

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BYRON JAMES FORE,
Appellant,
vs.
THE STATE OF NEVADA
DEPARTMENT OF CORRECTIONS;
AND JAMES G. COX, DIRECTOR,
INDIVIDUALLY AND OFFICIALLY,
Respondents.

No. 72847

FILED

OCT 30 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Byron James Fore appeals from an order dismissing an action for declaratory relief. Seventh Judicial District Court, White Pine County; Steve L. Dobrescu, Judge.

In a previous appeal, this court ordered the Nevada Department of Corrections (NDOC) to provide Fore, an inmate, with information pertaining to administrative restitution NDOC had previously assessed against him in relation to his having stabbed a fellow inmate.¹ On remand, NDOC filed a notice of compliance with the district court stating that it had complied with that court's order directing compliance with this court's original order. After six months passed with no further filings, the district court summarily dismissed the matter without providing prior notice to the parties.

In this appeal, Fore initially argued that NDOC never actually provided him with any information and that the district court erred by summarily dismissing the matter without making any factual findings or considering evidence. However, during the course of motion practice prior

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

to the supreme court's transferring the appeal to this court, NDOC produced a copy of the document it claims to have previously provided to Fore, and it argued that this appeal and the underlying case are now moot in light of Fore's receipt of the information. The supreme court allowed NDOC to supplement the record if it wished to discuss mootness in its answering brief, which it did. However, because we conclude that the district court properly dismissed the action, we need not consider NDOC's argument that the case is moot, nor must we consider Fore's argument that the information NDOC provided did not comply with this court's original order.

Fore argues that the district court's order of dismissal amounted to an improper grant of summary judgment in favor of NDOC, as NDOC failed to meet its initial burden of demonstrating the absence of a genuine issue of material fact, and the district court did not provide Fore the requisite notice for granting summary judgment sua sponte. NDOC counters that the notice it filed with the district court constituted sufficient evidence of compliance and that Fore failed to object to the notice.

As a preliminary matter, we note that NDOC's notice of compliance did not contain any request for relief or for judgment to be entered in its favor, and the district court's order of dismissal did not purport to enter judgment in NDOC's favor. Instead, the district court's order—entered six months after NDOC filed its notice—noted NDOC's representation of compliance and the lack of any further filings, and concluded that, thus, good cause existed to dismiss the matter. Accordingly, we evaluate the district court's decision as an order dismissing the action for want of prosecution. *See* NRCPC 41(e); *Hunter v. Gang*, 132 Nev. 249, 256, 377 P.3d 448, 453 (Ct. App. 2016). Because the district court's order makes no mention of NRCPC 41(e), and because the district court did not

provide prior notice to the parties, we evaluate its order as an exercise of its inherent authority. *See Hunter*, 132 Nev. at 256, 377 P.3d at 453 (reasoning that where the district court did not have authority to dismiss an action under NRCP 41(e), it must have acted under its inherent authority).

This court will reverse a district court's decision to exercise its inherent authority to dismiss an action for want of prosecution only when "the district court grossly abused its discretion." *Id.* at 259, 377 P.3d at 455. "The element necessary to justify dismissal for failure to prosecute is lack of diligence on the part of the plaintiff . . ." *Id.* (quoting *Moore v. Cherry*, 90 Nev. 390, 395, 528 P.2d 1018, 1022 (1974)). However, district courts should exercise this inherent authority sparingly. *Id.* at 258, 377 P.3d at 454 ("We remind courts that because inherent authority is not regulated by the Legislature or the people, it is more susceptible to misuse, and thus should be exercised sparingly.").

Because of the danger of courts misusing their inherent authority to dismiss actions without proper justification, we believe it is important to note the context in which the district court dismissed the underlying action. In this court's prior order, we noted that "[o]nce Fore has been given [the requisite] information, he can then determine whether to pursue a further grievance." *Fore v. State, Nev. Dep't of Corr.*, Docket No. 64028 (Order of Reversal and Remand, October 23, 2015). We further noted that "[b]ecause Fore has not yet been provided this information, and because this information could theoretically moot the need for any further challenge, we need not address the question of whether Fore might be entitled to a hearing in connection with a grievance after the information has been provided to him." *Id.* Essentially, we indicated to the parties that the only justiciable issue remaining in this case following remand would be

whether NDOC would provide information to Fore that complied with this court's order,² and that Fore would need to assert any further challenge through NDOC's administrative grievance process.³ Consequently, when Fore failed to challenge NDOC's representation of compliance for six months, the district court was faced not only with a plaintiff demonstrating a lack of diligence in prosecuting the action, but also with a situation in which Fore's failure to respond could easily be interpreted by reasonable minds to reflect his agreement with the substance of NDOC's notice, rendering the underlying dispute moot. *See Aguirre v. S.S. Sohio Intrepid*, 801 F.2d 1185, 1189 (9th Cir. 1986) ("Because mootness is an element of justiciability and raises a question as to our jurisdiction, we consider the matter *sua sponte*."); *Landreth v. Malik*, 127 Nev. 175, 179, 251 P.3d 163,

²While this court's prior order did not specifically address Fore's contention that assessing administrative restitution under NRS 209.246 in an amount "to be determined" exceeds NDOC's authority and violates various statutory provisions, we need not reach this issue in light of our disposition.

³As argued by NDOC in this appeal, this is so because the Prison Litigation Reform Act requires prisoners to exhaust any available administrative remedies prior to filing an action under federal law, and Fore's petition for a declaratory judgment relied on federal caselaw applying federal law. *See* 42 U.S.C. § 1997e(a); *Porter v. Nussle*, 534 U.S. 516, 532 (2002) ("[T]he PLRA's exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong."); *Berry v. Feil*, 131 Nev. 339, 344, 357 P.3d 344, 347 (Ct. App. 2015) (concluding that federal claims regarding prison life brought in Nevada state courts are subject to the PLRA's exhaustion requirements). We conclude that Fore's only argument that the PLRA does not apply—that this suit is not about prison conditions or prison life—is without merit, as the restitution he challenges is clearly a condition imposed on him relating to his conduct and status as an inmate.

166 (2011) (noting that courts may consider whether they lack subject matter jurisdiction sua sponte). In such a scenario, we conclude that the district court was entitled to rely on NDOC's unobjected-to notice of compliance. *See Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. 243, 256-57, 235 P.3d 592, 601 (2010) (noting in the context of a discovery dispute that the district court appropriately relied, in part, on "factual representations made by the attorneys, as officers of the court," and citing the duty of candor an attorney owes to the court under RPC 3.3). Accordingly, we conclude that the district court did not grossly abuse its discretion in dismissing the action for want of prosecution under its inherent authority.

Based on the foregoing, we

ORDER the judgment of the district court AFFIRMED.



C.J.

Silver



J.

Tao



J.

Gibbons

cc: Hon. Steve L. Dobrescu, District Judge
Legal Aid Center of Southern Nevada, Inc.
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