IN THE SUPREME COURT OF THE STATE OF NEVADA

COLONEL CLAIR, AN INDIVIDUAL; D/B/A MAGNAGEN OR BONAQUA DISTRIBUTING,

Appellants,

vs.

CARPENTER-BLOCK, INC., A NEVADA CORPORATION,

Respondent.

COLONEL CLAIR,

Appellants,

vs.

CARPENTER-BLOCK, INC., A NEVADA CORPORATION,

Respondent.

No. 33496

FILED

OCT 05 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

[redacted]

ORDER OF AFFIRMANCE

These are consolidated appeals from an order denying a motion to set aside a default judgment under NRCP 60(b)(1) and (2), and an order denying a motion to set aside a default judgment under NRCP 60(b)(3) for failure to provide three-day written notice of the application for judgment under NRCP 55(b)(2).[1]

Appellant Colonel Clair ("Clair") asserts that the district court erroneously: (1) permitted service by publication; (2) allowed Carpenter-Block, Inc. ("CBI") to ignore the mandatory three-day notice under NRCP 55(b)(2) prior to taking Clair's default; and (3) failed to set aside the default judgment for reasons of excusable neglect or fraud. Having considered all of appellant's contentions, however, we determine that his appeals lack merit.

[1]Clair seems to mistakenly assert that he moved only under NRCP 60(b)(3), which applies to void judgments, when he also invoked NRCP 60(b)(1) and (2), which specifically apply to excusable neglect and fraud, respectively.

First, we conclude that CBI used due diligence in locating Clair, and as a result, service by publication was proper. Although there is no indication from the record that CBI followed traditional guidelines for finding Clair (e.g., Department of Motor Vehicle records, utility records, etc.), we have recently held that "there is no objective, formulaic standard for determining what is, or is not, due diligence."[2] To the contrary, "[i]t is that diligence which is appropriate to accomplish the end sought and which is reasonably calculated to do so."[3]

Here, we conclude that CBI took appropriate steps to inform Clair of the lawsuit, and it was only due to Clair's evasive actions that service by publication was necessary. For instance, CBI attempted to personally contact Clair on numerous occasions, CBI attempted to leave certified mail with Clair, and Clair was informed by his own agents that CBI had brought suit. Therefore, we determine that the district court did not infringe on Clair's due process rights by permitting service by publication, since the record indicates that Clair was aware of the suit.[4]

Second, we conclude that CBI was not required to give three-day notice to Clair prior to taking his default. NRCP 55(b)(2) requires notice only in instances in which the defendant has made an appearance in the action. Here, Clair never made an appearance.

Clair asserts that his telephonic discussions with CBI constitute negotiations because he expressed an intention to defend the suit during these discussions. However, CBI maintains that Clair did not express an intention to defend the suit, but merely refused to accept service. The district court's determination that Clair avoided service suggests the district court did not find Clair's assertion credible. We have held that a course of negotiations can constitute an appearance when the defendant indicates "a clear purpose to defend the suit."[5] Here, however,

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[2]Abreu v. Gilmer, 115 Nev. 308, 313, 985 P.2d 746, 749 (1999).

[3]Id. (quoting Parker v. Ross, 217 P.2d 373, 379 (Utah 1950)).

[4]"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Browning v. Dixon, 114 Nev. 213, 217, 954 P.2d 741, 743 (1998) (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1949)).

[5]Christy v. Carlisle, 94 Nev. 651, 654, 584 P.2d 687, 689 (1978).

Clair failed to express an intention to defend the suit. Instead, he expressed an intention to ignore the suit. For example, Clair claimed to be unaware of the suit until money was debited from his bank account, yet over a year earlier, he faxed a letter directing a distributor to throw away any correspondence from CBI's attorney regarding the suit. Accordingly, the district court did not abuse its discretion in refusing to set aside the default judgment for failure to provide a three-day notice.

Third, we conclude that the district court did not abuse its discretion in failing to set aside the default judgment under NRCP 60(b)(1) for excusable neglect. "Motions under Rule 60(b) are addressed to the sound discretion of the trial court."[6] The trial court's determination "is not to be disturbed on appeal absent an abuse of discretion."[7]

Here, we are not persuaded that Clair's lack of awareness regarding procedural rules should be sufficient to set aside the judgment. Although we recognize Clair's legal inexperience, and generally allow a margin of error for lay people, this does not excuse evading service. Because of this evasiveness, the district court refused to set aside the default judgment. NRCP 60(b) provides for such discretion, and we conclude that it has not been abused.

Fourth, we conclude that there was no fraud wrought upon the district court that would justify setting aside the judgment pursuant to NRCP 60(b)(2).

Although the record is clear that Mason and Hanger ("M&H") and CBI did not enter into a contract, the district court concluded that CBI did not commit a fraud upon the court by alleging negotiations had taken place for the formation of a contract. Rather, CBI had an exclusive distributorship to sell Clair's MagneGen product in Texas. Clair admitted that he placed M&H in contact with his own California distributor to sell the system to M&H in Texas. Therefore, Clair was in breach of the exclusive agreement he entered into with CBI regardless of whether CBI had entered into a contract with M&H. In our view, there is substantial evidence in the record that attests to this breach of contract. Therefore,

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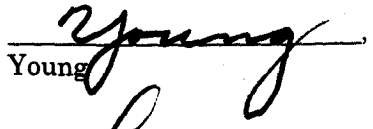
[6]Heard v. Fisher's & Cobb Sales, 88 Nev. 566, 568, 502 P.2d 104, 105 (1972) (citations omitted).

[7]Id.

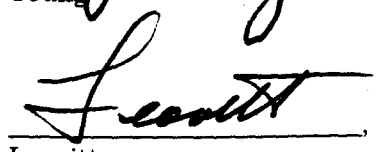
we conclude that the district court did not abuse its discretion in refusing to set aside the judgment.

Having reviewed all of appellant's arguments and concluded that they lack merit, we

AFFIRM the orders of the district court.



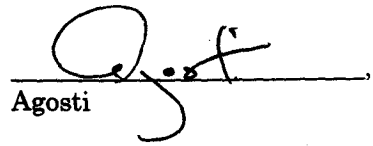
Young, J.



Leavitt, J.

AGOSTI, J., dissenting:

I dissent. In my opinion, service was insufficient. I do not believe due diligence was established.



Agosti, J.

cc: Hon. Jack Lehman, District Judge
Hon. Nancy M. Saitta, District Judge
Ashworth & Benedict
Cary Colt Payne, Chtd.
Clark County Clerk