

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MICHAEL ANGELO DRAKE,
Appellant,
vs.
CAROL NELSEN; AND PATRICIA
REEVES,
Respondents.¹

No. 66601

FILED

MAY 06 2016

ORDER OF AFFIRMANCE

TRACY L. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

This is an appeal from a district court summary judgment in a civil rights action.² Sixth Judicial District Court, Pershing County; Richard Wagner, Judge.

¹With regard to appellant's October 7, 2014; October 17, 2014; June 19, 2015; and July 14, 2015, letters, and his July 1, 2015, motion, we agree that Alicia Lerud should be removed from the caption, and we therefore direct the clerk of the court to conform the caption for this appeal to the caption on this order. For the reasons discussed below, we decline to add the City of Lovelock as a respondent to this appeal.

²Having considered appellant's November 5, 2014, motion for appointment of counsel on appeal, we conclude that appointment of counsel is not warranted in this case and we therefore deny that motion. See *Rodriguez v. Eighth Judicial Dist. Court*, 120 Nev. 798, 804, 102 P.3d 41, 45 (2004) (recognizing that the Sixth Amendment right to counsel applies only in criminal prosecutions). We grant appellant's April 6, 2016, motion for a waiver of the page limitation for his reply brief, and we direct the clerk of the court to file the reply brief provisionally received on April 6, 2016.

16-900531

Background

Appellant Michael Angelo Drake filed the underlying action against respondents, former justice of the peace Carol Nelsen and former clerk of the Lake Township Justice Court Patricia Reeves, alleging violations of his First, Fifth, and Fourteenth Amendment rights under the United States Constitution.³ In particular, Drake contended that Nelsen improperly denied him leave to proceed on appeal from a justice court decision in forma pauperis (IFP) and that Reeves failed to file multiple notices of appeal and motions for leave to proceed IFP, resulting in his losing his ability to appeal the justice court matter. Thus, all of Drake's claims were premised around a theory of denial of access to the courts.

The district court granted respondents judgment on the pleadings as to all of Drake's claims on immunity grounds. The Nevada Supreme Court affirmed the dismissal of certain claims, but reversed the dismissal of Drake's request for injunctive relief against Nelsen and Reeves in their official capacities, as well as his request for monetary

³For each count of his complaint, Drake identified a provision of the United States Constitution and then added the words "and pendant state/municipality claims." But he did not identify any basis under state law for his claims, nor does he identify any such basis on appeal. As a result, we conclude Drake did not allege any state law claims, and thus, his argument on appeal that respondents failed to address these claims lacks merit. *See Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 846, 858 P.2d 1258, 1260 (1993) ("The test for determining whether the allegations of a complaint are sufficient to assert a claim for relief is whether the allegations give fair notice of the nature and basis of a legally sufficient claim and the relief requested.").

damages against Reeves in her individual capacity.⁴ See *Drake v. Lerud*, Docket No. 60089 (Order Affirming in Part, Reversing in Part, and Remanding, November 14, 2013). On remand, respondents moved to dismiss the remaining claims and the district court granted that motion over Drake's opposition. Thereafter, Drake filed a motion to alter or amend the dismissal. On review of the motion to alter or amend the judgment, the district court essentially granted the motion insofar as the court addressed all of Drake's claims anew and set forth additional analysis for resolving those claims. In doing so, the court considered matters outside of the pleadings that were submitted both by Drake and by respondents. Ultimately, in addressing Drake's claims, the court treated the motion to dismiss as a motion for summary judgment and granted that motion in respondents' favor. This appeal followed.

Default judgment against the City of Lovelock/Lake Township

As an initial matter, Drake asserts on appeal that the clerk of the district court inadvertently left the "City of Lovelock/Lake Township" off of the caption in his appeal documents, resulting in the omission of the

⁴To the extent Drake argues the district court denied him due process by failing to consider his opposition to the original motion for judgment on the pleadings, this issue was presented in his appeal from the order granting that motion, and the Nevada Supreme Court determined that no further relief was warranted based on this argument. See *Drake v. Lerud*, Docket No. 60089 (Order Affirming in Part, Reversing in Part, and Remanding, November 14, 2013). Accordingly, we will not consider this issue in the context of this appeal. See *Recontrust Co. v. Zhang*, 130 Nev. ___, ___, 317 P.3d 814, 818 (2014) ("The law-of-the-case doctrine 'refers to a family of rules embodying the general concept that a court involved in later phases of a lawsuit should not re-open questions decided (i.e., established as law of the case) by that court or a higher one in earlier phases.'" (quoting *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 739 (D.C. Cir. 1995))).

City as a respondent in this appeal. He also argues that the district court erred by failing to grant a default judgment against the City.

Drake did not name the City of Lovelock in his complaint. Instead, the complaint included the "City of Lake Township" as a defendant to the action, and Drake purportedly served a summons on the "City of Lake Township, Lovelock." When no answer was filed for this entity, Drake sought a default judgment against the "City of Lake Township," which the district court denied on the grounds that there is no such entity in the State of Nevada.

On appeal, Drake does not address the district court's finding that the City of Lake Township does not exist, and thus, he has waived any argument as to the existence of Lake Township. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (explaining that an issue not raised on appeal is deemed waived). Instead, in his appeal statement, Drake refers to the entity he sought to include as a defendant as the City of Lovelock/Lake Township. As Drake did not name and serve the City of Lovelock, however, the district court did not err by declining to enter default judgment against the City.⁵ *See* NRCP 4 (requiring the summons and complaint to be served on any defendants); NRCP 55 (providing for default judgment against a party); *cf. Valley Bank of Nev. v. Ginsburg*, 110 Nev. 440, 448, 874 P.2d 729, 735 (1994) (explaining that an entity who has not been named as a party of record in

⁵Even if Drake had properly named the City of Lovelock, he asserts that he served the City by serving "Keren Stephens, Court Clerk." But service on a city must be made on "the chairperson of the board of commissioners, president of the council or trustees, mayor of the city, or other head of the legislative department thereof." NRCP 4(d)(5). Thus, service of the summons and complaint upon Stephens would not have been sufficient to bring the City of Lovelock into the underlying action.

the district court and served with process is not a party for the purposes of an appeal). Thus, in light of the district court's unchallenged conclusion that Lake Township does not exist and Drake's failure to name and serve the City of Lovelock, we affirm the district court's decision to deny default judgment.

Discovery

Next, Drake argues that "the totality of the circumstances involving discovery" demonstrates that the district court denied him due process and equal protection when resolving the parties' respective discovery requests. He further asserts that the district court treated him carelessly, denied him the opportunity to be heard, and abused its discretion by granting respondents' requests to stay discovery. He does not, however, explain why the district court should have resolved any specific discovery motion differently than it did or how the district court's resolution of the motions violated his constitutional rights. Having considered the record on appeal, we discern no abuse of discretion or constitutional violation in the district court's resolution of the discovery motions. *See In re Adoption of a Minor Child*, 118 Nev. 962, 968, 60 P.3d 485, 489 (2002) (explaining that appellate courts will not overturn a district court's discovery decision absent a clear abuse of discretion); *see also Awada v. Shuffle Master, Inc.*, 123 Nev. 613, 618, 173 P.3d 707, 711 (2007) (explaining that constitutional issues present questions of law that are reviewed de novo on appeal).

Timeliness of the motion to dismiss

In seeking resolution of the underlying case on remand, respondents styled their dispositive motion as a motion to dismiss the complaint. On appeal, Drake argues that the district court erred by entertaining the motion because it was untimely filed after respondents filed their answer to the complaint. *See* NRCP 12(b) (requiring a motion

to dismiss for failure to state a claim to “be made before pleading if a further pleading is permitted”).

Although respondents styled the filing as a motion to dismiss, the motion was essentially a timely second motion for judgment on the pleadings. Because we discern no harm affecting Drake’s substantial rights caused by calling the filing a motion to dismiss, we conclude that this argument does not provide a basis for reversing the district court’s decision. See NRCP 61 (requiring the court at all stages of a proceeding to disregard any error that does not affect a party’s substantial rights).

Consideration of the filing as a motion for summary judgment

Drake also argues that the district court improperly went one step further when it ultimately treated respondents’ motion as one for summary judgment. NRCP 12(c) requires a court to treat a motion for judgment on the pleadings as a motion for summary judgment when “matters outside the pleadings are presented to and not excluded by the court.” Drake cites federal cases for the proposition that, before treating a filing as a motion for summary judgment, the court must give an incarcerated pro se litigant notice of its intent to convert the motion and an explanation of the requirements for opposing the motion. See, e.g., *Klinge v. Eikenberry*, 849 F.2d 409, 411-12 (9th Cir. 1988) (concluding that federal district courts are obligated to advise pro se inmate litigants of the summary judgment requirements before granting an opposing party summary judgment).

While the Nevada Supreme Court has recognized “that, in the summary judgment setting at least, lack of explanation to a [pro se] litigant as to what is required to defeat a properly supported summary judgment has been held in some jurisdictions to be error cognizable on direct appeal,” *Bonnell v. Lawrence*, 128 Nev. 394, 403-04, 282 P.3d 712, 718 (2012), that court has not adopted such a rule for this jurisdiction.

Moreover, this is not a situation where respondents presented matters outside of the pleadings and Drake did not have an opportunity to present anything in opposition to those matters. Here, Drake himself presented documentary evidence outside of the pleadings for the district court's consideration, and the record demonstrates that the court considered the materials presented by Drake. Because the court considered matters outside the pleadings, it properly treated the motion as one for summary judgment. See NRCP 12(c).

Injunctive relief

As noted above, in the prior appeal, the Nevada Supreme Court reversed the dismissal of Drake's claims for injunctive relief against both respondents and remanded for further proceedings as to those claims. In the instant appeal, Drake asserts that the district court improperly concluded that his claims for injunctive relief were moot because both respondents left their positions with the justice court. Drake argues that his claims were not moot because respondents were acting under color of state law at all relevant times and he established that a constitutional deprivation had occurred.

Regardless of whether he stated a claim at the time of filing his complaint, "a controversy must be present through all stages of the proceeding." See *Personhood Nev. v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010) (recognizing that a claim that is cognizable at its beginning may become moot due to events occurring after the complaint is filed). And a claim is moot if the court cannot afford effective relief with respect to the issue being raised. See *id.* Here, Drake's claims for injunctive relief sought to compel respondents to fulfill certain duties in their positions with the court. But Drake does not dispute that both respondents have now left those positions. Thus, the district court could not grant relief compelling respondents to undertake the duties associated

with those positions, and Drake's claims are therefore moot as to these respondents. *See id.*

Drake also argues that his claims for injunctive relief are not moot because he sought relief against the offices themselves and against respondents' successors to those offices. "[I]njunctive relief is not available in the absence of actual or threatened injury, loss or damage. There should exist the reasonable probability that real injury will occur if the injunction does not issue." *Berryman v. Int'l Bhd. of Elec. Workers*, 82 Nev. 277, 280, 416 P.2d 387, 388-89 (1966) (citations omitted). Even assuming that respondents committed the constitutional infractions alleged by Drake, there is nothing to indicate that their successors would commit similar infractions or otherwise fail to perform their duties consistently with the law. As there is no threatened injury, the district court did not abuse its discretion by denying injunctive relief.⁶ *See id.*; see also *Personhood Nev.*, 126 Nev. at 602, 245 P.3d at 574 ("The question of mootness is one of justiciability. [The] court's duty is not to render advisory opinions but, rather, to resolve actual controversies by an enforceable judgment.").

⁶Because we conclude that the district court properly denied injunctive relief for the reasons discussed herein, we need not address Drake's arguments with regard to the availability of declaratory relief. Nevertheless, we note that his contention that respondents were barred by the law-of-the-case doctrine from making certain arguments on remand because they were not previously raised lacks merit. *See Recontrust Co. v. Zhang*, 130 Nev. ___, ___, 317 P.3d 814, 818 (2014) ("Subjects an appellate court does not discuss, because the parties did not raise them, do not become the law of the case by default." (quoting *Bone v. City of Lafayette, Ind.*, 919 F.2d 64, 66 (7th Cir. 1990))).

Damages claims on remand

Drake also asserts on appeal that his damages claims against respondents in both their individual and official capacities were proper. In his previous appeal, however, the Nevada Supreme Court affirmed the dismissal of the damages claims against Nelsen in both her individual and official capacity and the damages claim against Reeves in her official capacity. *See Drake v. Lerud*, Docket No. 60089 (Order Affirming in Part, Reversing in Part, and Remanding, November 14, 2013). Thus, the only damages claim that remained pending on remand was the individual capacity claim against Reeves. *See Wheeler Springs Plaza, LLC v. Beemon*, 119 Nev. 260, 266, 71 P.3d 1258, 1262 (2003) (“Under the law-of-the-case doctrine, when an appellate court decides a rule of law, that decision governs the same issues in subsequent proceedings.”).

Summary judgment as to damages

In ultimately deciding the dispositive motion in this case as one for summary judgment, the district court was required to construe all the evidence presented in the light most favorable to Drake and could only grant summary judgment to Reeves if there were no genuine issues of material fact and Reeves was entitled to judgment as a matter of law. *See Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Here, the district court concluded that the claim for damages failed for several reasons, including that Reeves had not violated Drake’s right of access to the courts because she was required to reject the notice of appeal he submitted for filing without the fee after Nelsen denied him leave to proceed IFP and that Reeves had not caused Drake any injury because the


notice of appeal that she rejected was premature and thus ineffective.⁷ Although he generally argues that the district court erred by resolving factual issues in granting the summary judgment motion, Drake does not address the district court's above-mentioned conclusions in his appeal statement or identify any factual dispute that the district court improperly resolved in reaching its decision. As a result, he has waived any argument in this regard. See *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (explaining that an issue not raised on appeal is deemed waived); see also *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (providing that the appellate court need not consider claims that are not cogently argued). Thus, we necessarily affirm the district court's decision to grant summary judgment to Reeves as to Drake's claim for damages for the purported violation of his right of access to the court.

⁷To the extent that the district court found that Reeves was entitled to absolute quasi-judicial immunity, this finding was contrary to the Nevada Supreme Court's holding in Drake's prior appeal, see *Drake v. Lerud*, Docket No. 60089 (Order Affirming in Part, Reversing in Part, and Remanding, November 14, 2013), and thus, it was in error. See *Wheeler Springs Plaza*, 119 Nev. at 266, 71 P.3d at 1262. Nevertheless, because the district court provided alternative grounds for granting summary judgment as discussed herein, this error does not provide a basis for reversing the district court's decision.

Accordingly, as Drake has not identified any basis for reversing the district court's decision, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Sixth Judicial District Court Department One
Michael Angelo Drake
Pershing County District Attorney
Pershing County Clerk