IN THE COURT OF APPEALS OF THE STATE OF NEVADA

GIDGET V. SWANSON, AN INDIVIDUAL,
Appellant,
vs.
CHARLES DATE, AN INDIVIDUAL; AND PATRICIA DATE, AN INDIVIDUAL,
Respondents.

No. 77106-COA

FILED

FEB 19 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

Gidget V. Swanson appeals from a district court order granting respondents' motion to strike a request for a trial de novo and entering final judgment on an arbitration award. Eighth Judicial District Court, Clark County; Richard Scotti, Judge.

Following an attempted sale of real property, Swanson filed an action in district court against respondents Charles and Patricia Date (collectively, the Dates), alleging, among other things, breach of contract, breach of the implied covenant of good faith and fair dealing, and tortious or intentional interference with a contract.[1] The case proceeded through the court-annexed arbitration program. The arbitrator found in the Dates' favor and issued his arbitration decision in May 2018. At the time, Keen Ellsworth served as counsel of record for Swanson. However, Ellsworth was unable to continue representing Swanson and asked attorney Scott Flahive to represent Swanson moving forward. Swanson agreed to the change in representation.

In June 2018, Flahive timely filed a request for a trial de novo on Swanson's behalf. Notably, Ellsworth did not file a motion to withdraw, and

[1]We do not recount the facts except as necessary to our disposition.

Flahive was unable to obtain Ellsworth's signature to file a substitution of counsel before filing the request. The ADR Commissioner sent out the Judicial Panel Strike list to counsel for the Dates and to Ellsworth.

Approximately one month later, the Dates filed a "Motion to Strike [Swanson's] Request for Trial de Novo and to Enter Judgment on the Arbitration Award," alleging that the request was a fugitive document because Flahive was not listed as counsel of record for Swanson at the time it was filed, and further alleging that Swanson did not participate in good faith during the arbitration. Within two weeks after being apprised of the defect in the document requesting the trial de novo, Flahive filed a proper substitution of counsel, and then timely filed an opposition to the motion to strike.

After a hearing on the motion, the district court granted the Dates' motion to strike under EDCR 7.40, stating that the request "was filed neither by [Swanson nor] her attorney of record." Accordingly, the district court struck the request for a trial de novo and reduced the arbitrator's award to judgment. The district court's order made no determination as to whether Swanson participated in good faith during the arbitration. This appeal followed.

On appeal, Swanson contends that the district court erred by striking her request for a trial de novo. Specifically, Swanson argues that dismissal was inappropriate under EDCR 7.40(a) and that any defect in her request was timely cured in compliance with NRCP 11(a).[2] The Dates

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[2]The Nevada Rules of Civil Procedure were amended effective March 1, 2019. *See In re Creating a Comm. to Update & Revise the Nev. Rules of Civil Procedure*, ADKT 0522 (Order Amending the Rules of Civil Procedure, the Rules of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules, December 31, 2018). All orders in this case were entered

counter, arguing that the district court correctly struck Swanson's request pursuant to EDCR 7.40(a) because the request was not signed by her attorney of record and therefore a fugitive document. We agree with Swanson and therefore reverse and remand.

A district court's decision to strike a request for a trial de novo is reviewed for an abuse of discretion. *Gittings v. Hartz*, 116 Nev. 386, 391, 996 P.2d 898, 901 (2000). However, this court reviews de novo a district court's legal conclusions regarding court rules. *Casey v. Wells Fargo Bank, N.A.*, 128 Nev. 713, 715, 290 P.3d 265, 267 (2012). "Every pleading, written motion, and other paper shall be signed by at least one attorney of record . . . ." NRCP 11(a). A defective paper, however, "should not be treated as a nullity unless the pleader is given an opportunity to correct the defect and fails to do so." *Cheek v. Bell*, 80 Nev. 244, 247, 391 P.2d 735, 736 (1964); *see also* NRCP 11(a) ("An unsigned paper shall be stricken unless omission of the signature is corrected promptly *after being called to the attention of the attorney or party*." (emphasis added)).[3] Under EDCR 7.40(a), "[c]ounsel who has appeared for any party must represent that party in the case and shall be recognized by the court and by all parties as having control of the case." Counsel may be changed via substitution, if done "by the written consent of both attorneys and the client . . . [and] filed with the court and served upon all parties." EDCR 7.40(b)(1).

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before March 1, 2019. Accordingly, we cite the prior version of NRCP 11 herein.

[3]Notably, NRCP 11(a)'s remedial language—i.e., "unless . . . corrected promptly"—indicates that deficient pleadings, papers, and other papers are voidable, not void *ab initio*.

According to the record, Swanson's new attorney, Flahive, timely filed a request for a trial de novo pursuant to NAR 18,[4] which was done at Swanson's request because Ellsworth was withdrawing as counsel of record. Approximately one month later, the Dates filed a motion to strike the trial de novo request because it was not signed by Swanson's attorney of record and was therefore, the Dates argued, a fugitive document. Two weeks later, Flahive filed a substitution of counsel that complied with the requirements of EDCR 7.40. After a proper substitution was filed, the district court heard the motion to strike, ordered Swanson's request for a trial de novo "hereby stricken," and ordered the arbitration award reduced to judgment. In its order, the district court reasoned that "since the Request for Trial de Novo was filed neither by the Plaintiff or her attorney of record, the same must be stricken" under EDCR 7.40(a). Based on this record, we conclude that the district erred for three reasons.

First, the district court's conclusion that Swanson's request "must be stricken" is not supported by the text of EDCR 7.40(a). *See, e.g.*, *Logan v. Abe*, 131 Nev. 260, 264, 350 P.3d 1139, 1141-42 (2015) (explaining that this court interprets unambiguous rules and statutes according to their plain meaning). Although EDCR 7.40 addresses attorney appearances, substitutions, and withdrawals, it does not authorize district courts to punish or sanction parties for noncompliance with the rule. And it certainly does not mandate that a court strike a paper because it was filed by someone other than the attorney of record. Thus, the district court erred because it misinterpreted and misapplied EDCR 7.40(a).

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[4]Under NAR 18(A), a party has 30 days after an arbitration award is issued to "file with the clerk of the court and serve on the other parties and the commissioner a written request for trial de novo."

Second, the district court should have utilized and applied NRCP 11(a), which was the proper rule for resolving this matter. Under NRCP 11(a), all pleadings, motions, and other papers must be signed by at least one attorney of record. Nevertheless, deficient pleadings, motions, and papers should not be stricken unless the filing attorney or party is notified of the deficiency and fails to cure the defect in a timely manner. *Cf. Cheek*, 80 Nev. at 247, 391 P.2d at 736; *see also* NRCP 11(a). Further, the opportunity to cure "should be given upon a motion to strike." *Cheek*, 80 Nev. at 247, 391 P.2d at 736.

Here, the request for a trial de novo was allegedly deficient because it was not signed by Swanson's counsel of record. The request was, however, filed and signed by Flahive who was and is an attorney licensed to practice in Nevada. *See Weldon v. United States*, 845 F. Supp. 72, 83 (N.D.N.Y. 1994), *aff'd*, 70 F.3d 1 (2d Cir. 1995) (providing that a signature by an outside attorney satisfies the requirements of FRCP 11). The Dates appropriately brought the alleged deficiency to Swanson's and Flahive's attention when they timely moved to strike. Subsequently, Flahive properly filed a substitution of counsel, thus curing the alleged defect as permitted by NRCP 11(a), and did so before the court ruled on the motion to strike.

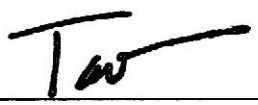
Additionally, Swanson filed an opposition to the Dates' motion to strike, arguing, among other things, that NRCP 11 was the applicable rule. Despite Swanson's remediation and citation to NRCP 11, the district court concluded that "[p]ursuant to 7.40(a), . . . the [request] must be stricken." But, as explained above, EDCR 7.40 does not authorize such a sanction, nor would striking the request have been appropriate under NRCP 11 in this instance because Swanson timely cured the alleged defect in accordance with NRCP 11(a) and caselaw interpreting the rule. Accordingly, the district court misapplied a local rule in a manner that was inconsistent with the Nevada

Rules of Civil Procedure. *W. Mercury, Inc. v. Rix Co., Inc.*, 84 Nev. 218, 222-23, 438 P.2d 792, 795 (1968) (explaining that local rules must not conflict with the Nevada Rules of Civil Procedure); *see also* NRCP 83(a)(1).

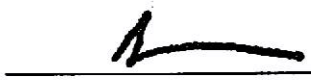
And finally, although NRCP 11(b) provides district courts with discretion to impose appropriate sanctions (including striking papers) when the court determines that a party has acted in bad faith or with an improper motive, nothing in the record indicates that Swanson's request for a trial de novo was frivolous or improper. Moreover, the district court's order made no findings to that effect. Consequently, because the district court misinterpreted and misapplied EDCR 7.40, and because it failed to apply NRCP 11(a), we conclude that the district court abused its discretion when it erroneously struck Swanson's request for a trial de novo.[5] Accordingly, we

REVERSE the district court's order striking the request for a trial de novo and entering final judgment on the arbitration award, AND REMAND this matter to the district court for proceedings consistent with this order.

_____, C.J.
Gibbons



_____, J.
Tao



_____, J.
Bulla

[5]The Dates also argue that Swanson did not participate in good faith during the arbitration proceedings. Although the Dates argued this point below in their motion to strike, the district court did not reach this issue in its order and thus made no factual findings. Therefore, we decline to address this argument on appeal in the first instance. *See In re Application of Finley*, 135 Nev., Adv. Op. 63, ___ P.3d ___, ___ n.4 (Ct. App. 2019) (noting that appellate courts are not well-suited to make factual determinations in the first instance); *see also Ryan's Express Transp. Servs., Inc. v. Amador Stage Lines, Inc.*, 128 Nev. 289, 299-301, 279 P.3d 166, 172-73 (2012).

cc: Hon. Richard Scotti, District Judge
Janet Trost, Settlement Judge
Flahive & Associates, Ltd.
Charles M. Damus & Associates
The Wright Law Group
Eighth District Court Clerk