

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

LIBORIUS AGWARA, ESQ.,
Appellant,
vs.
DCP INVESTMENT HOLDINGS, LLC,
D/B/A DCP HOLDINGS, LLC,
Respondent.

No. 83036-COA

FILED

MAY 18 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *S. Young*
DEPUTY CLERK

ORDER OF AFFIRMANCE

Liborius Agwara, Esq., appeals from a district court order granting a voluntary dismissal. Eighth Judicial District Court, Clark County; Jessica K. Peterson, Judge.

Agwara represented Pablo Payeras in a personal injury matter, resulting in a \$700,000 settlement.¹ Agwara distributed \$624,717.60 of the settlement funds to various creditors and lienholders, leaving a remainder of \$75,282.40. DCP Investment Holdings, LLC, had a medical lien for \$22,272.91 against Payeras stemming from Payeras' medical treatments, but Agwara failed to satisfy or otherwise address DCP's lien. After a state bar complaint was filed against him, Agwara filed an interpleader action and interpleaded the remaining settlement funds. DCP answered the interpleader complaint and filed a counterclaim asserting five separate causes of action. In the interpleader action, DCP filed a successful motion for distribution and was awarded the full value of its medical lien. Afterwards, the district court granted DCP leave to amend its counterclaim to explicitly plead attorney fees as special damages pursuant to NRCP 9(g) and *Sandy Valley Associates v. Sky Ranch Estates Owners Association*, 117 Nev. 948, 960, 35 P.3d 964, 971 (2001), for each of its five causes of action.

¹We do not recount the facts except as necessary to our disposition.

After completing certain discovery on its counterclaim, DCP filed a motion for attorney fees and costs for having to defend the interpleader action, arguing that the district court could dismiss its amended counterclaim if the court awarded fees pursuant to *Sandy Valley* and that fees and costs can be treated as special damages as the result of defending an interpleader action. Agwara opposed DCP's motion for attorney fees and costs and filed a countermotion for summary judgment, arguing that DCP's amended counterclaim was frivolous because DCP's lien against Payeras had been paid. Agwara also requested reimbursement of his attorney fees and costs for having to engage in discovery on DCP's amended counterclaim. Ultimately, the district court granted DCP's motion for attorney fees and costs and consequently denied Agwara's countermotion for summary judgment and request for fees and costs.

This court reversed the district court's order awarding attorney fees to DCP for being required to defend the interpleader action.² Because DCP had previously agreed to dismiss its amended counterclaim based upon the erroneous belief that it was entitled to attorney fees, we remanded the case back to the district court to conduct further proceedings on DCP's amended counterclaim. And although this court did not consider Agwara's countermotion for summary judgment and his request for attorney fees and costs on appeal, we noted that the district court would necessarily be required to address his countermotion for summary judgment.

After the matter was remanded, DCP filed a motion to voluntarily dismiss its amended counterclaim against Agwara pursuant to NRCP 41(a)(2), arguing that its medical lien had been satisfied and pursuit

²*Agwara v. DCP Inv. Holdings, LLC*, No. 79733-COA, 2020 WL 6954674 (Nev. Ct. App. Nov. 25, 2020) (Order of Reversal and Remand).

of its amended counterclaim would likely only result in DCP incurring additional legal fees and costs, none of which would be collectable against Agwara as he was essentially judgment proof. Agwara opposed DCP's motion to dismiss, arguing that the district court must first rule on his countermotion for summary judgment, which, he asserted, was effectively revived on remand. Agwara argued that his countermotion should be granted instead of DCP's voluntary dismissal so that he would be the prevailing party and therefore entitled to recover the costs expended in defending against DCP's amended counterclaim.³

The district court ultimately granted DCP's motion to dismiss from the bench, finding that there was no reason for DCP to pursue its amended counterclaim against Agwara because its lien had already been satisfied and pursuing the counterclaim would be futile. After granting DCP's motion to dismiss, the court denied Agwara's countermotion for summary judgment as moot. Nevertheless, the district court addressed the merits of Agwara's countermotion and found that DCP's amended counterclaim, which related back to its original counterclaim, was not frivolous, as DCP's decision to file the original counterclaim was necessary to protect its interest in its outstanding lien, and the counterclaim was filed before the remaining funds were interpleaded and DCP's lien satisfied. The district court entered an order granting DCP's voluntary motion to dismiss and denying Agwara's countermotion for summary judgment and request for costs. Based on the denial of Agwara's countermotion for summary judgment, the court determined that Agwara was not a prevailing party

³At the hearing on both motions, Agwara advised the district court that he was not seeking attorney fees but only his costs for deposing a witness on DCP's counterclaim during discovery. The district court noted this in its written order.

under NRS 18.010(2) and therefore not entitled to costs. This appeal followed.

On appeal, Agwara argues that the district court should have first ruled on his countermotion for summary judgment instead of voluntarily dismissing DCP's amended counterclaim, so that Agwara would be the prevailing party and entitled to recover his costs under NRS 18.020(3), which is the only mechanism by which Agwara could seek recovery. Moreover, Agwara argues that his countermotion for summary judgment had merit, as DCP's amended counterclaim was frivolous because it was filed after its lien had been satisfied from the interpleaded funds. Conversely, DCP argues that the district court did not abuse its discretion in granting its motion for voluntary dismissal before denying Agwara's countermotion as moot. DCP contends that the district court *did consider and reject* Agwara's countermotion because DCP's amended counterclaim, which related back to its initial counterclaim, was not frivolous. We agree with DCP and therefore affirm.

We review a district court's order granting voluntary dismissal for an abuse of discretion. *Westlands Water Dist. v. United States*, 100 F.3d 94, 96 (9th Cir. 1996); see *In re Phillip A.C.*, 122 Nev. 1284, 1290, 149 P.3d 51, 55 (2006). NRCP 41(a) governs voluntary dismissals. NRCP 41(a)(2) provides, in relevant part, that "[e]xcept as provided in Rule 41(a)(1),⁴ an

⁴NRCP 41(a)(1)(A) governs voluntary dismissal by right, rather than by court order, and provides that "the plaintiff may dismiss an action without a court order by filing: (i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or (ii) a stipulation of dismissal signed by all parties who have appeared." However, this case involves a voluntary dismissal by court order pursuant to NRCP 41(a)(2).

action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper.”

In this case, the district court granted DCP's motion to dismiss first, accepting DCP's reasons for dismissal, primarily that its lien was paid in full pursuant to the interpleader action, giving DCP no reason to continue litigating the amended counterclaim. *See Paulucci v. City of Duluth*, 826 F.2d 780, 783 (8th Cir. 1987) (recognizing that the sufficiency of the explanation of the need to take a dismissal is to be considered in deciding whether to permit voluntary dismissal). After dismissing DCP's amended counterclaim, the district court denied Agwara's countermotion as being moot and, as a result, the court determined that Agwara was not the prevailing party and therefore not entitled to costs.

In analyzing cases involving voluntary dismissal, the Nevada Supreme Court has turned to NRCP 41(a)'s federal counterpart, FRCP 41(a), and relevant federal circuit court decisions to determine whether an action was properly dismissed. *See Willick v. Eighth Judicial Dist. Court*, 138 Nev., Adv. Op. 19, 506 P.3d 1059, 1062-63 (2022) (looking to FRCP 41(a) in determining whether a plaintiff should be estopped from voluntarily dismissing his action pursuant to NRCP 41(a)(1)); *see also Phillip A.C.*, 122 Nev. at 1290, 149 P.3d at 55 (recognizing that “federal decisions involving the Federal Rules of Civil Procedure provide persuasive authority when this court examines its rules” (quoting *Winston Prods. Co., Inc. v. DeBoer*, 122 Nev. 517, 523, 134 P.3d 726, 730 (2006))). Courts “should grant a motion for voluntary dismissal under Rule 41(a)(2) *unless a defendant can show that it will suffer some plain legal prejudice as a result.*” *Smith v. Lenches*, 263 F.3d 972, 975 (9th Cir. 2001) (emphasis added) (footnote omitted).

The Ninth Circuit has defined “legal prejudice” as “prejudice to some legal interest, some legal claim, [or] some legal argument.” *Westlands*

Water Dist., 100 F.3d at 97. To ascertain the legal prejudice to an opposing party, federal courts have looked to relevant factors such as “the opposing party’s effort and expense” in preparing for trial, *Clark v. Tansy*, 13 F.3d 1407, 1411 (10th Cir. 1993); “excessive delay and lack of diligence on the part of the” movant, *Paulucci*, 826 F.2d at 783; and “insufficient explanation for the need to take a dismissal,” *Pace v. S. Express Co.*, 409 F.2d 331, 334 (7th Cir. 1969). However, such factors are non-exclusive, and there is no mandate that each factor must be resolved in favor of the movant. *Phillips USA, Inc. v. Allflex USA, Inc.*, 77 F.3d 354, 358 (10th Cir. 1996) (noting that these factors “are guides for the district court”); *Tyco Labs., Inc. v. Koppers Co.*, 627 F.2d 54, 56 (7th Cir. 1980).

When confronted with competing motions for voluntary dismissal and summary judgment, NRCP 41(a)(2) necessarily requires a district court to either grant the movant’s motion for voluntary dismissal and dismiss as moot the preceding motion for summary judgment or grant the preceding motion for summary judgment and deny the motion for voluntary dismissal. Both such resolutions are within the court’s sound discretion. *Westlands Water Dist.*, 100 F.3d at 96; see *Burgess v. Vancouver Police Dep’t*, No. C15-5844, 2016 WL 4573948, at *2 (W.D. Wash. Aug. 11, 2016) (granting plaintiff’s motion for voluntary dismissal and denying defendant’s motion for summary judgment as moot). Here, the district court found that DCP’s motion for voluntary dismissal was not frivolous but necessary to protect its lien interest based on Agwara’s own failure to timely satisfy its lien. Indeed, DCP’s lien was only satisfied when the remaining settlement funds were interpleaded and after DCP’s initial counterclaim was filed. Therefore, Agwara fails to show how the district court abused its

discretion in granting DCP's voluntary dismissal before first deciding his countermotion for summary judgment.⁵

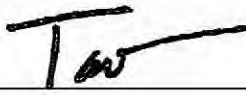
Further, Agwara had the burden of demonstrating that he would suffer legal prejudice resulting from the voluntary dismissal of DCP's amended counterclaim. Although Agwara argues that this deprived him of being the prevailing party and prevented him from recovering costs that he incurred from conducting a deposition during the discovery on DCP's counterclaim, he cites to no authority to support how being denied recovery of these limited costs would constitute legal prejudice sufficient to deny DCP's voluntary dismissal. Moreover, Agwara failed to substantively address the issue of legal prejudice below and on appeal. *Smith*, 263 F.3d at 975; see *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (explaining that this court need not consider an appellant's argument that is not cogently argued or lacks the support of relevant authority); *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (noting that issues not raised in the trial court are generally deemed waived).


Thus, Agwara fails to demonstrate how the district court abused its discretion in granting DCP's motion to voluntarily dismiss its amended counterclaim pursuant to NRCP 41(a)(2), based on the sufficiency of DCP's reasoning for seeking a voluntary dismissal, and denying Agwara's


⁵Because the district court did not abuse its discretion by granting DCP's motion to voluntarily dismiss its counterclaim before ruling on Agwara's countermotion for summary judgment, we need not delve into the merits of Agwara's countermotion, as the district court properly found it to be moot after granting DCP's motion to dismiss pursuant to NRCP 41(a)(2). As Agwara would only be the prevailing party by obtaining summary judgment against DCP, which he did not, the district court properly denied his request for costs.

countermotion for summary judgment as being moot. Because Agwara fails to demonstrate legal prejudice from the voluntary dismissal, this court cannot conclude that the district court abused its discretion in granting DCP's motion. Therefore, we

ORDER the judgment of the district court AFFIRMED.⁶


_____, J.
Tao


_____, C.J.
Gibbons


_____, J.
Bulla

cc: Hon. Jessica K. Peterson, District Judge
Paul M. Haire, Settlement Judge
Law Offices of Liborius Agwara, Ltd.
Wiley Petersen
Eighth District Court Clerk

⁶We have considered DCP's request for attorney fees for the instant appeal but find DCP's generalized allegations unpersuasive, as DCP points to nothing specific in the record to demonstrate that Agwara's appeal was frivolous which would entitle it to attorney fees pursuant to NRAP 38(b), particularly since both the voluntary dismissal and the countermotion were necessarily considered by the district court on remand. Therefore, DCP's request for sanctions pursuant to NRAP 38 is denied.