

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

LEON DUDLEY WILLIAMS, III, AS
TRUSTEE FOR THE L.D.W. III R.E.
ASSETS LIVING TRUST,
Appellant,

vs.

CLEAR RECON CORP., A DOMESTIC
CORPORATION; WILMINGTON
SAVINGS FUND SOCIETY, FSB, D/B/A
CHRISTIANA TRUST, NOT
INDIVIDUALLY BUT AS TRUSTEE
FOR PRETIUM MORTGAGE
ACQUISITION TRUST, A FOREIGN
CORPORATION; AND RUSHMORE
LOAN MANAGEMENT SERVICES,
LLC, A FOREIGN LIMITED LIABILITY
COMPANY,
Respondents.

No. 77112-COA

FILED

JUN 30 2020

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

ORDER OF AFFIRMANCE

Leon Dudley Williams, III, as trustee for the L.D.W. III R.E. Assets Living Trust, appeals from a district court order granting summary judgment in a foreclosure action. Eighth Judicial District Court, Clark County; Susan Johnson, Judge.

Susan Bonsignore, a non-party to this action, mortgaged the real property at issue in this dispute and executed a deed of trust in favor of Countrywide Home Loans, Inc.¹ In 2013, Bonsignore defaulted on the

¹The deed of trust has since been reassigned numerous times. According to the record, respondent Wilmington Savings Fund Society, FSB, is the current beneficiary of the deed of trust, respondent Rushmore Loan Management Services, LLC, is the loan servicer, and respondent Clear

loan and conveyed her entire interest in the property to Williams; Williams then used the property as his primary residence.² Although Williams purportedly assumed the mortgage, neither Clear Recon nor its predecessors in interest authorized or consented to the conveyance, which was required pursuant to the terms of the deed of trust. In 2017, Clear Recon recorded a notice of default and election to sell and mailed a copy of the notice to the subject property's address. Because Williams failed to timely cure the default or opt-in to the foreclosure mediation program, Clear Recon recorded a notice of trustee's sale.³

In 2018, prior to the trustee's foreclosure sale, Williams petitioned the district court for foreclosure mediation assistance. Shortly thereafter, Williams hired counsel and filed a complaint, wherein he alleged wrongful foreclosure and requested declaratory relief. Williams also requested, and the district court granted, a temporary restraining order and, later, a preliminary injunction, which required Clear Recon to provide Williams with a payoff statement. Clear Recon complied with the injunction and delivered a payoff statement to Williams.

In July 2018, Williams' counsel moved to withdraw, and the district court granted the request. In late August 2018, Clear Recon moved for summary judgment and served the summary judgment motion on "all parties in this litigation by Electronic Service via Odyssey." Williams failed to oppose Clear Recon's motion for summary judgment, and the district

Recon Corp. is the trustee. In this order, we refer to Wilmington, Rushmore, and Clear Recon collectively as Clear Recon.

²Technically, the property was conveyed to the L.D.W. III R.E. Living Trust, of which Williams is a trustee.

³We do not recount the facts except as necessary to our disposition.

court granted the motion pursuant to EDCR 2.20(e). Williams then hired new counsel and moved for a rehearing on the summary judgment motion. After a hearing on Williams' motion, the district court denied the request. Williams now appeals.

This appeal presents two issues: (1) whether the district court abused its discretion when it granted Clear Recon's summary judgment motion; and (2) whether the district court abused its discretion when it failed to grant Williams' motion for a rehearing where it did not consider the factors for setting aside a judgment originally articulated in *Yochum v. Davis*.⁴

The district court acted within its discretion when it granted summary judgment for Clear Recon

Williams argues that the district court abused its discretion when it denied his motion for a rehearing. Specifically, Williams avers that he was not properly served via U.S. Mail with Clear Recon's motion for summary judgment, and therefore, he did not have notice of the motion's pendency. Clear Recon argues that Williams was served with the summary judgment motion electronically. However, Clear Recon argues that even if Williams was not properly served, he failed to raise the service issue below and is therefore barred from doing so now.

It is well-established that a district court acts within its discretion when, pursuant to a local rule, it grants and treats a party's motion as meritorious, where that motion either went unopposed or the

⁴98 Nev. 484, 486, 653 P.2d 1215, 1216 (1982); *see also Rodriguez v. Fiesta Palms, LLC*, 134 Nev. 654, 657 & n.2, 428 P.3d 255, 257 & n.2 (2018) (recognizing the four *Yochum* factors and acknowledging that a fifth factor, concerning whether a meritorious defense was shown, has been overruled).

opposition was untimely filed.⁵ Under local rule EDCR 2.20(e), a non-moving party's failure to serve and file a written opposition within the time allotted "may be construed as an admission that the motion is meritorious and a consent to granting the same."

Here, the record shows that Clear Recon moved for summary judgment in a motion containing a certificate of electronic service, that Williams failed to file any opposition to the motion, and that the district court subsequently granted Clear Recon's unopposed motion for summary judgment pursuant to EDCR 2.20(e). This was within in the district court's discretion because EDCR 2.20(e) clearly articulates that an opposing party's failure to serve and file a written opposition "may be construed as an admission that the motion . . . is meritorious." In other words, the rule expressly provides the district court with the authority and discretion to grant an unopposed motion and adjudicate the matter on the merits, which the court did here. Therefore, the district court acted within its discretion because it operated within the scope of its authority established by a court rule. *See, e.g., King v. Cartridge*, 121 Nev. 926, 928, 124 P.3d 1161, 1163 (2005) (concluding that "the district court acted well within its discretion in granting summary judgment in [respondent's] favor" under local rules, where the opposing motion was untimely).

⁵*See, e.g., Las Vegas Fetish & Fantasy Halloween Ball, Inc. v. Ahern Rentals, Inc.*, 124 Nev. 272, 278 & n.15, 182 P.3d 764, 768 & n.15 (2008) (concluding that the district court did not abuse its discretion by granting a motion pursuant to EDCR 2.20(b) (now EDCR 2.20(e)) when the opposition thereto was untimely); *Nye Cty. v. Washoe Med. Ctr.*, 108 Nev. 896, 899-900, 839 P.2d 1312, 1314-15 (1992) (affirming district court's decision granting plaintiff's unopposed motion for summary judgment); *see also Walls v. Brewster*, 112 Nev. 175, 178, 912 P.2d 261, 263 (1996) (district court acted properly in construing plaintiff's failure to respond to defendant's motion to dismiss as admission that motion was meritorious).

Nevertheless, Williams contends that the only reason he failed to oppose Clear Recon's summary judgment motion was because he was not properly served with the motion and therefore lacked notice. Former local rule EDCR 8.05(a) (2011) states that "[a]ll documents in the E-filing System will be served through E-Service. Each party who submits an E-Filed document . . . consents to electronic service." But service on nonregistered recipients must be made by traditional means, e.g., standard mail. EDCR 8.05(e). However, "[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).

According to the record on appeal, all parties were electronically served with the summary judgment motion. But, even if Clear Recon failed to properly serve Williams with its summary judgment motion, Williams has waived his right to assert that argument on appeal because he did not raise the service issue in his motion for a rehearing or during the hearing on the motion.⁶ *Old Aztec Mine*, 97 Nev. at 52, 623 P.2d at 983. Therefore,

⁶Despite Williams' counsel's efforts during oral argument to persuade us otherwise, there is no plausible explanation as to why Williams did not raise the service issue in his motion for rehearing and during argument on the motion for rehearing, particularly since Williams and his counsel would have been well aware of any potential problem with service at that time and could have properly raised it as a reason to set aside the summary judgment. Further, we decline to address the service issue for the first time on appeal due to the prejudice to Clear Recon. Indeed, at oral argument, Clear Recon's counsel indicated that Williams had also been served with the summary judgment motion via U.S. mail, and Clear Recon could have presented the proof of this to the district court judge had the issue been raised below.

we conclude that the district court acted well within its discretion when it granted Clear Recon's unopposed motion for summary judgment.⁷

The district court did not abuse its discretion when it denied Williams' rehearing motion

Next, Williams contends that because he requested relief under NRCP 60(b)(1), the district court was required to consider the factors articulated in *Yochum*, and since the district court did not consider those factors, it abused its discretion in denying his request. Clear Recon argues that Williams' motion for a rehearing failed to invoke NRCP 60(b)(1) as a basis for relief, that the motion should be construed as an NRCP 59(e) motion, and that the district court correctly granted the motion because Williams failed to show that he was entitled to relief under NRCP 59(e).

We would note, however, that it is unclear from both the moving papers and the transcript from the hearing on Williams' motion as to what procedural grounds Williams was relying on to set aside the summary judgment order. Nevertheless, because Williams and Clear Recon disagree about whether Williams' motion for rehearing was an NRCP 60(b)(1) or an NRCP 59(e) motion, we examine both possibilities.⁸

⁷Williams also suggests that because he was pro se at the time Clear Recon's motion was filed, Clear Recon was required to serve him by U.S. Mail. As discussed, however, Williams failed to raise this argument below; therefore, it has been waived. *Old Aztec Mine*, 97 Nev. at 52, 623 P.2d at 983.

⁸The 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). Therefore, we cite the prior versions of the applicable rules, including local rules, as they were in effect at all relevant times herein.

Motions made pursuant to NRCP 60(b)(1)

“The salutary purpose of Rule 60(b) is to redress any injustices that may have resulted because of excusable neglect or the wrongs of an opposing party.” *Nev. Indus. Dev., Inc. v. Benedetti*, 103 Nev. 360, 364, 741 P.2d 802, 805 (1987). NRCP 60(b)(1) provides that a district court “may relieve a party or a party’s legal representative from a final judgment, order, or proceeding” on grounds of “mistake, inadvertence, surprise, or excusable neglect.” The Nevada Supreme Court has “established four factors that indicate whether NRCP 60(b)(1) relief is appropriate: ‘(1) a prompt application to remove the judgment; (2) the absence of an intent to delay the proceedings; (3) a lack of knowledge of procedural requirements; and (4) good faith.’” *Rodriguez v. Fiesta Palms, LLC*, 134 Nev. 654, 657, 428 P.3d 255, 257 (2018) (quoting *Yochum v. Davis*, 98 Nev. 484, 486, 653 P.2d 1215, 1216 (1982)).

We conclude that Williams’ motion for a rehearing cannot realistically be construed as an NRCP 60(b)(1) motion. Notably, Williams’ moving papers failed to invoke NRCP 60(b)(1) either expressly or impliedly. And during oral argument on the rehearing motion, Williams’ counsel never referenced NRCP 60(b)(1), nor did he make mention of the *Yochum* factors, which are absolutely necessary for resolving NRCP 60(b)(1) motions. *Fiesta Palms*, 134 Nev. at 657, 428 P.3d at 257 (explaining that in *Yochum*, “this court established four factors that indicate whether NRCP 60(b)(1) relief is appropriate”). Moreover, if Williams truly was relying on NRCP 60(b)(1), as he now contends, it seems strange that he never referenced the rule in any manner, that he never mentioned the *Yochum* factors in either his moving papers or at oral argument on the motion, and that nothing in the record intimates that NRCP 60(b)(1) formed the basis for the relief he was requesting. Thus, it does not appear that NRCP 60(b)(1) was within the

contemplation of Williams or his attorney at the time his motion for a rehearing was filed and argued.

Because Williams did not in any way reference NRCP 60(b)(1) in the district court, he cannot now be afforded the benefit of the same on appeal. *Cf. Old Aztec Mine*, 97 Nev. at 52, 623 P.2d at 983. Accordingly, we conclude that the district court did not abuse its discretion when it failed to consider the *Yochum* factors.

Motions made pursuant to NRCP 59(e)

Clear Recon argues that Williams' motion for a rehearing should be construed as an NRCP 59(e) rather than an NRCP 60(b)(1) motion. We agree. Generally, "a *motion to reconsider*, vacate, set aside, or reargue a final judgment will ordinarily be construed as a Rule 59(e) motion if made within ten days of entry of judgment." *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 584, 245 P.3d 1190, 1194 (2010) (emphasis added) (internal alterations and quotations omitted). A motion for rehearing is merely another term for a motion for reconsideration. See *Motion for rehearing*, *Black's Law Dictionary* (11th ed. 2019) ("Also termed *motion for reconsideration*.").

Here, Williams' motion more closely resembles an NRCP 59(e) motion than an NRCP 60(b)(1) motion. In particular, Williams filed the motion immediately after the district court granted summary judgment,⁹ it

⁹The district court issued its minute order granting Clear Recon's motion for summary judgment on September 18, 2018. Williams filed his motion for a rehearing on an order shortening time on September 24, 2018, and the district court subsequently issued its written summary judgment order on September 25, 2018. Although the rehearing motion appears to be early, the district court did not hear oral argument on Williams' rehearing motion until October 1, 2018, which was after the court rendered its written summary judgment. Further, there is authority to support the proposition

was made in writing, and it expressly requested a *rehearing* on Clear Recon’s motion for summary judgment, even though it did not reference NRCP 59(e) or any particular procedural rule.

Furthermore, Williams’ motion appears to address, if only tangentially, the merits of Clear Recon’s summary judgment motion, and specifically “requests that the court *re-hear* the motion for summary judgment, and keep the injunction in place.” In other words, Williams did not request relief from a final judgment—he requested reconsideration of a matter previously considered. Therefore, pursuant to *AA Primo*, Williams’ motion should be treated as an NRCP 59(e) motion to alter or amend a judgment, not as a motion requesting relief from a judgment or order under NRCP 60(b)(1). 126 Nev. at 584, 245 P.3d at 1194.

Having determined that Williams’ motion should be construed as an NRCP 59(e) motion, we also conclude that the district court did not abuse its discretion in denying Williams’ request for a rehearing.

Although not independently appealable, “an order denying an NRCP 59(e) motion is reviewable for abuse of discretion on appeal from the underlying judgment.” *AA Primo*, 126 Nev. at 589, 245 P.3d at 1197. Review for abuse of discretion is deferential, but deference is not owed to legal error. *Id.* Where a reconsideration order and motion related thereto are properly part of the record on appeal, and where the district court elected to entertain the motion on its merits, this court “*may* consider the arguments asserted in the reconsideration motion in deciding an appeal

that a premature motion under NRCP 59(e) or a similar rule ought to be treated as timely. 49 C.J.S. *Judgments* § 379 (2019) (citing *Law Offices of Taiwo Agbaje, P.C. v. JLH Properties, II, LLC*, 901 A.2d 249 (Md. Ct. Spec. App. 2006)).

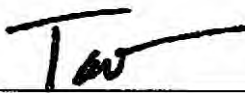
from the final judgment.” *Arnold v. Kip*, 123 Nev. 410, 417, 168 P.3d 1050, 1054 (2007) (emphasis added).

In this case, as discussed above, the record shows that Clear Recon moved for summary judgment, that Williams failed to file an opposition to the motion, and that the district court granted Clear Recon’s unopposed motion pursuant to local rules. Thus, the district court acted within the scope of its authority when it granted Clear Recon’s motion for summary judgment. Likewise, nothing in the record indicates that the district court committed legal error. The supreme court noted in *AA Primo* that the “basic grounds for a Rule 59(e) motion are correcting manifest errors of law or fact, newly discovered or previously unavailable evidence, the need to prevent manifest injustice, or a change in controlling law.” 126 Nev. at 582, 245 P.3d at 1193 (internal quotation marks and alterations omitted). Here, Williams’ motion for a rehearing did not address any of the grounds articulated in *AA Primo* with respect to the district court’s decision to grant summary judgment as unopposed under EDCR 2.20. Therefore, we conclude the district court did not abuse its discretion when it denied Williams’ rehearing motion, nor did it commit legal error. Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹⁰



_____, C.J.
Gibbons



_____, J.
Tao



_____, J.
Bulla

¹⁰In light of this order, we vacate the stay and injunction imposed by this court on January 4, 2019.

cc: Hon. Susan Johnson, District Judge
Washoe County School District Legal Dep't/Gina Session
Aldridge Pite, LLP
Eighth District Court Clerk