

IN THE SUPREME COURT OF THE STATE OF NEVADA

PETER B. MITCHELL, A/K/A PETE
MITCHELL, AN INDIVIDUAL,
Appellant,
vs.
TWI GROUP, INC., A NEVADA
CORPORATION D/B/A TWI GROUP;
STEVEN JOSEPH BARRY, AN
INDIVIDUAL; AND GREGORY P. KEH,
AN INDIVIDUAL,
Respondents.

No. 48237

FILED

APR 08 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *H. Anderson*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court default judgment following the striking of the appellant's answer as a discovery sanction in a defamation action. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

On appeal, appellant maintains that the district court improperly struck his answer as a discovery sanction. First, appellant argues that the district court abused its discretion when it struck his answer and entered a default judgment in favor of respondents without giving adequate consideration to the pertinent factors set forth in Young v. Johnny Ribeiro Building, 106 Nev. 88, 787 P.2d 777 (1990). Second, appellant argues that the district court abused its discretion by not conducting an evidentiary hearing prior to entering a default judgment. We address each of these arguments in turn.

Striking of appellant's answer

NRCP 37(b)(2) states that “[i]f a party . . . fails to obey an order to provide or permit discovery[,] . . . the court in which the action is pending may make such orders in regard to the failure as are just” Moreover, NRCP 37(b)(2)(C) states that it is within the district court’s power to “stri[k]e out pleadings or parts thereof” or “render[] a judgment by default against the disobedient party.”

When the district court has authority to impose discovery sanctions, this court will not reverse the sanctions absent a showing of abuse of discretion. See GNLV Corp. v. Service Control Corp., 111 Nev. 866, 869, 900 P.2d 323, 325 (1995). But “[w]here the sanction is one of dismissal with prejudice . . . a somewhat heightened standard of review should apply.” Young, 106 Nev. at 92, 787 P.2d at 779; see also Hamlett v. Reynolds, 114 Nev. 863, 865, 963 P.2d 457, 458 (1998). In cases where the alleged discovery violations are committed by the defendant, the ultimate sanction will generally be the striking of the defendant’s answer and the entry of a default judgment. See, e.g., Hamlett, 114 Nev. at 865, 963 P.2d at 458. This court “will uphold default judgments where ‘the normal adversary process has been halted due to an unresponsive party, because diligent parties are entitled to be protected against interminable delay and uncertainty as to their legal rights.’” Id. at 865, 963 P.2d at 458 (quoting Skeen v. Valley Bank of Nevada, 89 Nev. 301, 303, 511 P.2d 1053, 1054 (1973)).

Appellant argues that the district court abused its discretion when it struck his answer without giving adequate consideration to the pertinent factors set forth in Young v. Johnny Ribeiro Building, 106 Nev. 88, 92-93, 787 P.2d 777, 780 (1990). We disagree. In Young, we stated

that “while dismissal need not be preceded by other less severe sanctions, it should be imposed only after thoughtful consideration of all the factors involved in a particular case.” Id. at 92, 787 P.2d at 780. Moreover, we stated that “[w]e will further require that every order of dismissal with prejudice as a discovery sanction be supported by an express, careful and preferably written explanation of the court’s analysis of the pertinent factors.” Id. at 93, 787 P.2d at 780. We also held that we “will not reverse a default judgment entered as a sanction where the non-offending party has established a prima facie case by substantial evidence.” Id. at 94, 787 P.2d at 781. A court may properly consider, but is not limited to, the following pertinent factors in deciding whether dismissal with prejudice is appropriate:

[T]he degree of willfulness of the offending party, the extent to which the non-offending party would be prejudiced by a lesser sanction, the severity of the sanction of dismissal relative to the severity of the discovery abuse, whether any evidence has been irreparably lost, 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, the policy favoring adjudication on the merits, whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney, and the need to deter both the parties and future litigants from similar abuses.

Id. at 93, 787 P.2d at 780. Although the sanction at issue here is the striking of appellant’s answer and the entry of default judgment rather than the dismissal of appellant’s case, our decision in Young is nonetheless applicable to this case. See Hamlett, 114 Nev. at 865, 963 P.2d at 458.

Having reviewed the parties' briefs and the record on appeal, we conclude that the district court adequately considered the pertinent Young factors prior to striking appellant's answer when it adopted the commissioner's detailed report and recommendation. We further conclude that appellant's argument that the district court was required to expressly analyze each of the factors set forth in Young lacks merit. See Young, 106 Nev. at 93-95, 787 P.2d at 780-81.

Evidentiary hearing

Appellant also argues that the district court abused its discretion by not conducting an evidentiary hearing prior to entering a default judgment against him because he allegedly raised questions of fact that would warrant an evidentiary hearing. In support of this argument, appellant cites to Nevada Power v. Fluor Illinois, 108 Nev. 638, 837 P.2d 1354 (1992). In Nevada Power, we stated that it was permissible for a district court to dismiss a party's suit if the party "fails to obey an order to provide or permit discovery." Id. at 644, 837 P.2d at 1359 (quoting NRCP 37(b)(2)). Prior to dismissal, however, we stated that the aforementioned Young factors should be given "thoughtful consideration." Id. at 645, 837 P.2d at 1359 (quoting Young, 106 Nev. at 92, 787 P.2d at 780). In the event that the offending party "raises a question of fact as to any of these factors, the court must allow the parties to address the relevant factors in an evidentiary hearing." Nevada Power, 108 Nev. at 645, 837 P.2d at 1359.

Having reviewed the parties' briefs and the record on appeal, we conclude that appellant failed to present circumstances that would amount to raising questions of fact regarding the Young factors. Thus, an evidentiary hearing was not warranted. We therefore conclude that the

district court did not abuse its discretion by not conducting an evidentiary hearing prior to entering a default judgment against appellant.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹

Cherry, J.
Cherry

Saitta, J.
Saitta

Gibbons, J.
Gibbons

cc: Hon. Jackie Glass, District Judge
Larry J. Cohen, Settlement Judge
McDonald Carano Wilson LLP/Las Vegas
Holland & Hart LLP/Las Vegas
Eighth District Court Clerk

¹To the extent that appellant raises any additional arguments, including his contention that not conducting an evidentiary hearing violated his due process rights, we conclude that those arguments lack merit.