

IN THE SUPREME COURT OF THE STATE OF NEVADA

NUVEDA, LLC,

Appellant,

v.

JENNIFER GOLDSTEIN,

Respondent.

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Supreme Court Case No: 79806
District Court Case No: A-15-728510-B

APPEAL

From the Eighth Judicial District Court, Clark County
The Honorable ELIZABETH GONZALEZ, District Judge
District Court Case No. A-15-728510-B

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

Appellant NuVeda, LLC hereby certifies that there are no known interested parties other than those disclosed herein. Appellant NuVeda, LLC further certifies that it does not have a parent corporation and no publicly held corporation owns more than 10% of Appellant NuVeda, LLC's membership interest. The names of all law firms and attorneys who have appeared on NuVeda, LLC's behalf in this matter are as follows:

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Dated this 4th of March, 2020.

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JURISDICTIONAL STATEMENT

This court has jurisdiction over this matter pursuant to NRAP 3A(b)(1), which provides for jurisdiction over final judgments. Written notice of entry of the district court's *Findings of Fact, Conclusions of Law and Order: (1) Granting Plaintiff Jennifer M. Goldstein's Motion to Continue Hearing on NuVeda, LLC's Motion to Vacate Arbitration Award and to Extend Briefing Deadlines; (2) Denying Defendant NuVeda, LLC's Motion to Vacate Arbitration Award; and (3) Confirming the Arbitration Award* was served on September 9, 2019. Appellant NuVeda, LLC ("NuVeda") timely appealed from this final order on October 9, 2019.

ROUTING STATEMENT

Pursuant to NRAP 28(a)(5), Appellant states that this case originates in business court. Therefore, pursuant to NRAP 17(a)(9), the Supreme Court shall hear and decide this case.

ISSUE PRESENTED

Did the District Court err in granting Respondent's motion to extend briefing deadlines where Respondent failed to timely provide points and authorities in support of the motion as required by applicable court rule and where the Respondent failed to establish excusable neglect?

I. STATEMENT OF THE CASE

This is an appeal from an order granting Respondent Jennifer Goldstein's ("Goldstein") motion to extend briefing deadlines as said deadline related to NuVeda's motion to vacate arbitration award. Goldstein was a former member of NuVeda who commenced action against the company regarding Goldstein's separation from NuVeda, among other allegations. At the final hearing in an arbitration proceeding governed by the American Arbitration Association and its rules, the sole issue for determination was the value of Goldstein's ownership interest in NuVeda at the time she was expelled from the company. Less than one month before the arbitration hearing, Goldstein disclosed an initial expert report. The disclosure was late according to the Arbitrator's operative scheduling order, and therefore, NuVeda submitted a motion to strike the expert report. The Arbitrator ultimately denied the motion, and the arbitration hearing was conducted allowing the testimony of Goldstein's expert. The Arbitrator issued a final award in favor of Goldstein which relied upon the expert report at issue in the motion to strike.¹

As such, on June 18, 2019, NuVeda filed a motion to vacate arbitration award with the District Court based on the Arbitrator's erroneous decision to allow the expert testimony and the Arbitrator's manifest disregard for both the law and

¹ These facts are set forth in *NuVeda, LLC's Motion to Vacate Arbitration Award* (JA 00882-00890).

scheduling order. Goldstein failed to timely oppose the motion to vacate. Eventually, Goldstein filed a motion to continue the hearing date and motion to extend the briefing deadlines, but said motion failed to provide any points and authorities in support of Goldstein's motion to extend and failed to establish excusable neglect, which is required pursuant to local rule. Before the hearing, Goldstein filed a rogue opposition to the motion to vacate, nearly one month after it was originally due. The District Court – without entertaining argument regarding the applicable standard or timeliness of the motion – granted Goldstein's motion to extend briefing deadlines, and subsequently denied NuVeda's motion to vacate the arbitration award leading to the confirmation of the arbitration award.

NuVeda now brings the instant appeal seeking review of the District Court's decision and requests that the rules of procedure be duly enforced. There is a history of Goldstein blatantly disregarding the operative deadlines in this adversary proceeding, with the most recent violation being the issue on appeal - Goldstein did not timely oppose the motion vacate and then filed a defective motion to extend. As set forth herein, the District Court failed to apply the appropriate standard to Goldstein's motion to extend and Goldstein failed to show excusable neglect for filing an untimely motion to extend as required by EDCR 2.25 and NRCP 6. The District Court should have denied the motion to extend, which mandates that the motion to vacate be granted, or at minimum, that the rogue opposition be stricken.

II. STATEMENT OF FACTS

A. NuVeda's Motion to Vacate Arbitration Award

On June 17, 2019 – and within the statutorily prescribed time within which to file a motion to vacate an arbitration award – Appellant filed NuVeda, LLC's Motion to Vacate Arbitration Award ("Motion to Vacate"). (JA 00880-01461). The Motion to Vacate was based on the Arbitrator's erroneous decision to allow a certain expert's testimony, which manifestly disregarded both the law and scheduling order (JA 00891-00901).

On June 19, 2019, Goldstein's newly retained counsel, Brian Irvine, Esq., participated in a telephone conference with NuVeda's counsel, Jason Wiley, Esq., wherein Mr. Irvine requested an extension for Goldstein to oppose the Motion to Vacate Arbitration Award. (JA 01508-01509 ¶7). During said conference, NuVeda's counsel indicated that he did not have authority to grant the request without receiving consent from NuVeda. (JA 01508-01509 ¶8). Later on June 19, 2019, NuVeda's counsel sent email correspondence to Goldstein's counsel providing that NuVeda was amenable to the extension provided that the accrual of interest was "suspended during the period [counsel needed] to get up to speed, file the response, and [conduct] the hearing on the motion to vacate." (JA 01462).

On June 28, 2019, (*and for purposes relevant hereto, **after** an opposition to NuVeda's Motion to Vacate was due*) Goldstein's counsel sent NuVeda's counsel

correspondence stating that Goldstein was “not willing to suspend the accrual of interest” unless NuVeda deposited the full amount of the judgment into an escrow account pending disposition of the motion to vacate.” (JA 01466).

B. Goldstein’s Motion to Extend Deadlines

On July 1, 2019 (after the date within which to oppose NuVeda’s Motion to Vacate Arbitration Award pursuant to EDCR 2.20), Goldstein filed a *Motion to Continue Hearing on NuVeda, LLC’s Motion to Vacate Arbitration Award and to Extend Briefing Deadlines [First Requested Extension]* (“Motion to Extend”). (JA 01467-01479). The Motion to Extend relies exclusively on EDCR 2.22(d) as the lone points and authorities in asserting that a Court may continue a hearing “upon a showing by motion supported by affidavit or oral testimony that such continuance is in good faith, reasonably necessary and is not sought merely for delay.” (JA 01468). The Motion to Extend further alleges – incorrectly – “[i]n this case, Goldstein has met all three requirements for continuing the July 19, 2019, hearing and extending the briefing deadlines.” (JA01468). Goldstein also asserted – incorrectly – that “the requested continuance and extension of time will [not] have an adverse or prejudicial effect on the interests of any party to this action.” (JA01469).

On July 11, 2019, NuVeda filed its *Opposition to Motion to Continue Hearing on NuVeda, LLC’s Motion to Vacate Arbitration Award and to Extend Briefing Deadlines and Notice of No Opposition to Its Motion to Vacate Arbitration Award*

(“Opposition to Motion to Extend”) (JA 01483-01507). NuVeda’s Opposition to Motion to Extend asserted that that Goldstein’s Motion to Extend is fatally flawed in that it (a) solely relied on EDCR 2.22 which relates to the continuation of hearings as the lone points and authorities in support of Goldstein’s request to extend the deadline dates within which to oppose the motion to vacate; (b) does not cite any points and authorities in support of its petition to extend the briefing schedule; and (c) provides analysis under a “good faith” standard when applicable court rules require the demonstration of excusable neglect. (JA 01488-01492).

On July 16, 2019, Goldstein filed a *Reply in Support of Motion to Continue Hearing on NuVeda, LLC’s Motion to Vacate Arbitration Award and to Extend Briefing Deadlines* (“Reply”) (JA 01510-01530). In the Reply, Goldstein acknowledges “excusable neglect” is the correct standard in petitioning a court for an extension of deadlines once said deadlines have passed and provides legal argument on the same. (JA 01515-01516). The Reply further admits that Goldstein failed to adhere to applicable court rules but argues that there was a reasonable basis for the actions due to a failure of confluence between local rules and the Nevada Rules of Civil Procedure. (JA 01516-01517).

On July 25, 2019, *Plaintiff Jennifer M. Goldstein’s Opposition to NuVeda, LLC’s Motion to Vacate Arbitration Award* (“Opposition to Motion to Vacate”) was filed by Goldstein. (JA 01539-JA02330).

On August 12, 2019, the District Court conducted a hearing on Goldstein's Motion to Extend. (JA 02345-02363). During said hearing, the Court granted the Motion to Extend without entertaining argument from the parties. (JA 02346-02347). Specifically, the District Court determined that Goldstein's counsel was unaware of the applicable rules and suspension of the some of the Eighth District Court Rules because he practices "up north." (JA 02346). However, in so doing, the District Court did not rule – or mention whatsoever – Goldstein's failure to provide any points and authorities in support of the request to extend deadlines as provided in the Motion to Extend (JA 02346-02347).

On September 9, 2019, the District Court's *Findings of Fact, Conclusions of Law and Order: (1) Granting Plaintiff Jennifer M. Goldstein's Motion to Continue Hearing on NuVeda, LLC's Motion to Vacate Arbitration Award and to Extend Briefing Deadlines; (2) Denying Defendant NuVeda, LLC's Motion to Vacate Arbitration Award; and (3) Confirming the Arbitration Award* and notice of entry thereof were filed. (JA 02364-02373).

III. SUMMARY OF ARGUMENT

Since the arbitration proceeding, Goldstein has continually neglected to comply with the operative scheduling orders to the detriment of NuVeda. First, Goldstein blatantly failed to timely disclose an expert report in the arbitration proceeding, yet the Arbitrator erroneously allowed the expert to provide testimony

at the hearing. The Arbitrator's failure to hold Goldstein accountable for the expert disclosure deadline led to NuVeda filing the Motion to Vacate in the District Court. Then, for a second time, Goldstein failed to abide by an imposed scheduling deadline. Goldstein failed to timely file an opposition to the Motion to Vacate within 10 days as required by EDCR 2.20. This failure to oppose should have resulted in the Motion to Vacate being granted pursuant to the same rule.

Ultimately, Goldstein filed an untimely Motion to Extend, relying exclusively on EDCR 2.22(d) as the basis to continue the hearing and allow further time to oppose the Motion to Vacate. However, the Motion to Extend provided incorrect analysis in requesting an extension of time after the deadline to act had passed. EDCR 2.25(a) and NRCP 6(b)(ii) explicitly require that the moving party establish *excusable neglect* for failing to act before a deadline. Excusable neglect was never discussed in the Motion to Extend, nor were EDCR 2.25(a) and NRCP 6(b)(ii) even mentioned. Thus, there were no points and authorities before the District Court that supported an extension of time.

NuVeda filed an Opposition to the Motion to Extend, and eventually, Goldstein filed an Opposition to the Motion to Vacate nearly one month after it was originally due. At the hearing on the matter, the District Court – without entertaining argument on the aforementioned issues regarding the timing of the opposition and appropriate standard – granted Goldstein's motion to extend briefing deadlines, and

subsequently denied NuVeda's Motion to Vacate the arbitration award leading to the confirmation of the arbitration award.

NuVeda now brings this appeal seeking an order requiring that rules of procedure and applicable standard related to extension of time be duly enforced. The District Court's decision should be vacated because the District Court failed to apply EDCR 2.20 to the Motion to Vacate and the appropriate standard to Goldstein's Motion to Extend and because Goldstein cannot establish excusable neglect for filing an untimely Motion to Extend as required by EDCR 2.25 and NRCP 6.

IV. ARGUMENT

A. Standard of Review

This Court reviews a district court's confirmation of an arbitration award *de novo*. *Sylver v. Regents Bank, N.A.*, 129 Nev. 282, 286, 300 P.3d 718, 721 (2013). This Court reviews lower courts' conclusions of law under a *de novo* standard of review. *Phillips A.C. v. Central Council (In re Phillip A.C)*, 122 Nev. 1284, 149 P.3d 51 (2006); *Tore, Ltd. v. Church*, 5 Nev. 449, 451, 705 P.2d 662, 663 (1985).

B. Goldstein Failed to Timely Oppose the Motion to Vacate, and Thus, the Arbitration Award Should Have Been Vacated Forthwith by the District Court.

At the time the Motion to Vacate was filed, EDCR 2.20(e) provided the following:

Within 10 days after the service of the motion, and 5 days after service of any joinder to the motion, **the opposing party must serve and file**

written notice of nonopposition or **opposition thereto, together with a memorandum of points and authorities and supporting affidavits**, if any, stating facts showing why the motion and/or joinder should be denied. Failure of the opposing party to serve and file written opposition may be construed as an admission that the motion and/or joinder is meritorious and a consent to granting the same. *See* EDCR 2.20(e).²

The Motion to Vacate was filed on June 17, 2019. (JA 00880-01461) Therefore, according to the plain language of the aforementioned rule, Respondent had until June 27, 2019 to file an opposition. No opposition was filed by that date. Therefore, the Motion to Vacate should have been granted by the Court. It is well established that failure to timely oppose a motion is grounds to grant the pending motion. *See Foster v. Dingwall*, 126 Nev. 56, 62, 227 P.3d 1042, 1046 (2010).

Furthermore, the untimely Opposition to Motion to Vacate filed by Respondent on July 25, 2019 should have been stricken. (JA 01539-02320). EDCR 2.20(e) clearly requires that opposing points and authorities must be filed within 10 days of the filing of the motion. There was no order extending the briefing schedule entered at the time the tardy opposition was filed. Nor was any order entered prior to the hearing on the Motion to Vacate.³ Therefore, at minimum, the District Court

² EDCR 2.20 was amended on January 1, 2020 and now allows 14 days to oppose a motion.

³ Moreover, Respondent did not include the appropriate points and authorities in the Motion to Extend showing excusable neglect which is required in order to justify a tardy petition for extension. *See infra*. Therefore, there was no basis to extend the opposition deadline.

should have stricken the opposition and refrained from considering the arguments set forth therein.

C. Goldstein's Motion to Extend Was Procedurally Flawed and Should Have Been Denied

1. EDCR 2.22(d) Governs Continuance of a Matter

EDCR 2.22(d) provides:

When it appears to the court that a written notice of motion has been given, the court may not, unless the other business of the court requires such action, continue the matter specified in the notice except as provided in this rule or upon a showing by motion supported by affidavit or oral testimony that such continuance is in good faith, reasonably necessary and is not sought merely for delay. (emphasis added).

2. Goldstein Erroneously Relied on EDCR 2.22(d) in Support of its Argument that the Deadline to Respond to NuVeda's Motion to Vacate Should be Extended

Goldstein's Motion to Extend contains the simplistic argument that (a) EDCR 2.22(d) provides that a hearing may be continued upon a showing by motion that such continuance is in good faith, reasonably necessary and is not sought merely for delay; and (b) since Goldstein can purportedly satisfy these elements, that continuing the hearing on NuVeda's Motion to Vacate Arbitration Award and extending the briefing deadlines is warranted. (JA 01468).

In so asserting, Goldstein relies solely upon EDCR 2.22(d) in support of her position to extend the briefing deadlines. (JA 01468). This is clear error. Examination of that rule and subsection clearly and unequivocally provides that

EDCR 2.22(d) applies solely to the continuance of a hearing on a motion and has no applicability whatsoever to the extension of time within which to oppose a motion. Consequently, Respondent's Motion to Extend did not provide grounds or authority to alter the briefing deadlines.⁴ Therefore, the Motion to Extend should have been denied, and thus the Opposition to Motion to Vacate filed by Goldstein was a rogue document that should have been stricken by the Court.

3. EDCR 2.25 and NRCP 6 Govern Extension of Time

EDCR 2.25(a) provides, in pertinent part:

Every motion or stipulation to extend time shall inform the court of any previous extensions granted and state the reasons for the extension requested. A request for extension made after the expiration of the specified period **shall not** be granted unless the moving party, attorney, or other person demonstrates that the failure to act was the result of excusable neglect. (emphasis added).

Similarly, NRCP 6(b)(ii) provides:

When an act may or must be done within a specified time, the Court may, for good cause, extend the time on motion made after the time has expired if the party failed to act because of excusable neglect. (emphasis added).

Based on the plain language of these rules, excusable neglect as to the failure to act must be established in order to extend a deadline that has already expired.

⁴ EDCR 2.20(c) requires that a motion include a memorandum of points and authorities in support of each ground thereof.

Particularly, EDCR 2.25 provides that a motion to extend “shall not be granted” unless the excusable neglect is established.

4. Goldstein’s Motion to Extend Does Not Cite the Authorities Necessary to Support an Extension of Time

Though titled “Motion to Continue Hearing on NuVeda, LLC’s Motion to Vacate Arbitration Award and to Extend Briefing Deadlines,” Goldstein provides no authorities to extend the briefing scheduled and/or time to oppose NuVeda’s Motion to Vacate in her moving papers. (JA 01467-01479). EDCR 2.25 and NRCP 6 govern extensions of time. Both rules clearly and unambiguously provide that requests to extend time lodged with the Court *after* the expiration of the specified period shall not be granted unless the moving party demonstrates that the failure to act was the result of excusable neglect.

Goldstein’s Motion to Extend (a) does not cite EDCR 2.25 or NRCP 6; (b) does not provide argument that her failure to oppose NuVeda’s Motion to Vacate Arbitration Award was the product of excusable neglect; or (c) does not even use the phrase “excusable neglect.” (JA 01467-01479). As such, Goldstein failed to satisfy the requirements of either the local rule or the Nevada rule to extend the time within which to oppose NuVeda’s motion.

As provided in EDCR 2.25, a motion to extend “shall not be granted” unless “excusable neglect” is established. Therefore, the Court should have denied the Motion to Extend and, by extension, grant NuVeda’s Motion to Vacate Arbitration

Award pursuant to EDCR 2.20(e) (“[f]ailure of an opposing party to serve and file written opposition may be construed as an admission that the motion and/or joinder is meritorious and a consent to granting the same.”). Furthermore, the Opposition to Motion to Vacate should have been stricken, because it was filed after the deadline to oppose and before any extension of deadline was entered by the District Court.

D. The District Court Erred in Granting Goldstein’s Motion to Extend Because Excusable Neglect Cannot Be Established

Even if this Court subscribes to the attenuated theory that Goldstein’s analysis of EDCR 2.22(d) (i.e., good faith, reasonably necessary, and no delay) equates to an excusable neglect analysis – which it does not – Goldstein could not demonstrate satisfaction of excusable neglect necessary to extend the date within which to oppose NuVeda’s Motion to Vacate.

The factual events are undisputed. NuVeda filed its Motion to Vacate Arbitration Award on June 17, 2019. The applicable rules of civil procedure call for Goldstein to oppose the motion within ten days – i.e., June 27, 2019. *See* EDCR 2.20(e). On June 19, 2019, Goldstein’s counsel contacted NuVeda’s counsel and requested the parties stipulate to extend the briefing schedule and continue the hearing date. (JA 01508-01509). NuVeda’s counsel responded – *later that same day* – and stated that it would so stipulate provided Goldstein agreed to suspend the accrual of interest during the extended period and until the parties conducted the hearing on NuVeda’s Motion to Vacate. (JA 01462).

Thereafter, Goldstein did not respond to NuVeda's request until after the expiration of the time within which to oppose NuVeda's Motion to Vacate. (JA 01466). NuVeda and its representatives did nothing to hamper Goldstein's efforts and, in fact, responded to Goldstein's counsel expeditiously. Goldstein, in turn, had eight (8) days to consider NuVeda's "suspend accrual of interest" proposal before the deadline date to oppose the motion to vacate, and neither responded during the period to oppose said motion nor did she file a motion pursuant to EDCR 2.25 or NRCP 6 to extend the deadline date. Filing a motion to extend the opposition date prior to the expiration of said date would have eliminated the need to demonstrate excusable neglect. NRCP 6(b)(1). This Court has held that the concept of "excusable neglect" applies to instances where some external factor beyond a party's control affect the party's ability to act or respond as required. *Mosely v. Eighth Judicial Dist. Court*, 124 Nev. 654, 667-68, 188 P.3d 1136, 1145-46 (2008). Here, there were no external factors beyond Goldstein's control affecting her ability to act or respond.

Goldstein's failure to act and her conduct and actions, as described herein, do not constitute the excusable neglect necessary to extend deadline dates after the expiration of said date. Accordingly, Goldstein's Motion to Extend should have been denied and, due to Goldstein's failure to oppose NuVeda's Motion to Vacate, that motion should have been granted.

V. CONCLUSION

As set forth above, the District Court erroneously granted Goldstein's Motion to Extend. The Motion should have been denied because Goldstein failed to include points and authorities addressing the appropriate standard to support an extension of time. Even if the appropriate standard was cited, Goldstein could not establish excusable neglect for the untimely request as required by EDCR 2.25 and NRCP 6. Therefore, the District Court should have denied the Motion based on Goldstein's failure to establish grounds for an extension of time. Appellant requests that the final order and judgment be vacated, and that the case be remanded with instruction to deny the Motion to Extend and to strike Goldstein's Opposition to Motion to Vacate.

Considering that there was no timely opposition to NuVeda's Motion to Vacate, Appellant further requests that the District Court be instructed to enter an order granting the Motion to Vacate pursuant to EDCR 2.20.

VI. CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point, Times New Roman style. I further certify that this brief complies with the page- or type-volume

limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 4649 words, and it does not exceed 30 pages. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 4th day of March, 2020.

/s/ Jason M. Wiley

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PROOF OF SERVICE

I hereby certify that I am an employee of the Wiley Petersen., and that on the 4th day of March, 2020, I electronically filed the foregoing **APPELLANT'S OPENING BRIEF** with the Clerk of the Court for the Nevada Supreme Court by using the CM/ECF system. I further certify that all parties of record to this appeal either are registered with the CM/ECF or have consented to electronic service.

[X] (By Electronic Service) Pursuant to CM/ECF System, registration as a CM/ECF user constitutes consent to electronic service through the Court's transmission facilities. The Court's CM/ECF systems sends an e-mail notification of the filing to the parties and counsel of record listed above who are registered with the Court's CM/ECF system.

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