

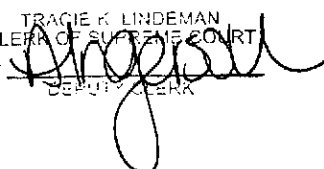
IN THE SUPREME COURT OF THE STATE OF NEVADA

DESERT VALLEY ASSOCIATES, INC.,
A NEVADA CORPORATION,
Appellant,
vs.
HSBC BANK USA, NATIONAL
ASSOCIATION, A FOREIGN
BUSINESS ENTITY REGISTERED IN
NEVADA; AMERICA'S SERVICING
COMPANY A/K/A SILVER STATE
MORTGAGE,
Respondents.

No. 60846

FILED

DEC 18 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a post-judgment district court order granting a motion to set aside default and vacate default judgment. Eighth Judicial District Court, Clark County; Susan Scann, Judge.

Respondent HSBC Bank USA (HSBC), as beneficiary of a deed of trust, purchased a property at a trustee's sale. The sale occurred while appellant Desert Valley Associates, Inc. (Desert Valley) was still performing repairs on the property. America's Servicing Company (ASC) was managing the property at the time for HSBC. Desert Valley recorded a mechanic's lien against the property. Desert Valley then filed a complaint to foreclose upon its mechanic's lien and also asserted other causes of action based on ASC and HSBC's alleged breach of contract and tortious conduct. Desert Valley served the summons and complaint on HSBC at its New York office. HSBC does not contest the method and validity of the service. The district court clerk entered a default against ASC and HSBC when they failed to respond to the complaint. Desert Valley then sought default judgment against ASC and HSBC for its breach

of contract and tort claims, but not the mechanic's lien. The district court issued a default judgment in the amount of \$175,967.43 in favor of Desert Valley.

Two years later, after Desert Valley domesticated its judgment in California in an attempt to collect, HSBC filed a motion to set aside the default judgment. The district court set aside default and vacated the default judgment against HSBC on two grounds: (1) the personal judgment was void because HSBC was an *in rem* defendant, and (2) Desert Valley should have foreclosed on its mechanic's lien before seeking a personal judgment. Desert Valley now appeals, arguing that the district court abused its discretion in setting aside default and vacating default judgment against HSBC because: (1) HSBC's motion to set aside default and vacate default judgment was filed beyond the six-month deadline under NRCP 60(b); (2) Desert Valley did not seek a default judgment against HSBC on the mechanic's lien claim, and therefore HSBC was not an *in rem* defendant; and (3) NRS 108.238 expressly allows contractors to seek personal judgments in cases involving mechanics' liens.

HSBC's motion to set aside default and vacate default judgment pursuant to NRCP 60(b) was untimely

This court reviews a district court's decision to set aside a default judgment for abuse of discretion. *Gassett v. Snappy Car Rental*, 111 Nev. 1416, 1419, 906 P.2d 258, 261 (1995), *superseded by rule on other grounds as stated in Fritz Hansen A/S v. Eighth Judicial Dist. Court*, 116 Nev. 650, 656, 6 P.3d 982, 985 (2000). An abuse of discretion occurs when a district court clearly ignores applicable legal principles without apparent justification. *Hotel Last Frontier Corp. v. Frontier Props., Inc.*, 79 Nev. 150, 153-54, 380 P.2d 293, 294 (1963).

NRCP 60(b) provides that a district court may relieve a party from a void final judgment, so long as a motion requesting such action is made within a reasonable time. A final judgment is void when a “defect [exists] in the court’s authority to enter judgment through either lack of personal jurisdiction or jurisdiction over the subject matter in the suit.” *Gassett*, 111 Nev. at 1419, 902 P.2d at 261 (concluding that default judgment against a defendant was void because the original service was defective). If the judgment is not void, a motion to set aside a final judgment must be filed “not more than 6 months after the proceeding was taken or the date that written notice of entry of the judgment or order was served.” NRCP 60(b). Here, given that HSBC was properly served with the complaint, we find nothing in the record to suggest that the default judgment was void. Therefore, HSBC’s motion to vacate the default judgment pursuant to NRCP 60(b) was untimely because it was not filed within six months after notice of entry of the order of default judgment. As such, we conclude that the district court abused its discretion when it set aside default and vacated the default judgment against HSBC.

Desert Valley was not required to foreclose on the mechanic’s lien prior to seeking a personal tort action against HSBC

Pursuant to NRS 108.238, we conclude that the district court abused its discretion by finding that “default judgment entered against [HSBC] personally is void because HSBC was an *in rem* defendant against whom a personal judgment is improper”.¹ NRS 108.238 states that

¹In evaluating Desert Valley’s tort claims, we conclude that the district court erred when it found HSBC was not subject to *in personam* jurisdiction in Nevada. It is clear from the record that HSBC is subject to personal jurisdiction in Nevada based on its widespread business contacts in the state. It appears that the district court refused to consider *in*
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provisions regarding mechanic's liens "must not be construed to impair or affect the right of a lien claimant . . . to maintain a civil action to recover that debt against the person liable therefor."² Thus, NRS 108.238 confirms the rule that a contractor seeking to recover for work performed on a property has two options: bring an action on the debt itself, or foreclose on the debt's security with a mechanic's lien. See *Lane-Tahoe, Inc. v. Kindred Const. Co., Inc.*, 91 Nev. 385, 390, 536 P.2d 491, 495 (1975), *disapproved of on other grounds by Cnty. of Clark v. Blanchard Constr. Co.*, 98 Nev. 488, 491 n.2, 653 P.2d 1217, 1219 n.2 (1982).

Here, Desert Valley elected to make its application for default judgment based on tort claims instead of foreclosing on the mechanic's lien. The existence of a mechanic's lien does not impair that choice. See *Lane-Tahoe, Inc.*, 91 Nev. at 390, 536 P.2d at 495 ("The mechanics' lien law does not impair the right to sue for the debt claimed to be due."); *State v. Moran*, 42 Nev. 356, 358, 176 P. 413, 413 (1919) ("[M]echanics' lien statutes shall not affect the right to a personal judgment, in an action brought to enforce a mechanic's lien, a personal judgment may be rendered against a person, personally liable if the complaint contains all necessary facts constituting both grounds of relief, and all the necessary

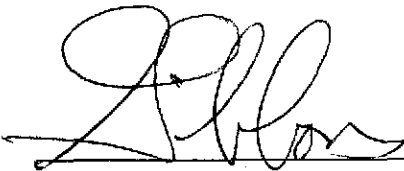
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personam jurisdiction because of its belief that NRS 108.239 barred any personal judgment against HSBC. However, as noted below, this was an erroneous interpretation of NRS Chapter 108.

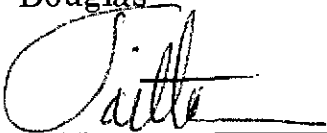
²We note that NRS 40.430 provides that a secured creditor under a mortgage or deed of trust must foreclose on the security prior to suing the debtor personally. See *Bonicamp v. Vazquez*, 120 Nev. 377, 380, 383, 91 P.3d 584, 586, 587 (2004). But NRS Chapter 108 contains no such restriction. In fact, NRS 108.238 expressly states otherwise.

allegations of an action in assumpsit.”). We therefore conclude that the district court abused its discretion when it set aside the default judgment against HSBC on the basis that Desert Valley was required to foreclose on the mechanic’s lien prior to seeking a personal judgment.³ Accordingly, we

ORDER the judgment of the district court REVERSED and REMAND this case for further proceedings consistent with this order.


_____, J.
Gibbons


_____, J.
Douglas


_____, J.
Saitta

cc: Hon. Susan Scann, District Judge
Leonard I. Gang, Settlement Judge
Ackerman & Nold
Akerman Senterfitt/Las Vegas
Reisman Sorokac
Eighth District Court Clerk

³We have considered the parties’ remaining arguments and conclude they are without merit.