

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN MCDONALD, AN INDIVIDUAL,
Appellant,

vs.

SHAMROCK INVESTMENTS, LLC;
D.P. MERRILL AND RUSSELL, LLC;
PHILIPPINE VILLAGE SHOPPING
CENTER, LLC; D.P. BONANZA-LAMB,
LLC; BONANZA WELLNESS CENTER
GROUP; AND SAN JUAN
CAPISTRANO GROUP,
Respondents.

No. 54852

FILED

SEP 29 2011

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

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court default judgment in a contract action. Eighth Judicial District Court, Clark County; Timothy C. Williams, Judge.

The underlying suit in this case arose from a series of loans in excess of \$2 million that respondents Shamrock Investments, LLC; D.P. Merrill and Russell, LLC; Philippine Village Shopping Center, LLC; D.P. Bonanza-Lamb, LLC; Bonanza Wellness Center Group; and San Juan Capistrano Group (collectively, Shamrock) made to appellant John McDonald and his corporation, J.W.M. Investments. After McDonald failed to make payments, he signed an agreement allegedly acknowledging the debt and promising to personally repay \$2.5 million to Shamrock. Shamrock filed a complaint in district court against McDonald for breach of the agreement when he again failed to make payments. McDonald, acting in proper person, filed an answer, and the case proceeded to discovery.

Although McDonald attended the early case conference, he did not make any initial disclosures of witnesses or exhibits. He also did not

sign Shamrock's case conference report or submit a unilateral case conference report. Shamrock thereafter sent McDonald notice of his deposition. About two weeks prior to his deposition, McDonald sent Shamrock's counsel an email indicating that he would not attend. Shamrock's counsel warned McDonald that if he did not appear for his deposition, Shamrock would seek to have his answer stricken and default entered. McDonald did not appear for his deposition and Shamrock filed a motion to strike McDonald's answer. McDonald did not file an opposition or appear at the hearing held by the discovery commissioner to consider Shamrock's motion to strike. Following the hearing, the commissioner issued a report finding that McDonald willfully failed to comply with NRCPC 16.1 and recommending that McDonald's answer be stricken and default entered or that another sanction be imposed as directed by the district court. Having received no objection from McDonald within ten days, the district court adopted the commissioner's report and recommendation to strike McDonald's answer and enter default.

Shortly thereafter, McDonald obtained representation and filed an objection to the commissioner's report, along with a motion requesting that the district court reconsider its order adopting the report. Following a hearing, the district court denied McDonald's motion for reconsideration.

Shamrock thereafter filed a motion for a default judgment. McDonald filed an opposition, contending that he had not breached any contractual obligations and that his answer should not have been stricken. The district court directed Shamrock to submit evidence documenting its claimed damages. Shamrock submitted a detailed application for default judgment, delineating its claimed damages through a copy of the promissory agreement, and numerous checks, wire transfers, and

affidavits. Satisfied with this documentation, the district court concluded that a prove-up hearing was unnecessary and entered a default judgment of approximately \$2.5 million against McDonald. This appeal followed.

McDonald makes two primary contentions on appeal: (1) the district court abused its discretion in striking his answer without carefully analyzing the factors set forth in Young v. Johnny Ribeiro Building, 106 Nev. 88, 93, 787 P.2d 777, 780 (1990), and (2) the district court abused its discretion in striking his answer without holding an evidentiary hearing. For the reasons set forth below, we conclude that the district court abused its discretion in striking McDonald's answer without carefully analyzing the Young factors. We further conclude that the district court abused its discretion in striking McDonald's answer without holding an evidentiary hearing. Accordingly, we reverse the district court's judgment and discovery order and remand this case for further proceedings. As the parties are familiar with the facts, we do not recount them further except as necessary to our disposition.

Standard of review

Discovery sanctions are generally reviewed for an abuse of discretion. Foster v. Dingwall, 126 Nev. ___, ___, 227 P.3d 1042, 1048 (2010). Where the sanction imposed is "case concluding," that is, where the sanction results in the striking of an answer "both as to liability and damages," we employ "a somewhat heightened standard of review." Bahena v. Goodyear Tire & Rubber Co., 126 Nev. ___, ___, 235 P.3d 592, 596 (2010).

The district court abused its discretion in striking McDonald's answer without carefully analyzing the Young factors

McDonald asserts that the district court abused its discretion in striking his answer as a discovery sanction because it failed to carefully analyze, in writing, the factors set forth in Young. We agree.

Where the district court imposes discovery sanctions involving dismissal, we require a careful examination of the Young factors. Bahena, 126 Nev. at ___, 235 P.3d at 598. These factors include:

[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.

Young, 106 Nev. at 93, 787 P.2d at 780.

Here, the district court struck McDonald's answer as to liability and entered default. Although Shamrock contends that the district court struck McDonald's answer as to liability only, after the district court struck McDonald's answer, it permitted Shamrock to prove its damages by simply submitting documentary evidence, and did not even require a prove-up hearing. In other words, the sanction imposed by the district court foreclosed McDonald from contesting both liability and Shamrock's claimed damages. Thus, we conclude that the district court entered a case concluding sanction. See Bahena, 126 Nev. at ___, 235 P.3d at 600 (indicating that the district court enters a case concluding sanction when it strikes a defendant's answer as to liability and permits damages to be established by way of a prove-up hearing).

Because the district court imposed a case concluding sanction against McDonald, we employ a heightened standard of review. Although

the district court order denying McDonald's motion to reconsider contains some cursory findings relevant to the Young factors, the district court neglected to analyze most of the pertinent factors, and failed to even mention Young. Accordingly, we conclude that the district court abused its discretion in striking McDonald's answer without a careful analysis of the Young factors.

The district court abused its discretion in striking McDonald's answer without holding an evidentiary hearing


Even assuming that the district court adequately considered the Young factors before striking McDonald's answer, we agree with McDonald's contention that the district court abused its discretion in striking his answer without holding an evidentiary hearing to consider the pertinent Young factors.

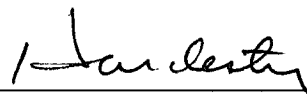
Before the district court enters a case concluding sanction, we require the district court to hold an evidentiary hearing on the issue of sanctions. Bahena, 126 Nev. at ___, 235 P.3d at 600; see Nevada Power v. Fluor Illinois, 108 Nev. 638, 645, 837 P.2d 1354, 1359 (1992) ("If the party against whom dismissal may be imposed raises a question of fact as to any of [the Young] factors, the court must allow the parties to address the relevant factors in an evidentiary hearing."); see also Young, 106 Nev. at 93, 787 P.2d at 780 (noting that the case concluding sanction imposed was fair because "a full evidentiary hearing" relating to the discovery abuses was conducted).

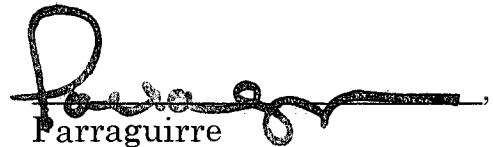
As noted above, the district court imposed a case concluding sanction against McDonald, and therefore, an evidentiary hearing was required. Although the district court heard arguments from McDonald's counsel regarding McDonald's discovery abuses and some of the factors relevant to Young, McDonald was not given an opportunity to testify or to present and cross-examine other witnesses, despite his repeated

assertions that his discovery abuses were not willful. Thus, we conclude that the district court abused its discretion in striking McDonald's answer without holding an evidentiary hearing.¹ Accordingly, we

ORDER the default judgment and discovery order of the district court REVERSED AND REMAND this matter to the district court for an evidentiary hearing consistent with this order.


_____, C.J.
Saitta


_____, J.
Hardesty


_____, J.
Farraguirre

cc: Hon. Timothy C. Williams, District Judge
Stephen E. Haberfeld, Settlement Judge
Law Firm of Chasey Honodel
Law Offices of Richard McKnight, P.C.
Eighth District Court Clerk

¹Shamrock contends that McDonald's failure to oppose its motion to strike constitutes an admission that the motion was meritorious and that, as a consequence, McDonald waived his right to challenge the district court's failure to utilize the Young factors or hold an evidentiary hearing. We have previously held that the failure to oppose a motion may be deemed an admission that a motion is meritorious. See, e.g., Foster, 126 Nev. at ___, 227 P.3d at 1049 (considering defendants' failure to oppose motion to strike an admission that the motion had merit). However, under the circumstances of this case, we elect not to deem McDonald's failure to oppose the motion to strike as an admission that the motion had merit.