IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DONALD ALT,
Appellant,
vs.
TAHOE-RENO INDUSTRIAL CENTER, LLC, MANAGING MEMBER; NORMAN PROPERTIES, INC.; AND L. LANCE GILMAN COMMERCIAL REAL ESTATE SERVICES INC.,
Respondents.

No. 85779-COA

ORDER OF AFFIRMANCE

Donald Alt appeals from a final order entered in a civil action. First Judicial District Court, Storey County; James Todd Russell, Judge.

On July 22, 2022, Alt filed a complaint in which he contended he had water and grazing rights, and a right-of-way over a portion of land maintained by the Bureau of Land Management (BLM). Alt contended that the BLM harmed his property rights by canceling his grazing permit for the relevant portion of land. Alt also contended that the State of Nevada, through the Nevada Department of Transportation (NDOT), caused a roadway to be built over the BLM land, impacting his property interests. Alt further contended that respondents Tahoe-Reno Industrial Center, LLC (TRIC); Norman Properties, Inc. (Norman); and Lance Gilman Commercial Real Estate Services Inc. (Gilman) benefited from the roadway and played a role in the construction and maintenance of the roadway over the relevant land, all of which he alleged impacted his property interests concerning that land.

Based on those allegations, Alt raised several claims against respondents, including a 42 U.S.C. § 1983 claim for violating his rights

under the Fifth and Fourteenth Amendments to the United States Constitution; a 42 U.S.C. § 1985 claim alleging they engaged in a conspiracy to violate his civil rights; and claims for breach of trust, concert of action, inverse condemnation for taking his property without just compensation, abuse of process, intentional interference with prospective economic advantage, negligent misrepresentation, and intentional infliction of emotional distress.

Alt completed service of process upon TRIC and Gilman. TRIC and Gilman subsequently filed a motion to dismiss pursuant to NRCP 12(b)(5) for failure to state a claim and Alt opposed the motion. In his opposition, Alt withdrew his claims of breach of trust, abuse of process, and intentional infliction of emotional distress against TRIC and Gilman.

For Norman, Alt attempted to complete service of process and the declaration of service states that the summons and the complaint were delivered to "Mario Mercado, Employee." Alt subsequently requested the clerk to enter a default and sought a default judgment against Norman because it failed to respond to his complaint. Norman soon after filed a motion to dismiss for insufficient process or insufficient service of process, *see* NRCP 12(b)(3) and (4), contending dismissal was appropriate because Alt did not identify Norman as a party to the action on the summons and because Alt did not complete service of process as required by NRCP 4.2(c)(1)(A), (B). In support of its motion, Norman submitted a declaration from its chief financial officer explaining that Norman was not registered to do business in Nevada and Alt failed to serve the summons and complaint upon a person authorized to receive service of process.

Norman soon after filed a second motion to dismiss, acknowledging that Alt had recently served it with the summons and

complaint but arguing that dismissal was warranted pursuant to NRCP 12(b)(5) because Alt failed to state a claim upon which relief could be granted. Alt filed an opposition to Norman's second motion to dismiss. Alt also filed a document requesting judicial notice of certain factual allegations and he attached additional documents in support of his assertion that respondents were part of a public-private partnership with the state and federal government and thus should be liable for governmental actions. Norman opposed Alt's request for judicial notice, contended that Alt presented information to the district court that was not appropriate for judicial notice, and argued that Alt had not demonstrated the authenticity of the documents attached to the request for judicial notice.

The district court ultimately entered written orders granting respondents' motions to dismiss pursuant to NRCP 12(b)(5) because Alt failed to state a claim upon which relief could be granted. The court found that Alt failed to allege a valid claim concerning a violation of his rights under the Fifth and Fourteenth Amendments and he failed to sufficiently allege civil conspiracy pursuant to 42 U.S.C. § 1985. The court also found that Alt's Fourteenth Amendment claim was barred because Alt alleged that the violation of his Fourteenth Amendment rights occurred at a meeting held in 2016 and he brought his lawsuit outside of the statute of limitations. In addition, the court reviewed Alt's allegations concerning breach of trust, concert of action, abuse of process, intentional interference with prospective economic advantage, negligent misrepresentation, and intentional infliction of emotional distress, but concluded that Alt either failed to oppose dismissal of those claims or failed to state a claim for which relief could be granted.

The district court also entered a written order denying Alt's motion for default and default judgment as to Norman, finding that a default was not warranted as Norman had filed a motion to dismiss.

Respondents subsequently moved for costs and attorney fees, arguing that they were entitled to attorney fees pursuant to NRS 18.010(2)(b) because Alt's claims were brought without reasonable grounds. Alt did not oppose the motion for attorney fees and the district court ultimately granted respondents' motion. In so doing, the district court found that Alt failed to oppose respondents' motion and, pursuant to FJDCR 3.8, Alt's failure to oppose the motion constituted a concession that the motion had merit. The district court also found that Alt's claims were brought without reasonable grounds and that attorney fees were warranted after addressing the appropriate factors under *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969). The district court accordingly awarded respondents' costs in the amount of $287.03 and attorney fees in the amount of $19,040. This appeal followed.

Motion for default judgment

Alt contends that the district court abused its discretion by denying his request for default judgment against Norman. Alt further maintains that his attempted service should have been sufficient and that Norman had constructive knowledge of the lawsuit as it has business relationships with the other defendants.

"Default judgments are only available as a matter of public policy when an essentially unresponsive party halts the adversarial process." *Lindblom v. Prime Hosp. Corp.*, 120 Nev. 372, 376, 90 P.3d 1283, 1285 (2004). "[N]otice is not a substitute for service of process. Personal service or a legally provided substitute must still occur in order to obtain

jurisdiction over a party." *C.H.A. Venture v. G.C. Wallace Consulting Eng'rs., Inc.*, 106 Nev. 381, 384, 794 P.2d 707, 709 (1990).

Here, Alt attempted to obtain a default judgment after he served the summons and complaint upon an employee of Norman. However, the district court denied Alt's request for a default judgment, finding Norman was not an essentially unresponsive party that halted the adversarial process as it moved for dismissal based on insufficient service of process. *See Lindblom*, 120 Nev. at 376, 90 P.3d at 1285. The court's decision is supported by substantial evidence, and therefore, we conclude that the district court did not err by denying Alt's motion. *See Williams v. Williams*, 120 Nev. 559, 566, 97 P.3d 1124, 1129 (2004) (explaining that appellate courts will not disturb the district court's decisions on appeal when they are supported by substantial evidence, which is evidence that "a sensible person may accept as adequate to sustain a judgment"). In addition, any notice Norman may have had concerning Alt's lawsuit due to its business relationship with the other defendants was not a substitute for service of process, *see C.H.A. Venture*, 106 Nev. at 384, 794 P.2d at 709, and Alt's contention that he was entitled to a default judgment as Norman had notice of the lawsuit therefore lacks merit. Based on the forgoing analysis, we conclude that the district court properly denied Alt's request for a default judgment.

Motion to dismiss

Alt contends that the district court erred by granting respondents' motions to dismiss. An order granting an NRCP 12(b)(5) motion to dismiss is reviewed de novo. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). A decision to dismiss a complaint under NRCP 12(b)(5) is rigorously reviewed on appeal with all

alleged facts in the complaint presumed true and all inferences drawn in favor of the plaintiff. *Id.* Dismissing a complaint is appropriate "only if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief." *Id.* at 228, 181 P.3d at 672.

First, Alt argues that the district court erred by dismissing his civil rights claims because they were not brought against state actors. In his complaint, Alt alleged that the respondents violated his Fifth Amendment rights by taking his property without just compensation.

"[A] property owner may bring a Fifth Amendment claim under § 1983." *Knick v. Twp. of Scott, Pennsylvania*, 588 U.S. 180, 181 (2019). The Takings Clause of the United States Constitution prohibits "the state from taking private property for public use without just compensation." *Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortg., a Div. of Wells Fargo Bank, N.A.*, 133 Nev. 28, 32, 388 P.3d 970, 974 (2017) (citing U.S. Const. amend. V). "There are two ways in which the state may effectuate a taking: (1) through a direct government appropriation or physical invasion of private property; or (2) through enacting a regulation that is so onerous that its effect is tantamount to a direct appropriation or ouster." *Id.* (internal quotation marks omitted).

In his complaint, although the BLM and the State of Nevada are not parties to this action, Alt alleged that the BLM harmed his property rights by canceling a grazing permit and the State of Nevada, through NDOT, impacted his property interest by causing construction of a roadway.

In contrast, Alt acknowledged that respondents were private business entities but asserted that they received benefits related to the building and maintenance of the roadway. Alt did not allege that respondents themselves effectuated or otherwise participated in a Fifth

Amendment taking. *See id.* Alt's allegations were thus insufficient to demonstrate that respondents, as private business entities, were somehow liable for a taking under the Fifth Amendment. Accordingly, Alt failed to state a claim for a taking under the Fifth Amendment, and we therefore conclude that the district court did not err by dismissing this claim.

Second, Alt contends that the district court erred by dismissing his inverse condemnation claim. "Inverse condemnation is an action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency." *State, Dep't of Transp. v. Cowan*, 120 Nev. 851, 854, 103 P.3d 1, 3 (2004) (internal quotation marks omitted). Moreover "[a] private party cannot recover in inverse condemnation for property taken by another private party." *Fritz v. Washoe Cnty.*, 132 Nev. 580, 584, 376 P.3d 794, 796-97 (2016).

As acknowledged by Alt in his complaint, respondents are not governmental defendants but are instead private business entities. And here, Alt alleged that the BLM and NDOT—not respondents—committed a taking which impacted his property rights. Alt's allegations concerning respondents' agreement to construct and maintain a roadway were insufficient to state an inverse condemnation claim against respondents. Moreover, Alt cannot recover in inverse condemnation from respondents because they are private business entities. *See id.* Accordingly, Alt failed to state a claim for inverse condemnation, and we therefore conclude that the district court did not err by dismissing this claim.

Third, Alt appears to argue that the district court erred by dismissing his remaining claims. However, Alt fails to provide any cogent

argument concerning the dismissal of his remaining claims, and therefore, we decline to consider them on appeal. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (providing that the appellate courts need not consider claims unsupported by cogent argument).

Finally, Alt contends that the district court should have utilized information contained within the request for judicial notice when it evaluated the motions to dismiss. Alt fails to demonstrate that the issues of fact contained within the documents he submitted were appropriate for judicial notice, *see* NRS 47.130, and the laws and judicial decisions had no bearing upon Alt's claims against respondents. Moreover, Norman challenged the authenticity of the documents, and Alt fails to demonstrate the district court should have reviewed the information contained within his request for judicial notice. *See Baxter v. Dignity Health*, 131 Nev. 759, 764, 357 P.3d 927, 930 (2015) (explaining that a district court may consider unattached evidence when evaluating a motion to dismiss if no party questions the authenticity of the evidence). Accordingly, Alt is not entitled to relief based on this claim.

Attorney fees

Next, Alt challenges the district court's award of attorney fees and costs in favor of respondents. This court reviews awards of attorney fees and costs for an abuse of discretion. *Chowdhry v. NLVH, Inc.*, 109 Nev. 478, 485, 851 P.2d 459, 463 (1993) (attorney fees); *Sheehan & Sheehan v. Nelson Malley & Co.*, 121 Nev. 481, 493, 117 P.3d 219, 227 (2005) (costs). A district court abuses its discretion when its findings are not supported by substantial evidence. *Miller v. Miller*, 134 Nev. 120, 125, 412 P.3d 1081, 1085 (2018). Moreover, pursuant to FJDCR 3.8, the district court has the

discretion to construe a party's failure to oppose a motion as a consent to the granting of the motion. *See Las Vegas Fetish & Fantasy Halloween Ball, Inc. v. Ahern Rentals, Inc.*, 124 Nev. 272, 278 & n.15, 182 P.3d 764, 768 & n.15 (2008) (reviewing, under an abuse of discretion standard, a district court decision to grant a motion pursuant to the district court rules based on a party's failure to oppose the motion).

In this case, Alt did not file an opposition to respondents' motions for attorney fees and costs. Thus, Alt waived any arguments concerning the award of attorney fees and costs by his failure to oppose respondents' motions before the district court. *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, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal."). In awarding fees, we note that, the district court reviewed the appropriate factors pursuant to *Brunzell*, 85 Nev. at 349-50, 455 P.2d at 33, and found that respondents' attorneys had extensive experience, the attorneys actually performed the work on this matter and did so with time and skill given to each task, and that the attorneys were successful because this matter was dismissed. And the district court's findings are supported by the record. Therefore, under the circumstances presented here, the district court did not abuse its discretion by granting respondents' request for fees and costs pursuant to FJDCR 3.8 for Alt's failure to oppose the motions. *See Las Vegas Fetish*, 124 Nev. at 278 & n.15, 182 P.3d at 768 & n.15.

Proposed orders

Alt argues that the district court abused its discretion by adopting and signing proposed orders prepared by respondents' counsel. However, Alt's claim lacks merit in light of the rules of practice for the First

Judicial District Court requiring parties to include proposed orders with their motions. *See* FJDCR 3.10(a)(1) (requiring a party filing a motion "seeking an order" to attach to the motion a copy of the proposed order and submit the original proposed order, unfiled, to the judicial clerk). Therefore, Alt is not entitled to relief based on this claim.

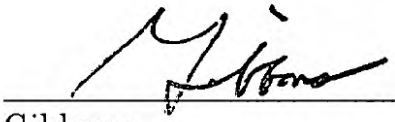
Judicial bias

Next, Alt argues that the district court was biased against him. We conclude that relief is unwarranted on this point because Alt has not demonstrated that the court's decisions in the underlying case were based on knowledge acquired outside of the proceedings and the court's decision does not otherwise reflect "a deep-seated favoritism or antagonism that would make fair judgment impossible." *Canarelli v. Eighth Jud. Dist. Ct.*, 138 Nev. 104, 107, 506 P.3d 334, 337 (2022) (internal quotation marks omitted) (explaining that unless an alleged bias has its origins in an extrajudicial source, disqualification is unwarranted absent a showing that the judge formed an opinion based on facts introduced during official judicial proceedings and which reflects deep-seated favoritism or antagonism that would render fair judgment impossible); *see In re Petition to Recall Dunleavy*, 104 Nev. 784, 789, 769 P.2d 1271, 1275 (1988) (providing that rulings made during official judicial proceedings generally "do not establish legally cognizable grounds for disqualification"); *see also Rivero v. Rivero*, 125 Nev. 410, 439, 216 P.3d 213, 233 (2009) (stating that the burden is on the party asserting bias to establish sufficient factual grounds for disqualification), *overruled on other grounds by Romano v. Romano*, 138 Nev. 1, 6, 501 P.3d 980, 984 (2022), *abrogated in part on other grounds by Killebrew v. State ex rel. Donohue*, 139 Nev., Adv. Op. 43, 535

P.3d 1167, 1171 (2023). Therefore, Alt is not entitled to relief based on this claim.

Accordingly, for the reasons set forth above, we

ORDER the judgment of the district court AFFIRMED.[1]



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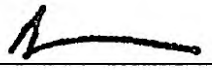

_____, J.
Bulla

_____, J.
Westbrook

cc: Hon. James Todd Russell, District Judge
Donald Alt
Gunderson Law Firm
Storey County Clerk

[1]Insofar as Alt raises arguments that are not specifically addressed in this order, we have considered the same and conclude that they do not present a basis for relief.