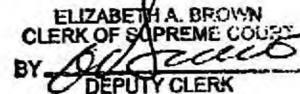
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

GREGG THOMPSON, AN INDIVIDUAL,
Appellant,
vs.
STEVE MASON, AN INDIVIDUAL; LORNA GREY, AN INDIVIDUAL; JAMES MASON, AN INDIVIDUAL; WILDSIDE USA, LLC, A NEVADA LIMITED LIABILITY COMPANY; AND POWERPOST MARKETING LTD., A BRITISH CORPORATION,
Respondents.

No. 78638-COA



APR 28 2021

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

ORDER REVERSING AND REMANDING

Gregg Thompson appeals from a final judgment following an order striking his request for trial de novo. Eighth Judicial District Court, Clark County; Jerry A. Wiese, Judge.

Thompson entered into a joint purchase agreement with Wildside USA, LLC, to purchase commercial property in Las Vegas.[1] Respondent Steve Mason was a co-owner of Wildside and party to the agreement.[2] The agreement provided that the parties would have equal possession and interest in the property, and share expenses equally.

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[1]We do not recount the facts except as necessary for our disposition.

[2]Mason owns Wildside USA, LLC, with Lorna Grey. Thompson entered into a joint purchase agreement with Wildside to purchase the commercial property. Wildside, Lorna Grey, Mason's son, and the son's business, PowerPost, are also named respondents to this case. We refer to all of the respondent parties collectively as Mason.

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Thompson and Mason then formed Social Storm, LLC, a marketing business that operated within the commercial property.

In Thompson's amended complaint, he alleged that Mason violated Social Storm's operating agreement by forming the competitor business, PowerPost. Thompson further alleged that Mason stole clients from Social Storm and that Mason unilaterally cancelled all of its service contracts with Social Storm's clients. The parties stipulated to attend arbitration to resolve their disputes arising under both the operating agreement and joint purchase agreement. After the stipulation, Mason filed an answer and counterclaim. Both parties propounded discovery requests prior to arbitration, though Thompson apparently never responded to any discovery requests.[3]

A few days before the arbitration hearing, the parties attended a discovery teleconference wherein Thompson communicated that he had fired his attorney. Thompson requested to extend the arbitration deadline so that he could obtain new counsel. Because the parties had continued the arbitration twice and the nine-month arbitration deadline was imminent, the arbitrator refused to continue the hearing or extend the deadline. The arbitrator stated that the parties must attend the arbitration as scheduled, but that the parties could discuss an extension at the hearing.

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[3]Thompson admits in his opening brief (but not below) that his attorney did not respond to Mason's interrogatories, requests for production of documents, or requests for admission. However, Thompson notes that this was one of the reasons for terminating his attorney. Thompson states that he attempted to rectify the situation and that he began to compile responses to Mason's discovery requests, but ceased doing so when the arbitrator issued the decision.

Thompson failed to appear both physically and telephonically at 10 a.m. for the arbitration hearing and he had not yet retained new counsel. After waiting for Thompson to call into the conference line, the arbitrator called Thompson's mobile number and left a voicemail telling him to call in by 10:30, otherwise the hearing would commence without him. Thompson never called, so the arbitrator proceeded with the hearing. Later, Thompson provided evidence that he emailed the arbitrator on the morning of the hearing. He stated in the email that he had an issue with the time zone—Thompson was in Arizona at the time and he was an hour ahead and he did not realize his electronic clocks had automatically reset to Arizona time.

During arbitration, the arbitrator dismissed Thompson's claims because he failed to present evidence to support them. Mason provided evidence to support his counterclaims. The arbitrator ultimately found that Thompson breached the joint purchase agreement and Social Storm's operating agreement. The arbitrator concluded that Thompson breached the covenant of good faith and fair dealing by not acting in a manner conducive to the preservation of Social Storm. The arbitrator awarded lost profits and expectancy damages to Mason.

Thompson requested a trial de novo, which Mason moved to strike. The district court conducted a non-evidentiary hearing and granted Mason's motion to strike. The court summarily concluded that Thompson did not participate in the arbitration process in good faith and failed to attend the arbitration. Thompson now appeals.

On appeal, Thompson alleges that he meaningfully participated in the arbitration process; that the district court failed to provide specific findings for granting Mason's motion to strike; and that the district court

erroneously relied on facts not supported by substantial evidence when it issued its order granting Mason's motion to strike. Mason responds that Thompson cannot demonstrate that he participated in the arbitration process in good faith, and further argues that the district court's order was appropriate.

"When a district court strikes a request for a trial de novo, the decision is treated for purposes of jurisdiction as a final order, subject to appellate review. The standard of review on appeal is abuse of discretion." *Gittings v. Hartz*, 116 Nev. 386, 391, 996 P.2d 898, 901 (2000). However, the review on appeal is limited to the order that struck, denied, or dismissed the trial de novo request. Nevada Arbitration Rule (NAR) 18(F). "If the district court strikes, denies, or dismisses a request for trial de novo for any reason, the court shall explain its reasons in writing and shall enter final judgment in accordance with the arbitration award." NAR 18(F). While Thompson raises three issues on appeal, our determination in this case ultimately turns on whether the district court's order contained sufficient findings. We conclude that the order did not, and therefore we do not address the other issues.

NAR 22 permits a district court to "sanction an arbitration participant by striking a request for a trial de novo if the participant has not acted in good faith. Specifically, 'the 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.'" *Gittings*, 116 Nev. at 390, 996 P.2d at 901 (quoting NAR 22(A)) (citing *Chamberland v. Labarbera*, 110 Nev. 701, 704, 877 P.2d 523, 523-24 (1994)). For purposes of a trial de novo request, the term "good faith" is equated with "meaningful participation" in the arbitration process. *Gittings*, 116 Nev. at

390, 996 P.2d at 901; *see Casino Props., Inc. v. Andrews*, 112 Nev. 132, 135, 911 P.2d 1181, 1182-83 (1996) (concluding that appellant failed to participate in the arbitration process in good faith because he refused to produce documents during discovery, failed to timely deliver a pre-arbitration statement, and failed to produce a key witness during the arbitration hearing). However, failure of a party to attend an arbitration hearing does not amount to a lack of good faith or lack of meaningful participation when counsel did appear. *Gittings*, 116 Nev. at 392, 996 P.2d at 902 (citing *Chamberland*, 110 Nev. at 705, 877 P.2d at 525).

Because the application of NAR 22(A) terminates the legal proceedings, on appellate review there is a "somewhat heightened standard of review." *Chamberland*, 110 Nev. at 704, 877 P.2d at 525 (quoting *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990)). In *Chamberland*, the district court struck a request for trial de novo, stating "having reviewed the submitted papers and hearing oral argument and good cause appearing therefor, IT IS HEREBY ORDERED that plaintiff's Motion to Strike defendant's Request for Trial De Novo be granted." *Id.* at 703, 877 P.2d at 524. The Nevada Supreme Court reversed, concluding that the order did not contain specific findings, "making review in this court extremely difficult." *Id.* at 705, 877 P.2d at 525. All rulings under NAR 22(A) "must be accompanied by specific *written* findings of fact and conclusions of law by the district court describing what type of conduct was at issue and how that conduct rose to the level of failed good faith participation." *Id.* at 705, 877 P.2d at 525 (emphasis added). *Cf. Willard v. Berry-Hinckley Indus.*, 136 Nev., Adv. Op. 53, 469 P.3d 176, 180 (2020) (holding "district courts must issue explicit and detailed findings, preferably in writing" to facilitate review of NRCP 60(b)(1) determinations).

Here, in its order to strike Thompson's request for a trial de novo, the district court stated, "THE COURT HEREBY FINDS Plaintiff/Counterdefendant Gregg Thompson did not prosecute the matter in good faith and failed to appear at the Arbitration Hearing on the Matter, therefore waiving his right to a trial de novo pursuant to N.A.R. 22(A)." The court's order does not explain what conduct, aside from Thompson not attending the arbitration hearing, amounted to not participating in the arbitration process in good faith. Further, the order does not make any finding whether the non-appearance was in bad faith or excusable in light of Thompson's explanation. Additionally, the record does not include a transcript of the hearing on Mason's motion to strike the request for a trial de novo.[4] The minutes from the hearing are also not instructive. At best, the district court's order is a partial recitation of NAR 18(F) and NAR 22(A), which is not sufficient to withstand a heightened standard of review on appeal. Without knowing the district court's reasoning when it struck the request for trial de novo, we cannot properly review the decision. *See Chamberland*, 110 Nev. at 705, 877 P.2d at 525 (noting that specific findings of fact and conclusions of law are "particularly appropriate for arbitration

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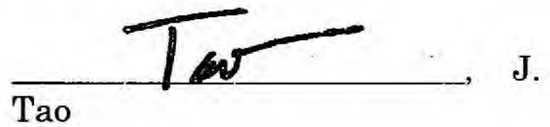
[4]We generally presume that whatever is missing from the record supports the district court's ruling. *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007). However, even if the record in this case included the hearing transcript, the district court's order is still deficient under NAR 18(F) and *Chamberland* because it does not contain specific written findings of fact and conclusions of law. Furthermore, the hearing only consisted of argument, not evidence, and the pleadings relied upon by the district court were not verified or supported by affidavits. *See* DCR 13(6) (stating that factual contentions in motions shall be initially presented and heard upon affidavits).

cases where the record on appeal is often scant, making review in this court extremely difficult").

We therefore conclude that the district court abused its discretion because it struck Thompson's request for a trial de novo and failed to make specific written findings of fact and conclusions of law consistent with *Chamberland*, 110 Nev. at 705, 877 P.2d at 525. Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court to make further findings or conduct further proceedings consistent with this order.

_______________, C.J.
Gibbons



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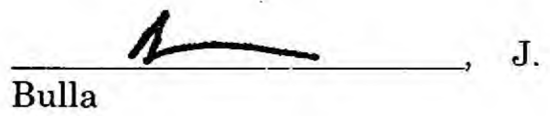

_______________, J.
Bulla

cc: Hon. Jerry A. Wiese, District Judge
Avalon Legal Group LLC
Law Offices of P. Sterling Kerr
Eighth District Court Clerk