

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

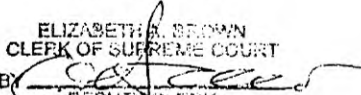
IN THE MATTER OF THE ESTATE OF  
WILLIAM TERRY, DECEASED.

No. 84392-COA

THEODORE STEVENS,  
Appellant,  
vs.  
JOSEPH LUPO,  
Respondent.

FILED

MAY 10 2023

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

*ORDER OF REVERSAL AND REMAND*

Theodore Stevens appeals from a district court order deeming a claim filed in a probate action as time barred. Eighth Judicial District Court, Clark County; Gloria Sturman, Judge.

Stevens, an inmate, retained William B. Terry, an attorney, to represent him before the Nevada Board of Pardon's Commissioners. Terry later passed away, and his will was admitted to probate. In the underlying probate action, respondent Joseph Lupo was appointed as the executor of Terry's estate, and shortly thereafter, he caused a notice to creditors to be published, which explained that the deadline to file a creditor's claim was 90 days after the first date of publication of the notice. Fifteen days after the filing period expired, Stevens filed a claim asserting that he paid Terry a \$25,000 retainer and that Terry did not perform any services for him prior to Terry's death. Lupo then petitioned the district court to deem Stevens's

claim as time barred. In response, Stevens submitted various filings in which he presented allegations of fraud against Terry to support his claim and argued that the filing period for the claim did not begin to run until the date that he discovered the alleged fraud, which he maintained was approximately two months after the date that the notice to creditor's was first published. Following a hearing, the district court granted Lupo's petition, concluding that Stevens's claim was untimely and that Lupo therefore need not allow, reject, or otherwise satisfy the claim. This appeal followed.

This court reviews a district court order allowing or denying a late creditor's claim for an abuse of discretion. *Cont'l Coffee Co. v. Estate of Clark*, 84 Nev. 208, 213, 438 P.2d 818, 821 (1968). Once appointed, the executor or administrator of an estate must provide notice of his or her appointment to creditors who are not readily ascertainable by way of publication in accordance with the procedure set forth in NRS 155.020. NRS 147.010. A creditor who receives notice by publication has 90 days after the first date that the notice is published to file a creditor's claim. NRS 147.040(1), (2). If the creditor does not file a claim within this period, "the claim is forever barred" unless the creditor files the claim before the filing of the final account and demonstrates that the creditor did not receive notice or have actual notice of the estate administration. NRS 147.040(3). "[K]nowledge of death or any knowledge of the estate proceedings, coupled with failure to act after such knowledge, are enough to support the lower

court's discretion in denying a late filing." *Cont'l Coffee Co.*, 84 Nev. at 212, 438 P.2d at 821.

On appeal, Stevens does not dispute that he was properly served with the notice to creditors by way of publication, but instead, he reiterates his argument from below that the time to file his claim did not begin to run until he discovered that Terry defrauded him. The Nevada Supreme Court has generally rejected arguments that NRS 147.040, which is commonly referred to as the non-claim statute, does not apply to bar late claims merely because they were contingent during the filing period. *See, e.g., Cont'l Coffee Co.*, 84 Nev. at 212, 438 P.2d at 821 (explaining that the non-claim statute is intended to facilitate "efficient and expedient administration of estates and that it applie[s] to contingent and non-contingent claims alike"); *Gardner Hotel Supply of Houston v. Estate of Clark*, 83 Nev. 388, 392, 432 P.2d 495, 497 (1967) (stating the same); *see also Contingent Claim*, *Black's Law Dictionary* (11th Ed. 2019) (defining the phrase "contingent claim" as "[a] claim that has not yet accrued and is dependent on some future event that may never happen"). However, the supreme court deviated from this general rule in *In re Estate of Newman v. First National Bank*, 86 Nev. 151, 154-57, 465 P.2d 616, 618-19 (1970), which reversed a district court order denying a motion to file a late creditor's claim on several bases, and in doing so, provided guidance with respect to how the district court should evaluate the motion on remand as it related to possible fraud.

In particular, the supreme court drew a comparison between a creditor's claim and a civil action, which cannot be filed until after a cause of action has accrued, and further observed that a cause of action for fraud does not accrue until the aggrieved party discovers the facts constituting the fraud. *Id.* at 156-57, 465 P.2d at 619 (citing NRS 11.010, which explains when civil actions may be commenced and NRS 11.190(3)(d), which explains when claims for fraud accrue). And based on the foregoing principles, the supreme court directed the district court to consider whether the creditors acquired sufficient knowledge of the facts underlying their claim within the non-claim statute's filing period in evaluating whether to permit them to file their late claim. *Id.* at 157, 465 P.2d at 619. This approach is sensible, given that it is unclear how or why a creditor would bring a claim for fraud within the non-claim statute's filing period if the creditor had not discovered, or could not have reasonably discovered, the facts underlying the fraud. *See Petersen v. Bruen*, 106 Nev. 271, 274, 792 P.2d 18, 20 (1990) (discussing the common law discovery rule, which is applicable to statutory limitations periods and expressly incorporated into NRS 11.190(3)(d), and explaining that, under the rule, "the statutory period of limitations is tolled until the injured party discovers or reasonably should have discovered facts supporting a cause of action").

In the present case, although Stevens argued that his claim involved fraud and did not accrue until approximately two months after the creditor's notice was first published, Lupo did not present any argument to oppose Stevens's position, and the district court did not address it in the

order deeming Stevens’s claim time barred. As a result, it appears that the district court failed to consider this issue, which presents a question of fact that should be resolved by the district court in the first instance. *See Winn v. Sunrise Hosp. & Med. Ctr.*, 128 Nev. 246, 251, 253, 277 P.3d 458, 462, 463 (2012) (recognizing that the date on which a cause of action accrues is generally a question of fact); *see also Round Hill Gen. Improvement Dist. v. Newman*, 97 Nev. 601, 604, 637 P.2d 534, 536 (1981) (“[A]n appellate court is not an appropriate forum in which to resolve disputed questions of fact.”). Consequently, we necessarily reverse the order deeming Stevens’s claim time barred and remand for the district court to consider when the fraud component of the claim accrued.<sup>1</sup> *See Davis v. Ewalefo*, 131 Nev. 445, 450, 352 P.3d 1139, 1142 (2015) (explaining that, although Nevada’s appellate courts review the district court’s “discretionary determinations deferentially, deference is not owed to legal error or to findings so conclusory they may mask legal error” (internal citations omitted)).

---

<sup>1</sup>On March 6, 2023, this court entered an order directing Lupo to file a response addressing the issues raised in this appeal, including the supreme court’s decision in *In re Estate of Newman*. Although this court granted Lupo an extension of time to file the response, he failed to do so by the new deadline and did not otherwise seek a second extension of time. Lupo’s failure to file a response provides an additional basis for our decision to reverse and remand the order deeming Stevens’s claim time barred. *See* NRAP 31(d)(2) (providing that a respondent’s failure to file a brief “may be treated by the court as a confession of error and appropriate disposition of the appeal thereafter made”).



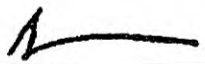
Because we reverse and remand for further proceedings, we clarify that the non-claim statute does not encompass all claims that may be asserted against a decedent, but instead, applies to only those claims that would diminish the estate if successful. *See In re Estate of Newman*, 86 Nev. at 156, 465 P.2d at 619 (stating the same). Thus, when a plaintiff seeks to recover property held by the decedent in trust, the plaintiff's claim is not subject to the non-claim statute's filing requirements since the property at issue is not part of the decedent's estate. *See id.* (requiring the district court to determine whether funds in a decedent's estate were trust property, and explaining that, if the funds belonged to the trust, then a claim for their recovery would not be a creditor's claim subject to the non-claim bar); *see also In re Dabney's Estate v. Philleo*, 234 P.2d 962, 966 (Cal. 1951) ("It is well settled that one who claims as his own, adversely to an estate, specific property held and claimed by the estate, cannot be called a creditor of the estate within the meaning of the probate law.").

In the present case, Stevens sought to recover the \$25,000 retainer he paid to Terry, alleging not only that Terry did not perform any services for him, but also that the funds were held in Terry's client-trust account. On this basis, Stevens asserted that the non-claim statute did not apply to his claim. The district court, however, failed to address the argument and instead simply concluded that Stevens's claim was time barred. As a result, on remand, the district court must consider whether

Stevens's claim is subject to the non-claim statute before evaluating when the statute's filing period began to run against him.<sup>2</sup>

It is so ORDERED.<sup>3</sup>

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

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

  
\_\_\_\_\_, J.  
Westbrook

---

<sup>2</sup>Insofar as Stevens raises arguments that are not specifically addressed in this order, we have considered them and conclude that they either do not present a basis for relief or need not be reached given our disposition of this appeal.

<sup>3</sup>Multiple individuals filed late claims in the underlying proceeding that were substantially similar to Stevens's claim, although Stevens is the only party who challenges the disposition of one of those claims in this appeal. Two of the late claims were brought by inmates, and in each instance, Lupo, who was represented by counsel below, petitioned to have the claims deemed time barred. However, Lupo did not take the same approach with a third late claim, which was brought by an attorney several weeks after the inmates' claims, as Lupo instead allowed the claim without objection notwithstanding that claims filed outside of the non-claim statute's filing period are typically barred. *See* NRS 147.040(3). Based on the record before this court, there is no apparent basis for the inconsistent treatment of the late claims in this case. *Cf.* Nevada Rules of Professional Conduct 3.3 (addressing the lawyer's duty of candor toward the tribunal).

cc: Hon. Gloria Sturman, District Judge  
Theodore Stevens  
Law Offices of Brian H. Nelson  
Eighth District Court Clerk