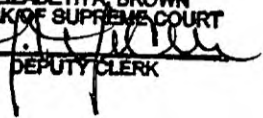


IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL TOH KOK SOON, AN
INDIVIDUAL,
Appellant,
vs.
ALEXANDER HENDERSON, AN
INDIVIDUAL; AND TOGA LIMITED, A
NEVADA CORPORATION,
Respondents.

No. 85115

FILED
AUG 14 2024
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district order granting summary judgment in a shareholder derivative action. Eighth Judicial District Court, Clark County; Joanna S. Kishner, Judge; Michael A. Cherry, Senior Judge.

Respondent Toga, Ltd., is a Nevada-incorporated company that primarily conducts its activities in Asia. Appellant Michael Toh Kok Soon was Toga's CEO while respondent Alexander Henderson was its CFO. Henderson's employment agreement stipulated that if he resigned for "Good Reason," Toga would pay him an amount equal to his salary. In 2021, a memorandum from Toga's China-based counsel raised concerns that Toga's subsidiary entities violated Chinese law. Henderson provided the company thirty days to cure the alleged illegal dealings or accept his resignation. After thirty days without a cure, Henderson submitted his resignation, maintaining that good reason existed and requesting a settlement pursuant to his employment contract. Henderson called a special board meeting to discuss his resignation and authorize the settlement agreement. Although Toh alleged that he did not get notice of the meeting, the meeting proceeded and the board approved the settlement.

Because Toh disputed the special board's action, the independent directors called for additional special board meetings, resulting in five special meetings over the course of several months in which the board ratified Henderson's settlement agreement and decided to remove Toh as chairman of the board, CEO, and president by a majority of disinterested board members. In response, Toh filed a derivative lawsuit, asserting tort and contract claims. After Toh unsuccessfully moved for a temporary restraining order and preliminary injunction, he moved to disqualify Henderson and Toga's counsel and for voluntary dismissal pursuant to NRCP 41(a)(1). The district court denied the motion for voluntary dismissal because Henderson and Toga had already filed an answer. In response, Toh moved for voluntary dismissal pursuant to NRCP 41(a)(2), and Henderson moved for summary judgment. While the motions for voluntary dismissal and summary judgment were pending, Toh moved again to disqualify opposing counsel. The district court denied Toh's motion for voluntary dismissal, concluding that Toh failed to provide notice of the motion to the shareholders. Toh then renewed the motion for voluntary dismissal.

Ultimately, the district court granted summary judgment in favor of respondents. The district court did not rule on the renewed motion for voluntary dismissal or the motions to disqualify counsel. Toh appeals.

Standard of review

We review a district court's grant of summary judgment de novo, and summary judgment is appropriate when there is no genuine dispute of material facts. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). All judgment, evidence, and any reasonable

inferences “must be viewed in a light most favorable to the nonmoving party.” *Id.*

The district court properly granted summary judgment on procedural grounds

The district court granted the motion for summary judgment on both procedural and substantive grounds. It granted summary judgment on procedural grounds because Toh untimely opposed the motion pursuant to EDCR 2.20. It also found that Toh failed to make a demand on the board before filing suit pursuant to NRCP 23.1. Toh waived the issue of whether he untimely opposed the motion because he failed to argue it before this court. *See Pelkola v. Pelkola*, 137 Nev. 271, 273, 487 P.3d 807, 809 (2021) (explaining that the court relies on the parties to present issues); *Senjab v. Alhulaibi*, 137 Nev. 632, 633-34, 497 P.3d 618, 619 (2021) (explaining that the court “will not supply an argument on a party’s behalf but review only the issues the parties present”). As to the second point, Toh argued for the first time in his reply brief to this court that a demand upon the board would have been futile. He, therefore, waived this issue because this court may not consider arguments raised for the first time in a reply brief. *See Khoury v. Seastrand*, 132 Nev. 520, 530 n.2, 377 P.3d 81, 88 n.2 (2016).

Accordingly, we conclude that Toh has failed to demonstrate that the district court erred in granting summary judgment on procedural grounds. We nonetheless examine the district court’s substantive ruling.

The district court properly granted summary judgment on substantive grounds

Toh argues that the district court improperly found that there were no disputed issues of material fact, including that Henderson and the board of directors cancelled a special stockholders’ meeting and improperly removed Toh as an officer.

Toga's bylaws state that only the chairman can call special meetings, but if the chairman "refuses or neglects to call such special meeting, a special meeting may be called by a written request signed by the Lead Independent director or at least a majority of the directors in office."

We conclude that Toh only disputes immaterial facts. The material facts in this case instead include the validity of Henderson's settlement agreement and whether the board properly called at least one of the special meetings, and we conclude they are not disputed facts. Although Henderson and the directors improperly called the first and second meetings, they properly called the third one. In that case, they requested in writing that the board hold a special board meeting, and Toh never called the third meeting and refused to attend it. Because Toh refused to call or attend that meeting, and Henderson and the board formally requested the meeting in an email, they properly called the third meeting. In addition to being properly noticed, the board also established a quorum and approved the settlement with a majority vote. As a result, the settlement agreement is valid and there is no issue of material fact.¹

Accordingly, because there is no issue of material fact, the district court did not err in granting summary judgment on substantive grounds.

The district court properly denied the NRCP 56(d) request

Toh argues that the district court erred in denying his request to conduct discovery under NRCP 56(d) because available records contained

¹Toh also alleges that Henderson provided meeting minutes that are unverified and unsigned. We conclude that this argument, however, is not cogently argued and need not address it here. *See Edwards v. Emperors Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006).

further evidence about Henderson’s alleged improprieties, and Toh complied with all of NRCP 56(d)’s requirements.

NRCP 56(d) permits a district court to grant a continuance when facts are unavailable to the nonmovant seeking the continuance, so the court may (1) defer considering or deny the motion, (2) allow more time to obtain declarations or take discovery, “or (3) issue any other appropriate order.” The nonmovant must show why he cannot respond to the motion for summary judgment and how a “postponement of a ruling on the motion would enable him” to rebut the allegation of a genuine issue of fact. *Sciarratta v. Foremost Ins. Co.*, 137 Nev. 327, 333, 491 P.3d 7, 12 (2021) (internal quotation marks omitted). Whether to continue a matter pursuant to NRCP 56(d) is reviewed for an abuse of discretion. *Id.*

We conclude that the district court did not abuse its discretion in denying Toh’s NRCP 56(d) request. Toh failed to demonstrate that any new discovery would raise a genuine dispute of material fact to invalidate Henderson’s settlement agreement. While Toh argues that he did not have access to redacted documents and that “[t]here was substantial missing information in the record,” he fails to argue what these documents were and how they would demonstrate a genuine dispute of material fact. His opposition to summary judgment also failed to set forth any facts that would show a genuine dispute of material fact. He stated that he needed “to gather evidence and to take key depositions” without explaining what the evidence would show or what key depositions would reveal. We therefore conclude that the district court did not err because Toh failed to demonstrate how further discovery would allow him to prove the existence of disputed material facts.

The district court did not abuse its discretion when it failed to address Toh’s motions to disqualify opposing counsel

Toh argues that Henderson and Toga's counsel should have been disqualified because their counsel was not authorized to represent both an organization and its former employee in a shareholder derivative action, which created a conflict of interest. Henderson argues that this court lacks jurisdiction over Toh's disqualification claim because the district court did not rule on Toh's motions.

Henderson's jurisdictional argument presents a threshold issue. A district court's failure to rule on a request constitutes a denial of the request. *See Bd. of Gallery of History, Inc. v. Datecs Corp.*, 116 Nev. 286, 289, 994 P.2d 1149, 1150 (2000) (request for attorney fees and costs); *see also Weiler v. Ross*, 80 Nev. 380, 382, 395 P.2d 323, 323 (1964) (holding that the district court's refusal to rule upon a motion had the effect of denying the motion). We, therefore, address whether the district court abused its discretion in denying the disqualification motions.

"District courts have broad discretion in determining whether disqualification is required in a particular case." *Nelson v. Eighth Jud. Dist. Ct.*, 138 Nev., Adv. Op. 82, 521 P.3d 1179, 1183 (2022). NRPC 1.7(a) prohibits a lawyer from representing "a client if the representation involves a concurrent conflict of interest." Such a conflict exists if "[t]here is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." NRPC 1.7(a)(2).

"The party seeking to disqualify bears the burden of establishing that it has standing to do so." *Liapis v. Second Jud. Dist. Ct.*, 128 Nev. 414, 420, 282 P.3d 733, 737 (2012). Under NRPC 1.7, the general rule is that only a former or current client may bring an action to disqualify

counsel on the basis of a conflict of interest. In some circumstances, however, a nonclient may move to disqualify an attorney if a breach of ethics impacts the nonclient moving party's interest in lawfully determining their claims or if there is a breach of confidentiality owed to the complaining party. *Liapis*, 128 Nev. at 420-21, 282 P.3d at 737-38. The district court must also "balance the prejudices that will inure to the parties as a result of its decision." *Brown v. Eighth Jud. Dist. Ct.*, 116 Nev. 1200, 1205, 14 P.3d 1266, 1270 (2000). The moving party must "establish at least a reasonable possibility that" an identifiable impropriety occurred, and that this impropriety outweighs the interests served by a lawyer's continued participation in the case. *Id.* (internal quotation marks omitted).

First, we conclude that Toh lacked standing to move to disqualify either Henderson or Toga's counsel. Toh was not a former or current client of Henderson or Toga's attorneys. Neither party alleges that Toh ever had a confidential or fiduciary relationship with them. Furthermore, Toh fails to argue that the litigation affected his ability to assert his rights or that the litigation infected his personal interest.

Second, no identifiable impropriety occurred. Toh alleges that Toga's and Henderson's attorneys accessed confidential and privileged information in their representation of both parties because one of Henderson's attorneys had previously worked at the same law firm as Toga's counsel, but Toga's counsel indicated that both Toga and Henderson waived any potential conflict of interest, and Toh never had access to this confidential information as he was always an adverse party. Toh alleges improper actions taken on behalf of Toga but does not offer specific examples. Without specific examples, Toh cannot establish a reasonable possibility that impropriety occurred.

Third, Toh did not establish that he was prejudiced by either Henderson or Toga's counsel's continued participation as counsel. *See id.* at 1206, 14 P.3d at 1270 (providing that disqualification is not warranted where there is no evidence of prejudice in the attorney's continued participation). Accordingly, we conclude that the district court did not abuse its discretion regarding disqualification.

The district court did not abuse its discretion in denying Toh's motions for voluntary dismissal

Toh argues that he diligently and promptly moved for voluntary dismissal and that no notice was required to the shareholders before granting voluntary dismissal under NRCP 23.1.

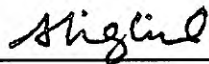
We review a district court's order granting voluntary dismissal for an abuse of discretion. *In re Petition of Phillip A.C.*, 122 Nev. 1284, 1290, 149 P.3d 51, 55 (2006). Under NRCP 41(a)(2), a court may dismiss a case at the plaintiff's request. Under NRCP 23.1, a derivative action "may not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise must be given to shareholders or members in such manner as the court directs." A failure to provide shareholder notice when dismissing a case violates a party's procedural due process right. *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 644 n.71, 137 P.3d 1171, 1186 n.71 (2006), *abrogated on other grounds by Guzman v. Johnson*, 137 Nev. 126, 483 P.3d 531 (2021).

We conclude that the district court did not abuse its discretion in denying Toh's motion for voluntary dismissal because Toh did not provide notice to shareholders. Under NRCP 23.1, notice of the proposed dismissal "must" be given to the shareholders. The plain reading of the rule requires notice to shareholders. Because Toh failed to provide notice to shareholders

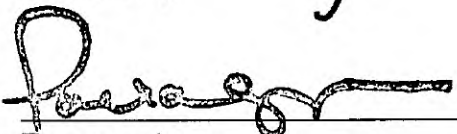
before filing his motion for voluntary dismissal, the district court did not abuse its discretion in denying the motion.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Stiglich


_____, J.
Pickering


_____, J.
Parraguirre

cc: Chief Judge, The Eighth Judicial District Court
Hon. Joanna S. Kishner, District Judge
Hon. Michael A. Cherry, Senior Judge
Dana Jonathon Nitz, Settlement Judge
Cory Reade Dows & Shafer
Beckstrom & Beckstrom, LLP
Chasey Law Offices
The Powell Law Firm
Eighth District Court Clerk