

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARY JANE PICAZO AND HOSPICIO
LACAYANGA,

Appellants,

vs.

THE CIRCUS AND ELDORADO JOINT
VENTURE, D/B/A THE SILVER

LEGACY CASINO,

Respondent.

No. 40804

FILED

JUL 01 2004

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

Appeal from a district court order dismissing a complaint for failure to comply with discovery requirements pursuant to NRCP 16.1. Second Judicial District Court, Washoe County; Janet J. Berry, Judge.

Appellants Mary Jane Picazo and her husband, Hospicio Lacayanga, (jointly Picazo) brought a personal injury action against respondents The Circus and Eldorado Joint Venture, d/b/a the Silver Legacy Casino, (Silver Legacy) arising out of a slip and fall incident at the Silver Legacy. Picazo, a California resident, retained a California law firm to represent her in this matter. The associate working on Picazo's case left the firm, and alleged calendaring mistakes precluded his successor from timely scheduling an NRCP 16.1 case conference and filing an NRCP 16.1 case conference report. On the Silver Legacy's motion, the district court dismissed Picazo's complaint without prejudice. Because the applicable statute of limitations had run, Picazo could no longer pursue the claim.

On appeal, Picazo argues that the district court abused its discretion in dismissing her complaint because the running of the statute of limitations forever deprived Picazo of her day in court.

FACTS

The underlying personal injury action arose out of a slip and fall incident. On April 30, 2000, Picazo, a guest at the Silver Legacy, slipped on an oily substance present on a pedestrian walkway inside the hotel. Picazo allegedly suffered serious injuries as a result of the fall, including herniated disks in her spine. Picazo underwent one surgery and may undergo additional surgeries in the future. On December 14, 2001, Picazo filed a personal injury action against the Silver Legacy, alleging that the Silver Legacy negligently caused her injuries. Picazo's complaint also stated that her husband suffered loss of consortium as a result of the incident. Picazo stated that the cost of her injuries exceeded \$40,000.00 and requested an exemption from the mandatory court-annexed arbitration program, which the district court granted.

On December 27, 2001, the Silver Legacy filed motions to disqualify Picazo's counsel and to dismiss Picazo's complaint. The motion rested on the fact that Picazo had retained the Law Offices of John D. Winer, a California law firm, to represent her in this matter. Although Picazo's complaint listed John D. Winer, Felicia C. Curran, and Peter F. Lacques as her counsel, none of these attorneys were licensed to practice law in Nevada nor had they applied for limited admission. While Picazo's complaint also listed Mark H. Gunderson,¹ a Nevada attorney, as a counsel of record, Lacques signed the complaint. Picazo responded that her California attorneys intended to apply for a pro hac vice admission,

¹Other than this listing, Gunderson has not appeared in the instant case.

but before they complied with SCR 42 requirements, Lacques inadvertently signed and filed the complaint.

On February 1, 2002, Brian R. Morris, an attorney licensed to practice in Nevada, filed an amended complaint on Picazo's behalf. The Silver Legacy responded by filing a demand for security of costs because Picazo resided in California, with which Picazo complied. On February 25, 2002, the Silver Legacy answered Picazo's amended complaint and withdrew its motion to dismiss. On April 18, 2002, Picazo moved to associate her California counsel, which the district court granted. As a result, three attorneys represented Picazo: Winer, Lacques, and Morris.²

On May 15, 2002, the parties appeared in court and set trial for March 3, 2003. On September 12, 2002, the Silver Legacy filed a motion to dismiss Picazo's case for failure to comply with NRCP 16.1. The Silver Legacy based its motion on Picazo's failure to schedule an NRCP 16.1 joint case conference and to file an NRCP 16.1 conference report. Picazo agreed that she had failed to comply with NRCP 16.1, but alleged that Lacques, one of her California attorneys, had unexpectedly left the firm. Because Lacques was primarily responsible for overseeing the case, his abrupt departure caused calendaring mistakes in the matter. Picazo asserted that the new attorney who inherited the case had been diligently working on collecting medical records and would produce them to the Silver Legacy within a few days. Picazo also argued that although NRCP 16.1 authorized dismissal "without prejudice," dismissing the case would, in effect, be "with prejudice" because the applicable statute of limitations had run on April 30, 2002.

²Curran never appeared in this matter.

On December 10, 2002, after receiving the Silver Legacy's opposition, the district court granted the Silver Legacy's motion to dismiss Picazo's complaint "without prejudice." The court found no "compelling and extraordinary circumstances' to explain Picazo[s] . . . failure to follow the rules of court." The district court concluded that

Picazo[s] . . . delay in prosecuting . . . has left the Silver Legacy with minimal time to form a defense. Additionally, due to the transient nature of employment in the casino industry, the longer it takes this case to go to trial, the more likely the employees with knowledge of the alleged incident may no longer be accessible to the Silver Legacy, which may serve to prejudice the defense.

This appeal followed.

DISCUSSION

Standard of review

We review a district court's decision to impose discovery sanctions for abuse of discretion.³ However, "if the sanction imposed is that of dismissal with prejudice, a somewhat heightened standard of review applies."⁴

NRCP 16.1 dismissal

Picazo argues that the district court erred in dismissing her case without prejudice because the dismissal effectively barred Picazo from pursuing her claim due to the running of the applicable statute of limitations. We conclude that Picazo's argument lacks merit.

³GNLV Corp. v. Service Control Corp., 111 Nev. 866, 869, 900 P.2d 323, 325 (1995).

⁴Id.

NRCP 16.1 provides that "[w]ithin thirty (30) days after service of the answer by the first answering defendant, . . . the attorneys for the parties . . . shall meet in person for the purpose of,"⁵ among other things, exchanging documents to be used in support of the allegations or denials of the parties, exchanging lists of persons who may have pertinent information, proposing a discovery schedule, and discussing possible action settlement.⁶ Pursuant to NRCP 16.1(a), "[t]he attorney for the plaintiff shall designate the time and place of each meeting." The attorneys for the parties may agree to extend the time for a conference for no more than ninety days.⁷ NRCP 16.1 permits the court to grant additional time for compliance, but "[a]bsent compelling and extraordinary circumstances, neither the court nor the parties may extend the time to a day more than one hundred and eighty (180) days after service of the summons and complaint upon the defendant in question."⁸ If the mandatory case conference does not materialize within 180 days after service of the summons and complaint, the court may dismiss the case without prejudice, unless compelling and extraordinary circumstances justify a continuance.⁹ NRCP 16.1(e)(2) also provides for dismissal without prejudice "[i]f the plaintiff does not file a case conference report

⁵NRCP 16.1(a).

⁶NRCP 16.1(b).

⁷NRCP 16.1(a).

⁸Id.

⁹NRCP 16.1(e)(1).

within two hundred and forty (240) days after the service of a summons and complaint upon a defendant."

Picazo claims that the district court abused its discretion in dismissing the case because NRCP 16.1 did not authorize dismissal "with prejudice" and the running of the applicable statute of limitations rendered the dismissal "with prejudice." Because the district court's decision effectively precluded Picazo from pursuing her claim, Picazo argues that the district court should have considered the factors we outlined in Young v. Johnny Ribeiro Building.¹⁰ Picazo asserts that the district court should have granted an extension allowing Picazo to comply with NRCP 16.1 because the statute of limitations bar and Lacques' unexpected departure constituted "compelling and extraordinary circumstances" justifying the extension. Picazo argues that the numerous procedural roadblocks the Silver Legacy placed during the first five months of litigation render the circumstances of the case even more extraordinary and compelling. Picazo claims that the district court's decision to dismiss the case constituted abuse of discretion because the district court allegedly failed to consider less onerous sanctions. Because there was no evidence of intentional and flagrant non-compliance with procedural rules, Picazo's actions did not warrant dismissal.

¹⁰106 Nev. 88, 787 P.2d 777 (1990). In Young, we set out an inexhaustive list of eight factors that a court should consider before using dismissal as a sanction: (1) the offending party's degree of willfulness; (2) whether the non-offending party would be prejudiced by lesser sanctions; (3) the severity of dismissal relative to the severity of the abusive conduct; (4) irreparable loss of evidence; (5) the feasibility and fairness of less severe sanctions; (6) the policy favoring substantive adjudication; (7) whether sanctions unfairly penalize a party for counsel misconduct; and (8) the need for deterrence. Id. at 93, 787 P.2d at 780.

Although Picazo admits that her counsel should have scheduled an NRCP 16.1 conference and filed an NRCP 16.1 report, Picazo contends that their conduct constituted excusable neglect. Picazo also maintains that the Silver Legacy had failed to show prejudice from Picazo's failure to comply with NRCP 16.1 and thus dismissal was unduly harsh. Finally, Picazo asserts that strong public policy favors adjudication on the merits and the district court erred in precluding her from pursuing the claim. We find Picazo's contentions unpersuasive.

As an initial matter, it is unclear why both parties refer to NRCP 37. While NRCP 16.1(e)(3)(A) allows the district court to impose sanctions available under NRCP 37(b)(2), NRCP 37(b)(2) pertains to a party's failure to obey an order to provide or permit discovery. There is no evidence of such an order in the instant case. The controversy revolves around Picazo's neglect to schedule a case conference and provide a case report.

Turning to NRCP 16.1, we emphasize that Picazo does not dispute her failure to comply with NRCP 16.1. Consequently, we will first address Picazo's contention that NRCP 16.1 did not authorize the district court's actions because the running of the statute of limitations rendered the dismissal "with prejudice." This argument is unavailing because the district court's decision specifically stated the dismissal was "without prejudice," as NRCP 16.1 authorizes. Although the district court presumably knew that the statute of limitations had run, NRCP 16.1 does not contain an exception for such situations. The district court's right to dismiss a complaint without prejudice under NRCP 16.1 does not hinge on the timeliness of a party's litigation conduct. Picazo is essentially arguing that a district court may not dismiss a case without prejudice after the

statute of limitations has run and must always consider the Young factors applicable to dismissal with prejudice. NRCP 16.1 does not impose such a burden upon the district court. If the rule drafters intended to impress such responsibility upon the district court, they would have included respective language in the rule.

Picazo's next contention, that the district court should have granted her an extension because the statute of limitations bar and Lacques' departure constituted "compelling and extraordinary circumstances," is inapposite for two reasons. First, NRCP 16.1(e)(2), which permits the district court to dismiss a complaint without prejudice for failure to file a case conference report within 240 days of service of the summons and complaint, does not contain a "compelling and extraordinary circumstances" exception. Thus, NRCP 16.1(e)(2) provides independent grounds for upholding the district court's decision.

Second, the district court did not abuse its discretion in determining that the statute of limitations and Lacques' departure did not warrant an extension. The statute of limitations argument lacks merit because Picazo attempts to justify her failure to comply with NRCP 16.1 with the punishment she received for such failure. Also, Lacques' departure does not excuse Picazo's lack of compliance. Picazo's brief indicates that Lacques left the California law firm after his pro hac vice admission in Nevada. The district court's order permitting Lacques' association in this matter was dated May 20, 2002. Because the Silver Legacy filed its answer on February 25, 2002, Lacques had ample opportunity to schedule a case conference and file a case report. Second, although Lacques may have been the attorney primarily overseeing the case, Picazo had enlisted the services of two other attorneys: Winer and

Morris. Both of these attorneys had a duty to monitor the case development and promptly comply with discovery deadlines. Furthermore, mere calendaring mistakes and procedural obstacles do not constitute "compelling and extraordinary circumstances" justifying an NRCP 16.1 violation.

Although Dougan v. Gustaveson, the only published decision addressing sanctions for failure to comply with NRCP 16.1, does not define "compelling and extraordinary circumstances," it discusses other pertinent considerations.¹¹ In Dougan, we reversed the district court's order dismissing a complaint for failure to comply with NRCP 16.1, where the statute of limitations had run.¹² However, Dougan is factually distinguishable from the instant case. In Dougan, the defendants did not submit their answers until well after the case conference deadline because of an open extension of time the district court had granted to both defendants. In such circumstance, we concluded that holding a case conference would have been "fruitless."¹³

Unlike Dougan, the Silver Legacy filed its answer on February 25, 2002, only twenty-four days after Picazo filed her amended complaint and well within the permissible case conference period. Furthermore, the plaintiff in Dougan had attempted to comply with the requirements of NRCP 16.1 by submitting a unilateral case conference report, actually scheduling a case conference, and writing to the defendants to request

¹¹108 Nev. 517, 835 P.2d 795 (1992), abrogated on other grounds by Scrimmer v. Dist. Ct., 116 Nev. 507, 998 P.2d 1190 (2000).

¹²Dougan, 108 Nev. at 519, 521-22, 835 P.2d at 796, 798-99.

¹³Id. at 522, 835 P.2d at 799.

documents associated with the conference.¹⁴ Distinguishable from Dougan, Picazo did not attempt to comply with NRCP 16.1, but merely neglected the rule's mandates. Picazo's contentions that she demonstrated an effort to comply with NRCP 16.1 because Lacques' successor had been gathering medical records and was prepared to produce them shortly thereafter are unpersuasive. There is no showing that Picazo took steps to meet and confer with the Silver Legacy or attempted to set up a case management plan. Despite the competing policy supporting resolution on the merits, another strong policy favors prompt compliance with NRCP 16.1.¹⁵

Dougan also addresses Picazo's contention that the district court improperly dismissed her complaint because the Silver Legacy failed to show prejudice. One of the reasons for reversal we articulated in Dougan was that the defendants "[f]ailed to show any prejudice that they suffered because of Dougan's accommodation of their requests for extensions."¹⁶ The district court's order in the instant case stated that "due to the transient nature of employment in the casino industry, the longer it takes this case to go to trial, the more likely the employees with knowledge of the alleged incident may no longer be accessible to the Silver Legacy, which may serve to prejudice the defense." On its face, the district court's reasoning appears to deviate from Dougan's reasoning because it

¹⁴Id. at 522, 835 P.2d at 798.

¹⁵Id. at 522-23, 835 P.2d at 799.

¹⁶Id. at 522, 835 P.2d at 799.

hinges on the possibility of prejudice. However, Picazo's repeated procedural violations justify the district court's exercise of discretion. Although the district court failed to articulate specific grounds of prejudice to the Silver Legacy, it nevertheless reached the correct result. Consequently, we decline to disturb the district court's ruling.

Picazo's reliance on Finkelman v. Clover Jewelers Boulevard, Inc.¹⁷ and Young v. Johnny Ribeiro Building¹⁸ for the contention that the district court should have considered the imposition of less severe sanctions is inapposite. Both Finkelman and Young are distinguishable because neither involved NRCP 16.1 sanctions. Finkelman concerned the entry of a default after the district court deemed a party's discovery responses unintelligible. We reversed the district court's default entry because default was too drastic a remedy where the party had attempted to comply with discovery.¹⁹ Unlike Finkelman, Picazo did not even attempt to schedule a case conference or prepare a case report. Picazo merely neglected the guidelines of NRCP 16.1. Young is also distinguishable because it involved a dismissal with prejudice under NRCP 37 for willful fabrication of evidence.²⁰ Unlike Finkelman and Young, the district court dismissed the case under NRCP 16.1. In light of

¹⁷91 Nev. 146, 532 P.2d 608 (1975).

¹⁸106 Nev. 88, 787 P.2d 777 (1990).

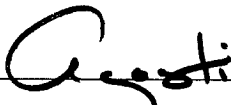
¹⁹Finkelman, 91 Nev. at 147-48, 532 P.2d at 609.

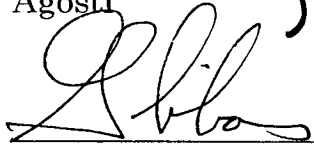
²⁰106 Nev. at 91-92, 787 P.2d at 779.

the foregoing, we cannot say that the district court abused its discretion in dismissing Picazo's complaint.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Agosti


_____, J.
Gibbons

cc: Hon. Janet J. Berry, District Judge
Lemons Grundy & Eisenberg
Brian R. Morris
McDonald Carano Wilson LLP/Reno
Washoe District Court Clerk

BECKER, J., dissenting:

Pursuant to Dougan v. Gustaveson,¹ I would reverse for lack of a finding of prejudice by the district court and remand for imposition of lesser sanctions.

Becker, J.
Becker

¹108 Nev. 517, 835 P.2d 795 (1992), abrogated on other grounds by Scrimmer v. Dist. Ct., 116 Nev. 507, 998 P.2d 1190 (2000).