

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

**Building and Construction**

**COURT MINUTES**

**August 11, 2022**

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A-20-816451-C Nevada CRT, LLC, Plaintiff(s)  
vs.  
Triangle Construction, Inc., Defendant(s)

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**August 11, 2022 3:00 AM Minute Order**

**HEARD BY:** Barisich, Veronica M. **COURTROOM:** Chambers

**COURT CLERK:** Joy McClain

**JOURNAL ENTRIES**

The Court notes that an evidentiary hearing was held on June 23, 2022 to determine if case ending sanctions are appropriate as against Defendant Jacob Chavez (Chavez ). The basis of Plaintiff s request for sanctions is Chavez s purported failure to truthfully answer and provide evidence. The scope of the evidentiary hearing was to determine if Chavez committed perjury; if he committed perjury, whether he did so in bad faith, with a willful intent to withhold evidence, and if there was prejudice to Plaintiff.

After hearing the oral arguments, the Court took the matter UNDER ADVISEMENT. After carefully considering the evidence and arguments submitted, and good cause appearing, the COURT FINDS and ORDERS as follows:

Relevant law

If a party failed to preserve the evidence in question, but did not willfully do so, dismissal of a case is inappropriate as it should only be used in extreme situation and discovery sanctions must be just and relate to the specific conduct at issue. GNLV Corp. v. Serv. Control Corp. 111 Nev. 866, 870, 900 P.2d 323, 325 (1995).

If the evidence was destroyed with the intent to harm another party, a rebuttable presumption is an appropriate remedy. Bass-Davis v. Davis, 122 Nev. At 448, 134 at 106 (2006). Rebuttable presumption is a presumption that an evidence willfully suppressed would be adverse if produced. Id. at 448-49, 107; NRS 47.250(3). However, if the evidence is lost through negligence, the appropriate remedy is an adverse inference instruction or other appropriate action. Id. Rebuttable presumption for willful destruction of evidence requires more than simply destruction of evidence and instead requires that evidence be destroyed with the intent to harm another party. If the evidence is lost

through mere negligence, rebuttable presumption is not applied; rather, the jury should be given adverse inference instruction or another appropriate sanction. *Id.*

If the Court is to consider an order to dismiss to prejudice as a discovery sanction, the Court must review the following factors: (1) the degree of willfulness of the offending party, (2) the extent to which the non-offending party would be prejudiced by a lesser sanction, (3) the severity of the sanction of dismissal relative to the severity of the discovery abuse, (4) whether any evidence has been irreparably lost, (5) the feasibility and fairness of alternative, less severe sanctions, such as an order deeming facts relating to improperly withheld or destroyed evidence to be admitted by the offending party, (6) the policy favoring adjudication on the merits, (7) whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney, and (8) the need to deter both the parties and future litigants from similar abuses. *Young v. Johnny Riberio Bldg., Inc.*, 106 Nev. 88, 900 P.2d 323 (1990)

If a party failed to abide by NRCPC 16.1 s disclosure requirements or NRCPC 26(e)(1) supplemental disclosure requirements, a party is prohibited from using such undisclosed evidence unless the party can show there was substantial justification for the failure to disclose or the failure was harmless. *Pizarro-Ortega v. Cervantes-Lopez*, 396 P.3d 783, 787 88 (2017); NRCPC 37(c)(1); see also, NRCPC 16.1(e)(3)(B) (providing for discretionary exclusion of evidence under similar circumstances if an attorney fails to reasonably comply with any provision of NRCPC 16.1 ). Furthermore, in addition, the Court may impose other appropriate sanctions, including attorney s fees, caused by the failure.

For failure to comply with a court’s discovery order, the Court may direct that the matters embraced in the order or other designated facts be taken as established for purposes of the action as the prevailing party claims, prohibit the disobedient party from supporting or opposing designated claims or defenses or introduce designated matters in evidence, strike pleadings in whole or in part, staying further proceedings until the order is obeyed, dismissing the action or proceeding in whole or in part, rendering a default judgment against the disobedient party, or treating as contempt of court the failure to obey any order. NRCPC 37(b)(1). Furthermore, the court must order the disobedient party to pay the other party s reasonable expenses, including attorney s fees, caused by the failure unless the failure was substantially justified or other circumstances make an award of expenses unjust. NRCPC 37(b)(3).

#### Factual Findings

The Court FINDS that Chavez indeed provided false or contradictory information during discovery and in his deposition, which Plaintiff relied upon. Chavez failed to investigate his personal accounts or records to determine the truthfulness of his statements made in discovery and in his deposition.

The Court FINDS that when Chavez was presented with the evidence to show receipt of payment from Triangle Construction, Chavez altered his statement and admitted to receiving funds. Then, Chavez amended his discovery responses to reflect the new statements.

The Court FINDS that Chavez also failed to investigate or take any steps to discover information after receiving evidence that he received funds or had an agreement. Thus, he also failed to supplement any documents to his discovery responses.

The Court FINDS that based on these evidence, Chavez misled and altered his statements. Thus, the Court must determine if Chavez did so with a specific intent to harm Plaintiff or to acquire an advantage in the case.

The Court FINDS that in addition, evidence (via witness testimony, the Secretary of State Annual Report and the Notice of Lien) was presented that Chavez was not an owner or accountant of Triangle Construction and that he did not have access to or have control over the company s bank account or finances.

The Court FINDS that based upon the evidence presented, Chavez took no steps to discover or truthfully disclose information about the employment status with Triangle Construction, the receipt of payment in the approximate amount of \$160,000.00 from Triangle Construction, an agreement to receive payment from Triangle Construction, the timeframe that he worked on the CRT project for Triangle Construction, any of the projects he worked on for Triangle Construction, if he was involved with starting up the website despite receiving payment for such, or his bank statements prior to OR after his responses to the written discovery and deposition. Instead Chavez relied upon Plaintiff s statements and evidence. Therefore, insufficient evidence exists to allow a rebuttable presumption for those issues.

The Court FINDS that under Bass-Davis, a rebuttable presumption under NRS 47.250(3) applies as Chavez failed to produce evidence and information with the intent to harm Plaintiff. Under MDB Trucking, case ending sanctions are a last resort when no lesser sanction will do. Here, the Court reviewed the Johnny Riberio factors and determined that Chavez willfully failed to produce truthful information; Plaintiff will not be prejudiced by a lesser sanction; striking the answer is a severe penalty that does not rise to the level of the discovery abuse; evidence was not irreparably lost as it was not destroyed but was not produced; alternate, less severe sanctions as determined by the court are fair and feasible; the court favors adjudicating cases on its merits; the sanction deters and penalizes Chavez for its own actions.

The Court FINDS that Chavez s cavalier or misleading attitude has caused prejudice to Plaintiff as discovery is closed, but that may be cured with a lesser sanction than the most severe of striking Defendant s Answer. Further, Plaintiff may pose questions during cross-examination to attack Defendant s credibility, which is for the jury to determine.

The Court FINDS that the rebuttable presumption that will be given to the jury in this case is as follows: Plaintiff has met the initial burden of providing the following facts. The jury shall accept the following as fact, unless Chavez can overwhelmingly prove otherwise:

Defendant Chavez was an employee of Triangle Construction. Chavez was involved with Triangle Construction as he put projects together, assisted with bids and budgeting, negotiated contracts, and dealt with contractors. Chavez received income of approximately \$160,000.00 from Triangle Construction for the subject CRT project; Chavez received the income from Triangle Construction for this specific project, not for another project(s); and Chavez received \$888.00 from Triangle Construction to pay for the start up its website.

The Court FINDS that Plaintiff is responsible for proving all elements of the causes of action at trial. It is the burden of Defendant Chavez to overcome the rebuttable presumption. Since discovery is now closed, Defendant may not disclose or supplement any documents, exhibits, or witnesses to refute the above presumption per NRCP 37(c)(1). Only exhibits and witnesses timely and properly disclosed shall be allowed at trial.

The Court FINDS that in addition, per NRCP 37(b)(3), Plaintiff is entitled to an award of reasonable expenses, including attorney s fees, that were caused by Defendant s failure to produce the evidence, including filing of the motion to strike and the evidentiary hearing.

#### Orders

The COURT ORDERS that Plaintiff s motion to strike Chavez s answer and enter default against him shall be DENIED. However, an alternative relief in the form of the rebuttable presumption against Chavez, as set for above is appropriate. Furthermore, an award of reasonable attorney s fees and costs for having to bring the instant motion to strike and holding an evidentiary hearing to address Chavez s discovery violations.

The COURT ORDERS that Plaintiff shall submit an Affidavit of Attorney s Fees and Memorandum of Costs to the Court within 14 days of the issue of this minute order. Chavez may file an objection within 14 days of the filing of the affidavit of fees and memorandum of costs. Plaintiff may file a reply within 7 days of the filing of the objection. The Court will make the determination of the reasonable attorney s fees and costs to be awarded to Plaintiff, which will be included in the order from the evidentiary hearing.

Counsel for Plaintiff is directed to submit a proposed Order consistent with this Minute Order and the submitted briefing. Counsel may add language to further supplement the proposed Order in accordance with the Court s findings and any submitted arguments. Chavez s counsel is to review and countersign as to form and content. Counsel is directed to have the proposed Order submitted to chambers within 7 days of filing of the affidavit of reply consistent with the AO 22-07 and EDCR 7.21.

CLERK'S NOTE: The above minute order has been distributed to all registered parties via File and Serve. //jm 8-11-22