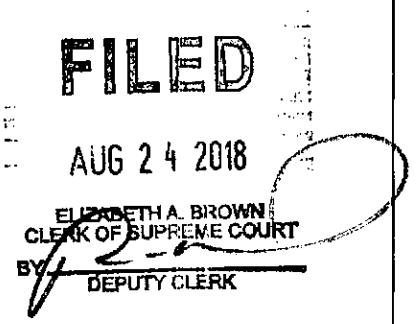
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ADZ ON WHEELS, LLC; AND ROBERT MARSHALL,
Appellants,
vs.
KENNETH AYLESWORTH; CHARLOTTE AYLESWORTH; DANIEL MILLER; RORY ODOM; SCOTT REED; JONAS STOSS; PHILIP WESTBROOK; LISA WESTBROOK; MAG ADZ, INC.; EXOTIC CAR ADZ, LLC; AND XTREME POKER APPAREL, INC.,
Respondents.

No. 72917




*ORDER OF AFFIRMANCE*

Adz on Wheels, LLC, and Robert Marshall appeal from a district court order denying a motion to set aside the judgment in a contract action. Eighth Judicial District Court, Clark County; Linda Marie Bell, Judge.

Respondents, who were investors in Adz on Wheels, LLC, filed a complaint against Adz on Wheels and Robert Marshall (hereinafter collectively "Adz on Wheels") alleging several causes of action including breach of contract and fraud.[1] After three notices of intent to default were filed, Adz on Wheels filed their answer. Adz on Wheels' initial counsel appeared at an early case conference, but it appears that Adz on Wheels did not make any discovery disclosures. Soon after filing their answer, Adz on Wheels filed for bankruptcy in federal court, and their counsel was allowed to withdraw from the present case.

[1]We do not recount the facts except those necessary to our disposition.



18-901892

Respondents quickly moved for and were granted relief from the automatic stay in the bankruptcy court proceedings. Respondents filed a notice of the bankruptcy court's relief order in the district court, signaling to the district court that the present case could proceed against Adz on Wheels. Respondents then unsuccessfully tried to engage Adz on Wheels in discovery. Respondents subsequently filed and served a motion for summary judgment. Adz on Wheels did not file an opposition and did not appear at the hearing on the motion. The district court granted respondents' motion for summary judgment and respondents filed a notice of entry of the written order.

Approximately one week after the summary judgment was entered, new counsel for Adz on Wheels filed a notice of appearance. Adz on Wheels filed their motion to set aside the order granting summary judgment approximately three months later. After a hearing, the district court denied the motion to set aside summary judgment. Adz on Wheels appeals, arguing that the district court abused its discretion by denying their motion.

*Legal Standard*

NRCP 60(b)(1) provides that a "court may relieve a party . . . from a final judgment, order, or proceeding for . . . mistake, inadvertence, surprise, or excusable neglect." A district court may grant an NRCP 60(b)(1) motion if there was "(1) a prompt application to remove the judgment; (2) an absence of an intent to delay the proceedings; (3) a lack of knowledge of the procedural requirements on the part of the moving party; and (4) good faith." *Stoecklein v. Johnson Elec., Inc.*, 109 Nev. 268, 271, 849 P.2d 305, 307 (1993). An order granting or denying an NRCP 60(b) motion to set aside judgment is reviewed for an abuse of discretion. *Id.*[2]

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[2]Adz on Wheels also argues that because they filed an answer that asserted twenty-three affirmative defenses, they demonstrated "meritorious

*Adz on Wheels filed their motion to set aside within a reasonable time*

The parties do not dispute that Adz on Wheels' motion to set aside summary judgment was filed within NRCP 60(b)'s six-month time limit. Respondents argue that because the appellants waited almost three months to file their motion, they lacked the required diligence under Nevada caselaw.

NRCP 60(b) requires a motion to set aside a judgment based on mistake, inadvertence, surprise, or excusable neglect be filed "within a reasonable time" or at least within six months of when judgment was entered. *Stoecklein*, 109 Nev. at 272, 849 P.2d at 308. The supreme court has cautioned, however, "that the six-month period represents the extreme limit of reasonableness." *Id.*

Here, the motion to set aside was filed about a week shy of ninety days of the notice of entry of the order granting summary judgment, which we conclude was a reasonable time within the meaning of NRCP 60(b) to satisfy the first factor. *See Lesley v. Lesley*, 113 Nev. 727, 732, 941 P.2d 451, 454 (1997) (concluding that the district court erred when it found a motion to set aside that was filed approximately two and a half months after the notice

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defenses" and the district court's decision to overlook the answer was an abuse of discretion. Yet, Adz on Wheels did not make this argument in their motion below. While they mentioned their answer once during the hearing, they did not argue how the answer established any meritorious defense. Accordingly, we conclude that Adz on Wheels waived this argument. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal."). Even if Adz on Wheels had properly asserted a meritorious defense in their answer in the district court, it is, at most, but one factor the court can consider. *See Stoecklein*, 109 Nev. at 274, 849 P.2d at 309 ("The tendering of a responsive pleading in good faith which would tend to establish a meritorious defense to all or part of the claim for relief is a factor the court will consider when ruling on an NRCP 60(b)(1) motion.").

of entry of judgment was untimely), *overruled on other grounds by Epstein v. Epstein*, 113 Nev. 1401, 950 P.2d 771, (1997). Additionally, Adz on Wheels obtained counsel within about a week of entry of the summary judgment order, which also demonstrates "promptness." *See id.* Accordingly, application of this factor tends to favor Adz on Wheels.

*Adz on Wheels did not demonstrate an absence of intent to delay*

Adz on Wheels argues that the district court abused its discretion by not stating any findings that Adz on Wheels intended to delay the proceedings. Moreover, they argue that they did not delay the proceedings because respondents had obtained summary judgment. Respondents counter that the lack of participation by Adz on Wheels in both this case and the bankruptcy case demonstrate the appellants' intent to delay.

While the district court did not make specific findings of an intent to delay, we conclude it made an implied finding that appellants had not shown an absence of intent to delay because it determined that Adz on Wheels did not meet NRCP 60(b)'s standard, which includes showing no intent to delay. *See Pease v. Taylor*, 86 Nev. 195, 197, 467 P.2d 109, 110 (1970) ("It is true that this court has repeatedly held that even in the absence of express findings, if the record is clear and will support the judgment, findings may be implied.").

This court may look to "the circumstances surrounding the filing of the motion for relief from judgment itself to determine whether the applicant was acting solely for the purpose of delay." *Stoecklein*, 109 Nev. at 272, 849 P.2d at 308. Generally, the moving party can demonstrate an absence of intent to delay when there is evidence he participated in the proceedings below or did not have actual notice of a proceeding or the deadline for a responsive pleading, or he offers a reasonable explanation as to why he mistakenly did not respond. *See id.* (concluding there was no evidence of

intent to delay where the appellant appeared at his deposition without counsel and without requesting a continuance, "immediately" requested relief from judgment about 35 days after judgment was entered, and never received notice of the trial date); *compare Blakeney v. Fremont Hotel, Inc.*, 77 Nev. 191, 193, 195-96, 360 P.2d 1039, 1040-41 (1961) (concluding no intent to delay when the respondent followed his office's customary docketing practice, but the complaint had apparently been misplaced), *with Bryant v. Gibbs*, 69 Nev. 167, 168-70, 243 P.2d 1050, 1051-52 (1952) (affirming a denial of a motion to set aside because the movant did not explain why, after he received the complaint and summons and set them aside in his house, he did not rediscover them until after a default judgment was entered against him).

Here, Adz on Wheels did not claim below or on appeal that they had not received notice of the motions or proceedings below, including those that took place after respondents were granted relief from the bankruptcy proceedings, and yet they failed to respond to respondents' subsequent discovery efforts and motion for summary judgment. This supports finding that Adz on Wheels failed to demonstrate an absence of intent to delay the proceedings. *See Kahn v. Orme*, 108 Nev. 510, 514, 835 P.2d 790, 793 (1992) (concluding that there was evidence of the appellant's intent to delay because, in part, he "failed to file a single motion" in opposition to the respondent's motions), *overruled on other grounds by Epstein.* They also do not offer an explanation and merely claim that it was a "regrettable oversight," which is not enough. *See Bryant*, 69 Nev. at 168-70, 243 P.2d at 1051-52. Accordingly, Adz on Wheels' argument is not persuasive on this point.

*Adz on Wheels did not demonstrate that they lacked adequate knowledge of the procedural requirements*

Adz on Wheels contends that they did not have the required procedural knowledge because they were without counsel for part of the

proceedings below. They also claim Marshall had a "mistaken belief" that the bankruptcy case was pending. Respondents argue that even parties acting pro se must respond to filings below and that a lack of procedural knowledge is primarily found when the movant shows a lack of notice.

"A lack of procedural knowledge on the part of the moving party is not always necessary to show excusable neglect under NRCP 60(b)(1)." *Stoecklein*, 109 Nev. at 273, 849 P.2d at 308. "Each case depends upon its own facts." *Id.* "A lack of procedural knowledge on the part of the moving party is but one persuasive factor to justify the granting of relief under NRCP 60(b)(1)." *Id.* When a movant shows that he never received notice of the important date by which to respond or appear, a district court may grant a motion to set aside based on upon lack of procedural knowledge. *See id.* (concluding that "while [the movant] may not have been ignorant of any procedural *requirements*, he was unaware of an essential procedural fact—the trial date"). Ultimately, however, "[f]undamental rules governing the finality of judgments cannot be applied differently merely because a party not learned in the law is acting pro se." *Bonnell v. Lawrence*, 128 Nev. 394, 404, 282 P.3d 712, 718 (2012) (internal quotation marks omitted).

Adz on Wheels' reliance on their lack of counsel is not compelling. The record shows that the appellants had an attorney during the bankruptcy proceeding who approved the order granting respondents relief from the automatic stay. Thus, Adz on Wheels knew that the district court proceedings were not precluded by their bankruptcy case. *See Stoecklein*, 109 Nev. at 273, 849 P.2d at 309 ("Notice or knowledge of an attorney, acquired during the time he is acting within the scope of employment, is imputed to the client."). Additionally, Adz on Wheels does not claim they lacked notice of the motion for summary judgment or the hearing thereupon. Thus, even though they

were pro se in the district court proceedings at the time the motion for summary judgment was filed, they were still obligated to respond. *See Bonnell*, 128 Nev. at 404, 282 P.3d at 718. Accordingly, Adz on Wheels failed to demonstrate that they lacked required procedural knowledge so as to support finding excusable neglect.

*Adz on Wheels did not demonstrate good faith*

In arguing good faith, Adz on Wheels points to the fact that they initially hired an attorney and filed an answer. They also argue that filing for bankruptcy should not be held against them. Finally, they contend that because the district court did not make any findings about a lack of good faith, this court must presume that Adz on Wheels acted in good faith. Respondents counter that Adz on Wheels' lack of participation below is evidence of their lack of good faith.

"Good faith is an intangible and abstract quality with no technical meaning or definition and encompasses, among other things, an honest belief, the absence of malice, and the absence of design to defraud." *Stoecklein*, 109 Nev. at 273, 849 P.2d at 309. "In common usage the term is used to describe a state of mind denoting honesty of purpose and freedom from intent to defraud." *Id.* In *Stoecklein*, the supreme court concluded that the appellant acted in good faith because, in part, there was no evidence to refute his contention that he had not received actual notice of the trial date. *Id.* at 274-75, 849 P.2d at 309-10.

Here, Adz on Wheels does not claim that they lacked notice of the proceedings below and, despite multiple notices, they repeatedly failed to respond. Moreover, the bankruptcy court granted respondents relief from the automatic stay well before respondents filed their motion for summary judgment, which shows that the district court was not obligated to consider Adz on Wheels' bankruptcy proceeding and, in fact, could not consider it as a

reason to delay its proceedings below. As a result, Adz on Wheels has not shown the district court "faulted" them for their bankruptcy filing or that the lack of findings prejudiced them. *See Pease*, 86 Nev. at 197, 467 P.2d at 110 (concluding that "findings may be implied" when the record supports the court's decision).[3] We thus conclude that the facts Adz on Wheels argues do not adequately show their good faith participation in the proceedings below.

*Conclusion*

While the district court may have been incorrect as to the first factor regarding the timeliness of appellants' motion to set aside, the movant must at least show no intent to delay and good faith, *see Bauwens v. Evans*, 109 Nev. 537, 539, 853 P.2d 121, 122 (1993), *overruled on other grounds by Epstein*; *see also Stoecklein*, 109 Nev. at 271, 849 P.2d at 307, and that each determination is based on the individual facts of a case, reviewed for an abuse of discretion, *see Lentz*, 84 Nev. at 199-200, 438 P.2d at 256 (acknowledging that there are various results in appellate cases reviewing orders setting aside judgments "because of the different facts involved").

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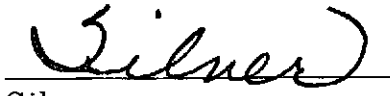
[3]On appeal, Adz on Wheels highlights Nevada's policy of resolving cases on their merits and points to the fact that there was no hearing on the merits of respondents' motion for summary judgment. We agree that the policy is important and a required part of our analysis here. *See Stoecklein*, 109 Nev. at 271, 849 P.2d at 307. In this case, however, we conclude that policy does not warrant a reversal because of Adz on Wheels' repeated lack of diligence. *See Lentz v. Boles*, 84 Nev. 197, 200, 438 P.2d 254, 256-57 (1968) ("Litigants and their counsel may not properly be allowed to disregard process or procedural rules with impunity. Lack of good faith or diligence, or lack of merit in the proposed defense, may very well warrant a denial of the motion for relief from the judgment."); *cf. Hunter v. Gang*, 132 Nev. ___, ___, 377 P.3d 448, 454 (Ct. App. 2016) ("[C]ourts may exercise their inherent authority . . . to dismiss an action for want of prosecution to prevent undue delays . . . ." (internal quotation marks omitted)).

Here, based on the facts of this case and under an abuse of discretion standard of review, Adz on Wheels' repeated failure to respond below despite having received notice of the proceedings, and failure to provide a sufficient explanation for their lack of participation, support the district court's order denying their motion to set aside the summary judgment. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



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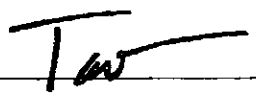
Silver



_____, J.
Tao

_____, J.
Gibbons

cc: Hon. Linda Marie Bell, District Judge
Carolyn Worrell, Settlement Judge
Kirk T. Kennedy
Parry & Pfau
Eighth District Court Clerk