

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DANA JONATHAN NITZ, ESQ., AN
INDIVIDUAL,
Appellant,
vs.
OLSON, CANNON, GORMLEY,
ANGULO & STOBERSKI, A NEVADA
PROFESSIONAL CORPORATION,
Respondent.

No. 76894-COA

FILED

FEB 04 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE¹

Dana Jonathan Nitz appeals from a district court order granting respondent's motion to dismiss for want of prosecution. Eighth Judicial District Court, Clark County; Ronald J. Israel, Judge.

Nitz filed a complaint against Olson, Cannon, Gormley, Angulo & Stoberski (OCGAS) on December 31, 2014, followed by an amended complaint on January 26, 2015.² In his complaint, Nitz alleged various breach of contract causes of action stemming from five employment agreements the parties entered in 1990 (collectively, 1990 Agreements). After Nitz filed his amended complaint, OCGAS failed to file an answer and the case sat stale until January 2018 when the district court filed and served through the electronic filing system a sua sponte order to show cause regarding want of prosecution.

While OCGAS failed to appear, Nitz filed a response to the district court's order to show cause and appeared in court where he argued

¹The Honorable Bonnie A. Bulla, Judge, voluntarily recused herself from participation in the decision of this matter.

²We do not recount the facts except as necessary to our disposition.

that the district court should not dismiss the complaint because the parties had stipulated to an open extension to file an answer and were in settlement negotiations. Nitz also stated that he sought to litigate some of the claims in arbitration, as required by arbitration clauses in two of the 1990 Agreements. The district court discharged its order to show cause and directed OCGAS to file an answer within 20 days. Nitz served the district court order on OCGAS through postal mailing. Nitz also sent OCGAS a letter demanding OCGAS attend mandatory arbitration as required under the terms of the 1990 agreements.

Rather than file an answer or respond to Nitz's letter, OCGAS filed a motion to dismiss for want of prosecution where it essentially argued the same legal and factual issues the district court considered when it discharged its order to show cause for want of prosecution. OCGAS also added that the district court should dismiss the complaint under the *Monroe/Hunter* factors because Nitz's conduct demonstrates bad faith and he failed to provide an adequate excuse for his delayed prosecution.³ OCGAS further argued that Nitz's claims were meritless because the parties entered into an alleged subsequent contract that invalidated the 1990 agreements from which the alleged breach of contract arose. Further, OCGAS argued that Nitz could not substantively succeed on any of his five claims. In response, Nitz filed an opposition/countermotion to compel arbitration under the mandatory arbitration clauses in the 1990 agreements, but he did not address the motion to dismiss under the *Monroe/Hunter* factors.

³*Monroe v. Columbia Sunrise Hosp. & Med. Ctr.*, 123 Nev. 96, 103, 158 P.3d 1008, 1012 (2007); *Hunter v. Gang*, 132 Nev. 249, 260-61, 377 P.3d 448, 456 (Ct. App. 2016).

Since discovery had yet to commence in the case, the district court relied on exhibits and affidavits provided by the parties. Specifically, the district court considered oral arguments by the attorneys, the 1990 agreements, affidavits from OCGAS's managing shareholder and Nitz, and invoices and correspondence from the disputed mediations.

The district court granted OCGAS's motion to dismiss for want of prosecution, finding that it had the authority to dismiss under NRCP 41(e), EDCR 2.90(a), and the *Hunter* factors. Specifically, the district court determined Nitz's conduct was unreasonable, he failed to provide an adequate excuse for delaying litigation, and Nitz's claims were meritless. Although the district court did not dismiss Nitz's complaint with prejudice, it noted that Nitz would be barred from filing another complaint because the statute of limitations had expired. Therefore Nitz would suffer prejudice, but the district court found that this factor was outweighed by the other factors.

On appeal, Nitz argues that OCGAS should have filed a motion for reconsideration or a motion for relief from judgment because its motion to dismiss raised the same factual and legal arguments decided at the order to show cause hearing. Nitz also challenges the district court's application of the *Monroe/Hunter* factors because the district court's findings are unsupported by substantial evidence.⁴ OCGAS, in response, argues that

⁴Nitz argues that he informed the district court that he did not prosecute the case because the parties were discussing settlement and arbitration. He further argues that the district court abused its discretion by finding that neither Nitz nor OCGAS provided evidence of the parties' negotiations because NRS 48.105 provides that settlement negotiations are privileged. Moreover, Nitz contends that the district court erred by determining that a new contract superseded the 1990 Agreements in

Nitz waived any procedural or factual challenges on appeal because he failed to raise these arguments before the district court. We agree with OCGAS.

“A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.” *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). Additionally, the appellant is responsible for making an adequate appellate record, and when “appellant fails to include necessary documentation in the record, we necessarily presume that the missing portion supports the district court’s decision.” *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007).

Here, the district court concluded that Nitz’s opposition/countermotion failed to oppose OCGAS’s arguments. Rather than respond to OCGAS’s arguments regarding whether dismissal should be granted under the *Monroe/Hunter* factors, Nitz summarily asked the district court to deny OCGAS’s motion to dismiss and grant Nitz’s countermotion to compel arbitration. We further conclude that nothing in the record shows that Nitz challenged the alleged procedural deficiency of OCGAS’s motion to dismiss that he now argues. Moreover, we cannot confirm that Nitz opposed OCGAS’s motion to dismiss at the hearing on the grounds he now asserts because he failed to provide the hearing transcript on appeal.

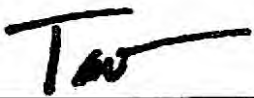
dispute despite contradictory affidavits by each side, Nitz’s breach of contract claim for unpaid mediation services is meritless based on OCGAS’s affidavit, and Nitz lacked standing to bring a breach of contract claim relating to distribution of profits because he is an individual shareholder. For the reasons provided herein, we cannot consider these issues.

Therefore, we cannot consider Nitz's arguments on appeal because he did not raise them before the district court, and we must presume that the missing hearing transcript supports the district court's findings and conclusions.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao

cc: Hon. Ronald J. Israel, District Judge
Jay Young, Settlement Judge
Stovall & Associates
McNutt Law Firm
Eighth District Court Clerk