IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHIGAN GEOSEARCH, INC., A MICHIGAN CORPORATION; AND THOMAS F. FODOR, AN INDIVIDUAL,
Appellants,
vs.
PROSPERITY BANCSHARES, INC. D/B/A PROSPERITY BANK,
Respondents.

No. 61672

FILED

JAN 27 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order setting aside a default judgment and denying leave to amend that judgment under NRCP 15(a) and 60(a). Second Judicial District Court, Washoe County; David A. Hardy, Judge.

Michigan Geosearch, Inc. and Thomas F. Fodor (collectively, appellants) entered into two contracts with Norman J. McCallum and his firms Sigma Holding, Inc., Sigma Petroleum, Inc., and Sigma Oil & Gas [USA] Ltd. (collectively, McCallum). In these contracts, McCallum agreed to fund joint oil exploration ventures, and appellants agreed to promote "Brazilian Bonds" that McCallum claimed to own. According to appellants, these contracts were worth "billions of dollars."

Appellants began executing their contractual duties: preparing reports, engaging in preparatory research for the oil exploration, and promoting the bonds. But, McCallum failed to provide funding as agreed. So, appellants sought assurance that he could still fund the projects. McCallum asked a lobby manager at Prosperity Bank

(Bank), to provide that assurance. The lobby manager sent two letters confirming that McCallum's accounts at the Bank held the required funds. In actuality, McCallum's accounts at the Bank held less than $5,000, and had been repeatedly overdrawn. When appellants discovered this, they filed suit.

Appellants amended their complaint two weeks after filing the suit. In their amended complaint, they named as defendants McCallum, the lobby manager, and "Prosperity Bancshares, Inc., parent company of and dba as Prosperity Bank." Prosperity Bancshares, Inc. (Bancshares) is the grandparent company of the Bank and does no business under the fictitious name attributed to it in the amended complaint. Appellants did not specifically name the Bank in the complaint or amended complaint.

Appellants attempted to serve a copy of the complaint, the amended complaint, and a summons at a branch of the Bank. Because the Bank's registered agent was not available, the process server left the documents with a Bank employee, the "President" of the "El Campo Banking Center." General counsel for both the Bank and Bancshares replied the next day on the Bank's letterhead, advising appellants that he rejected their summons because "Prosperity Bank is not subject to Nevada jurisdiction." Appellants' counsel replied by letter advising him that she intended to proceed.

Neither the Bank nor Bancshares ever appeared or filed an answer, so appellants obtained a default, and then moved for default judgment. The district court granted this motion and entered default judgment in appellant's favor and against "Prosperity Bancshares, Inc., parent company of and dba as Prosperity Bank." Bancshares appealed the default judgment; its appeal was docketed in this court as Case No. 60218.

Bancshares also filed a motion in the district court to set aside the default judgment on the grounds that it: (1) was the party named in the suit, (2) was not served with process, (3) was not subject to personal jurisdiction in Nevada, and (4) was not in any way liable to appellants. Appellants opposed this motion and moved to substitute the Bank's name for Bancshares's on the default judgment and in the amended complaint, citing NRCP 60(a) and 15(a).

The district court entered an order in which it certified its intention to grant Bancshares's motion to set aside the default judgment and denied appellants' countermotion to amend the default judgment based on due process concerns. This court then remanded in Case No. 60128 for entry of the order the district court certified its intention to enter. *See Foster v. Dingwall*, 126 Nev. ___, 228 P.3d 453, 455-56 (2010). Following remand, the district court finalized the order, whereupon Bancshares dismissed its appeal in Case No. 60218. Appellants then filed this appeal.

I.

Appellants first argue that the district court erred by failing to make a clerical correction to the default judgment under NRCP 60(a), naming the Bank in Bancshares's stead. We review a district court's refusal to issue a clerical correction for an abuse of discretion. *See Mack v. Estate of Mack*, 125 Nev. 80, 93, 206 P.3d 98, 107 (2009).[1]

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[1]Despite appellants' contentions to the contrary, both the text of NRCP 60(a) and our precedent support that amendment under NRCP 60(a) is an exercise of discretion. *See, e.g., Frontier Ins. Serv., Inc. v. State*, 109 Nev. 231, 239, 849 P.2d 328, 333 (1993) (noting that NRCP 60(a) *permits* the district court to correct clerical mistakes). Indeed, even the cases appellants cite ultimately state that clerical errors "may" be

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NRCP 60(a) allows that "[c]lerical mistakes in judgments, orders, or other parts of the record . . . may be corrected by the court at any time of its own initiative." A "clerical error" is "a mistake in writing or copying" that cannot "be attributed to the exercise of judicial consideration or discretion." *Marble v. Wright (In re Humboldt River Sys.)*, 77 Nev. 244, 248, 362 P.2d 265, 267 (1961). An error in a party name may be a "clerical error" where it is so diminutive that a defendant "could not possibly have been misled." *U.S. Fid. & Guar. Co. v. Reno Elec. Works*, 43 Nev. 191, 194, 183 P. 386, 387 (1919).[2]

Here, appellants' counsel intentionally named "Prosperity Bancshares, Inc., parent company of and dba as Prosperity Bank," because she believed that to be the defendant entity's proper name. Moreover, her description of Bancshares as the "parent company" of the Bank, reflects a seeming deliberate choice between the two entities. And, as Bancshares notes, the complaint listed the named defendant's address as that of Bancshares's corporate office. Thus, the alleged error was not merely one in "writing or copying" but one which involved a deliberate choice in naming the defendant entity.

Further, "Prosperity Bancshares, Inc." is an existing entity, entirely separate from the Bank. And, the complaint discusses the conduct of "Prosperity," which by appellants' definition includes Prosperity Bancshares, Inc., and the Bank, individually. Thus it is entirely possible

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corrected. *Silva v. Second Judicial Dist. Court*, 57 Nev. 468, 474, 66 P.2d 422, 424 (1937); *Allen v. Allen*, 70 Nev. 412, 415, 270 P.2d 671, 672 (1954).

[2]Appellants contend that under *U.S. Fidelity* all errors in names are clerical errors. This is simply not the case.

that the error presently at issue could have "misled" the Bank to believe it was not the intended defendant.

Given this, relief under NRCP 60(a) was not appropriate, and the district court did not abuse its discretion by refusing to grant the motion to amend the default judgment.[3]

II.

Alternatively, appellants argue that the judgment and default judgment should have been amended under NRCP 15(a). We review the district court's denial of leave to amend under this section for an abuse of discretion. *Adamson v. Bowker*, 85 Nev. 115, 121, 450 P.2d 796, 801 (1969).

A.

A court may not properly grant leave to amend a pleading after judgment has been entered on it unless the judgment is set aside. *See* 6 Charles Allen Wright, Arthur R. Miller, Mary Kay Kane, *Federal Practice and Procedure Civil* § 1489 (3d 2010). Here, the district court set aside the judgment. We review its decision to do so for an abuse of discretion. *Helitzer Adver., Inc. v. Seven Star Media Corp.*, 89 Nev. 411, 412, 514 P.2d 214, 215 (1973).

1.

The district court set aside the judgment for improper service of process on Bancshares. We generally review findings of sufficiency of process for an abuse of discretion. *Abreu v. Gilmer*, 115 Nev. 308, 312-13,

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[3]Whether or not the district court abused its discretion, appellants ask this court to independently issue relief under NRCP 60(a). But, because the error was not clerical, NRCP 60(a) is not the proper vehicle for amendment, and we decline to do so.

985 P.2d 746, 749 (1999). But, where the lower court fails to make findings, we review de novo. *State v. Haberstroh*, 119 Nev. 173, 184, 69 P.3d 676, 683 (2003).

The district court found service of process on Bancshares lacking. Bancshares agrees with this finding. Appellants agree as well; indeed, they state that they have "never contended that Bancshares was served with process." Thus, if Bancshares was the named defendant, the district court did not abuse its discretion by finding that sufficiency of process was lacking.

Appellants urge this court to treat its service as directed to the Bank, not Bancshares, and to deem it sufficient to bring the Bank into the suit for the purposes of amending the judgment. But, because it found that the amended complaint and judgment ran against Bancshares, not the Bank, the district court refused to make any findings as to the sufficiency of process on the Bank. Thus on this issue our de novo review is implicated.

A plaintiff may successfully serve a foreign corporation by furnishing a copy of the complaint and summons to its officers or designated agent for service of process. NRCP 4(e)(2), 4(d)(1). This state does not authorize service on mid-level management. *See Saavedra-Sandoval v. Wal-Mart Stores*, 126 Nev. ___, ___, 245 P.3d 1198, 1201 (2010) (determining that service on a store co-manager in lieu of the registered agent was improper). Instead, proper officers for service are the president, board chairman, and other "superior officers." 19 Am. Jur. 2d *Corporations* § 1905 (2004).

Here, appellants furnished a copy of the amended complaint and summons to a Bank employee, Carolyn Roy, the "President" of the "El

Campo Banking Center." Roy was not the Bank's registered agent or a "superior officer." Her title indicates that her purview is limited to the El Campo banking center she operates. A position with such site-specific authority is more like that of a Wal-Mart store manager, who cannot accept service under NRCP 4(d)(2), than a corporate president or chairman, who can. *See Sandoval*, 126 Nev. at ___, 245 P.3d at 1201. Thus, service, even as to the Bank, was improper.[4]

2.

A court generally must set aside a judgment where it is void for lack of service on the named defendant. *See generally In re Harrison Living Trust*, 121 Nev. 217, 222, 112 P.3d 1058, 1061 (2005); *Browning v. Dixon*, 114 Nev. 213, 218, 954 P.2d 741, 744 (1998). Given the above analysis, service of process was improper no matter which defendant was named in the complaint.[5] Thus, the district court did not abuse its discretion by setting the judgment aside.

B.

Because the judgment was properly set aside, we turn to whether the court should have granted leave to amend it under NRCP 15(a). Bancshares suggests that the judgment to add the Bank would

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[4]Appellants argue that Bancshares is estopped from claiming service was improper because Roy was misrepresented to the process server she was authorized to accept service. But, the process server did not state that Roy made such misrepresentations, nor did the Appellants did not provide other evidence indicating such misrepresentations.

[5]Because the district court lacked jurisdiction over Bancshares and the Bank for insufficient process, we decline to reach the issue of whether Nevada also lacked personal jurisdiction over the entities.

violate the Bank's due process rights.[6] Bancshares's seems both to lack standing to bring this challenge, and to have failed to raise the issue below. Nonetheless, we chose to address the issue sua sponte. *Sterling v. State*, 108 Nev. 391, 394, 834 P.2d 400, 402 (1992); *A-Mark Coin Co., Inc. v. Estate of Redfield*, 94 Nev. 495, 498, 582 P.2d 359, 361 (1978).

In *Nelson v. Adams USA, Inc.*, 529 U.S. 460 (2000), the United States Supreme Court held that where a judgment was amended to add a party, and that party had no opportunity to defend the claims presented, that party's due process rights were prejudiced.[7] *Id.* at 465-68. If the

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[6]Appellants argue that the Bank was not added as a party, but rather was a party from the beginning. We are not persuaded by this argument: though appellants discussed the Bank's conduct in its complaint, it named only its parent company, Bancshares, in the caption. Under either NRCP 10(a)'s "legal contemplation" standard, *Nurenberger Hercules-Werke GMBH v. Virostek*, 107 Nev. 873, 881, 822 P.2d 1100, 1105 (1991), or an examination of the body of the complaint, the approach favored by appellants, the Bank was a new party.

[7]Appellants cite to *Jones v. San Francisco Sulphur Co.*, 14 Nev. 172 (1879), and eight foreign cases as countervailing authority to *Nelson*. We are not persuaded. This court decided *Jones* long before *Nelson* was decided, and only addressed whether a party could be properly served if it was incorrectly named in a complaint. *Jones*, 14 Nev. at 174-75. To the extent that they could be read to contradict *Nelson*, two of the foreign cases appear to deal principally with complaint amendments. *Radio Parts Co. v. Lowry*, 125 B.R. 932, 935 (D. Md. 1991); *United States v. A.H. Fischer Lumber Co.*, 162 F.2d 872, 873-74 (4th Cir. 1947). And, the other six involve clerical amendments under FRCP 60(a) (NRCP 60(a)'s counterpart), which is not at issue because the requested amendment is not clerical. *Mitchell Repair Info. Co. v. Rutchey*, No. C08-500 RSM, 2009 WL 3242093, at *2 (W.D. Wash. Oct. 2, 2009); *Labor v. Sun Hill Indus., Inc.*, 720 N.E.2d 841, 843 (Mass. App. Ct. 1999); *Chrysler Credit Corp. v. Anthony Dodge, Inc.*, No. 92 C 5273, 1996 WL 509888, at *4 (N.D. Ill. Sept. 4, 1996); *PacifiCorp Capital, Inc. v. Hansen Props.*, 161 F.R.D. 285, 287-88

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default judgment were amended to name the Bank, it would not have an opportunity to defend the claims presented by appellant's complaint. And, under *Nelson*, such an amendment violates the Bank's due process rights. Thus, we cannot say that the district abused its discretion by declining to grant the change under NRCP 15(a).

III.

Seemingly as an afterthought, appellants argue before this court that the district court erred by not granting leave to amend their complaint a second time. It is not evident that appellants properly moved for leave to amend the complaint below: they failed to provide the district court a proposed amended pleading, and they argued exclusively for amendment of the default judgment, demanding only that the "[f]irst [a]mended [c]omplaint shall be similarly corrected."

Given this failure, it is not surprising that the district court does not appear to have considered amending the complaint separate and apart from amending the default judgment. Indeed, in the concluding paragraph of the challenged order, the district court states only that appellants' "motion to correct the judgment is denied."

On such a limited record, we decline to exercise our discretion in place of that of the district court.

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(S.D.N.Y. 1995); *Fluoro Elec. Corp. v. Branford Assocs.*, 489 F.2d 320, 325-26 (2d Cir. 1973); *Anderson v. Brady*, 6 F.R.D. 587, 587-88 (E.D. Ky. 1947).

Thus, we AFFIRM the district court's setting aside of the default judgment.

Pickering, J.
Pickering

Parraguirre, J.
Parraguirre

Saitta, J.
Saitta

cc: Hon. David A. Hardy, District Judge
Madelyn Shipman, Settlement Judge
Richard G. Hill, Chartered
Gordon Silver/Reno
Washoe District Court Clerk