

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TARA KELLOGG,
Appellant,
vs.
ELSKE SHIPP,
Respondent.

No. 86356-COA

FILED

DEC 11 2024

ELIZABETH A. BROOKS
CLERK OF SUPREME COURT
BY: 
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

Tara Kellogg appeals from a district court order entering default judgment pursuant to NRCP 55(b)(2). Eighth Judicial District Court, Clark County; Christy L. Craig, Judge.

The parties share a contentious history. Kellogg is the ex-wife of respondent Elske Shipp's boyfriend, nonparty Alex Ghibaudo. The underlying matter arises out of a dispute over an alleged Facebook post, which resulted in the entry of default pursuant to NRCP 55(a) and a subsequent default judgment and award of \$10,000 pursuant to NRCP 55(b)(2). Shipp filed a civil complaint against Kellogg alleging Kellogg posted a copy of a 2017 Nevada State Bar grievance filed against Ghibaudo on her personal Facebook page. The grievance allegedly contained fabricated text messages purporting to be from Ghibaudo accusing Shipp of abusing drugs and having sex with multiple men. Shipp alleged Kellogg then shared her post to a public Facebook page, which resulted in approximately 600 people seeing the post and messages. Shipp alleged Kellogg committed defamation per se and requested an award of \$50,000.

Shipp subsequently filed an affidavit of service stating a copy of the summons and complaint was served on an unknown woman who lived

with Kellogg on March 2, 2022. The affidavit describes the woman as a white female with brown hair who appeared to be in her twenties. Kellogg did not respond to the complaint and, on March 30, 2022, the clerk of the court issued an entry of default pursuant to NRCP 55(a). Four days after the entry of default, and twelve days after a responsive pleading was due, Kellogg filed an answer denying Shipp's allegations. Shipp then filed an application for default judgment pursuant to NRCP 55(b)(1), which argued the answer was untimely, the entry of default had not been set aside, and Shipp was entitled to \$50,000 in presumed damages because she asserted a defamation per se claim.

The same day Shipp filed an application for default judgment, Kellogg filed a motion to set aside the entry of default pursuant to NRCP 55(c). Kellogg argued that good cause existed to set aside the default because she was unsure who was served with a copy of the summons and complaint but appeared to suggest it was her 21-year-old daughter. Assuming it was her daughter, Kellogg argued she was immature and ultimately did not inform her of the litigation. Kellogg averred she learned of the litigation only after the entry of default and promptly filed an answer. Shipp opposed her motion arguing service complied with NRCP 4.2(a)(2), that Ghibaudo informed Kellogg's divorce attorney of the litigation,¹ and it should be inferred that Kellogg was acting in bad faith to unnecessarily delay these proceedings. At the hearing on the set-aside motion, neither the parties nor the court expressly addressed NRCP 55(c), nor did they address whether under the *Yochum* factors she established "good cause" to

¹It is undisputed that Kellogg's divorce attorney did not represent her in the underlying matter and Shipp does not argue that Kellogg's divorce attorney was authorized to accept service on her behalf.

set aside the default pursuant to NRCP 60(b)(1). See *Blige v. Terry*, 139 Nev., Adv. Op. 60, 540 P.3d 421, 426-27 (2023) (recognizing that the “good cause” standard under NRCP 55(c) includes the NRCP 60(b)(1) grounds for relief); *Yochum v. Davis*, 98 Nev. 484, 487, 653 P.2d 1215, 1217 (1982) (setting forth factors to consider when evaluating good cause to set aside a default under NRCP 60(b)(1)), *overruled in part by Epstein v. Epstein*, 113 Nev. 1401, 1405, 950 P.2d 771, 773 (1997). The district court subsequently entered an order denying the motion to set aside the entry of default solely on the basis that service complied with NRCP 4.2(a)(2).

Following the order denying the motion to set aside the entry of default, Kellogg filed an opposition to Shipp’s application for entry of default judgment pursuant to NRCP 55(b)(1) and a countermotion requesting a prove-up hearing and prehearing discovery on Shipp’s alleged damages. In response, Shipp filed a second application for default judgment, this time pursuant to NRCP 55(b)(2), and argued Kellogg’s opposition was a fugitive filing, the deadline for Kellogg to appeal the entry of default had passed, and because Shipp was seeking damages only for her defamation per se claim, a prove up hearing was unnecessary because she was not required to submit any evidence supporting her request for \$50,000.

The district court held a prove up hearing on November 8, 2022. Shipp and Ghibaudo testified at the hearing. Ultimately, the district court entered default judgment pursuant to NRCP 55(b)(2) and awarded Shipp \$10,000 after considering the nature of the testimony, the content of the messages, and that the grievance was not previously public knowledge. Kellogg now appeals both the denial of her motion to set aside entry of default and the order awarding default judgment.

We review an order denying a motion to set aside an entry of default for an abuse of discretion. *Landreth v. Malik*, 127 Nev. 175, 188, 251 P.3d 163, 171 (2011). Moreover, “an appellate court is more likely to affirm a lower court ruling setting aside a default judgment than it is to affirm a refusal to do so. In the former case a trial upon the merits is assured, whereas in the latter it is denied forever.” *Yochum*, 98 Nev. at 487, 653 P.2d at 1217 (internal quotation marks and italics omitted).

Kellogg argues on appeal that the district court erred by failing to set aside the entry of default because she was not personally served, she was unaware of the litigation prior to the entry of default, she moved promptly to set aside the entry of default, and Nevada has a strong preference for adjudicating cases on their merits. In response, Shipp contends this appeal is untimely because the district court certified its order denying the motion to set aside as a final appealable judgment. Shipp further argues Kellogg failed to provide a copy of the hearing transcript relating to the set-aside motion and, as a result, we must presume the transcript supports the denial of Kellogg’s motion. Finally, Shipp argues service complied with NRCP 4.2(a)(2) and thus there is no basis to set aside the default.

We conclude the district court did not correctly certify its order denying the motion to set aside as a final appealable judgment pursuant to NRCP 54(b). The district court’s order, which states “this Order may be certified as a final appealable order,” does not comply with NRCP 54(b), which requires the district court make an express determination that there is no just reason for delay and direct entry of a final judgment. *See Hern v. Erhardt*, 113 Nev. 1330, 1334 n.4, 948 P.2d 1195, 1197 n.4 (1997) (holding the district court’s attempt to certify the judgment pursuant to NRCP 54(b)

was ineffective because it did not contain an express determination that there was no just cause for delay); *see also Aldabe v. Evans*, 83 Nev. 135, 136-37, 425 P.2d 598, 599 (1967). Because the district court's order did not contain an express determination that there is no reason for delay, and failed to direct entry of a final judgment, it was ineffective and Kellogg's appeal is timely.

Contrary to Shipp's argument, Kellogg did provide the transcript of the hearing on her motion to set aside the entry of default. On May 28, 2024, Kellogg filed her reply brief and volume three of her appendix. Following motion practice, the supreme court struck Kellogg's reply brief but did not strike volume three of the appendix.² Thus, the transcript was available for our review and consideration.

Reaching the merits of the appeal, we conclude the district court abused its discretion by failing to properly evaluate whether Kellogg demonstrated good cause to set aside the entry of default pursuant to NRCP 55(c). In asking to set aside a default for good cause, "the moving party must show some excuse for its failure to answer or otherwise defend." *Sealed Unit Parts Co. v. Alpha Gamma Chapter of Gamma Phi Beta Sorority Inc. of Reno*, 99 Nev. 641, 643, 668 P.2d 288, 289 (1983), *overruled on other grounds by Epstein*, 113 Nev. at 1405, 950 P.2d at 773. The "good cause" standard includes NRCP 60(b)(1) grounds for relief, including "mistake, inadvertence, surprise or excusable neglect." *Intermountain Lumber & Builders Supply, Inc. v. Glen Falls Ins. Co.*, 83 Nev. 126, 129, 424 P.2d 884, 886 (1967). "Good cause" for setting aside a default entered by a

²A review of Shipp's motion to strike the reply brief and/or dismiss this appeal demonstrates she was aware Kellogg filed a third appendix accompanying her reply but did not move to strike the appendix.

clerk may be “somewhat broader” than “mistake, inadvertence, surprise or excusable neglect” under NRCP 60(b)(1) when determining whether to set aside a final judgment, but it does not encompass “inexcusable neglect.” *Id.* at 130, 424 P.2d at 886.


When determining whether a litigant has demonstrated good cause to set aside an entry of default, courts are guided by the *Yochum* factors: (1) a prompt application to remove the judgment, (2) the absence of an intent to delay the proceedings, (3) lack of knowledge of procedural requirements, and (4) good faith. *See Yochum*, 98 Nev. at 486, 653 P.2d at 1216.

Here the district court abused its discretion by finding that because service complied with NRCP 4.2(a)(2), Kellogg failed to demonstrate good cause to set aside the entry of default. In doing so, the district court failed to apply the correct legal standard when adjudicating the motion to set aside. Notably, Kellogg did not argue service was improper and the entry of default was void, but instead argued the circumstances surrounding service was part of her good cause analysis. Kellogg moved to set aside the entry of default pursuant to NRCP 55(c) and argued good cause supported her request because: assuming her daughter was served, her daughter was immature and would not have understood the significance of the documents; Kellogg did not learn about this matter until after the entry of default; and Kellogg moved promptly to respond to the complaint once she became aware of it. Thus, the appropriate inquiry was whether Kellogg demonstrated good cause and not whether service complied with NRCP 4.2(a)(2).

Instead of addressing Kellogg’s argument, the district court’s order addresses only whether service was proper and failed to reach the

ultimate issue of good cause. Further, our review of the hearing transcript reveals the parties never discussed NRCP 55(c) nor did they discuss the good cause analysis. Thus, it appears the district court failed to address the relevant standard both at the hearing and in its written order.³ Therefore, we

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


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

cc: Hon. Christy L. Craig, District Judge
Hon. Michael Villani, Senior Judge
Schwab Law Firm PLLC
Backus | Burden
Eighth District Court Clerk

³In light of our determination regarding the entry of default, we necessarily reverse the entry of default judgment pursuant to NRCP 55(b)(2) and need not address the parties' arguments regarding the same.