

IN THE SUPREME COURT OF THE STATE OF NEVADA

RUDY MALNATI,
Appellant,
vs.
DESERT SOUTHWEST AIRLINES,
INC.; AND OLD REPUBLIC
INSURANCE COMPANY, A
PENNSYLVANIA CORPORATION,
Respondents.

No. 43429

FILED

FEB 13 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a motion to set aside a default judgment. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

DISCUSSION

Appellant Rudy Malnati asserts that the district court erred in denying his motion to vacate the default judgment. More specifically, he asserts that respondents' lack of due diligence in effecting personal service of him rendered service by publication erroneous. He also disputes whether respondents' complaint sufficiently pleaded that Malnati was the alter ego of Las Vegas Air Show, Inc. ("Air Show").

We review determinations regarding due diligence in effecting personal service for an abuse of discretion.¹ This court uses this same standard in assessing a lower court's decision on whether to set aside a default judgment.² In our review of this decision, we consider whether the moving party demonstrated a legitimate excuse for failing to answer or

¹Abreu v. Gilmer, 115 Nev. 308, 312, 985 P.2d 746, 749 (1999).

²Price v. Dunn, 106 Nev. 100, 103, 787 P.2d 785, 787 (1990).

otherwise defend.³ We also keep in mind that public policy generally favors a decision on the merits.⁴

NRCP 4(e)(1)(i) permits service by publication if the plaintiff establishes that a cause of action exists against the defendant, that the defendant is a necessary party, and the defendant (1) resides out of state, (2) departed from the state, (3) cannot with due diligence be located within the state, or (4) seeks to avoid service through concealment.

We conclude that the district court committed no abuse of discretion in permitting service by publication. First, respondents' complaint provides sufficient notice of their claim that Malnati is the alter ego of Air Show.⁵ Second, respondents' assertion of this claim renders Malnati a necessary party to the action below. Third, Malnati resides out of state, as indicated in his brief on appeal. Further, it appears that Malnati attempted to conceal himself from service, as demonstrated by his phone call to the process server following the process server's fourth attempt to serve him. Satisfaction of these factors is sufficient to warrant service by publication.

We also conclude that the district court did not abuse its discretion in denying Malnati's motion to set aside the default judgment, because he failed to provide a legitimate excuse for failing to answer or defend in a timely fashion below. Despite the salutary reasons generally

³Id. at 104, 787 P.2d at 787.

⁴Id.

⁵See Consolidated Generator v. Cummins Engine, 114 Nev. 1304, 1309, 971 P.2d 1251, 1254 (1998) (stating that this court liberally construes pleadings to place into issue matters fairly noticed to an adverse party).

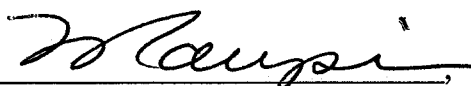
favoring a decision on the merits, Malnati's failure to timely defend below, despite his knowledge of the suit, militates against such a result.

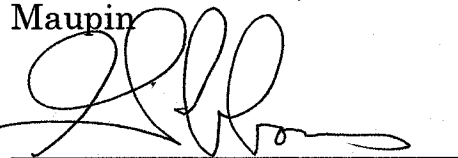
We have considered Malnati's remaining contentions, and conclude they are without merit.

CONCLUSION


We conclude that service by publication was proper below. Therefore, we

ORDER the judgment of the district court AFFIRMED.

 J.

Maupin
 J.

Gibbons

 J.
Hardesty

cc: Hon. Valerie Adair, District Judge
Christopherson Law Offices
Carolyn Ellsworth
Clark County Clerk