

S.W. PUB. SERVICE CO. V. RLR INV.

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**SOUTHWESTERN PUBLIC SERVICE
COMPANY,**

Plaintiff/Counterdefendant-Appellee,

v.

RLR INVESTMENTS, LLC,

Defendant/Counterclaimant-Appellant.

No. 35,659

COURT OF APPEALS OF NEW MEXICO

January 9, 2017

APPEAL FROM THE DISTRICT COURT OF EDDY COUNTY, Lisa B. Riley, District
Judge

COUNSEL

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Hine LLP, William W. Jacobs, Cleveland, OH, for Appellant

JUDGES

JAMES J. WECHSLER, Judge. WE CONCUR: JONATHAN B. SUTIN, Judge, M.
MONICA ZAMORA, Judge

AUTHOR: JAMES J. WECHSLER

MEMORANDUM OPINION

WECHSLER, Judge.

{1} In this condemnation action, Defendant/Counterclaimant RLR Investments, LLC (RLR) appeals from the district court's order of dismissal without prejudice, entered April

22, 2016, and raises issues pertaining to its counterclaims against Southwestern Public Service Company (SPS). [DS 6; II RP 203A, 217] In our first notice of proposed disposition, we proposed to dismiss for lack of a final order because RLR had filed a timely motion to clarify the order of dismissal in the district court, which was still pending below. [See 1 CN 1-5] RLR filed a timely response to our first notice of proposed disposition and informed this Court that it had withdrawn its motion for clarification. [1 Response 2] In our second notice of proposed disposition, we proposed to reverse the district court's sua sponte dismissal of RLR's counterclaims, and we proposed to conclude that RLR's second issue—that the district court's failure to grant RLR's motion for a default judgment—is premature. [See 2 CN 1-5] RLR filed a timely response to our second notice of proposed disposition, in which RLR agreed with our proposed disposition but asked this Court to include more specific language in our opinion. [2 Response 1-2] SPS did not file a response to our second notice of proposed disposition.

{2} Issue 1: In its docketing statement, RLR argued that the district court erred in sua sponte dismissing its counterclaims, to which SPS never responded, without addressing the counterclaims in its order. [DS 6] In our second notice of proposed disposition, we noted that it was unclear whether the district court intended to dismiss the counterclaims, but based on the broad dismissal language in the order, it appeared that the district court dismissed the entire case, including RLR's counterclaims. [2 CN 4] Based on the facts before this Court, we proposed to conclude that the district court abused its discretion in sua sponte dismissing RLR's counterclaims. [2 CN 4-5]

{3} In response, RLR agrees with this Court's proposed reversal on this issue, but asks this Court to (1) specify that the April 22, 2016 order is reversed only as to the dismissal of RLR's counterclaims and (2) confirm that the dismissal of SPS's condemnation petition reflected in the April 22, 2016 order remains in place. [2 Response 2] RLR asserts that SPS did not timely appeal the dismissal of its petition and RLR did not challenge that aspect of the district court's disposition of the case. [Id.]

{4} As we discussed in our second notice of proposed disposition, the district court erred in sua sponte dismissing RLR's counterclaims. [2 CN 4-5] The district court's dismissal of SPS's condemnation petition was not an issue raised on appeal; therefore, we decline to address it in this opinion.

{5} Issue 2: In its docketing statement, RLR asserted that the district court erred in failing to grant its application for default judgment on its counterclaims against SPS. [DS 6] Given this Court's proposed disposition as to Issue 1, we proposed to conclude that this issue is premature and we declined to address it further in our second notice of proposed disposition. [2 CN 5]

{6} In response, RLR agrees with this Court's proposed disposition as to Issue 2, but asks this Court to instruct the district court to proceed with ruling on the pending application for default judgment. [2 Response 2] Because this issue is premature, we decline to address this issue further.

{7} Accordingly, for the reasons stated herein and in our second notice of proposed summary disposition, we reverse and remand for further proceedings consistent with this opinion.

{8} IT IS SO ORDERED.

JAMES J. WECHSLER, Judge

WE CONCUR:

JONATHAN B. SUTIN, Judge

M. MONICA ZAMORA, Judge