

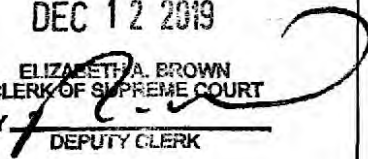
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

EASTERN HILLS CENTER PHASE LL
2015, LLC, A NEVADA LIMITED
LIABILITY CORPORATION,
SUCCESSOR IN INTEREST TO THE G
& M DANIEL FAMILY LIMITED
PARTNERSHIP,
Appellant,
vs.
MYRH, INC., A NEVADA
CORPORATION, D/B/A THE
JEWELERS OF LAS VEGAS,
Respondent.

No. 75316-COA

FILED

DEC 12 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Eastern Hills Center Phase LL 2015, LLC appeals from a judgment entered on an arbitration award following a district court order striking its request for trial de novo. Eighth Judicial District Court, Clark County; Adriana Escobar, Judge.

Eastern Hills filed suit against respondent Myrh, Inc., alleging Myrh owed it money under a commercial lease agreement. The matter proceeded to court annexed arbitration. The arbitrator then entered an award that purported to dismiss the matter without prejudice, but the ADR Commissioner advised the arbitrator and the parties that the arbitrator did not have authority to dismiss the matter and that the award would thus be treated as a defense award. Thereafter, Eastern Hills timely filed a request for trial de novo and Myrh moved to strike it. Over the opposition of Eastern Hills, the district court granted the motion to strike. In so doing, the court found that Eastern Hills failed to meaningfully participate in the



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arbitration, in large part based upon its late initial disclosures, which compromised Myrh's ability to depose proper parties and form an adequate arbitration strategy. The court also based its decision on Eastern Hills' failure to produce requested documents that were crucial to its case. Ultimately, the district court entered judgment on the arbitration award and this appeal followed.

As an initial matter, review on appeal from a judgment entered on an arbitration award following an order striking a request for trial de novo is limited to the order striking the trial de novo request and written interlocutory orders disposing of a portion of the case. See NAR 18(F). Therefore, while Eastern Hills raises numerous arguments addressing issues other than the striking of its trial de novo request, they are not properly before this court and are thus not addressed herein.¹

Turning to the order striking Eastern Hills' trial de novo request, NAR 22(A) provides that "[t]he failure of a party or an attorney to either prosecute or defend a case in good faith during the arbitration proceedings shall constitute a waiver of the right to a trial de novo." In this context, good faith means meaningful participation. See *Casino Props., Inc. v. Andrews*, 112 Nev. 132, 135, 911 P.2d 1181, 1182 (1996). The decision to strike a request for a trial de novo is reviewed for an abuse of discretion. *Gittings v. Hartz*, 116 Nev. 386, 391, 996 P.2d 898, 901 (2000).

¹Eastern Hills attempts to avoid this rule by couching various arguments as raising issues of subject matter jurisdiction, but our review reveals no jurisdictional infirmity. See *Vaile v. Eighth Judicial Dist. Court*, 118 Nev. 262, 276, 44 P.3d 506, 515-16 (2002) (noting that subject matter jurisdiction cannot be waived and can be raised at any time).

In its motion to strike, Myrh alleged various failures by Eastern Hills to comply with discovery requirements, which they argued amounted to a lack of meaningful participation in arbitration. But Eastern Hills did not address any of those failures in the district court, except to assert that Myrh never filed a motion to compel, that the discovery issues should have been brought up to the arbitrator and that the arbitrator did not find it acted in bad faith.² On appeal from the decision to strike its request for trial de novo, Eastern Hills presents a number of arguments asserting that its handling of the discovery process did not warrant the striking of its request for trial de novo. But aside from the points noted above, these arguments were not raised below and, thus, are not properly before us for the first time on appeal. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court . . . is deemed to have been waived and will not be considered on appeal.").

Regardless, none of the arguments Eastern Hills presents on appeal show that the district court abused its discretion in striking the request for trial de novo. Eastern Hills' conduct during the discovery process is similar to the conduct addressed by our supreme court in *Casino Properties*, where the court upheld the striking of a request for trial de novo. 112 Nev. at 135-36, 911 P.2d at 1183. Specifically, the *Casino Properties*

²In the district court, in opposition to the motion to strike, Eastern Hills largely focused on the issue regarding its alleged lack of capacity under NRS 86.548(2) for failing to register with the Nevada Secretary of State and, on appeal, argues that the failure to register was the principal ground upon which the district court struck its request for trial de novo. But this assertion is belied by the record as the district court focused primarily on the discovery issues.

court held that the defendants' failure to respond to discovery until "ten days before the arbitration hearing . . . amounted to a lack of meaningful participation because it compromised [the plaintiff's] ability to depose the proper parties and form an adequate arbitration strategy." *Id.* at 135, 911 P.2d at 1183.


Here, Eastern Hills failed to provide its initial disclosures until after the discovery cutoff and only did so two weeks prior to the arbitration hearing—conduct that the district court found compromised Myrh's ability to depose the proper parties and form an adequate arbitration strategy. Additionally, Eastern Hills failed to timely respond to discovery requests, and when it did, it failed to produce all of the requested information, which was information crucial not only to proving its case, but to Myrh's ability to defend the case. And considering Eastern Hills is the plaintiff and has the burden to prove its case, its failure to provide information necessary to meet that burden shows a lack of meaningful participation. *See id.*, at 911 P.2d at 1182 (equating good faith with meaningful participation); *Stickler v. Quilici*, 98 Nev. 595, 597, 655 P.2d 527, 528 (1982) (explaining that the burden is on the plaintiff to prove every fact essential to establishing a cause of action).

Although Eastern Hills attempts to downplay its shortcomings by asserting Myrh failed to file a motion to compel, it points to no authority, and we are not aware of any, which would excuse Eastern Hills' failure to participate in good faith on this basis. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (declining to consider issues that are not supported by relevant authority). Accordingly, we conclude that the district court did not abuse its discretion in striking

Eastern Hills' request for trial de novo. *See Gittings*, 116 Nev. at 391, 996 P.2d at 901. We therefore,

ORDER the judgment of the district court AFFIRMED.³


_____, C.J.
Gibbons


_____, J.
Tao

³While we reach a different conclusion than our dissenting colleague, we agree with the dissent's concerns regarding the errors in the handling of the underlying matter during the arbitration process. Specifically, as the ADR Commissioner correctly noted, the arbitrator should not have attempted to dismiss the matter. Instead, any such request for dismissal should have been directed to the district court, *see* NAR 4(E), with the arbitration continued or stayed pending the outcome. Or the arbitrator should have issued an award on the merits after the hearing that was held. Compounding this error is the fact that there is no authority specifically authorizing the ADR Commissioner to construe the purported dismissal as an award for Myrh. However, we cannot reach these issues given the constraints NAR 18(F) imposes on the scope of our review and therefore, our affirmance of the challenged order does not take these issues into consideration.

Nonetheless, it should be emphasized that Eastern Hills was not without a remedy to challenge these determinations. For example, NAR 8(B) provides a mechanism, through the use of a petition for judicial review, by which Eastern Hills could have challenged the ADR Commissioner's ruling that the dismissal would be treated as an award for Myrh. But Eastern Hills did not avail itself of this remedy, or any other method of challenging the ADR Commissioner's actions, such as filing a petition for a writ of prohibition or mandamus and instead moved forward with a request for trial de novo.

Bulla, J., dissenting:

In affirming the decision to strike appellant Eastern Hills Center Phase LL 2015's request for trial de novo, the majority upholds the district court's decision to enter a judgment on the merits stemming from the arbitrator's decision below. But there was no hearing on the merits in the underlying case—either before the arbitrator or otherwise—and the arbitrator's award likewise did not address the merits of Eastern Hills' case. Instead, the arbitrator attempted to dismiss the case without prejudice. Because I cannot affirm the district court's decision under these circumstances, I respectfully dissent.

The majority concludes that NAR 18(F) limits the scope of review on appeal to the denial of the trial de novo. However, in my view, nothing in this rule prevents this court from acting within its authority to correct plain and manifest errors *sua sponte*—including determining whether the de novo request was properly before the district court in the first instance. *Cf. Bradley v. Romeo*, 102 Nev. 103, 105, 716 P.2d 227, 228 (1986) (“The ability of this court to consider relevant issues *sua sponte* in order to prevent plain error is well established.”) Indeed, the majority acknowledges multiple errors were made on different levels before the de novo request was before the district court. *See* majority order, *supra* note 3. I would utilize the authority of this court and correct these errors, which are plain and obvious, and therefore reverse and remand.

As the record demonstrates, after this matter proceeded into the Court Annexed Arbitration Program, the arbitrator entered an award that purported to dismiss the matter without prejudice based on a perceived

lack of standing.⁴ Although the ADR Commissioner properly recognized that the arbitrator could not dismiss the case,⁵ the Commissioner went on to determine that this improper dismissal would nonetheless be treated as an arbitration award in favor of respondent Myrh, Inc. But no authority exists in either the Nevada Revised Statutes, the Nevada Arbitration Rules, or otherwise that authorizes the Commissioner to take such an action.

Notably, while NAR 17(C) provides that the Commissioner can issue an amended award, this rule is predicated on the arbitrator making a request to amend the award, which did not happen here. Moreover, no amended award was issued in this case. Instead, the Commissioner simply sent a letter to the arbitrator and the parties advising that the arbitrator's decision was going to be treated as a defense award in favor of Myrh. In so doing, the Commissioner's actions transformed the arbitrator's decision from one on non-merit based grounds to one on the merits. Critically, NAR 17(D) specifically states that the rule does not authorize the use of an amended award to change the arbitrator's decision on the merits. Thus, even if the Commissioner had issued an amended award, under the circumstances presented here, such an award would be improper under NAR 17(D).

⁴Although the arbitrator framed this issue as one of standing, Eastern Hills' failure to register with the Secretary of State actually presents a capacity issue.

⁵Instead, the question of whether the case should have been dismissed should have been heard by the district court because such dispositive issues are, by rule, to be brought in front of that court. See NAR 4(E) (providing for dispositive motions to be filed in the district court).

Following the Commissioner's letter regarding the purported award, Eastern Hills requested a trial de novo. Thereafter, the district court considered Eastern Hills' request for trial de novo and ultimately struck the request on Myrh's motion. The district court subsequently entered a judgment on the improper award—a judgment on the merits, even though the merits of the case were never actually heard. Given that there was never actually a proper arbitration award, issued after an arbitration hearing on the merits,⁶ the district court should not have considered Eastern Hills' request for a trial de novo or Myrh's motion to strike that request.⁷ Indeed, given that the arbitrator lacked authority to dismiss the case and that the Commissioner was likewise without authority to change that decision into an award in Myrh's favor, there was no effective decision for Eastern Hills to request a trial de novo from. *Cf. Vaile v. Eighth Judicial Dist. Court*, 118 Nev. 262, 271 44 P.3d 506, 512-13 (2002) (citing, with approval, the proposition that, where a court "acts without authority . . . the action of the court is void" (internal citations omitted)).

⁶*Cf.* NAR 8(A)(2) (providing that the arbitrator has the power to relax rules but "without sacrificing a party's right to a full and fair hearing on the merits"); NAR 16(B) (providing that "[t]he arbitrator shall determine all issues raised by the pleadings in cases that are subject to arbitration under the program").

⁷The district court's handling of the trial de novo issue is understandable, however, given that Eastern Hills, while arguing that the arbitrator's dismissal of its case was improper, failed to address the impact of the ADR Commissioner changing the award from a dismissal to a decision on the merits, and its effect on Eastern Hills' request for a trial de novo.

Under the circumstances presented here, the request for trial de novo was not properly before the district court. Instead, the district court should have returned this matter to the Court Annexed Arbitration Program so that it could proceed to a proper arbitration on the merits of Eastern Hills' claims. Because the district court failed to do so, I would reverse and remand the matter back to the district court for further proceedings.⁸


_____, J.
Bulla

cc: Hon. Adriana Escobar, District Judge
Kennedy & Couvillier, PLLC
Flangas Dalacas Law Group, Inc.
Eighth District Court Clerk

⁸Although Eastern Hills initially challenged whether it was required to register with the Nevada Secretary of State, it appears from the record that it has now registered, permitting the case to proceed on the merits.