

IN THE SUPREME COURT OF THE STATE OF NEVADA

SASSON REJWAN, INDIVIDUALLY,

No. 35600

Appellant,

vs.

REBEL OIL COMPANY, A NEVADA
CORPORATION,

Respondent.

FILED

JUL 13 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Rehan*
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART; REVERSING IN PART; AND REMANDING

This is an appeal from a district court order entering default judgment against appellant.

Appellant Sasson Rejwan failed to attend two early case conferences. As discovery sanctions, the district court struck Rejwan's answer and entered his default. Further, the district court denied Rejwan's motion to set aside default and entered default judgment against him in the amount of \$2,181,731.60.

On appeal, Rejwan contends that his failure to attend two early case conferences does not warrant striking his answer and entering default against him. Rejwan, who represented himself in the district court but is represented by counsel on appeal, alleges that he did not know that attendance at an early case conference was mandatory. Thus, Rejwan argues that the district court abused its discretion in imposing such a harsh sanction. Additionally, Rejwan argues that the district court abused its discretion in denying his motion to set aside the default. Finally, Rejwan argues that the district court abused its discretion in entering a default judgment against him without first conducting a hearing to determine the amount of damages.

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We conclude that the district court did not abuse its discretion in striking Rejwan's answer and entering his default. But we conclude that entering default judgment in the amount of \$2,181,731.60 was an abuse of discretion because such damages were not proven by substantial evidence. Therefore, we reverse the district court's default judgment, and we remand this case to the district court for further proceedings consistent with this order.

NRCP 16.1 dictates that the parties' attorneys must attend an early case conference to begin the discovery process and discuss settlement. If a party fails to comply with this rule, then appropriate sanctions may be levied against the party.¹ Even though a party is not represented by an attorney, the party is required to comply with NRCP 16.1.² Thus, attendance at an early case conference is mandatory, regardless of whether a party is represented by counsel or not.

NRCP 16.1(e)(3)(A) expressly authorizes the district court to impose discovery sanctions pursuant to NRCP 37(b)(2) if a litigant fails to comply with the provisions of NRCP 16.1. NRCP 37(b)(2) states "the court in which the action is pending may make such orders in regard to the failure as are just." Moreover, it is within the district court's power pursuant to NRCP 37(b)(2)(C) to "strik[e] out pleadings or parts thereof" and "render[] a judgment by default against the disobedient party."

Where the district court has authority to impose discovery sanctions, this court will not reverse the sanctions

¹See NRCP 16.1(e)(3).

²See NRCP 16.1(g).

absent a showing of abuse of discretion.³ Further, this court "will uphold default judgments where 'the normal adversary process has been halted due to an unresponsive party, because diligent parties are entitled to be protected against interminable delay and uncertainty as to their legal rights.'"⁴

We conclude that the district court did not abuse its discretion in striking Rejwan's answer and entering his default, because Rejwan halted the adversary process by not attending two early case conferences. Since attendance at an early case conference is mandatory, regardless of whether a party is represented by counsel, the entry of default against Rejwan was appropriate.

With respect to the district court's denial of Rejwan's motion to set aside default, NRCP 55(c) states that a district court may set aside an entry of default "[f]or good cause shown." Moreover, a district court's decision to deny a motion to set aside an entry of default is reviewed under the abuse of discretion standard.⁵

Here, it is apparent from the record that this case languished in the district court for almost three years due to Rejwan's dilatory litigation tactics. Moreover, respondent Rebel Oil Company scheduled two early case conferences, but each time Rejwan failed to attend. In an affidavit attached to his motion to set aside default, Rejwan averred that he

³See GNLV Corp. v. Service Control Corp., 111 Nev. 866, 869, 900 P.2d 323, 325 (1995).

⁴Hamlett v. Reynolds, 114 Nev. 863, 865, 963 P.2d 457, 458 (1998) (quoting Skeen v. Valley Bank of Nevada, 89 Nev. 301, 303, 511 P.2d 1053, 1054 (1973)).

⁵See Sealed Unit Parts v. Alpha Gamma Ch., 99 Nev. 641, 643, 668 P.2d 288, 289 (1983).

"was under the impression that all proceedings were stayed by reason of an appeal filed by [him] on the question of his posting of cost bonds demanded by other parties." Despite this averment, Rejwan's affidavit also stated that he asked counsel for Rebel Oil "to withhold noticing the early case conference, pending the Supreme Court's decision on appeal, but [counsel for Rebel Oil] would not do so." Thus, even though Rejwan was under the mistaken impression that the case had been stayed due to the appeal pending in this court, Rejwan was informed of Rebel Oil's intent to proceed with the discovery process. Accordingly, we conclude that the district court did not abuse its discretion in denying Rejwan's motion to set aside default.

Although the district court did not abuse its discretion in striking Rejwan's answer and entering default against him, we conclude that the district court abused its discretion in granting Rebel Oil's application for default judgment because the application was insufficient as to the amount of damages Rebel Oil was requesting. This court has stated that "[w]here a default judgment is neither for a sum certain, nor for a sum which can be . . . made certain, the plaintiff must prove up his damages."⁶ But "[i]n cases involving entry of default judgment as a discovery sanction, the non-offending party need only establish a prima facie case in order to obtain the default judgment."⁷ Accordingly, this court "will not reverse a default judgment entered as a

⁶Kelly Broadcasting Co., Inc. v. Sovereign Broadcast, Inc., 96 Nev. 188, 193, 606 P.2d 1089, 1092 (1980).

⁷Young v. Johnny Ribeiro Building, 106 Nev. 88, 94, 787 P.2d 777, 781 (1990).

sanction where the non-offending party has established a prima facie case by substantial evidence."⁸

However, in the event the non-offending party is unable to establish a prima facie case by substantial evidence, then NRCP 55(b)(2) provides that if "it is necessary . . . to determine the amount of damages . . . , the court may conduct such hearings or order such references as it deems necessary and proper." Specifically, NRCP 55(b)(2) states as follows:

If, in order to enable the court to enter [default] judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the State.

Thus, if the non-offending party is unable to establish a prima facie case by substantial evidence, the district court should conduct a hearing or order such references as may be necessary to determine the amount of damages. In this case, we conclude that Rebel Oil did not establish a prima facie case by substantial evidence.

First, the record lacks substantial evidence to support awarding Rebel Oil \$545,432.92 in compensatory damages. Specifically, Rebel Oil's application for default judgment fails to set forth a "sum certain." Instead, the application merely lists numerous figures that do not add up to \$545,432.92. Further, the application fails to calculate the amount of damages allegedly attributable to Rejwan. The application simply requests that the district court "[e]nter

⁸Id.

[j]udgment against the named Defendants in the amount of [c]ompensatory [d]amages proved to satisfaction of the Court." Moreover, the affidavits attached to the application are insufficient to support awarding Rebel Oil \$545,432.92 in compensatory damages because they do not state why Rejwan should be held liable for the damages ultimately awarded by the district court. In light of the foregoing, we conclude that the district court abused its discretion in not conducting a hearing or ordering such references as necessary in accordance with NRCP 55(b)(2).

Second, we conclude that the record lacks substantial clear and convincing evidence of malice to support awarding Rebel Oil \$1,636,298.70 in punitive damages. This court has stated that "[i]n order to award punitive damages, the trial court must find substantial [clear and convincing] evidence of malice in fact."⁹ In granting default judgment, the district court did not make a finding of malice in fact on the part of Rejwan. Rather, the district court simply signed an order submitted by Rebel Oil's counsel and awarded Rebel Oil punitive damages "in an amount three times the compensatory damages." Accordingly, we conclude that the district court abused its discretion in awarding Rebel Oil punitive damages without first determining if such damages were warranted.

Furthermore, Rejwan's net worth was not addressed prior to the district court's award of punitive damages. NRS 42.005(3) provides that punitive damages may be awarded after

⁹Kelly Broadcasting, 96 Nev. at 194, 606 P.2d at 1093; see also Evans v. Dean Witter Reynolds, Inc., 116 Nev. 598, 612, 5 P.3d 1043, 1052 (2000).

a hearing is held to determine the amount of such damages.¹⁰ Moreover, NRS 42.005(4) mandates that evidence of the financial condition of the defendant must be addressed prior to the award of punitive damages.¹¹ We have previously held that the defendant cannot be ordered to pay punitive damages in such an amount that would financially annihilate him.¹² Because the district court failed to make a finding of malice in fact supported by clear and convincing evidence, failed to conduct a hearing to determine the amount of punitive damages to be awarded, if any, and failed to consider Rejwan's financial condition, we conclude that the district court abused its discretion in awarding punitive damages.

Based on the foregoing, the district court did not abuse its discretion in striking Rejwan's answer and entering default against him as a sanction for his failure to attend two early case conferences. But we conclude that entering default judgment in the amount of \$2,181,731.60 was an abuse

¹⁰NRS 42.005(3) provides as follows:

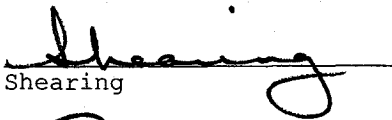
If punitive damages are claimed . . . , the trier of fact shall make a finding of whether such damages will be assessed. If such damages are to be assessed, a subsequent proceeding must be conducted before the same trier of fact to determine the amount of such damages to be assessed. . . .

¹¹NRS 42.005(4) states that "[e]vidence of the financial condition of the defendant is not admissible for the purpose of determining the amount of punitive damages to be assessed until the commencement of the subsequent proceeding to determine the amount of exemplary or punitive damages to be assessed."

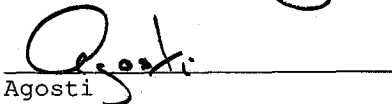
¹²See Caple v. Raynel Campers, Inc., 90 Nev. 341, 344-45, 526 P.2d 334, 337 (1974) ("The concept of punitive damages rests upon a presumed public policy to punish a wrongdoer for his act and to deter others from acting in similar fashion. The punitive allowance should be in an amount that would promote the public interest without financially annihilating the defendant. The wrongdoer may be punished but not

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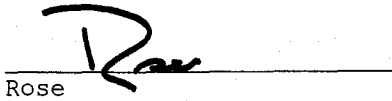
of discretion because the compensatory damages were not proven by substantial evidence, and the punitive damages were not supported by the record. Therefore, we reverse the district court's order granting default judgment, and remand this case to the district court for further proceedings consistent with this order.



Shearing J.



Agosti J.



Rose J.

cc: Hon. Gene T. Porter, District Judge
Fitzgibbons & Anderson
Gerald T. Cobb
Clark County Clerk

. . . continued
destroyed."); accord Ace Truck v. Kahn, 103 Nev. 503, 507, 746
P.2d 132, 135 (1987).