

IN THE SUPREME COURT OF THE STATE OF NEVADA

HAPPY CAMPERS LLC, A NEVADA  
LIMITED LIABILITY COMPANY;  
JOSEPH E. KENNEDY, AN  
INDIVIDUAL; AND VALERIE  
KENNEDY, AN INDIVIDUAL,  
Appellants,

vs.

POST & PEARL PROPERTIES, LLC, A  
DELAWARE LIMITED LIABILITY  
COMPANY,  
Respondent.

HAPPY CAMPERS LLC, A NEVADA  
LIMITED LIABILITY COMPANY;  
JOSEPH E. KENNEDY, AN  
INDIVIDUAL; AND VALERIE  
KENNEDY, AN INDIVIDUAL,  
Appellants,

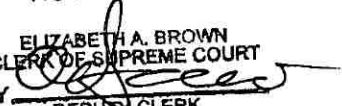
vs.

POST & PEARL PROPERTIES, LLC, A  
DELAWARE LIMITED LIABILITY  
COMPANY,  
Respondent.

No. 84808

FILED

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ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

No. 85015

*ORDER OF AFFIRMANCE*

These are consolidated appeals from two district court orders granting respondent summary judgment on the issues of liability and damages following termination of a commercial lease and breach of guaranty, and a district court order awarding attorney fees and costs. Eighth Judicial District Court, Clark County; Mark R. Denton, Judge.

In 2019, appellant Happy Campers LLC entered into an agreement to lease property from respondent Post & Pearl Properties, LLC.

The lease term was set to end in August 2024. Appellants Joseph E. and Valerie Kennedy served as guarantors. Happy Campers stopped paying rent in March 2020. At the end of April, Happy Campers notified Post & Pearl that Happy Campers was terminating the lease because COVID-19 restrictions made use of the property impracticable and/or impossible. Post & Pearl rejected the attempt to terminate the lease and reclaimed possession of the property in May 2020. Post & Pearl applied Happy Camper's security deposit to cover the unpaid rent and other costs, and subsequently entered into a lease agreement with a replacement tenant, for a lower rent but a longer term that also required tenant improvements at Post & Pearl's expense.

Post & Pearl sued Happy Campers for breach of contract and breach of guaranty. In its complaint, Post & Pearl alleged that it had mitigated its damages by procuring a replacement tenant and sought recovery for its unmitigated damages. Happy Campers answered and raised as affirmative defenses that Happy Camper's performance was excused as impracticable and/or impossible given the COVID-19 pandemic restrictions and that Post & Pearl's damages were barred in whole or in part by its failure to mitigate its damages. Post & Pearl's initial disclosures included a computation of damages that took the mitigation provided by the replacement tenant into account, including lost rent due to the reduced rental rate, construction costs for the improvements required by the replacement tenant, and the real estate commission for that tenant. Happy Campers made no discovery requests regarding mitigation or calculation of damages. In response to Post & Pearl's discovery request for facts supporting Happy Campers' defenses, Happy Campers simply pointed to its termination letter and the publicly known COVID-19 restrictions.

The district court's scheduling order required all dispositive motions to be filed by January 20, 2022. Four days after that deadline, Post & Pearl moved for summary judgment, attaching a manager's declaration outlining the expected rents from Happy Camper, the replacement tenant's longer term at a lower rate, the difference between the rent Happy Campers would have paid and what the replacement tenant paid, Post & Pearl's incurred tenant improvement costs, and the calculated damages of \$475,455.52 including mitigation and interest. Happy Campers opposed the summary judgment motion, objecting to the declaration as to damages, but not submitting evidence of its own. Post & Pearl supplemented its initial disclosures with a copy of the replacement tenant's lease agreement and the construction contract for the tenant improvements. The district court granted summary judgment as to liability but deferred summary judgment as to damages to allow supplemental briefing.

Happy Campers moved to deny summary judgment on damages and to reopen discovery under NRCPC 56(d)(2), arguing Post & Pearl's supplemental disclosures as to mitigation were untimely and should have been made during discovery. In support, Happy Campers submitted declarations by its attorney and its agent. The latter declaration stated that Happy Campers had found a replacement tenant that "would have resulted in no damages" to Post & Pearl.

The district court rejected Happy Campers' motion and granted summary judgment on damages. Including attorney fees and costs, the district court ultimately awarded Post & Pearl more than \$538,500.

On appeal, Happy Campers argues (1) that the district court improperly considered the motion for summary judgment without first finding good cause to extend the scheduling order's deadline; (2) that the

district court erred by denying Happy Campers' request to reopen discovery on the issue of damages; and (3) that summary judgment was precluded by genuine issues of material fact regarding the impossibility of performance, the amount of damages, and the reasonableness of Post & Pearl's mitigation efforts. Happy Campers further argues that if summary judgment is reversed, the attorney fees award should likewise be reversed.

These arguments are unpersuasive. First, NRCP 16(b)(4) allows a district court to modify a schedule for good cause, and a district court has the inherent authority to control its own docket, *Maheu v. Eighth Judicial Dist. Court*, 89 Nev. 214, 216-17, 510 P.2d 627, 629 (1973). Here, the district court granted the motion for "good cause appearing," and on the record presented (which omits transcripts of the hearing on the motion for summary judgment) it is fair to infer the district court found sufficient cause to hear the motion despite Post & Pearl's four-day delay in filing it. *Cf. Luciano v. Diercks*, 97 Nev. 637, 639, 637 P.2d 1219, 1220 (1981) ("[T]his court will imply findings of fact and conclusions of law so long as the record is clear and will support the judgment."). *See also Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007) (explaining that the appellant has the burden of providing this court with an adequate appellate record and that we will presume the missing portions support the district court's decision). And, given that the district court granted Happy Campers additional time and briefing opportunity to dispute Post & Pearl's mitigation efforts before the decision relative to damages, the record does not show Happy Campers was prejudiced. *See Zupancic v. Sierra Vista Recreation, Inc.*, 97 Nev. 187, 192-93, 625 P.2d 1177, 1180 (1981) (explaining that scheduling decisions, where allowed by the rules, will not

be overturned absent an abuse of discretion or substantial prejudice to a party).

Next, NRCP 56(d)(2) allows a court to grant extra time for discovery if the party opposing summary judgment “shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition.” Thus, a continuance is appropriate only where the movant shows “how further discovery will lead to the creation of a genuine issue of material fact.” *Aviation Ventures, Inc. v. Joan Morris, Inc.*, 121 Nev. 113, 118, 110 P.3d 59, 62 (2005). A district court’s decision to deny a continuance for further discovery is reviewed for an abuse of discretion. *Id.* Here, Happy Campers’ declarations failed to identify specific additional facts or materials that might be obtained through additional discovery that would warrant denying summary judgment. The record shows Happy Campers knew from Post & Pearl’s complaint and initial disclosures and computation of damages about its replacement tenant and its unmitigated damages, yet did not diligently pursue discovery on those or other issues while discovery was open. *See Francis v. Wynn Las Vegas, LLC*, 127 Nev. 657, 669-70, 262 P.3d 705, 714 (2011) (explaining the district court may deny the motion if the movant previously failed to diligently pursue discovery). The district court therefore did not abuse its discretion by declining to reopen discovery as to damages.

Last, summary judgment is appropriate where the pleadings and other evidence on file, viewed in the light most favorable to the nonmoving party, demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Once the moving party has met its burden to show that no genuine issue of fact


remains in dispute, the nonmoving party must present specific facts demonstrating that genuine issues of material fact remain. *Id.* at 732, 121 P.3d at 1031.


Post & Pearl filed a properly supported motion for summary judgment that established that (1) Happy Campers defaulted on the rent payment, (2) the Kennedys failed to cover rent and other damages following that default, (3) Post & Pearl mitigated its damages, and (4) what its remaining unmitigated damages were. Happy Campers failed to offer evidence in opposition to Post & Pearl's motion. It failed to show that COVID-19 restrictions excused their nonperformance or to demonstrate any remaining issue of fact as to liability. Turning to damages, Happy Campers contends that Post & Pearl did not prove its damages exceeded \$132,220. But as the district court correctly found, Happy Campers miscalculated the mitigated damages, subtracting the total amount of rent due from the replacement tenant from the rent remaining due on Happy Campers' lease. Happy Camper's calculation was in error, given that the term of the replacement lease exceeded that remaining on the Happy Campers lease by several years. The district court correctly calculated damages by offsetting the rent for the months remaining on the Happy Campers lease and prorating the tenant improvement expense similarly. As Happy Campers acknowledges, Post & Pearl presented evidence it mitigated its damages by securing the replacement tenant; it therefore fell to Happy Campers to present competent evidence that Post & Pearl's mitigation was unreasonable. *See Conner v. S. Nev. Paving, Inc.*, 103 Nev. 353, 355-56, 741 P.2d 800, 801 (1987) ("[T]he burden of proving failure to mitigate damages is on the breaching party."). And while Happy Campers alludes to an issue respecting the reasonableness of Post & Pearl's mitigation efforts, it does


not cogently argue the point in its opening brief on appeal, thereby waiving it. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (holding that an appellate court need not consider claims that are not cogently argued). We therefore conclude that summary judgment was appropriate and that, in turn, Happy Campers has established no basis to reverse the attorney fees award. Accordingly, we


ORDER the judgments of the district court AFFIRMED.

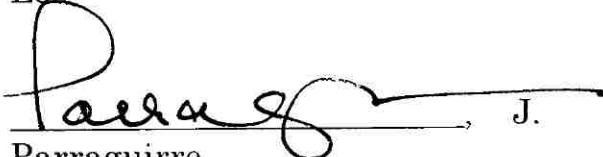
  
\_\_\_\_\_, C.J.  
Stiglich


  
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Cadish

  
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Herndon

  
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Lee

  
\_\_\_\_\_, J.  
Parraguirre

  
\_\_\_\_\_, J.  
Bell



cc: Hon. Mark R. Denton, District Judge  
Thomas J. Tanksley, Settlement Judge  
Law Office of Mitchell Stipp  
Kaempfer Crowell/Las Vegas  
Eighth District Court Clerk