

IN THE SUPREME COURT OF THE STATE OF NEVADA

AKIN OMOJOLA AND KARIN  
OMOJOLA, INDIVIDUALLY AND AS  
LEGAL GUARDIANS OF KELVIN  
OMOJOLA AND MONA OMOJOLA,  
Appellants,  
vs.  
BEAZER HOMES HOLDINGS CORP., A  
DELAWARE CORPORATION,  
Respondent.

No. 46078

**FILED**

MAY 09 2008

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY:   
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order dismissing, as a discovery sanction, an action involving contract and tort claims. Eighth Judicial District Court, Clark County; Nancy M. Saitta, Judge.

In 2003, appellants Akin and Karin Omojola filed a district court damages and declaratory relief complaint against respondent Beazer Homes Holdings Corp., alleging breach of expressed and implied warranties, negligence, breach of fiduciary duty, fraud, and intentional infliction of emotional distress, stemming from various constructional defects and the presence of mold in their home, which they had purchased from Beazer Homes.

Because the case was deemed to involve complex litigation, the district court appointed a special master to hear and determine all discovery disputes and motions. During discovery, the Omojolas were required to provide a constructional defect list, cost of repair estimates, and responses to the interrogatories posed to their construction and medical experts. The Omojolas, however, withdrew their defect list, provided no cost of repair estimates, and provided incomplete

interrogatory responses by their experts. Consequently, Beazer Homes filed a motion to dismiss the action as a discovery sanction under NRCP 37(b)(2). The Omojolas opposed Beazer Homes' motion to dismiss and filed counter motions.<sup>1</sup>

After two hearings, the district court granted Beazer Homes' motion to dismiss with prejudice all of the Omojolas' remaining claims.<sup>2</sup> In doing so, the court noted that the Omojolas had agreed to dismiss with prejudice any claims for damages resulting from alleged constructional defects. Moreover, the court precluded the Omojolas from offering any expert opinions, as it found that they had failed to timely comply with the special master's recommendations and the court's orders to provide a final defect list, cost of repair estimate, and their medical expert's complete interrogatory responses. Then, the court determined that the Omojolas could not proceed with this action, as all of their claims either sought damages for constructional defects or depended on the precluded expert opinion. Accordingly, after dismissing the Omojolas' claims, the district court denied their request for declaratory relief. The Omojolas have appealed.

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<sup>1</sup>The district court orally denied the Omojolas' counter motions without prejudice, because they did not deal with matters that were set forth in Beazer Homes' motion to dismiss. With respect to the Omojolas' challenge on appeal to the district court's decision to deny their counter motions to strike the dismissal motion and for summary judgment, we conclude that there is no merit to the Omojolas' arguments.

<sup>2</sup>The court had previously dismissed the Omojolas' breach of contract claim under NRCP 12(b)(5), which action the Omojolas do not challenge on appeal.

NRCP 37(b)(2) allows the district court to fashion appropriate sanctions, including precluding evidence and dismissing an action, if a party has failed to obey a discovery order. Discovery sanctions are reviewed for an abuse of discretion, and we will not substitute our judgment for that of the district court.<sup>3</sup> But when the sanction is for a dismissal with prejudice, we apply a heightened standard of review and consider the factors outlined in Young v. Johnny Ribeiro Building.<sup>4</sup>

Based on our consideration of the parties' briefs and review of the appendices and hearing transcripts, in light of the relevant Young factors, we conclude that the district court did not abuse its discretion by dismissing the Omojolas' complaint. First, the sanction appropriately was related to the Omojolas' failure to timely provide documents and complete interrogatory responses, as required by the district court's orders. Second, the sanction was imposed only after the district court thoughtfully considered the relevant Young factors, as expressed in its order and the hearing transcripts. Third, the district court's analysis of the pertinent factors reveals no abuse of discretion and that the sanction was just.

In particular, the record contains substantial evidence showing that the Omojolas had adequate notice of the discovery deadlines and the impending trial date, and that they nevertheless failed to timely provide all of the materials required by the March 25, 2005 case

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<sup>3</sup>Young v. Johnny Ribeiro Building, 106 Nev. 88, 92-93, 787 P.2d 777, 779-80 (1990) (stating that factors to be considered include willfulness of the abuse, prejudice to non-offender of a lesser sanction, the sanction's severity in relation to the abuse, and feasibility of alternatives).

<sup>4</sup>106 Nev. at 92-93, 787 P.2d at 779-80

management order and the April 26, 2005 special master recommendation and order.

The Omojolas' violations cannot be excused by their financial inability to conduct discovery, incorrect view of the law, or voluntary dismissal of their constructional defect claims after the discovery deadline had passed. During the previous two years of litigation, the Omojolas failed to provide medical and constructional defect information requested and needed by Beazer Homes to defend against their complaint and to prepare for the impending trial. Consequently, substantial evidence supports the district court's finding that the Omojolas engaged in willful discovery violations.<sup>5</sup>

As the district court expressed, a lesser sanction than dismissal would have prejudiced Beazer Homes, which had been unable to conduct discovery, evaluate the Omojolas' settlement demand, or prepare its case against the Omojolas and third-party subcontractors, despite its own diligence, with only four months remaining before trial. Given the district court's supported finding of multiple and willful discovery violations, and consequent preclusion of expert opinions, as well as the Omojolas' consent to the dismissal of all causes of action sounding in constructional defect, there was little, if any, evidence to support their remaining causes of action. Therefore, the district court did not abuse its

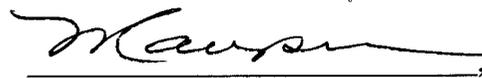
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<sup>5</sup>See Havas v. Bank of Nevada, 96 Nev. 567, 613 P.2d 706 (1980); Kelly Broadcasting Co. v. Sovereign Broadcast, 96 Nev. 188, 606 P.2d 1089 (1980).

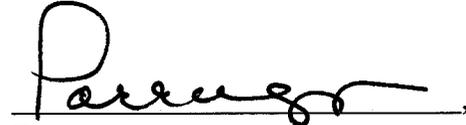
discretion in concluding that a lesser sanction was not feasible and that dismissal was not too severe in relation to the discovery abuses.<sup>6</sup>

Thus, after considering the arguments raised on appeal in light of the relevant Young factors, we conclude that the district court did not abuse its discretion in dismissing with prejudice the Omojolas' complaint as a discovery sanction. Accordingly, we

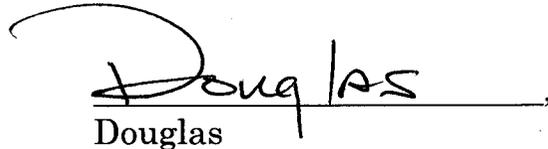
ORDER the judgment of the district court AFFIRMED.

 J.

Maupin

 J.

Parraguirre

 J.

Douglas

cc: Eighth Judicial District Court Dept. 18  
Lester H. Berkson, Settlement Judge  
Piazza & Associates, Las Vegas  
Koeller Nebeker Carlson & Haluck, LLP, Las Vegas  
Eighth District Court Clerk

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<sup>6</sup>Young, 106 Nev. 88, 787 P.2d 777.