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Summary of Lindblom v. Prime Hospitality Corp., 120 Nev. Adv. Op. No. 40

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Lindblom v. Prime Hospitality Corp., 120 Nev. Adv. Op. No. 40, 90 P.3d 1283 (June 10, 2004)[1]
JUDGMENT – APPEAL and ERROR

Disposition/Outcome

District court's order setting aside default judgment against hotel-Respondent affirmed. An order setting aside a default judgment was appealable as a special order under Nevada Rules of Appellate Procedure (NRAP) 3A(b)(2)[2]. The trial court's determination of excusable neglect under Nevada Rules of Civil Procedure (NRCP) 60(b)(2)[3] was not a proper basis upon which to grant relief from the default judgment, but a trial court's exercise of discretion to deny or grant a motion to set aside a default judgment under NRCP 60(b)(1) on the grounds of mistake, inadvertence, surprise, or excusable neglect will not be disturbed upon appeal, absent an abuse of discretion. The default judgment should have been rendered void under NRCP 60(b)(3) for Appellant's failure to provide Respondent with the three-days' written notice of hearings on the application for default judgment required under NRCP 55(b)(2).[4] The hotel's participation in pre-suit negotiations equated to an "appearance" under NRCP 55(b)(2) and the three-days' written notice under NRCP 55(b)(2) was required when pre-suit interactions evinced a clear intent to appear and defend.[5]

Factual and Procedural History

The Appellant, Karen Lindblom, was injured on June 30, 2000 while a guest at the Wellesley Inn and Suites Hotel in Las Vegas, Nevada. The Respondent, Prime Hospitality Corporation (Prime), owned the hotel facility. During the year following the accident, Lindblom and Prime's liability insurer engaged in extensive discussions and negotiations concerning her claim for negligence and damages. Several settlement offers were exchanged and rejected. Lindblom filed a personal injury action against Prime on July 25, 2001, and effected service on July 27, 2001.

Prime timely forwarded the summons and complaint to their insurer. The insurer did not act upon them because they either did not receive the documents or through oversight.

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[2] Nev. R. App. Pro. 3A(b)(2) states: An appeal may be taken: …

> (2) From an order granting or refusing a new trial, or granting or refusing to grant or dissolving or refusing to dissolve an injunction, or appointing or refusing to appoint a receiver, or vacating or refusing to vacate an order appointing a receiver, or dissolving or refusing to dissolve an attachment, or changing or refusing to change the place of trial, or from any order entered in a proceeding that did not arise in a juvenile court that finally establishes or alters the custody of minor children, and from any special order made after final judgment *except an order granting a motion filed and served within sixty (60) days following entry of a default judgment, setting aside the judgment pursuant to N.R.C.P. 60(b)(1).* [Emphasis added.]

[3] Nev. R. Civ. Pro. 60 (b) provides: On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: *(1) mistake, inadvertence, surprise, or excusable neglect;* (2) fraud ... [or] (3) *the judgment is void* .... The motion shall be made within a reasonable time, and for reasons (1) and (2) not more than six months after the judgment, order, or proceeding was entered or taken. (Emphasis in original.)

[4] Nev. R. Civ. Pro. 55(b)(2) states: If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application.

[5] Lindblom v. Prime Hospitality Corp., 90 P.3d 1283, 1285, n. 7 (Nev. 2004).

Lindblom entered default on August 28, 2001. A default judgment was obtained on September 10, 2001, without notice to either Prime or its insurer. There was no record of interaction between Lindblom and Prime or its insurer between commencement of the action and entry of default. No further contact occurred between the parties until Lindblom initiated collection proceedings in April 2002.

Prime and its insurer immediately moved to set aside the default judgment as void under NRCP 60(b)(3) and NRCP 55(b)(2) for Lindblom's failure to provide three-days' notice of the hearing on the application for entry of default judgment. However, Prime's motion was filed more than six months from the date of the entry of default judgment. The district court declined to afford relief based on lack of notice, but granted Prime's motion under NRCP 60(b)(1), on the basis of excusable neglect. Lindblom timely filed an appeal from the order setting aside the default judgment.

In an opinion by Nevada Supreme Court Justice A. William Maupin, the court affirmed the district court's order setting aside the default judgment holding: (1) an order setting aside a default judgment was appealable as a special order; (2) even though the trial court's finding of excusable neglect under Nevada Rules of Civil Procedure (NRCP) 60(b)(2) was not a proper basis upon which to grant relief from the default judgment, the trial court's exercise of discretion to deny or grant a motion to set aside a default judgment under NRCP 60(b)(1) on the grounds of mistake, inadvertence, surprise, or excusable neglect will not be disturbed upon appeal, absent an abuse of discretion; (3) the default judgment should have been rendered void under NRCP 60(b)(3) for Appellant's failure to provide Respondent with the three-days' written notice of hearings on the application for default judgment, as required under NRCP 55(b)(2). A default judgment entered without notice when notice to defendant is required is void; (4) for policy reasons and consistency with other jurisdictions, the court extended its earlier holding in *Christy v. Carlisle*[6] that the hotel's participation in pre-suit negotiations equated to an "appearance" under NRCP 55(b)(2) and that three-days' written notice was required when pre-suit interactions evinced a clear intent to appear and defend.[7]

Discussion

The primary issue in this case was whether a defendant's participation in pre-suit negotiations constituted an "appearance" and entitled the defendant to receive written notice of default proceedings required under NRCP 55(b)(2). Secondary issues included whether an order setting aside a default judgment was appealable and the proper basis for granting the motion to set aside the default judgment.

The court disagreed with Prime's argument that an order setting aside default judgment was not an appealable order. The court stated that an order setting aside a default judgment was appealable as a special order under NRAP 3A(b)(2), if the motion to set aside was made more than sixty days after entry of the default judgment under NRCP 60(b)(1).[8] The motion in this case was made eight months after the entry of default and, thus, appealable as a special order.

The court stated a trial court's exercise of discretion to grant or deny motions to set aside a default judgment on the grounds of mistake, inadvertence, surprise, or excusable neglect under NRCP 60(b)(1) would not be disturbed on appeal, absent an abuse of discretion. Motions to set aside default judgments under NRCP 60(b)(1) must be filed within

[6] Christy v. Carlisle, 584 P.2d 687, 689 (Nev. 1978).
[7] Lindblom v. Prime Hospitality Corp., 90 P.3d 1283, 1285, n. 7 (Nev. 2004).
[8] *Citing* Kokkos v. Tsalikis, 530 P.2d 756 (Nev. 1975) (holding that an order setting aside *entry of default* was not appealable under NRAP 3A). (Emphasis in original.) *See also* Nev. R. App. Pro. 3A(b)(2), *supra*, note 2.

six months after entry of the judgment.[9] Under NRCP 60(b)(3), the six-month time limit does not apply if the default judgment is void for some reason.[10]

On the issue of whether pre-suit interactions constituted an appearance, the court extended its prior holding in *Christy*[11] to equate pre-suit negotiations with an appearance under NRCP 55(b)(2). Thus, three days' written notice to defendants of hearings on applications for default judgments under NRCP 55(b)(2) were required when pre-suit interactions envinced a clear intent to appear and defend. This conclusion was consistent with other jurisdictions.[12] Default judgments were only available when an essentially nonresponsive party halted the adversarial process. Given the extensive settlement negotiations between the parties prior to filing legal action, the short time period between the deadline for appearance and the entry of default, and Prime's promptness in referring the matter to its insurer and seeking relief, the court could not conclude that Prime or its insurer had abandoned or ignored the proceedings. The court held that Prime's participation in the pre-suit negotiations constituted an appearance and Prime was thus entitled to written notice of the default judgment proceeding. Appellant's failure to give the written three-day notice rendered the default judgment void.

The court concluded the district court improperly set aside the default judgment for excusable neglect under NRCP 60(b)(1). The motion was filed more than six months after the default judgment. However, Prime originally asked for relief under NRCP 60(b)(3) and the default judgment was void for lack of notice. Thus, the district court should have considered the voidness argument.

Conclusion

The pre-suit interactions between Lindblom and Prime's insurer constituted an appearance under NRCP 55(b)(2). Appellant's failure to give Prime three-days' written notice of the hearings on the default judgment rendered the judgment void and subject to motions to set aside under NRCP 60(b)(3). Although improvidently based, the district court did not abuse its discretion to grant Prime's motion. For all these reasons, the district court's order setting aside the default judgment was affirmed.

[9] *Supra*, note 3.
[10] *Id.*
[11] *Supra*, note 6.
[12] *Lindblom*, 90 P.3d, at 1285, n. 7.