IN THE COURT OF APPEALS OF THE STATE OF NEVADA

WATTS REGULATOR CO.,
Appellant,
vs.
AMERICAN NATIONAL INSURANCE COMPANY, AS SUBROGEE OF VANCE RANDALL,
Respondent.

No. 79745-COA

FILED

JAN 25 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

Watts Regulator Company appeals from a district court order striking its request for a trial de novo in a subrogation matter following arbitration. Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.

In this case, the underlying litigation stems from a subrogation claim involving the alleged failure of a swivel hose adaptor purportedly manufactured by Watts Regulator Company (Watts), which caused water damage to the property of American National Insurance Company's (American National) insured, Vance Randall, in May of 2016. After settling with its insured, American National filed a subrogation action against Watts to recover its payment on Randall's claim, and the matter proceeded through the court-annexed arbitration program. The arbitrator found in American National's favor, awarding it $33,202.60—the total amount that American National paid its insured.

Subsequently, Watts filed a request for a trial de novo. American National moved to strike Watts's request, arguing that Watts did not participate in arbitration proceedings in good faith because (1) Watts did not respond to discovery requests timely, (2) Watts changed its theory of the case right before the arbitration hearing, and (3) at the hearing Watts's

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witness Michael Mullavey testified about a privileged report that was not produced during discovery. Watts opposed American National's motion to strike, arguing that it meaningfully participated in good faith by serving and answering discovery and by participating at the arbitration hearing, including engaging in direct and cross-examination. Watts also argued that Mullavey did not rely on any privileged report not previously produced when testifying at the hearing. The district court ultimately granted American National's motion to strike and denied Watts's trial de novo request, finding that Watts had not participated in the arbitration in good faith; but, the court also declined to find that Watts participated in bad faith. This appeal followed.

On appeal, Watts argues that the district court abused its discretion in granting American National's motion to strike its trial de novo request because the sanction was too severe for its alleged conduct during the arbitration proceedings. Watts also argues that it meaningfully participated at the arbitration hearing, and because the district court specifically found that Watts did not act in bad faith during the arbitration proceedings, it was an abuse of discretion to strike its request for a trial de novo. American National asserts that the court properly found that Watts did not participate in good faith, and additionally, that Watts's appeal is untimely.[1] We agree with Watts.

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[1]American National argues that this appeal is untimely under NRAP 4(a)(1). Under the rule, a notice of appeal must be filed within 30 days after the notice of entry of an appealable order has been served. Here, American National electronically served the notice of entry on September 3, 2019, making the notice of appeal due 30 days from that point. Therefore, we conclude that the notice of appeal, filed on September 30, 2019, was timely.

The Nevada Constitution provides litigants with the right to a jury trial, but it states that the parties may waive that right "in all civil cases in the manner to be prescribed by law." Nev. Const. art. 1, § 3. One such method of waiver is provided in Nevada Arbitration Rule (NAR) 22. *Gittings v. Hartz*, 116 Nev. 386, 390, 996 P.2d 898, 901 (2000). Under NAR 22(A), "[t]he failure of a party or attorney to either prosecute or defend a case in good faith during the arbitration proceedings shall constitute a waiver of the right to request a trial de novo." As pertinent here, the rule permits the district court to strike a party's trial de novo request as a case-terminating sanction based on the party's failure to defend its arbitration case in good faith. *See* NAR 22(A).

While the power to sanction a party is ordinarily reviewed for an abuse of discretion, a "somewhat heightened standard of review" is applied to sanctioning orders that terminate legal proceedings. *Chamberland v. Labarbera*, 110 Nev. 701, 704, 877 P.2d 523, 525 (1994) (*quoting Young v. Johnny Ribeiro Bldg.*, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990)). A district court abuses its discretion where it disregards controlling law, and its factual findings are not based on substantial evidence or are otherwise arbitrary and capricious. *MB Am., Inc. v. Alaska Pac. Leasing*, 132 Nev. 78, 88, 367 P.3d 1286, 1292 (2016); *Skender v. Brunsonbuilt Constr. & Dev. Co.*, 122 Nev. 1430, 1435, 148 P.3d 710, 714 (2006); *Campbell v. Maestro*, 116 Nev. 380, 383, 996 P.2d 412, 414 (2000).

As a preliminary matter, in its order striking Watts's request for a trial de novo, the district court concluded that "NAR 22(A) does not apply." However, NAR 22(A) is the controlling legal authority that permits the district court to strike a trial de novo. Therefore, when the district court concluded NAR 22(A) did not apply, it foreclosed to itself the only avenue

authorizing it to strike the request for a trial de novo. Thus, the district court's order striking Watts's request for a trial de novo was without legal support and is therefore arbitrary and capricious. *Skender*, 122 Nev. at 1435, 148 P.3d at 714 ("An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason.").

Even assuming that the district court properly relied on NAR 22(A) to strike Watts's trial de novo request (independent of the plain language of its order), the court's findings that Watts failed to participate in the arbitration proceedings in good faith, yet at the same time did not participate in bad faith, do not provide a legal basis for striking the de novo request pursuant to NAR 22(A).

The Nevada Supreme Court, in interpreting NAR 22(A), uses "meaningful participation," lack of "good faith," and "bad faith" interchangeably when determining which conduct is sufficiently egregious to support striking a trial de novo. *See Walker v. Second Judicial Dist. Court*, 136 Nev., Adv. Op. 80, 476 P.3d 1194, 1197 (2020) ("[I]n the *absence of bad-faith arbitration practices* under NAR 22, [a party] enjoy[s] a constitutionally established right to the jury trial requested." (emphasis added)); *see also Gittings*, 116 Nev. at 391, 996 P.2d at 901 ("Mere failure of a party to attend or call witnesses in an arbitration hearing does not amount to bad faith or lack of meaningful participation."); *see also Walls v. Brewster*, 112 Nev. 175, 179 n.3, 912 P.2d 261, 263 n.3 (1996) ("[The district court's] ruling was incorrect given the fact that there was no evidence that Walls failed to prosecute the arbitration in good faith . . . [and his actions] do not amount to bad faith under NAR 22(A) which constitutes a waiver of Walls' right to request a trial de novo."); *see also Casino Props., Inc. v. Andrews,*

112 Nev. 132, 135, 911 P.2d 1181, 1182 (1996) (concluding that "good faith" is equated with "meaningful participation").

Specific to this case, because "lack of good faith" and "bad faith" are treated as interchangeable terms throughout our precedents, the district court could not have concluded that Watts failed to act in good faith, while simultaneously concluding that Watts engaged in conduct that did not amount to bad faith. Thus, when the district court found that Watts did not act in bad faith, but also concluded that Watts did not meaningfully participate in good faith, the district court's legal analysis was internally inconsistent, contradictory, and finds no support in our jurisprudence. *Walker*, 136 Nev., Adv. Op. 80, 476 P.3d. at 1197. Therefore, we conclude that by making these inconsistent factual findings, the district court's decision to strike the trial de novo fails, and in doing so the court abused its discretion. *Skender*, 122 Nev. at 1435, 148 P.3d at 714.

Additionally, in this instance, the district court's factual findings, as provided in its order, do not meet the threshold necessary to support the conclusion that Watts failed to defend the arbitration case in good faith. *See Chamberland*, 110 Nev. at 705, 877 P.2d at 525 (requiring the district court to support an order striking a request for a trial de novo under NAR 22(A) with "specific written findings of fact and conclusions of law . . . describing what type of conduct was at issue and how that conduct rose to the level of failed good faith participation").

First, the delay in serving discovery responses is not, in and of itself, evidence of bad faith. *See Gittings*, 116 Nev. at 392, 996 P.2d at 902 (concluding that although appellant's actions were insufficient to support striking a trial de novo request, the imposition of alternative sanctions may have been warranted); *Cf. Walls*, 112 Nev. at 179 n.3, 912 P.2d at 263 n.3

("The record shows that the delays in the arbitration were due to evidentiary disputes and . . . Hamilton's illness. These factors do not amount to bad faith under NAR 22(A) which constitutes a waiver of Walls' right to request a trial de novo."). In this case, some of the delays were in fact due to defense counsel's illness. Further, while Watts's discovery responses were undisputedly untimely, they were in fact served in advance of the arbitration. These types of delays, do not give rise to the level of bad faith or lack of good faith participation under NAR 22(A) necessary to strike a trial de novo, although perhaps they would have warranted other sanctions. *See* NAR 22(B).

Second, Watts's change of its defense theory as to the cause of the property damage during installation is arguably a litigation strategy which does not give rise to bad faith conduct, as it was not a complete change in Watts's theory of liability as asserted by American National. *See Gittings*, 116 Nev. at 391, 996 P.2d at 901. Here, Watts consistently contested liability, claiming that the third-party installer was at fault. Even though Watts changed its defense strategy as to precisely how the third-party installer caused the property damage (i.e., from the use of excess torque to the use of its product for an unintended purpose), Watts disclosed this change in its defense theory well in advance of the arbitration hearing. Thus, this is not a case where there was a sudden change in Watts's defense theory during the arbitration hearing that may have adversely affected American National's ability to effectively present its case at arbitration. *See Casino Props., Inc.*, 112 Nev. at 135, 911 P.2d at 1182-83 (concluding that the defendant-appellant participated in bad faith only because its actions occurring right before the arbitration compromised the other party's ability to form an adequate arbitration strategy).

Finally, American National also alleges that Mullavey testified about a privileged report that was not produced during litigation, which, according to American National, supports the district court's conclusion that Watts failed to participate in good faith. The record is unclear on this point. However, even if Mullavey's testimony did improperly reference an undisclosed report, such conduct is not tantamount to bad faith participation under NAR 22(A). This is so because Watts's alleged nondisclosure amounted to discovery misconduct; thus, other less-severe sanctions were more appropriate than the case-terminating sanction that the district court ultimately meted out here, especially since the court concluded that Watts did *not* participate in bad faith. *See, e.g.*, NAR 22(B) (permitting the district court to impose NRCP 37 sanctions during the trial de novo if it determines a party engaged in "conduct designed to obstruct, delay or otherwise adversely affect the arbitration proceedings"); NRCP 37 (authorizing sanction for discovery abuses); *see also Melendez v. Illinois Bell Tel. Co.*, 79 F.3d 661, 671 (7th Cir. 1996) (affirming preclusion of expert testimony as a sanction for discovery misconduct and noting that bad faith "is not required for a district court to sanction a party for discovery abuses").

Moreover, Mullavey's alleged reference to the undisclosed report appears to have been harmless in this instance as American National prevailed in the arbitration proceeding. *Cf.* NRCP 61 ("At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.").

For the foregoing reasons, we conclude that the district court abused its discretion in striking Watts's request for a trial de novo because the record does not support a finding of bad faith. Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court with instructions to reinstate and grant Watts's request for a trial de novo.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. Kathleen E. Delaney, District Judge
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