpose”).

of courts have held that merely filing a complaint and proceeding to properly litigate the case does not meet [the ‘willful act’ requirement]). As a result, these allegations were insufficient to support an abuse of process claim.


Further, to the extent that Rogoff alleges that Galliher made certain defamatory comments towards her in pleadings or in front of the court, we observe that Nevada follows the “long-standing common law rule that communications [made] in the course of judicial proceedings [even if known to be false] are absolutely privileged.” *Clark Cty. Sch. Dist. v. Virtual Educ. Software, Inc.*, 125 Nev. 374, 382, 213 P.3d 496, 502 (2009) (alterations in original) (internal quotation marks omitted). “In order for the absolute privilege to apply to defamatory statements made in the context of a judicial or quasi-judicial proceeding, ‘(1) a judicial proceeding must be contemplated in good faith and under serious consideration, and (2) the communication must be related to the litigation.’” *Jacobs v. Adelson*, 130 Nev. 408, 413, 325 P.3d 1282, 1285 (2014) (quoting *Clark Cty. Sch. Dist.*, 125 Nev. at 383, 213 P.3d at 503).

Here, Galliher’s allegedly defamatory statements were made during the course of proceedings in a prior civil matter, and there is nothing in the record to suggest these statements would not be subject to the litigation privilege under the factors outlined in *Jacobs*. *Id.* Thus, these alleged statements are protected by the litigation privilege and likewise cannot support Rogoff’s abuse of process claims. See *Hampe v. Foote*, 118 Nev. 405, 409, 47 P.3d 438, 440 (2002) (“An absolute privilege bars *any* civil litigation based on the underlying communication.” (emphasis added)), *overruled in part on other grounds by Buzz Stew*, 124 Nev. at 228 n.6, 181 P.3d at 672 n.6. Accordingly, for the reasons set forth above, we conclude

that the district court did not err when dismissing Rogoff's complaint under NRCP 12(b)(5).<sup>3</sup> See *Buzz Stew*, 124 Nev. at 227–28, 181 P.3d at 672. Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>4</sup>

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Bulla

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<sup>3</sup>Rogoff also contends that the district court erred when it failed to address her motion for leave to file an amended complaint. However, this court recognizes that “[t]he absence of a ruling awarding the requested [relief] constitutes a denial of the claim.” *Bd. of Gallery of History, Inc. v. Datecs Corp.*, 116 Nev. 286, 289, 994 P.2d 1149, 1150 (2000). Additionally, as Rogoff failed to file her motion within the time prescribed by the district court, we conclude that the district court did not abuse its discretion in declining to grant Rogoff leave to amend her complaint. See *Stephens v. S. Nev. Music Co.*, 89 Nev. 104, 105, 507 P.2d 138, 139 (1973) (explaining that a district court’s decision to deny leave to amend will not be overturned on appeal absent an abuse of discretion).

<sup>4</sup>Insofar as Rogoff raises arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.

cc: Chief Judge, Eighth Judicial District Court  
Eighth Judicial District Court, Dept. 4  
Marlene Rogoff  
The Galliher Law Firm  
Eighth District Court Clerk