

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES SMITH AND LORI FOWLER-
SMITH,

Appellants,

vs.

SHARON CLAIR, INDIVIDUALLY AND
AS GUARDIAN AD LITEM OF
MATTHEW MANNO, A MINOR; ALICIA
MANNO, A MINOR; AND VINCENT
MANNO,

Respondents.

No. 49462

FILED

FEB 05 2009

TRACE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court default judgment and an order denying a motion to set aside the default judgment in a tort action. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

The underlying lawsuit involves a dispute over appellants' liability for damages resulting from an alleged mold infestation in a house sold by appellants to respondents.¹ After the parties signed a lease and option to buy agreement, respondents allegedly discovered mold, vacated the property, and sued appellants for damages. The court released appellants from the purchase contract obligations and appellants successfully sold the property to another buyer.

After appellants answered respondents' complaint in 2002, the parties continued to litigate the matter for several years. At a March 13, 2006, hearing, the district court orally informed appellant James Smith

¹All defendants except appellants settled out of court for \$50,000 or less, prior to the entry of the default judgment against appellants.

about an upcoming pretrial conference on April 3, 2006. Appellants, however, did not attend the April conference. At that conference, the district court orally set new pretrial conference and trial dates, without entering a written order or providing notice of the new dates to appellants. In October 2006, when appellants did not appear at the unnoticed pretrial conference, the court, again in an oral pronouncement, struck their answer as a sanction for their "lack of participation and not following discovery procedure." Appellants' perceived discovery violations consisted of their alleged failure to timely provide expert disclosures. As before, no written order was entered and appellants received no written notice of the court's oral ruling.

The district court then reset the trial date for January 2007 and did not provide any notice to appellants. While appellants received subpoenas to appear at the January trial as witnesses for defendant Century 21, Century 21 settled its portion of the case prior to trial and informed appellants that they need not attend pursuant to the subpoenas. Appellants, proceeding in proper person and relying on the legal advice of Century 21's counsel, did not appear at trial, believing that their witness testimony was no longer needed.

At the January trial, the district court orally granted a default judgment against appellants. The court then scheduled a prove-up hearing without providing any notice to appellants. At the prove-up hearing, the district court awarded respondents \$4,631,569.10 in damages, including punitive damages, prejudgment interest, attorney fees, and costs. The award was based on respondents' experts' affidavits and respondent Sharon Clair's testimony at the prove-up hearing. The record does not contain any documentation supporting an award of \$857,674.52

in attorney fees and \$16,121,95 in costs. The court denied appellants' motion to set aside the default judgment and this appeal followed.

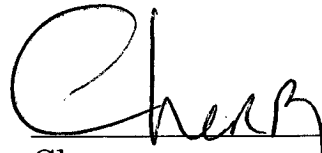
We will not reverse the district court's order concerning a discovery sanction, including the entry of a default, absent a clear abuse of discretion. Hamlett v. Reynolds, 114 Nev. 863, 963 P.2d 457 (1998).

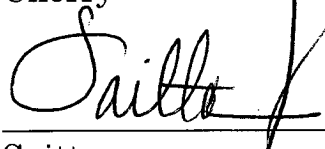
The record on appeal reveals numerous due process violations in the underlying proceedings. The record reflects that appellants did not receive notice of several proceedings and effectively were precluded from participating in the litigation of the underlying case. While appellants are not without fault and could have been more diligent in defending their case, the balance between the numerous procedural violations and appellants' lack of diligence weighs heavily in appellants' favor. The district court record supports appellants' allegations that several oral rulings were never entered in writing, including the important pronouncements striking appellants' answer and granting a default judgment. Moreover, appellants did not receive notice of numerous hearings, conferences, and trial dates, including the dates and times for the postponed pretrial conference, the continued trial, and the prove-up hearing. Further, the award of damages and attorney fees exceeding \$4.6 million appears excessive when established at a short prove-up hearing, without providing appellants with an opportunity to meaningfully oppose and participate in the determination of such an award. Moreover, it appears that the award is not supported by any detailed accounting for medical bills, attorney fees, and costs. We also cannot perceive from the record the basis for an award for lost equity in the home.


Accordingly, after reviewing the parties' briefs and the record on appeal, we conclude that the district court abused its discretion when it

entered a default judgment against appellants as a sanction for their lack of participation and discovery violations. Therefore, we order the district court's default judgment

REVERSED and REMAND this case for further proceedings consistent with this court's order.²


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Hon. Jackie Glass, District Judge
William F. Buchanan, Settlement Judge
Greenberg Traurig, LLP
Judd J. Balmer
Muije & Varricchio
Eighth District Court Clerk

²Our disposition of this matter renders the propriety of the district court's order denying NRCP 60(b) relief moot.