

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

NUVEDA, LLC,  
  
Appellant,  
  
v.  
  
JENNIFER GOLDSTEIN,  
  
Respondent.

Supreme Court Case No. 79806  
District Court Case No. A-15-728510-B  
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**APPEAL**

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

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**APPELLANT'S REPLY BRIEF**

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## **I. SUMMARY OF REPLY ARGUMENT**

Throughout the arbitration proceeding and the confirmation proceeding, Respondent JENNIFER GOLDSTEIN's ("Respondent" or "Goldstein") has failed to comply with operative litigation deadlines. Less than one month before the arbitration hearing, and after the expert disclosure deadline, Goldstein disclosed an initial expert report. Appellant, NUVEDA, LLC ("Appellant" or "NuVeda") moved to strike the expert, but the Arbitrator ignored its own scheduling order to the detriment of Appellant and entered an award in favor of Goldstein relying on the ostensible expert opinion.

Due to the Arbitrator's error, Appellant filed a motion to vacate arbitration award with the District Court. Thereafter, Goldstein failed to timely file an opposition. Goldstein eventually 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 applicable rules. Thereafter, 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 request – granted Goldstein's motion to extend briefing deadlines, and subsequently denied NuVeda's motion to vacate the

arbitration award, leading to the ultimate confirmation of the decision. This appeal has followed.

Goldstein's Answering brief has failed to establish that an opposition was timely filed or that the District Court had legal basis to allow an extension of time for a tardy opposition. The undisputed sequence of events before the District Court is the following:

- June 17, 2019 - Appellant files Motion to Vacate;
- June 27, 2019 - Respondent's last day to oppose Motion to Vacate per EDCR 2.20(e);
- July 1, 2019 - Respondent files Motion to Extend without points and authorities addressing EDCR 2.25 or NRCP 6 and without addressing excusable neglect requirement;
- July 11, 2019 - Appellant files Opposition to Motion to Extend;
- July 16, 2019 - Respondent files the Reply addressing excusable neglect for the first time;
- July 25, 2019 - Respondent files the Opposition to Motion to Vacate [almost 1 month after the deadline]; and
- August 12, 2019 - District Court conducts hearing and grants Motion to Extend without entertaining argument.

Crucial to this appeal, the Opposition to Motion to Vacate and the Motion to Extend were filed *after* the deadline to oppose the motion. The Motion to Extend *did not include* points and authorities addressing EDCR 2.25 or NRCP 6, or

excusable neglect. Therefore, the Motion to Extend was groundless does not amount to request for extension, as EDCR 2.20 requires a valid motion to have supporting points and authorities. Consequently, the District Court was required to deem the Motion to Vacate as unopposed. Again, the record was devoid of legal grounds to allow an extension of time to file a tardy opposition.

The District Court erred, and abused its discretion, by not following the plain language of the rules and ultimately allowing the tardy opposition to be considered in deciding the pending motion. The District Court should have denied the Motion to Extend due to failure to establish legal grounds for extending time as required by applicable rules. Thus, the Opposition to Motion to Vacate was a rogue filing and for purposes of the pending motion, no opposition was filed.

As a result, the District Court should have granted the Motion to Vacate based on the lack of opposition, or alternatively, the District Court should have stricken the rogue opposition and rendered its final decision based only on consideration of the points and authorities that were properly submitted. Appellant seeks an order remanding this case to the District Court with instruction to strike the Opposition to Motion to Vacate and render an appropriate decision based on the points and authorities in the record.

## II. LEGAL ARGUMENT

### A. Standard of Review

#### 1. The Applicable Standard of Review is *De Novo*

Respondent contends that the standard of review is abuse of discretion, not *de novo*. This assertion is clearly incorrect. Appellant has challenged the District Court's conclusion of law as it relates to the interpretation and subsequent application of EDCR 2.20, EDCR 2.25 and NRCP 6 to the undisputed facts of this case. The Nevada Supreme Court has made it clear that "the district court's conclusions of law are reviewed *de novo*" and the "construction of a statute is a question of law, which this court also reviews *de novo*." *Phillips A.C. v. Central Council (In re Phillip A.C)*, 122 Nev. 1284, 1293, 149 P.3d 51, 57 (2006). The Nevada Supreme Court further held that "[w]hen interpreting a statute, words should be given their plain meaning unless it would violate the spirit of the act" and "[w]hen a statute's language is clear and unambiguous, there is no room for construction and the apparent intent must be given effect." *Id.* Nevada's Rules of Civil Procedure are subject to the same rules of interpretation as statutes and the interpretation is reviewed under a *de novo* standard. *Barbara Ann Hollier Trust v. Shack*, 131 Nev. 582, 588, 356 P.3d 1085, 1089 (2015).

EDCR 2.20, EDCR 2.25 and NRCP 6 are unambiguous rules that should be enforced according to their plain language. The District Court failed to do so in

reaching its conclusions of law related to the Motion to Vacate and Motion to Extend. Particularly, the District Court held in the **“Conclusion of Law”** section of its order that Respondent’s **“Reply”** [not Motion to Extend] addressed excusable neglect and that the District Court “will therefore consider Goldstein’s Opposition to the Motion to Vacate . . .” *See* (JA02369). The plain language of the rules prohibits the District Court from reaching this conclusion. The rules were either misinterpreted or misapplied by the District Court.

**2. The Plain Language of the Applicable Rules Required that the Opposition to the Motion to Extend be Stricken**

Appellant has established that EDCR 2.20 strictly requires that the opposition be filed within 10 days after the motion and that Respondent failed to file an opposition within that time frame. *See* Opening Brief (“Op. Br.”) at 8-9. Appellant has further established that EDCR 2.25 and NRCP govern the extension of time and require an affirmative showing of excusable neglect. *See* Op. Br. at 11-12. EDCR 2.20(c) further requires that a motion include a memorandum of points and authorities in support of each ground thereof. In this case, the Motion to Extend did not include any points or authorities related to EDCR 2.25, NRCP 6, or excusable neglect. *See* Op. Br. at 12-13. Respondent even admits that excusable neglect was not addressed until the Reply. *See* Answering Brief (“An. Br.”) at 22. Therefore, Goldstein did not properly request an extension of time and the District Court did not have grounds to allow the tardy opposition based on the plain language of EDCR



2.25 and NRCp 6. The District Court's conclusion of law that the Opposition to Motion to Vacate may be considered was erroneous and contrary to the applicable rules. The Opposition should have been stricken.

### **3. Goldstein Failed to Establish Abuse of Discretion is the Appropriate Standard**

Respondent failed to cite convincing authority that an abuse of discretion standard should be applied in this case. Respondent relies on *Eldan LLC v. Gordana*, 2016 Nev. LEXIS 588, 1-4, 132 Nev. 965, 2016 WL 3480382, which found that the district court did not abuse its discretion when it allowed plaintiff to file an untimely reply. However, there is no discussion in *Eldan* regarding whether a proper motion to extend was filed with excusable neglect being established in the initial motion. Therefore, the *Eldan* holding does not provide any guidance to the case at bar because the procedural issue of requesting an extension and interpretation of the rules was not addressed.

Respondent also cites to *Moseley v. Eighth Judicial Dist. Court of Nev.*, 124 Nev. 654, 662, 188 P.3d 1136, 1142 (2008), which states that "NRCp 6(b)(2) provides that the district court may exercise its discretion to grant an enlargement of time to take an action that is otherwise required to be done within a specified time when excusable neglect is shown." However, *Moseley* was a writ of mandamus proceeding and it also did not address the issue of whether an extension and tardy

opposition can be allowed when a motion with the appropriate authorities was never filed. Therefore, *Moseley* is inapposite to this case.

Finally, Respondent argues that a “district court’s decision whether to consider an untimely motion unopposed pursuant to EDCR 2.20(e) is similarly reviewed for abuse of discretion”, citing *Las Vegas Fetish & Fantasy Halloween Ball, Inc. v. Ahern Rentals, Inc.*, 124 Nev. 272, 278 n.15, 182 P.3d 764, 768 (2008). The *Ahern* holding is also inapplicable because it does not directly discuss the appropriate standard of review when a court fails to interpret correctly and apply the rules governing extension of time. *Ahern* simply found that a district court did not abuse its discretion when it granted a motion pursuant to EDCR 2.20(b), as no opposition was filed. Appellant has averred in this appeal that the District Court was prohibited from allowing the Opposition to the Motion to Vacate because a motion to extend, with points and authorities supporting an extension, was *never* filed. *Ahern* does not address such an issue, nor set forth the applicable standard of review for the same. Therefore, Respondent has failed to establish that abuse of discretion is the appropriate standard.

**B. Goldstein Failed to Request an Extension of Time to File the Opposition to Motion to Vacate**

As set forth, Goldstein never filed a proper motion to extend prior to the District Court’s hearing on the Motion to Vacate. Goldstein attempts to confuse the issue by arguing that the District Court had discretion to consider the tardy

opposition. This argument is nothing more than a red herring. The record before this District Court clearly establishes that a proper request to extend was not filed, Appellant was denied an opportunity to oppose an argument that there was excusable neglect, and the District Court did not act within its discretion in considering the rogue opposition.

### **1. Goldstein's Reply Does Not Constitute a Timely Motion**

Respondent has not provided any evidence that the Motion to Extend included any points and authorities supporting an extension of time. Excusable neglect was not discussed until the Reply was filed by Respondent on July 16, 2019 - one month after the Motion to Vacate was filed. Respondent argues that NuVeda misrepresented the facts and procedural history of this case. However, Respondent still cannot point to any citation in the Motion to Extend discussing EDCR 2.25, NRCP 6, or excusable neglect. Instead, Respondent essentially argues that the reply authorities should be considered as the authorities set forth in the original motion, but there is no supporting case law that supports this proposition.

Respondent first relies on *GemCap Lending I, LLC v. Mann*, 2019 U.S. Dist. LEXIS 227514, 12-13 (C.D.Cal. Oct. 30, 2019), which provided the following:

. . . the Ninth Circuit has recognized that a moving party is permitted to rebut arguments raised in an opposition brief by, for instance, providing a fuller context of surrounding facts. *Id.*

However, *GemCap* is inapposite because Respondent in this case was not rebutting an argument raised in opposition by providing a *fuller context of surrounding facts*. In this case, Appellant duly pointed out in its Opposition to the Motion to Extend that there were no points and authorities referencing EDCR 2.25, NRCP 6, and excusable neglect. (JA01485). Respondent's Reply does not provide a fuller context, but instead addresses those authorities for the first time. *GemCap* does not stand for the proposition that points and authorities mentioned for the first time in a reply are permissible.

Respondent also relies on *United States v. Taibi*, 2012 U.S. Dist. LEXIS 21471, \*11, 2012 WL 553143 (S.D.Cal. Feb. 21, 2012). *Taibi* provided the following:

Because the Court agrees that **Plaintiff initially provided enough evidence to establish its prima facie case**, and because these documents respond directly to Defendant's allegations made in his opposition brief, the Court finds it may properly consider this rebuttal evidence even though it was offered for the first time in Plaintiff's reply brief. *Id* (emphasis added).

*Taibi* is not applicable because Respondent did not initially provide evidence to establish a prima facie case for an extension. No evidence or legal authority that could feasibly support an extension was initially presented in the Motion to Extend. Therefore, the holding in *Taibi* does not support Respondent's proposition. In fact, the holding *Taibi* supports Appellant's argument.

Respondent then cites to *EEOC v. Creative Networks, LLC and Res-Care, Inc.*, 2008 U.S. Dist. LEXIS 103381, 2008 WL 5225807 at \*2 (D.Ariz. Dec. 15, 2008) (reviewing the rule that a party may not provide "new" evidence with a reply and then deprive the opposing party of an opportunity to respond to the new evidence, and denying the motion to strike because the challenged evidence was not "new" but rather properly rebutted arguments first raised in opposition to the motion for summary judgment.) Unfortunately for Respondent, the holding for *EEOC* supports Appellant's argument that the Reply's excusable neglect argument *should not* have been considered by the District Court because it was "new evidence" and argument. The excusable neglect evidence and authorities were not even mentioned in the initial Motion to Extend. Moreover, Appellant was deprived the opportunity to respond to the new evidence and argument included in the Reply because no further briefing was permitted under the applicable rules. Therefore, according to the holding in *EEOC*, the Reply arguments should be stricken (or at minimum not considered by the District Court in rendering its decision).

In sum, Respondent does not provide any legal authority that arguments and evidence brought for the first time in a reply may be relied upon to establish that the initial motion was meritorious or be considered by the court when rendering its decision. A reply rebuts arguments from an opposition. A reply is not allowed to

provide initial authorities to support a motion. Therefore, Goldstein's Reply does not constitute a proper motion with points and authorities pursuant to EDCR 2.20.

## **2. The District Court Did Not Act Within its Discretion**

Respondent is incorrect in asserting that the District Court was acting within its discretion in allowing the tardy Opposition to Motion to Extend. The Nevada Supreme Court discussed the definition of "discretion" in *Goodman v. Goodman*, 68 Nev. 484, 487, 236 P.2d 305, 306 (1951).

Bouvier has defined "discretion" in part as: "That part of the judicial function which decides questions arising in the trial of a cause, according to the particular circumstances of each case, and as to which the judgment of the court is uncontrolled by fixed rules of law. The power exercised by courts to determine questions to which no strict rule of law is applicable but which, from their nature, and the circumstances of the case, are controlled by the personal judgment of the court." *Id.*

"The term 'discretion' implies the absence of a hard and fast rule. The establishment of a clearly-defined rule would be the end of discretion." *Id.* (citing *Norris v. Clinkscales*, 47 S.C. 488, 25 S.E. 797, 801 (1900)).

In this case, there were hard and fast rules that clearly defined the parameters for allowing an opposition to a motion. Those rules are set forth in EDCR 2.20, EDCR 2.25, and NRCP 6. Simply put, EDCR 2.20 provides the opposition must be served and file within 10 days. EDCR 2.25 and NRCP 6 only allow a tardy opposition to be filed if excusable neglect is established in the party's motion to extend. The rules for an opposition are strictly defined and should be enforced as

written. There is no room for discretion. Discretion does not enter the equation unless a motion to extend actually addresses excusable neglect. Then, the District Court would determine (within its discretion) whether that has been established. Here, Respondent's Motion to Extend did not address excusable neglect, and therefore, the District Court did not have discretion to allow a tardy opposition.

### **III. CONCLUSION**

Appellant seeks an order remanding this case to the District Court with instruction to strike the Opposition to Motion to Vacate and render an appropriate decision based on the points and authorities in the record.

### **IV. CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief complies with the formatting requirements of the typeface requirements, and the type style requirements of NRAP 32 because this reply 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 because, excluding the parts of the brief exempted by NRAP 32, it is proportionately spaced, has a typeface of 14 points or more, and contains 2,728 words, and it does not exceed 15 pages. Finally, I hereby certify that I have read this reply 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 reply brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28.2, 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 reply brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 28th day of May, 2020.

LAW OFFICE OF MITCHELL STIPP

/s/ Mitchell Stipp

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## **CERTIFICATE OF SERVICE**

I hereby certify that I am an employee of the Law Office of Mitchell Stipp, and that on the 27th day of May, 2020, I electronically filed the foregoing with the Clerk of the Court for the Nevada Supreme Court by using the court's electronic filing system.

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Dated this 27th day of May, 2020.

LAW OFFICE OF MITCHELL STIPP

*/s/ Amy Hernandez*

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Amy Hernandez, an employee