IN THE SUPREME COURT OF THE STATE OF NEVADA

KEN ZUREK,

Appellant,

vs.

FREMER & ASSOCIATES, INC., AND LISA FREMER-TENNER,

Respondents.

No. 35046

FILED

JUL 12 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This appeal is taken from a district court order denying an NCRP 60(b) motion to vacate a default judgment. The district court determined that it lacked jurisdiction to consider the motion because the motion was filed while appellant's appeal from the default judgment was pending.

Under Holiday Inn v. Barnett,[1] this court has jurisdiction to consider orders denying Rule 60(b) relief. Here, in light of appellant's pending appeal from the default judgment, the district court properly determined that it lacked jurisdiction to consider the NRCP 60(b) motion and denied the motion on that basis. As we explained in Rust v. Clark County School District,[2] "[j]urisdictional rules go to the very power of this court to act. . . . Indeed, a timely notice of appeal divests the district court of jurisdiction to act and vests jurisdiction in this court." Although, citing Huneycutt v. Huneycutt,[3] the district court further stated that the motion lacked merit and proffered its reasons why, the court lacked jurisdiction to reach the motion's merits, and they are not before us on appeal.

[1]103 Nev. 60, 732 P.2d 1376 (1987).

[2]103 Nev. 686, 688, 747 P.2d 1380, 1382 (1987); accord Smith v. Emery, 109 Nev. 737, 740, 856 P.2d 1386, 1388 (1993).

[3]94 Nev. 79, 575 P.2d 585 (1978).

01-11865

Respondents assert that the appeal from the district court's order denying NRCP 60(b) relief should be dismissed as frivolous because the issues raised in appellant's motion to vacate were already considered and rejected by this court in appellant's appeal from the default judgment. Respondents maintain that this court's order dismissing the default judgment appeal is the "law of the case in this matter and [appellant] is not entitled to 'another bite at the apple.'" Respondents also maintain that appellant is simply continuing his long history of delay and harassment.[4]

We note that the district court is not

> free to flout the decision of the appellate court so far as it goes, but [it] should be free to consider whether circumstances not previously known to either court compel a new trial.[5]

Accordingly, Rule 60(b) relief is not automatically precluded when an appeal has previously been taken from the judgment. We therefore deny respondents' motion to dismiss this appeal. Nevertheless, as the district court properly determined that it lacked jurisdiction, we affirm the district court's order. As the NRCP 60(b) motion was timely filed, the district court may now consider it, but the court should determine whether any issues presented in appellant's motion are simply reargument and barred by the law of the case doctrine. If the parties wish to appeal from the district court's order resolving the NRCP 60(b) motion, they must file notices of appeal in compliance with NRAP 4(a). Any appeal will be treated as a new appeal and assigned a new docket number.

---

[4]Respondents also correctly point out that even though appellant purports to appeal from "all judgments and orders in this case," he cannot now appeal from the default judgment or any interlocutory orders.

[5]11 Charles A. Wright, Arthur R. Miller and Mary K. Kane, Federal Practice and Procedure § 2873, at 439-40 (2d ed. 1995).

Finally, we deny appellant's countermotion to recall the remittitur in Docket No. 34415.

It is so ORDERED.[6]

_____, J.
Shearing

_____, J.
Agosti

_____, J.
Rose

cc: Hon. James C. Mahan, District Judge
Beckley Singleton Jemison Cobeaga & List
Jimmerson Hansen
Clark County Clerk

[6]We construe appellant's October 3, 2000 response to respondents' motion for leave to file a reply as a motion for reconsideration, and we deny the motion.