

IN THE SUPREME COURT OF THE

STATE OF NEVADA

CLARK NMSD, LLC,
Appellant,

vs

JENNIFER GOLDSTEIN,
Respondent.

Electronically Filed
Nov 21 2022 08:48 PM
Elizabeth A. Brown
Clerk of Supreme Court

Supreme Court Case No. 84623

District Court Case No. A-15-728510-B

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

1. Appellant, Clark NMSD, LLC, is a private, Nevada limited liability company, which is owned by NuVeda DE, LLC, a Delaware limited liability company, and managed by Dr. Pejman Bady, Dr. Pouya Mohajer, and Joseph Kennedy.
2. Dr. Pejman Bady, Dr. Pouya Mohajer, and Joseph Kennedy are managers/members of NuVeda DE, LLC.
3. Dr. Pejman Bady, Dr. Pouya Mohajer, and Joseph Kennedy are residents of the State of Nevada.
3. Mitchell Stipp, Nevada Bar No. 7531, of the Law Office of Mitchell Stipp, represents Appellant, Clark NMSD, LLC.

DATED this 21st day of November, 2022

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I. JURISDICTIONAL STATEMENT.

This appeal concerns the post-judgment collection activity of Jennifer Goldstein (“Respondent”) in District Court Case No. A-15-728510-B. The order on appeal (“Subject Order”)¹ is a final judgment entered in an action or proceeding commenced in the court in which the judgment is rendered. See NRAP 3A(b)(1). Appellant, Clark NMSD, LLC, a Nevada limited liability company d/b/a The Sanctuary (“Appellant”), ***intervened*** in the district court case pursuant to which NuVeda, LLC (“NuVeda”) is a judgment debtor and Respondent is a judgment creditor.² Las Vegas Police Prot. Ass’n v. Dist. Ct., 122 Nev. 230, 239 (Nev. 2006) (quoting Municipality of Penn Hills, 546 A. 2d 50, 52 (Pa. 1988); see also All Nite Garage, Inc. v. A.A.A. Towing, Inc., 85 Nev. 193 (Nev. 1969) (independent action not required under NRS 31.070). Appellant is not subject to Respondent’s judgment.

The Appellant filed an application/petition in accordance with NRS 31.070 in the district court, which application/petition was opposed by Respondent and denied by the district court. The sole and exclusive remedy for third parties whose property is wrongfully seized is set forth in NRS 31.070. See Cooper v. Liebert, 81 Nev. 341, 344, 402 P.2d 989, 991 (1965) (confirming NRS 31.070 as exclusive remedy).

Appellant timely filed its notice of appeal of the Subject Order on April 21, 2022. See NRAP 4(a); see also Dkt. No. 22-13277.

¹ The Subject Order is attached to Appellant’s Appendix, which has been filed separately in support of Appellant’s Opening Brief. See APP 000084-000093 (Vol. 1).

² See Nevada Supreme Court Case No. 69648.

II. ROUTING STATEMENT.

The district court case is a business court case. Therefore, the Nevada Supreme Court shall hear and decide the appeal pursuant to NRAP 17(a)(9).

III. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW.

A. Whether the district court has jurisdiction summarily to deny an application under NRS 31.070 if Appellant complied with the requirements of NRS 31.070(1) and offered prima facie evidence that the cash seized belonged to Appellant?

B. Whether the district court has jurisdiction to deny an application under NRS 31.070 if Respondent failed to post any security required by NRS 31.070(1) and (2)?

C. Whether the actions of the district court warrant reassignment of the district court case if the Subject Order is vacated and matter is remanded?

IV. STATEMENT OF CASE.

Judge Elizabeth Gonzalez of Department 11 of the Eighth Judicial District Court, State of Nevada, presided over District Court Case No. A-15-728510-B. After the retirement of Judge Gonzalez, the case was reassigned to Department 31, Judge Joanna Kishner. Respondent caused the Constable's Office to serve a writ of execution for cash at the marijuana dispensary operated by Appellant (which owns marijuana dispensary licenses under Nevada law). APP 000005-000027, 0000007 (Vol. 1). The Constable's Office seized cash from the dispensary, which cash belongs to Appellant. Id. at 000007-000008 (referencing Exhibit A to Exhibit 2 to

Appellant's Application/Petition, APP 000016-000023). Appellant made a written claim for the cash in accordance with NRS 31.070. Id. 000016-000023 (Vol. 1). Appellant filed an application/petition for the return of the cash after the Constable's Office refused to release the same to Appellant. APP 000005-000027 (Vol. 1). Respondent opposed the application/petition. APP 000028-000038 (Vol. 1). Appellant filed a reply. APP 000039-000059 (Vol. 1).

The district court denied Appellant's application/petition because the court determined that Appellant failed to comply with the requirements under NRS 31.070 and failed to establish that it had any relationship with or interest in the judgment debtor (NuVeda) or the cash seized. APP 000060-000061 (Vol. 1) (Minutes); APP 000084-000093 (Vol. 1) (Order). Respondent's attorney, Brian Irvine, Esq., was ordered by the district court to prepare the order from the hearing. APP 000060-000061 (Vol. 1) (Minutes).

When Mr. Irvine timely failed to prepare a draft order, Appellant filed a motion for entry of an order and reconsideration of the court's decision. APP 000062-000077 (Vol. 1). After filing the motion, on March 9, 2022, the district court issued an order to show cause regarding non-compliance with EDCR 7.21. APP 000078-000083 (Vol. 1). Mr. Irvine immediately prepared a draft order, which was revised by Appellant's counsel, Mitchell Stipp, Esq., and the order was entered by the district court on March 11, 2022. APP. 000084-000093 (Vol. 1).

Respondent filed her opposition to Appellant's motion. APP 000097-000108 (Vol. 2). Appellant filed its reply to the opposition. See APP 000109-000114 (Vol.

2). At the hearing on the matter, the district court denied the motion as premature **because Respondent failed to provide notice of entry.** See APP 000115-000116 (Vol. 2); APP 000220-000225 (Vol. 3). To avoid further delay by Respondent, Appellant prepared and filed notice of entry of the order submitted by Respondent. APP 000117-000128 (Vol. 2).

After providing notice of entry, Appellant re-filed its motion. APP 000129-000148 (Vol. 2). As expected, Respondent opposed the relief. APP 000152-000219 (Vol. 3). Unfortunately, the district court would not hear the matter on shortened time, and there was insufficient time to hear the motion before the deadline expired to file a notice of appeal. Therefore, Appellant filed its notice of appeal. APP 000226-000240 (Vol. 3). Appellant filed its reply and therein explained how the matter still could be considered by the district court pursuant to Huneycutt v. Huneycutt, 94 Nev. 79, 575 P.2d 585 (1978). APP 000245-000256 (Vol. 4).

The district court refused to consider the motion because it purportedly contained no points and authorities and there was an appeal then pending. APP 000257-000258 (Vol. 4). According to the district court, there is no mechanism under the Nevada Rules of Civil Procedure or the Eighth Judicial District Court of the State of Nevada for filing a “renewed” motion for reconsideration. APP 000259-000271 (Vol. 4). Alternatively, the district court denied the motion because, “as a matter of due process,” Respondent was impermissibly precluded from addressing the impact of the appeal. Id.

V. STATEMENT OF FACTS.

Appellant delivered a written claim under NRS 31.070(1) to the Constable's Office setting out Appellant's right to the cash. See APP 000016-000023 (Vol. 1) (Written Claim, Exhibit 2 to Appellant's Application/Petition, APP 000005-000027); APP 000043-000044 (Vol. 1) (Declaration of Dr. Pejman Bady with Notarized Signature); see also APP 000152-000219 (Exhibit 2 to Opposition, Complaint, APP 000164-000219).

The Constable's Office and District Attorney's Office received and accepted the claim under NRS 31.070. APP 000024-000027 (Vol. 1) (Exhibit 3 to Appellant's Application/Petition).

Respondent did not provide any security to the Constable's Office under NRS 31.070 (1) and (2).

Appellant filed its application/petition before the district court when the Constable's Office refused to release the cash. See APP 000005-000027 (Vol. 1).

The Constable's Office remains in possession of the cash it seized.

VI. SUMMARY OF ARGUMENT.

Appellant provided a written claim to the Constable's Office that was verified by Dr. Pejman Bady as manager of Appellant under oath that the cash seized belonged to Appellant. The written claim was also verified by Appellant's counsel, Mitchell Stipp, Esq., which prepared, signed and served on the Constable's Office

the written claim by Appellant. Therefore, Appellant complied with NRS 31.070 (specifically, NRS 31.070(1)).

Respondent never provided the security required by NRS 31.070. As a result, the Constable's Office was required to release the cash to Appellant but has refused to do so without an order from the district court. NRS 31.070(1).

Appellant's claim to the cash seized by the Constable's Office is prima facie evidence of Appellant's entitlement under Nevada law. Ferris v. United States, 501 F. Supp. 98 (D. Nev. 1980). Therefore, Appellant was entitled to an evidentiary hearing (if there were any factual disputes). See Brooksby v. Nev. State Bank, Corp., 312 P.3d 501 (Nev. 2013) (holding that claimants appear to have made proper and timely claims under NRS 31.070 asserting ownership of the garnished funds, they should have an opportunity to demonstrate, in an evidentiary hearing, that the funds are owned by them).

VII. ARGUMENT.

A. APPELLANT COMPLIED WITH NRS 31.070.

Apparently, the district court blindly accepted Respondent's contention that Appellant's written claim failed to satisfy the requirement under NRS 31.070(1) that it be "verified by the person's oath or that of the person's agent." See APP 000060-000061 (Vol. 1); see also APP 000084-000093 (Vol. 1) (Paragraph 1). Appellant confirmed the claim was supported by the declaration of Dr. Bady, whose signature appeared on the original demand (but was removed electronically when attached as Exhibit 2), was acknowledged by a notary, and separately verified by Mr. Stipp, who

as counsel for Appellant prepared, signed, and served the claim on the Constable's Office. See APP 000016-000023 (Vol. 1) (Written Claim, Exhibit 2 to Appellant's Application/Petition, APP 000005-000027); APP 000043-000044 (Vol. 1) (Declaration of Dr. Pejman Bady with Notarized Signature) and APP 000206-000210 (Volume 3) (Exhibit 2 to Complaint attached as Exhibit 2 to Respondent's Opposition, APP 000152-000219). Regardless, Mr. Stipp's verification was sufficient and accepted by the Constable's Office and the Clark County District Attorney's Office. APP 000024-000027 (Vol. 1) (Exhibit 3 to Appellant's Application/Petition).

The district court determined that Appellant's application/petition should be denied because it failed to satisfy the requirements under NRS 31.070, and Appellant has not established that it has any relationship with or interest in NuVeda or the property at issue. See APP 000084-000093 (Vol. 1) (Paragraph 2).

B. RESPONDENT FAILED TO POST SECURITY AS REQUIRED BY NRS 31.070(1) AND (2).

Respondent failed to post security required by NRS 31.070(1) and (2). Therefore, the cash seized by the Constable's Office was required to be returned to Appellant without obtaining an order from the district court.

C. APPELLANT PROVIDED PRIMA FACIE EVIDENCE OF ITS ENTITLEMENT TO THE CASH AND SHOULD HAVE RECEIVED AN EVIDENTIARY HEARING TO RESOLVE ANY FACTUAL DISPUTES.

Appellant's claim to the cash seized by the Constable's Office is prima facie evidence of Appellant's entitlement under Nevada law. Ferris, 501 F. Supp. 98.

Respondent did not provide any declarations or affidavits in support of Respondent's opposition that NuVeda had exclusive rights to the money seized. See APP 000028-000038 (Vol. 1). Instead, Respondent argued that NuVeda (not Appellant) previously claimed to own cannabis licenses and operate dispensaries, which she believed judicially estopped NuVeda from disclaiming any ownership in the dispensary operated by Appellant including the money seized. As it should be clear from the Subject Order, the district court did not make its decision on the basis of judicial estoppel. APP 000084-000093 (Vol. 1).

The district court held that Appellant failed to demonstrate that it had any relationship with or interest in NuVeda. NRS 31.070 does not require Appellant to establish any relationship other than with the property at issue (here—cash). **Whether Appellant owned NuVeda or NuVeda owned Appellant is immaterial.** Noteworthy, the district court previously denied NuVeda's motion to quash the writs (including the writ which resulted in the seizure of cash at issue here) because the district court determined based on the arguments of Respondent that **NuVeda lacked standing to assert exemptions on behalf of third parties.** The district court even cited to its prior decision and rationale in the Subject Order, when denying Appellant's application/petition. APP 000084-000093 (Vol. 1) (Paragraph 4). If NuVeda does not have standing to challenge the writ because such right only belongs to the rightful owner of the property intended to be seized, then the district court clearly recognized that NuVeda did not have any rights to the cash.

Rather than summary denial of its application/petition, Appellant was entitled to an evidentiary hearing (assuming there were legitimate factual disputes to

resolve). See Brooksby, 312 P.3d 501. Here, there were no factual disputes. Respondent's arguments about judicial estoppel did not serve as the basis for the district court's decision. Even so, judicial estoppel does not apply. Marcuse v. Del Webb Communities, 123 Nev. 278 (Nev. 2007) (applies when (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake). NuVeda's prior ownership of cannabis licenses, subsidiaries or involvement in the cannabis industry are not statements about cash generated from a dispensary operated by Appellant and cannot be used to prevent Appellant from confirming what is a fact: money seized from dispensary belongs to the licensed marijuana establishment, which is the Appellant—not NuVeda.

D. UPON REMAND, THE DISTRICT CASE SHOULD BE REASSIGNED TO ANOTHER BUSINESS COURT DEPARTMENT.

The Nevada Supreme Court has recognized the right of an Appellant to request that the district court case be reassigned upon remand. Valley Health Sys., LLC v. Eighth Judicial Dist. Court of Nev., 510 P.3d 777 (Nev. 2022). Appellant has not sought recusal or disqualification of Judge Kishner (Department 31). However, the reassignment is warranted here. In Valley Health Sys., the Nevada Supreme Court held that an order directing reassignment without a disqualification motion in the district court is rare “but occasionally warranted, even in the absence of bias, to avoid an appearance of partiality.” Id. (quoting United States v. New York City, 717 F.3d 72, 99 (2d Cir. 2013); see also Aparicio v. State, 137 Nev., Adv. Op.

62, 496 P.3d 592, 597 (2021) (reassigning a case to a different district court judge on remand for resentencing where the judge erred in considering the impact of statements from friends and non-immediate family members of the victim); FCH1, LLC v. Rodriguez, 130 Nev. 425, 435, 335 P.3d 183, 190 (2014) (granting appellant's request that, on remand, the case be reassigned to a different district judge); Leven v. Wheatherstone Condo.Corp., 106 Nev. 307, 310, 791 P.2d 450, 451 (1990) (similar decision).

Joseph Kennedy is a managing member of NuVeda and a manager of Appellant. Mr. Kennedy acquired the interests of E&T Ventures, LLC, which is the plaintiff in the district court case, Case No. A-19-796919-B, before Judge Kishner in Department 31. That district court case is stayed pending the decision of the Nevada Supreme Court in Case No. 84336, which concerns the request to disqualify Judge Kishner. Appellant believes Judge Kishner's decision as memorialized in the Subject Order cannot be explained other than by deep-seated antagonism toward NuVeda, Appellant and Mr. Kennedy by Judge Kishner that would make fair judgment impossible.

In this case, Judge Kishner ignored clear facts, misapplied the applicable law, and imposed procedural hurdles to avoid reconsideration of the substantive matters before her. She denied a motion to reconsider her prior decision because there was no notice of entry on file. See APP 000115-000116 (Vol. 2); APP 000220-000225 (Vol. 3). After notice of entry was made, she refused to consider the relief because she claimed the applicable rules did not expressly provide for a second motion for reconsideration. APP 000257-000271 (Vol. 4). However, Nevada law is clear: the

district court has inherent jurisdiction to vacate or modify its orders and judgments. See Warden v. Peters, 83 Nev. 298, 429 P.2d 549 (1967); Lisby v. State, 82 Nev. 183, 414 P.2d 592 (1966); Osborne v. State, 82 Nev. 342, 418 P.2d 812 (1966); Dixon v. State, 83 Nev. 120, 424 P.2d 100 (1967).

VIII. CONCLUSION.

The Subject Order should be vacated. The Nevada Supreme Court should order the Chief Judge of the Eighth Judicial District Court to reassign the district court case and for the new judge to enter an order for the return of the cash seized by the Constable's Office to Appellant. Alternatively, the new judge should schedule an evidentiary hearing on Appellant's application/petition.

ATTORNEY'S CERTIFICATE UNDER NRAP 28.2

1. 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:

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2. 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 either:

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3. 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.

/s/ Mitchell Stipp

Dated: NOVEMBER 21, 2022

MITCHELL STIPP, ESQ.
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21st day of November, 2022, I filed the foregoing
Appellant's Opening Brief, using the court's electronic filing system.

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