IN THE SUPREME COURT OF THE STATE OF NEVADA

DANNY LEE MALLICOAT,
Appellant,
vs.
DARRELL THOMAS AND BEVERLY THOMAS,
Respondents.

No. 37639

ORDER OF REVERSAL AND REMAND

This is an appeal from the district court's order sanctioning Danny Lee Mallicoat by striking his answer and counterclaim because he provided inadequate discovery responses, from the court's subsequent order granting default judgment in favor of Darrell and Beverly Thomas, and from the court's ruling that Mallicoat was not entitled to attorney fees incurred in defending the writ of attachment. On appeal, Mallicoat argues that the district court's sanction resulting in default judgment was unduly harsh under the circumstances. Mallicoat also argues that the district court erred in its writ of attachment proceedings by refusing to award him attorney fees. We agree that the district court's sanction was unduly harsh and conclude that the issue related to the writ of attachment proceedings remains an open question.

A district court may dismiss or strike a party's pleading as a discovery sanction if, after holding a hearing on the matter, the district court finds, among other pertinent factors, that the offending party has acted willfully, and a lesser sanction is inadequate in relation to the

offending behavior.[1] In Young v. Johnny Ribeiro Building,[2] we set out a nonexhaustive list of eight factors that a court should consider before using dismissal as a sanction.[3] Before a district court can impose the dismissal sanction, it must hold a hearing on the Young factors and set forth "an express, careful and preferably written explanation of the court's analysis of the pertinent factors."[4]

Mallicoat contends that the district court's sanction was an abuse of discretion because he was denied a hearing. In response, the

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[1]See GNLV Corp. v. Service Control Corp., 111 Nev. 866, 871, 900 P.2d 323, 325 (1995); Nevada Power v. Flour Illinois, 108 Nev. 638, 644, 837 P.2d 1354, 1358-1359 (1992).

[2]106 Nev. 88, 787 P.2d 777 (1990).

[3]The district court should consider the following factors:

> (1) the degree of willfulness of the offending party;
>
> (2) the extent to which the non-offending party would be prejudiced by a lesser sanction;
>
> (3) the severity of dismissal relative to the severity of the abusive conduct;
>
> (4) whether evidence has been irreparably lost;
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> (5) the feasibility and fairness of alternative and less severe sanctions, . . . ;
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> (6) the policy favoring adjudication on the merits;
>
> (7) whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney; and
>
> (8) the need to deter both the parties and future litigants from similar abuses.

GNLV Corp., 111 Nev. at 870, 900 P.2d at 325-26 (citing Young, 106 Nev. at 93, 787 P.2d at 780) (placed in list format).

[4]Young, 106 Nev. at 93, 787 P.2d at 780.

Thomases argue that a hearing was not required because there were no questions of fact to resolve. We disagree. The district court failed to engage in a "thoughtful consideration" of the Young factors, as it did not provide a written analysis of the factors.[5] We conclude that the district court's failure to hold a hearing before striking Mallicoat's answer and counterclaim, and its failure to provide an "express" analysis of the pertinent Young factors, together demonstrate an abuse of discretion warranting reversal.[6]

Mallicoat next contends that the district court erred in its writ of attachment proceedings by failing to award him attorney fees he incurred in contesting the writ and by failing to require the Thomases to pay the statutory bond. NRS 31.030(1) states that the district court, "in its order for attachment, shall require a written undertaking on the part of the plaintiff" and allows the defendant to recover from that undertaking "all damages which the defendant may sustain by reason of the attachment including attorney's fees." But the statute also states that a litigant can only seek an award for wrongful attachment "if the plaintiff dismiss[es] such action or if the defendant recover[s] judgment . . . ."[7] In Clarence E. Morris, Inc. v. Vitek,[8] we held that this phrase constitutes "a precondition to liability upon the bond," requiring the party alleging

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[5]See GNLV Corp., 111 Nev. at 870, 900 P.2d at 325.

[6]See Nevada Power, 108 Nev. at 644, 837 P.2d at 1358-59 (noting that this court will not reverse a particular sanction imposed unless there has been an abuse of discretion).

[7]NRS 31.030(1).

[8]85 Nev. 652, 653, 461 P.2d 864, 865 (1969).

wrongful attachment to wait to claim the award until either the plaintiff dismisses the underlying action or the defendant prevails on it. Accordingly, we conclude that Mallicoat is entitled to attorney fees he incurred in contesting the writ of attachment if he prevails in the underlying action or the Thomases dismiss it.[9]

Having concluded that the district court abused its discretion in issuing such a harsh sanction without conducting a hearing or stating its analysis for such action, we reverse the order striking Mallicoat's answer and counterclaim and vacate the district court's entry of default judgment in favor of the Thomases. As a result, we conclude that the issue related to attorney fees incurred in contesting the writ of attachment remains an open question.

Accordingly we,

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

_____, C.J.
Young

_____, J.
Rose

_____, J.
Agosti

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[9]Because we vacate the default judgment, we need not address Mallicoat's remaining arguments related to the default judgment.

cc: Hon. Steven R. Kosach, District Judge
Marc P. Picker
Skinner, Sutton, Watson & Rounds/Reno
Washoe District Court Clerk