

IN THE SUPREME COURT OF THE STATE OF NEVADA

GUSTIN CORPORATION, A NEVADA CORPORATION; EVERETT D. GUSTIN AND EVERETT E. GUSTIN,
Appellants,

vs.

YOLANDA GONZALEZ, IN HER OFFICIAL AND PERSONAL CAPACITIES; DAN HOLLINGSWORTH, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES; RON REESE, IN HIS OFFICIAL AND PERSONAL CAPACITIES; PAUL FERRIN, IN HIS OFFICIAL AND PERSONAL CAPACITIES; GERALD RODRIGUE, IN HIS OFFICIAL AND PERSONAL CAPACITIES; FRANKIE SUE DEL PAPA, IN HER OFFICIAL AND PERSONAL CAPACITIES; NORM AZAVEDO, IN HIS OFFICIAL AND PERSONAL CAPACITIES; BART DRUEHL, IN HIS OFFICIAL AND PERSONAL CAPACITIES; JAMES LANSFORD, IN HIS OFFICIAL AND PERSONAL CAPACITIES; AND THE NEVADA DEPARTMENT OF TAXATION,
Respondents.

No. 34472

FILED

MAY 07 2002

JANEITE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richard*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order dismissing appellants' complaint as a discovery sanction. The Nevada Department of Taxation ("NDOT") audited the appellants ("Gustin") in 1994, on behalf of the State Industrial Insurance System ("SIIS") and Division of Employment Security ("ESD"), as well as for sale and use tax. The Fourth

Judicial District Court of the State of Nevada ordered Gustin to produce books and records necessary to perform the sale and use tax audit on December 14, 1994, after Gustin failed to comply with an administrative subpoena. On August 19, 1997, this court denied Gustin's writ of mandamus petition seeking relief from that order. Gustin ultimately produced the documents necessary to conduct the SIIS and ESD audits.

Rather than supply the documents required for the sales and use tax audit, Gustin filed the complaint in this action on January 20, 1995, in the First Judicial District Court. Gustin's claims against NDOT included alleged civil rights violations, violations of state tax and administrative law, and abuse of process. After Gustin refused to produce documents requested at the pretrial conference, NDOT filed a motion to compel production of the documents on February 6, 1996. On March 29, 1996, the district court ordered Gustin to supply the documents.

On April 23, 1996, Gustin filed a combined motion for preliminary injunction and motion for rehearing of NDOT's motion to compel production. Before the district court ruled on the motion, Gustin petitioned this court for a writ of mandamus directing the district court to vacate its order compelling production of the documents and rule on the preliminary injunction motion. This court rejected the petition on August 15, 1996.

The district court subsequently denied Gustin's aforementioned motions on April 23, 1998, noting that Gustin's motion for preliminary injunction attempted to circumvent the previous discovery order of March 29, 1996. The court again ordered Gustin to comply with the discovery order.

In response, Gustin filed a motion for stay of the order pending appeal to this court, which the district court denied on July 24, 1998. This court subsequently dismissed Gustin's appeal on December 29, 1998, stating that it lacked jurisdiction to consider "an interlocutory appeal that amounts to a discovery dispute."

On February 10, 1999, NDOT filed a motion for sanctions pursuant to NRCP 37(b)(2),¹ based on Gustin's persistent refusal to comply with numerous discovery orders. The district court dismissed Gustin's suit with prejudice on June 22, 1999, citing Gustin's willful refusal to produce discovery documents originally requested four years earlier.

On appeal, the issue is whether the district court abused its discretion in dismissing Gustin's case as a sanction for failure to comply

¹NRCP 37(b)(2) provides in pertinent part:

If a party . . . fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule . . . , the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

. . . .

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party[.]

with a discovery order.² The underlying merits of Gustin's suit, including whether NDOT's auditing procedures violated provisions of the Nevada Administrative Procedures Act or the Taxpayer's Bill of Rights, were litigated by Gustin as a basis for non-discoverability of his records. However, after unsuccessfully challenging its obligation to turn over documents, Gustin was required to comply with the orders issued by the Fourth and First Judicial District Courts.

Gustin has willfully failed to comply with these orders. Complying with a court order is not discretionary after a party has exhausted all methods of challenging the order, even though the party believes the court has erred in its decision or ruling. Indeed, court orders would be meaningless if the "losing" party could simply refuse to comply with an order because it firmly believes that the court's ruling was wrong.

The district court considered Gustin's claims in this case before ordering dismissal,³ and ultimately focused upon Gustin's persistent refusal to comply with court orders. We have also considered the merits of Gustin's claims below, which, as indicated, formed the basis of his refusal to comply with the discovery orders. We conclude that he

²See Young v. Johnny Ribeiro Building, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990) (abuse of discretion standard generally applies to discovery sanctions, but a somewhat heightened standard of review applies when the sanction is dismissal with prejudice). This heightened standard includes a requirement that the dismissal relate to the claims at issue in the discovery order and that the district court carefully consider all relevant factors in a particular case. See id. at 92, 787 P.2d at 779-80.

³See id. at 93, 787 P.2d at 780 (outlining eight pertinent factors a court may consider in deciding whether dismissal with prejudice is appropriate).

should have complied with the district court's order and then litigated the merits of his claims. We therefore cannot conclude, even under a heightened standard of review, that the district court abused its discretion in dismissing Gustin's case, given the degree and scope of Gustin's noncompliance with discovery orders. Having considered the party's arguments, we

ORDER the district court's dismissal of Gustin's case with prejudice AFFIRMED.

Maupin, C.J.
Maupin

Young, J.
Young

Shearing, J.
Shearing

Agosti, J.
Agosti

Rose, J.
Rose

Leavitt, J.
Leavitt

Becker, J.
Becker

cc: Hon. Norman C. Robison, Senior Judge
Attorney General/Carson City
Hansen & Hall, LLC/Las Vegas
Carson City Clerk