IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ROBERT B. GREENSTONE, AN INDIVIDUAL,
Appellant,
vs.
CAROLYN D. COHEN, A/K/A CAROLYN KESSLER, AN INDIVIDUAL,
Respondent.

No. 68352

FILED

JUN 28 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order granting a motion to set aside a final judgment in a real property action.[1] Eighth Judicial District Court, Clark County; Kerry Louise Earley, Judge.

In the underlying action, respondent Carolyn D. Cohen and non-party Donna Finley filed a complaint against appellant Robert Greenstone, and Greenstone, in turn, filed an answer and counterclaims. The case was subsequently stayed when Finley filed a petition in bankruptcy. After Cohen and Finley failed to take any action in the case following Finley's bankruptcy discharge, the district court granted Greenstone's unopposed motion to involuntarily dismiss the claims against him and for partial summary judgment as to liability on his claims against Cohen and Finley (the first order). Several months later, the district court granted Greenstone's unopposed motion for summary

[1]The order on appeal did not apply to Donna Finley, and thus, she is not a party to this appeal. Accordingly, we direct the clerk of the court to conform the caption in this appeal to the caption on this order.

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judgment as to damages on his claims against Cohen and Finley (the second order). Cohen and Finley subsequently moved the district court to set aside both orders under NRCP 60(b)(1) based on excusable neglect. The district court granted that motion, and this appeal followed.

On appeal, Greenstone argues the district court lacked jurisdiction to set aside the first order under NRCP 60(b)(1) because the motion was filed more than six months after notice of entry of that order was served. NRCP 60(b) provides that a motion to set aside a judgment based on excusable neglect must be filed within a reasonable time, and not more than six months after service of written notice of entry of the judgment. But "NRCP 60(b) applies only to *final* judgments." *Barry v. Lindner*, 119 Nev. 661, 669, 81 P.3d 537, 542 (2003) (emphasis added). Thus, NRCP 60(b), and its six-month time limit, did not apply to the motion to set aside the first order, which was not a final judgment. *See Lee v. GNLV Corp.*, 116 Nev. 424, 426, 996 P.2d 416, 417 (2000) (defining what constitutes a final judgment). And we conclude that, if the court properly set aside the second order, which was the final judgment in the underlying matter, under NRCP 60(b), then it had authority to revisit the first order. *See* NRCP 54(b) (providing that a court may revise an interlocutory order before the entry of final judgment).

With regard to the timeliness of the motion as to the second order, the motion was filed within six months of that order. And under the circumstances of this case, we conclude that it was within the district court's discretion to find that the motion was filed within a reasonable time after notice of entry of the second order. *See Stoecklein v. Johnson Elec., Inc.*, 109 Nev. 268, 271, 849 P.2d 305, 307 (1993) (explaining that "[t]he district court has wide discretion in deciding whether to grant or

deny a motion to set aside a judgment under NRCP 60(b)"); *see also Lesley v. Lesley*, 113 Nev. 727, 732, 941 P.2d 451, 454 (1997) (concluding that a motion to set aside a judgment was timely filed two-and-a-half months after entry of the judgment), *overruled on other grounds by Epstein v. Epstein*, 113 Nev. 1401, 1405, 950 P.2d 771, 773 (1997).

As to the finding of excusable neglect, Greenstone argues the district court abused its discretion because the evidence demonstrated that Cohen knew, before the entry of the first order, that her attorney was not properly representing her interests, but she failed to check on the status of her case or hire a new attorney until three months after the second order was entered. But Cohen contends that her actions constituted excusable neglect because her attorney had told her, approximately a year before entry of the first order, that the case was no longer pending. Thus, she asserts that she did not realize the action was still proceeding when the first and second orders were entered.

The record demonstrates that the district court credited Cohen's explanation that she did not take any action because she believed the case had concluded. This finding by the district court was supported by Cohen's affidavit submitted in support of the motion to set aside the first and second orders, in which Cohen attested that her attorney had informed her that the case was no longer proceeding and led her to believe Greenstone's claims against her had been dropped. Additionally, two letters Cohen filed with the Nevada State Bar both asserted that her attorney had filed the underlying action in the wrong venue, which was

consistent with her assertion that she believed the action was no longer pending and that she would have to refile it to pursue her claims.[2]

Moreover, Cohen attested that, as soon as she discovered that the case had been proceeding and orders had been entered against her, she retained a new attorney and took action to have the orders set aside. Under these circumstances, we conclude it was within the district court's discretion to grant the motion to set aside the orders based on excusable neglect.[3] *See* NRCP 60(b)(1) (permitting a court to set aside a final judgment based on excusable neglect); *see also* NRCP 54(b) (allowing a court to revise an interlocutory order); *Stoecklein*, 109 Nev. at 271-74, 849 P.2d at 307-09 (recognizing that the court has "wide discretion" in resolving an NRCP 60(b)(1) motion to set aside a judgment and discussing the factors to be considered in determining whether a judgment should be set aside based on excusable neglect).

Finally, Greenstone asserts that the district court should have awarded him attorney fees as a condition precedent to setting aside the first and second orders. But Greenstone has not identified a rule or statute authorizing the district court to award attorney fees under these

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[2]In his reply brief, Greenstone notes that Cohen makes statements in her answering brief that he asserts are inconsistent with statements made, both in the answering brief and before the district court, regarding when she last spoke to her attorney. While we agree that the statements are inconsistent, it appears that the statement in Cohen's answering brief was a misstatement. As this inconsistency appears only in the answering brief and not in the district court record, it does not affect our review of the district court's analysis of the motion before that court.

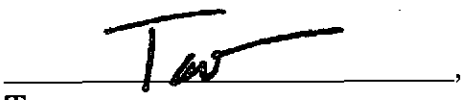
[3]In light of our conclusions herein, we need not address Cohen's argument that the orders that were set aside were procured by fraud upon the court.

circumstances. *See State, Dep't of Human Res., Welfare Div. v. Fowler*, 109 Nev. 782, 784, 858 P.2d 375, 376 (1993) ("The established rule is that a court may not award attorney's fees unless authorized by statute, rule or contract."). Thus, the district court properly denied attorney fees in the underlying action.

Accordingly, we affirm the district court's order setting aside the first and second orders as to Cohen.[4]

It is so ORDERED.

_____, C.J.
Gibbons



_____, J.
Tao

_____, J.
Silver

cc: Hon. Kerry Louise Earley, District Judge
Persi J. Mishel, Settlement Judge
Holland & Hart LLP/Las Vegas
Alessi Law, PLLC
Eighth District Court Clerk

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[4]To the extent Greenstone makes additional arguments, we have considered those arguments and conclude that they do not provide a basis for reversal.