

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MARIA CRISTINA ORTIZ,
Appellant,
vs.
RAUL ORTIZ-PINON,
Respondent.

No. 79544-COA

FILED

AUG 19 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER VACATING JUDGMENT AND REMANDING

Maria Cristina Ortiz appeals from the district court's findings of fact, conclusions of law, and decree of divorce. Eighth Judicial District Court, Clark County; David S. Gibson, Jr., Judge.

Maria Cristina Ortiz and Raul Ortiz-Pinon were married on June 16, 2006.¹ Maria and Raul² acquired the marital residence on October 27, 2011. Maria filed a complaint for divorce on September 21, 2018. During divorce proceedings, Raul failed to timely serve his NRCP 16.2 disclosures and to timely respond to Maria's requests for interrogatories, documents, and admissions. Maria attempted to contact Raul multiple times for each transgression to no avail. Maria filed two separate motions for sanctions for Raul's discovery violations.

A senior judge granted both of Maria's motions for sanctions on April 11, 2019. The notice of entry of order was also filed on April 11.³ As pertinent to this appeal, the sanctions were as follows: (1) Raul was not permitted to oppose Maria's claim that the marital residence was her

¹We recount the facts only as necessary to our disposition.

²We reference the parties by their first names for clarity.

³The district court order incorrectly cites the entry of order as April 12; however, this error has no effect on the disposition of this appeal.

separate property; (2) Raul was prohibited from offering any evidence that would contradict Maria's claim that the marital residence was her separate property; (3) Raul's NRCP 16.2 disclosures would establish that Raul had no interest in the marital residence and that the marital residence was Maria's separate property; (4) Raul's answer and counterclaim were stricken as to non-child custody matters; (5) Raul was in default as to all non-child custody matters; and (6) Raul admitted that there was no donative intent to him when Maria's parents purchased the marital residence and titled it in both Raul's and Maria's names.

The bench trial took place over two days, on April 15, 2019 and April 22, 2019. Before witness testimony began on the first day of trial, Raul *orally* objected to the discovery sanctions as improperly distributing the community property by default, which was essentially a request to reconsider or rehear the motion for sanctions, and also requested a new trial date. However, at no time did Raul file a motion to reconsider or hear the sanctions motion pursuant to EDCR 5.512. Maria argued that continuing the trial and engaging in discovery would violate her right to due process, and that the sanctions imposed against Raul were proper. The district court denied Raul's oral motion for a continuance, stating that this was the consequence of Raul's failure to participate in discovery. The district court, however, did not address the sanctions previously imposed against Raul at that time, but instead heard Maria's direct testimony before concluding the proceedings for the day.

During direct examination, Maria testified that her father purchased the marital residence "for the children," and that she never intended to gift the house to Raul, even though the marital residence was titled in both Maria's and Raul's names. Maria testified that she had a rental agreement with her parents to pay them back the money for the

marital residence. Maria stated that the marital residence was titled in both her and Raul's names because she thought it would help Raul with his immigration paperwork. The district court stated that if Maria wanted to designate the marital residence as separate property, Maria would need to admit writings demonstrating the transfer of marital residence from Maria's father to Maria was intended to be her separate property. Maria did not produce or admit such writings at trial, nor did she produce them during discovery. In her exhibit list, she did include the deed, which included the transfer of the marital residence to both herself and Raul.

On April 22, the second day of trial, both Maria and Raul testified. During his cross-examination of Maria, Raul started to question Maria about the marital residence. Maria objected to Raul's question because the discovery sanction order barred him from opposing her claims regarding the marital residence. Maria further stated that Raul was barred from offering any documents into evidence that would contradict her claim to the marital residence. The district court stated that Maria opened the door to cross-examination by talking about the marital residence during direct examination. Maria argued that the discovery sanctions order signed by the court was the operative order in the case. The district court stated that it could set aside or reconsider the order, even though a motion had not been filed by Raul, because the court preferred to hear the matter on the merits. The district court decided it would hear the evidence and then allow the parties to later brief the court on what it could and could not rule on based on the discovery sanctions order.

Raul's cross-examination of Maria thereafter continued, and Raul moved to admit the grant, bargain, and sale deed to the marital residence. Maria objected based on the discovery sanctions order, and the district court responded that it was setting aside the discovery sanctions

order. However, the district court stated that it would still impose some sanctions: Raul would not be able to call any witnesses or introduce any exhibits that he did not produce to Maria. Nevertheless, Raul would be able to testify, cross-examine Maria, and try to admit any exhibits that Maria produced.

Raul admitted the deed to the marital residence. Maria testified that the grant, bargain, and sale deed was dated October 27, 2011, and that the marital residence was conveyed from PNC Bank, National Association to Raul Ortiz and Maria Cristina Ortiz as community property with right of survivorship. Maria testified that there were no writings demonstrating (1) the house belonged to anyone other than Maria and Raul, (2) a rental agreement for the marital residence,⁴ or (3) Maria's parents purchased the house for her.

After the conclusion of witness testimony, Maria renewed her objection. Maria stated that had she known that the district court would disregard the discovery sanctions order on the second day of trial, her discovery and trial strategy would have been different. Maria stated that she did not present her case as fully as she would have had she known the district court would not adhere to the discovery sanctions order. The district court responded that the discovery sanctions were draconian as applied and that by hearing the matter on the merits the court was able to preserve the due process rights of both parties.

⁴The record suggests that there may have been an understanding or rental agreement between the parties and Maria's parents for repayment of funds used to purchase the marital residence. However, a written agreement was not produced during discovery or at trial, nor was one submitted with the record on appeal.

The district court filed its findings of fact, conclusions of law, and decree of divorce on July 30, 2019. The district court made several findings justifying its decision to modify the discovery sanctions order the second day of trial. The district court found that (1) the discovery sanctions order was noticed on April 12, 2019 and, therefore, was within the time allowed for reconsideration; (2) the discovery sanctions order was signed by a senior judge, and while sanctions against Raul were warranted, the order was draconian in its application; (3) delaying trial would have prejudiced Maria; (4) the case should be heard on the merits, and the court tailored the discovery sanctions to afford both parties due process; (5) the court could extend discovery deadlines in the interest of justice and without prejudice to the parties; and (6) even if the court admitted Raul's responses to Maria's requests for admissions, the responses would not help Raul's position at trial and therefore Maria was not prejudiced. Thus, the district court considered the evidence and summarily found that the marital residence was community property.

Maria thereafter appealed. On appeal, Maria argues that (1) the district court violated her right to due process by setting aside the discovery sanctions order mid-trial; (2) the district court abused its discretion by awarding the marital residence as community property; and (3) the district court abused its discretion by not awarding her all of her attorney fees and costs. Raul responds that the district court properly modified the discovery sanctions because community property may not be distributed by default. Raul also argues that the district court properly reconsidered the discovery sanction order. We begin by addressing Maria's first argument.

Maria initially argues that the district court violated her right to due process by rescinding the discovery sanctions order on the second day

of trial without notice or an opportunity to be heard. However, Maria does not provide a due process analysis under *Mathews v. Eldridge*, 424 U.S. 319 (1976). See *Kirkpatrick v. Eighth Judicial Dist. Court*, 119 Nev. 66, 76-77, 64 P.3d 1056, 1063 (2003) (suggesting that the *Mathews* test can be applied to determine whether a procedural due process violation occurred during an intra-family dispute). Instead, Maria filed a notice of supplemental authority urging this court to resolve this case under *Garcia v. Awerbach*, 136 Nev., Adv. Op. 27, 463 P.3d 461 (2020).⁵ In her notice, Maria described *Garcia* as “directly on point,” and specified that “it is prejudicial to modify a discovery sanctions order after trial started.” We agree and conduct an unfair prejudice analysis under *Garcia* rather than a due process analysis under *Mathews*.

In *Garcia*, the district court imposed a discovery sanction that established the legal issue of permissive use as a matter of law. *Id.* at 465. This sanction guided the plaintiff’s discovery strategy and trial preparation. *Id.* The district court, sua sponte, modified the discovery sanction on the first day of trial. *Id.* The modification resulted in the possibility that the plaintiff would need to present evidence she previously would not have had to present. *Id.* Consequently, the supreme court vacated the underlying judgment, reversed the district court’s order modifying the discovery sanction, and remanded for a new trial, concluding that the district court’s sua sponte modification was error and unfairly prejudiced the plaintiff’s ability to present her case. *Id.* at 465-66.

Here, the proceedings in this case closely mirror those in *Garcia*. The senior judge imposed several discovery sanctions which established that

⁵We note that *Garcia* was published after Maria filed her appeal, and the district court did not have the benefit of this decision.

Raul was in default regarding the marital residence. The discovery sanctions further stated that Raul could not oppose Maria's claim to the marital residence or admit exhibits contradicting Maria's claim that the marital residence was her separate property. Therefore, Maria made discovery and trial strategy decisions based on the belief that she would not need to present evidence regarding the marital residence at trial.

On the first day of trial, Raul made an oral request to the district court, asking for a modification of the discovery sanctions order. On the second day of trial, the district court modified the discovery sanctions order, allowing Raul to oppose Maria's claim that the marital residence was her separate property, and to admit exhibits supporting his opposition, including the deed to the property. Maria stated several times on the record that the discovery sanctions guided her discovery strategy and trial preparation, and that had she known the district court would not adhere to the discovery sanctions order, she would have proceeded differently.

It is clear that the modification of the discovery sanctions order severely impacted Maria's ability to present her case. Prior to the modification of the discovery sanction order, Raul was unable to present evidence that contradicted the claim that the residence was Maria's separate property. Therefore, Maria started trial with the belief that she would not have to present evidence to support her claim to the marital residence. Accordingly, as the district court modified the discovery sanctions order after the start of trial, Maria was unprepared to call witnesses, admit exhibits or present other evidence supporting that the marital residence was intended to be her separate property. Therefore, we conclude that the district court's modification of the discovery sanctions order was in error under *Garcia*, and that the timing of the modification unfairly prejudiced Maria's ability to present her case at trial.

Next, we consider Raul's responding argument that under *Blanco v. Blanco*, 129 Nev. 723, 311 P.3d 1170 (2013), the district court's modification of the discovery sanctions order was proper because community property may not be distributed by default. In *Blanco*, the district court imposed the case-concluding discovery sanction of a default divorce decree without a prove-up or an evidentiary hearing. *Id.* at 728, 311 P.3d at 1173. The default divorce decree included, among other things, the summary distribution of the marital residence. *Id.* at 729, 311 P.3d at 1173. On appeal, the supreme court considered whether case-concluding discovery sanctions such as default were appropriate in a divorce proceeding. *Id.* at 729, 311 P.3d at 1174. The court concluded that "[t]he equal disposition of community property may not be dispensed with through [case-concluding discovery sanctions]." *Id.* at 732, 311 P.3d at 1175. The court elaborated that "community property and debt must be divided in accordance with law" and, therefore, the district court must make findings on the division of property in accordance with NRS 125.150. *Id.* at 731-32, 311 P.3d at 1175.

Here, the discovery sanctions order stated that Raul was in default regarding all non-custody matters, i.e. the marital residence. The marital residence was acquired during marriage, so it was presumed community property. *Forrest v. Forrest*, 99 Nev. 602, 604-05, 668 P.2d 275, 277 (1983). As potential community property, the district court could not dispose of the marital residence by default under *Blanco*. Therefore, this discovery sanction may have been improper. And although the district court did not base its decision to modify the discovery sanctions on *Blanco*, the district court had the right instinct to modify this specific sanction. This, however, does not change our ultimate conclusion that the district court's modification of the sanctions order unfairly prejudiced Maria's ability to present her case. Even though the discovery sanctions may have been

improper, the sanctions were signed by the district court and Maria relied on them in her discovery and trial strategy.⁶

Finally, we consider Raul's argument that the district court's reconsideration of the discovery sanctions order was proper because it was timely. Although the court's reconsideration of the discovery sanctions order may have been timely, it does not overcome the prejudice to Maria. Further, there was a lack of technical compliance with the local rule governing reconsideration or rehearing of the court's prior ruling.⁷

Thus, we conclude that the district court erred in the timing of the modification of the discovery sanctions order. *Garcia*, 136 Nev., Adv. Op. 27, 463 P.3d at 465-66. Accordingly, we vacate the underlying judgment and remand for a new trial. Additionally, we direct the district court to consider modifying the scheduling order pursuant to NRCP 16.2 in order to allow the parties to conduct discovery on the issues concerning the marital residence.⁸


⁶The prudent course of action would have been to continue the trial and allow both sides to prepare to address the proper division of the residence. *Cf. Bongiovi v. Sullivan*, 122 Nev. 556, 563, 138 P.3d 433, 440 (2006) (concluding that the denial of the motion to continue was not an abuse of discretion because there was no prejudice).


⁷Raul's oral request to reconsider was made within 14 calendar days from the notice of entry of the sanctions order. However, we note that this *oral* request does not comply with the requirement that motions for reconsideration or hearing of a ruling must be filed with the court. *See* EDCR 5.512 (2019). We note, however, that the district court could have enlarged the time for Raul to file a motion to comply with the rule. *Id.*


⁸In light of our disposition, we do not consider Maria's argument regarding the district court's ultimate distribution of the marital residence as community property because the district court will necessarily reconsider this decision at the time of the new trial.

Finally, we need not consider Maria's argument regarding the district court's award of attorney fees because it is necessarily vacated upon our remand for a new trial. See *Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.*, 124 Nev. 1102, 1119-20, 197 P.3d 1032, 1043 (2008) (concluding that because a new trial was warranted, the award of attorney fees was necessarily vacated). Accordingly, we

ORDER the judgment of the district court VACATED AND REMAND this matter to the district court for proceedings consistent with this order.⁹


_____, J.
Tao


_____, C.J.
Gibbons


_____, J.
Bulla

cc: Hon. David S. Gibson, Jr., District Judge
Law Offices of F. Peter James, Esq.
Page Law Office
Eighth District Court Clerk

⁹The district court and the parties may want to consider our opinion in *DeChambeau v. Balkenbush*, 134 Nev. 625, 431 P.3d 359 (Ct. App. 2018), upon remand.