

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MICHAEL SAWYER,
Appellant,
vs.
NEVADA PROPERTY 1, LLC, D/B/A
COSMOPOLITAN RESORT & CASINO;
AND THYSSENKRUPP ELEVATOR
CORPORATION,
Respondents.

No. 81987-COA

FILED

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ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *cc*
DEPUTY CLERK

ORDER OF AFFIRMANCE

Michael Sawyer appeals from a district court order dismissing the underlying case. Eighth Judicial District Court, Clark County; Richard Scotti, Judge.

Sawyer, a resident of Mississippi, filed a complaint against respondents Nevada Property 1, LLC (d/b/a Cosmopolitan Resort and Casino), and Thyssenkrupp Elevator Corporation (TKE) after allegedly sustaining injuries in an elevator while staying at the Cosmopolitan. Both defendants answered the complaint on February 28, 2020. On March 30—the day the initial 30-day deadline to conduct an NRCP 16.1(b) early case conference expired—Sawyer's counsel filed a motion to withdraw on an order shortening time, and the district court entered its order granting that motion on April 15. The order granting counsel's motion to withdraw further specified that while the early case conference should have been held by March 30, the 90-day and 180-day extensions permitted by the rule would expire on May 28 and August 26, respectively.

As relevant here, the district court later held several status checks during which Sawyer (now proceeding pro se) indicated that he was in the process of retaining counsel, but that he was having difficulties

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finding an attorney who would accept his case due to his previous counsel's withdrawal, and difficulties with the COVID-19 pandemic related closures. As a result of these delays, Sawyer made several requests to extend the time to comply with the requirements of NRCP 16.1. The district court granted Sawyer's requests for an extension several times, but Sawyer failed to comply with those deadlines. And although Sawyer made attempts to complete his initial disclosures under NRCP 16.1(a) and proposed a joint case conference report, he ultimately failed to conduct an early case conference before the 180-day deadline under NRCP 16.1(b)(2)(B) expired on August 26.

At that time, the district court issued an order to show cause and scheduled a hearing for September 14 to allow Sawyer the opportunity to demonstrate that "compelling and extraordinary" circumstances existed to avoid dismissal pursuant to NRCP 16.1(e)(1). Prior to the hearing, both defendants submitted briefing in support of dismissal, and on September 8, Sawyer retained counsel and subsequently submitted a brief in opposition. After the hearing and oral arguments by counsel, the district court entered its order dismissing Sawyer's complaint without prejudice for disobeying its earlier orders to conduct an early case conference and file a joint case conference report under EDCR 7.60, and for failing to schedule and complete an early case conference under NRCP 16.1. Sawyer now appeals.

We first note that Sawyer failed to challenge the district court's alternative ground for dismissal under EDCR 7.60, and he has therefore waived this argument on appeal. *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (providing that issues not raised on appeal are deemed waived). Thus, affirmance of the dismissal

order is warranted on this basis alone.¹ *Id.*; see also *Hillis v. Heineman*, 626 F.3d 1014, 1019 n.1 (9th Cir. 2010) (affirming a dismissal where the appellants failed to challenge the alternative grounds the district court provided for it).

Nevertheless, having considered the parties' briefs and the record on appeal, we also conclude that the district court did not abuse its discretion in dismissing Sawyer's complaint for failure to hold an early case conference under NRCP 16.1. See *Arnold*, 123 Nev. at 414, 168 P.3d at 1052 (reviewing a district court's decision to grant a motion to dismiss under NRCP 16.1(e) for an abuse of discretion). In particular, if the case conference is not held within 180 days of a defendant's answer, "compelling and extraordinary circumstances" must exist in order for the district court to permit the case conference to be held. NRCP 16.1(b)(2)(B), (e)(1).

As to the district court's dismissal under NRCP 16.1, we recognize Sawyer's arguments that (1) his previous counsel's withdrawal and the COVID-19 pandemic made it difficult to retain new counsel, and (2) he made efforts to serve his initial disclosures and a proposed joint case conference report on opposing counsel in an attempt to comply with the other provisions of NRCP 16.1. In light of these efforts, the district court's

¹To the extent the dissent suggests the EDCR 7.60-based dismissal should be reversed based on the district court's failure to consider the factors articulated in *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 787 P.2d 777 (1990), for determining whether case-concluding sanctions should be imposed, Sawyer himself expressly acknowledges that the "*Young* factors do not apply here," which further reflects that he only challenges the NRCP 16.1 based dismissal of his case. And our supreme court has recognized that the *Young* factors do not apply to dismissals under NRCP 16.1(e). See *Arnold v. Kip*, 123 Nev. 410, 418, 168 P.3d 1050, 1055 (2007) (stating that the supreme court "will not require the district court to examine the *Young* factors when exercising its discretion under [NRCP 16.1(e)(2)]").

dismissal of Sawyer's case for failing to hold the early case conference may seem unduly harsh, especially when considering the delays and impact of the COVID-19 pandemic.

Nonetheless, nothing in Sawyer's arguments demonstrates that delays caused by the pandemic resulted in Sawyer's inability to conduct an early case conference as required by NRCP 16.1. Indeed, Sawyer admits in his reply brief that he was not suggesting "COVID prevented him from conducting an early case conference," but instead did not do so because he did not understand the rule. Likewise, the record demonstrates that Sawyer was in contact with both a California attorney and a Nevada attorney at least in early June, but failed, by his own admission, to "make a choice" between the two prior to the deadline expiring in August.

Moreover, despite Sawyer's efforts to comply with other portions of NRCP 16.1, it is undisputed that he made no effort to communicate with respondents in an attempt to schedule the early case conference or to encourage respondents' counsel to arrange for the conference. See NRCP 16.1(g) (specifying that pro se plaintiffs must comply with the requirements of NRCP 16.1); *Rodriguez v. Fiesta Palms, LLC*, 134 Nev. 654, 659, 428 P.3d 255, 259 (2018) ("While district courts should assist pro se litigants as much as reasonably possible, a pro se litigant cannot use his alleged ignorance as a shield to protect him from the consequences of failing to comply with basic procedural requirements."), *modified on other grounds by Willard v. Berry-Hinckley Indus.*, 136 Nev. 467, 471 n.6, 469 P.3d 176, 180 n.6 (2020). Thus, under these specific facts, we cannot say the district court abused its discretion when it found that compelling and extraordinary circumstances did not exist to justify an extension of NRCP

16.1(b)(2)(B)'s 180-day time frame and—as a result—dismissed Sawyer's case.² We therefore

ORDER the judgment of the district court AFFIRMED.³


_____, C.J.
Gibbons


_____, J.
Tao

²While the district court did not expressly reference the *Arnold* factors in its dismissal order, at the show cause hearing, the court discussed the circumstances of this case in relation to the *Arnold* factors—such as the length of the delay, general considerations of case management (including Sawyer's failure to comply with its previous orders), and whether Sawyer demonstrated good cause for the delay—which is sufficient to support affirmance of the challenged order. Affirmance is further warranted given that the record demonstrates that respondent Nevada Property 1, LLC, referenced the *Arnold* factors in its brief in support of dismissal, while Sawyer, in contrast, presented no argument related to the *Arnold* factors in response, such that any assertion that the *Arnold* factors were not fully considered has been waived. See *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (“A point not urged in the trial court . . . is deemed to have been waived and will not be considered on appeal.”).

³Insofar as the parties raise arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.

BULLA, J., dissenting:

In affirming the district court's decision to dismiss Sawyer's complaint as a case-terminating sanction under EDCR 7.60(b)⁴ for failure to comply with its order requiring Sawyer to conduct an early case conference by June 24, and for Sawyer's failure or refusal to participate in pretrial discovery by not holding a timely case conference under NRCP 16.1(e)(1)—during a world-wide pandemic like none encountered since early in the last century—the majority upholds a harsh penalty. Although the court dismissed the case without prejudice (as required by NRCP 16.1(e)), because the statute of limitations has expired the dismissal is, in reality, one with prejudice. Thus, I cannot affirm the district court's order for the reasons discussed below.

The district court abused its discretion in imposing sanctions under EDCR 7.60(b)

EDCR 7.60(b) contemplates the imposition of *reasonable* sanctions. A dismissal of a case based on a pretrial discovery order that acts as a dismissal with prejudice constitutes the ultimate sanction, and “should be imposed only after thoughtful consideration of all the factors involved in a particular case.” *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 92, 787 P.2d 777, 780 (1990). Our supreme court has made clear that the imposition of any case-terminating discovery sanction must be

⁴Although EDCR 7.60(b) is not specifically identified in appellant's briefs, in my view, the briefs address both dismissal with prejudice as a case terminating sanction as well as dismissal of the case without prejudice pursuant to NRCP 16.1(e). Thus, I remain confident that Sawyer's appellate counsel intended to address dismissal in both circumstances. Nevertheless, it is undisputed that the foundation of the district court's dismissal was failure to comply with NRCP 16.1.

accompanied by an “express, careful and preferably written explanation of the court’s analysis of the pertinent factors.”⁵ *Id.* at 93, 787 P.2d at 780. As relevant here, such factors include the willfulness of the offending party, the severity of dismissal in comparison to the severity of the discovery abuse, and whether the sanction unfairly penalizes the party for the actions of his attorney. *Id.*

Yet, in dismissing Sawyer’s complaint under EDCR 7.60 for failure to comply with the court’s May 27 order, the district court failed to consider—much less apply—any of these factors. For example, the court should have considered Sawyer’s significant efforts to advance his case, including his efforts to retain new counsel during a pandemic after the withdrawal of his original attorney⁶ on the date of the initial deadline for holding the early case conference—a feat made especially difficult as Sawyer resides in Mississippi—as well as Sawyer’s efforts to comply with NRCP 16.1 by making his initial disclosures and preparing a proposed joint case conference report.

As I noted above, it should be emphasized that Sawyer’s initial Nevada counsel withdrew from representing Sawyer on March 30, 2020, the very day of the first early case conference deadline pursuant to NRCP

⁵In Sawyer’s opening brief he states that the *Young* factors do not apply to this case. However, notwithstanding Sawyer’s counsel’s statement, such factors still should be applied when imposing a case terminating sanction for any reason set forth in EDCR 7.60(b), including for failing to follow a court order, which is independent of any additional analysis undertaken pursuant to NRCP 16.1(e) where *Young* would not apply.

⁶Respondents suggest that Sawyer could not obtain counsel for reasons other than the pandemic, but there appears to be no dispute that the country was in the midst of a pandemic that adversely affected the legal system and played some role in Sawyer’s difficulties.

16.1(b), and, of course, at the beginning of a global pandemic. The order granting counsel's withdrawal was not filed until April 15. Therefore, Sawyer would have been unable to act on his own behalf to schedule an early case conference until his attorney was no longer involved in the case. See EDCR 7.40(a) ("When a party has appeared by counsel, the party cannot thereafter appear on the party's own behalf in the case without the consent of the court."). The record does not support any such consent. Thus, holding the initial delay for conducting the early case conference against Sawyer runs contrary to our jurisprudence. *Cf. Young*, 106 Nev. at 93, 787 P.2d at 780 (noting that sanctions should not operate to unfairly penalize a party for the actions of his or her attorney).

Therefore, the district court's dismissal of Sawyer's complaint as a sanction under EDCR 7.60 without evaluating the *Young* factors to determine if such a case-terminating sanction was reasonable in light of Sawyer's conduct, is necessarily an abuse of discretion warranting reversal. While my colleagues would affirm this decision on the basis that Sawyer failed to conduct the early case conference as ordered by the court, in my view, in order to impose a case-terminating sanction pursuant to EDCR 7.60 for failing to comply with the district court's order on pretrial matters, a proper application of the *Young* factors is necessary as such application would likely have yielded a different result. 106 Nev. 88, 797 P.2d 777.

The district court abused its discretion in its application of NRCP 16.1 to dismiss Sawyer's case

Under NRCP 16.1(b), a plaintiff is required to complete an early case conference within 30 days after a defendant files an answer. NRCP 16.1(b)(2)(A). The parties may extend the case conference deadline "for an additional period of not more than 90 days" and "[t]he court, for good cause shown, may also continue the time for any case conference" but not beyond

180 days “absent compelling and extraordinary circumstances.” NRCP 16.1(b)(2)(B); NRCP 16.1(e)(1). Relatedly, the parties are required to file a joint or individual case conference report within 30 days after an early case conference. *See* NRCP 16.1(c)(1)(A). In this case, Sawyer demonstrated good cause for not being able to comply with the initial deadline for conducting the early case conference. Therefore, based on the date on which respondents filed their answers—February 28—Sawyer had until August 26 to conduct an early case conference and October 26 to file the case conference report, before triggering a possible dismissal for failure to do so under NRCP 16.1(e).

However, in this case, after the initial deadline had passed, the district court imposed its own deadlines for Sawyer to conduct an early case conference and file a case conference report, not necessarily in keeping with NRCP 16.1. For example, while the court required the conference to be held by June 24 and the report to be filed by July 9, NRCP 16.1 contemplates that the parties will have 30 days after the early case conference to file the joint case conference report, not merely 15 days. Further, based on the date on which respondents filed their answers, February 28, Sawyer had until August 26 to conduct an early case conference and until October 26 to file the case conference report, before triggering a possible dismissal for failure to do so under NRCP 16.1(e).⁷ Because the district court’s arbitrary deadlines on which it based its dismissal were not in accordance with the

⁷It appears that at least one of the respondents suggested that the NRCP 16.1(e) deadlines were triggered by the service of the summons and complaint, but this is incorrect. The deadlines are triggered by the date of the answer of the first answering defendant. *See* NRCP 16.1(b)(2)(A).

timelines set forth in NRCP 16.1(e), the court abused its discretion in significantly relying on this rule to dismiss Sawyer's case.

Nonetheless, I recognize that the case conference was not conducted on or before August 26, and on remand would require an extension of the deadline by the district court for "compelling and extraordinary circumstances," which in my view are present here as discussed below. I would also note, however, that prior to August 26, at the hearing on August 24, the district court had already determined that a show cause hearing would be set for failure to comply with the deadlines in the court's May 27 order, and there appears to have been no consideration given as to whether a dismissal without prejudice under NRCP 16.1(e)(1), for failing to conduct the conference within 180 days, had been triggered.⁸ But as of August 24, and understandably so, there was no incentive for respondents to participate in an early case conference as the case was on the brink of being dismissed. Indeed, after Sawyer retained counsel and before the show cause hearing scheduled for September 14, Sawyer's new counsel reached out to respondents' counsel to attempt to schedule an early case conference and respondents' counsel declined.

⁸I would note that in a minute order issued by the district court on July 10 rescheduling the status check conference for August 24 (no appearances having been made by the parties on July 10), the court stated that a joint case conference report could be filed by August 19 in lieu of an appearance. The minute order did not reference any additional deadline beyond the June 24 deadline to conduct the early case conference, nor did the court indicate that if a joint case conference could not be agreed to by the parties each party could file its own report as permitted by the rule. In my view, this further confused Sawyer as to whether he was still required to conduct a conference, particularly in light of at least one of the respondents' statement that it was Sawyer's initial disclosure of documents that was of primary importance, which he made.

Second, and perhaps more troubling is that dismissal under NRCP 16.1(e) for failure to hold the early case conference within 180-days, or failure to file a case conference report within 240 days, is *permissive*, not mandatory. Further, the district court may grant an extension for conducting the early case conference if “compelling and extraordinary circumstances” exist. NRCP 16.1(e)(1). “Based on this permissive language, [the supreme] court has repeatedly recognized a district court’s discretion to dismiss a case under NRCP 16.1(e).” *Dornbach v. Tenth Judicial Dist. Court*, 130 Nev. 305, 310, 324 P.3d 369, 373 (2014). Our supreme court has also recognized that while the parties to a case are expected to abide by the controlling court rules, “an overly strict application of a rule—especially when coupled with ultimate sanctions—will defeat the very ends of justice that the rules are designed to promote.” *Dougan v. Gustaveson*, 108 Nev. 517, 523, 835 P.2d 795, 799 (1992) *abrogated on other grounds by Arnold v. Kip*, 123 Nev. 410, 415, 168 P.3d 1050, 1053 (2007).

In this case, the district court further abused its discretion in not fully considering the *Arnold* factors in determining whether a dismissal under NRCP 16.1(e) was warranted, particularly because such dismissal would act as the ultimate sanction.⁹ As with the *Young* factors, *Arnold* requires consideration of, among other things, “the length of the delay, whether the defendant . . . caused the delay, whether the delay has otherwise impeded the timely prosecution of the case, general

⁹Although I recognize that *Arnold* indicates that the district court is not required “to consider the plaintiff[’]s inability to pursue his claim after an NRCP 16.1(e)(2) dismissal because the statute of limitations may expire,” nothing in the opinion expressly prohibits the district court from taking into consideration that the ultimate dismissal may be with prejudice. 123 Nev. at 416, 168 P.3d at 1053.

considerations of case management . . . , or whether the plaintiff has provided good cause for the delay.” 123 Nev. at 415-16, 168 P.3d at 1053. Here, there are a number of the *Arnold* factors that should have been fully considered by the district court, but were not such that the court’s dismissal of the case pursuant to NRCP 16.1(e) constituted an abuse of discretion.

The district court failed to treat the COVID-19 pandemic as a “compelling and extraordinary” circumstance

My colleagues conclude that the COVID-19 pandemic did not prevent Sawyer from picking up the telephone and scheduling and conducting a *telephonic* early case conference, now permitted by a 2019 amendment to NRCP 16.1. And it appears from the record that Sawyer acknowledges this point. But, this line of reasoning ignores Sawyer’s position that he was actively seeking to retain counsel to represent him, and respectfully asked the court for additional time to do so because COVID-19 was hindering his progress.

During the summer of 2020, not only were law firms, attorneys, and parties across the country socially distancing and keeping limited office hours in order to protect themselves and their loved ones, courts across the nation—including the Eighth Judicial District Court—implemented emergency measures to assist with stopping the spread of COVID-19. The impact of COVID-19 related closures is immeasurable and permeated all corners of this case, even if it may not have prevented Sawyer from picking up a telephone. Accordingly, it is my opinion that Sawyer’s conduct does not warrant dismissal of his case in light of the overwhelming impact of the COVID-19 pandemic, which surely is a “compelling and extraordinary” circumstance. NRCP 16.1(e)(1); *see also Arnold*, 123 Nev. at 415-16, 168 P.3d at 1053.

The district court failed to consider its own internal delays in determining the impact of Sawyer's conduct in delaying the timely prosecution of the case

Because of the pandemic, all civil jury trials in the Eighth Judicial District Court were stayed effective March 13, 2020, and this stay remained in effect until at least February 1, 2021, when Chief Judge Linda Marie Bell authorized a limited return of jury trials.¹⁰ Thus, even if Sawyer had conducted a timely early case conference, the case would not have been able to proceed to trial at the time of dismissal. *See Dornbach*, 130 Nev. at 311, 324 P.3d at 373 (stating that “the district court’s internal delays are relevant” when considering case management under the *Arnold* factors). Therefore, as discussed above, given the compelling and extraordinary circumstance of the COVID-19 pandemic, any delay during the summer of 2020 in conducting an early case conference did not impede the timely prosecution of the case.

Additionally, under the 2019 amendment to NRCP 16, the district court now has the responsibility to take an active role in case management, including scheduling and planning.¹¹ *See generally* NRCP 16 and NRCP 16(b)(1) (“Except in categories of actions exempted by local rule, the court must, after consulting with the attorneys for the parties and any unrepresented parties by a scheduling conference, case conference,

¹⁰*See* Administrative Order 20-01 signed by Chief District Court Judge Linda Marie Bell on March 13, 2020 (limiting hearings in the Eighth Judicial District Court); Administrative Order 20-13, signed April 16, 2020 (renewing the March 13 order); Administrative Order 21-01, signed January 12, 2021 (allowing a limited return to civil jury trials).

¹¹*See In re Creating a Comm. to Update and 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).

telephone conference, or other suitable means, enter a scheduling order.”). Other than to impose the June and July deadlines on Sawyer (which did not provide any leeway based on the COVID-19 restrictions), the court does not appear to have actively engaged in case management pursuant to NRCP 16, as required.

The district court failed to take into account the defendants’ own delays in moving the case forward

Sawyer filed his complaint on May 14, 2019, but the defendants failed to answer until February 28, 2020, after Sawyer filed a notice of intent to take default. Thus, the defendants themselves arguably contributed to the overall delay in moving this case forward, something the district court failed to account for in dismissing Sawyer’s case. *See Arnold*, 123 Nev. at 415, 168 P.3d at 1053 (instructing courts to consider whether the defendant caused the delay when contemplating dismissal under NRCP 16.1(e)). Further, Sawyer’s responsibilities under NRCP 16.1 did not begin until the defendants filed their answers. *See Dougan*, 108 Nev. at 522, 835 P.2d at 799 (noting that it would be “fruitless” to attempt an early case conference before the defendants had filed their answers). Therefore, at the time the district court dismissed the case in September 2020, nearly one year of any delay in moving the case forward after the filing of the complaint was due to the defendants’ own delays in filing their answers.

The district court failed to fully consider Sawyer’s efforts to comply with discovery and NRCP 16.1

In this case, Sawyer made significant efforts to move his case forward by making initial NRCP 16.1 disclosures of over 1,000 pages of medical records, preparing a proposed joint case conference report, and ultimately retaining counsel who were ready, willing, and able to proceed with the case in September, including desiring to participate in a case

conference, *before* the court dismissed the case—effectively with prejudice—at the show cause hearing. However, the district court seemingly ignored Sawyer’s efforts choosing instead to impose case-terminating sanctions pursuant to NRCP 16.1(e). In so doing, the district court imposed an unfairly punitive sanction on a *participating* litigant and his new counsel in contravention of both the spirit and purpose of NRCP 16.1. *Arnold*, 123 Nev. 410, 168 P.3d 1050. To conclude otherwise would be to endorse an “overly strict application” of the rules and “defeat the very ends of justice that the rules are designed to promote.” *Dougan*, 108 Nev. at 523, 835 P.2d at 799.

Given the district court’s failure to consider the *Young* and *Arnold* factors in dismissing Sawyer’s complaint, its failure to follow the deadlines established under NRCP 16.1, and based on the totality of the circumstances discussed above, in my view, the district court abused its discretion in dismissing the case as a case terminating sanction pursuant to EDCR 7.60(b), *see Young*, 106 Nev. at 92, 787 P.2d at 780, (stating that the ultimate sanction of dismissal should “be imposed only after thoughtful consideration of all the factors involved in a particular case”), as well as pursuant to NRCP 16.1(e). Thus, I would reverse and remand this matter to the district court to permit the parties to conduct an early case conference and file a joint case conference report with the input of the district court as required under NRCP 16. And because my colleagues have determined that the district court’s dismissal order should be affirmed despite the circumstances discussed above, I respectfully dissent.


_____, J.
Bulla

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