

IN THE SUPREME COURT OF THE STATE OF NEVADA

SIMPLEX TIME RECORDER
COMPANY,
Appellant,

vs.

VITA ELECTRIC COMPANY, INC.;
WESTERN INSURANCE COMPANY;
AND AMERICAN CASUALTY
COMPANY OF READING
PENNSYLVANIA,
Respondents.

No. 39901

FILED

NOV 09 2004

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order granting a NRCP 60(b) motion to set aside a default judgment in a contract dispute. Eighth Judicial District Court, Clark County; Allan R. Earl, Judge.

This appeal involves the notice requirement under NRCP 55(b)(2), which requires a plaintiff to serve a defendant who has appeared in an action with written notice of an application for a default judgment three days before a hearing on the default judgment.

This dispute arises from a series of public works construction contracts entered into between the subcontractor, appellant Simplex Time Recorder Company, and the general contractor, respondent Vita Electric Company. On behalf of Vita, respondents Western Insurance Company and American Casualty Company issued payment and performance bonds.

In January 2001, Simplex sent Vita a demand letter requesting payment under the payment bond. Later that month, Vita sent Simplex a letter agreeing that money was owed to Simplex but disputing the amount owed.

Simplex then filed a breach of contract action against respondents, seeking payment under the bond. Vita failed to file a timely answer and a default was entered. Subsequently, Simplex moved for a default judgment without serving a three-day notice pursuant to NRCP 55(b)(2) on respondents. The district court entered a default judgment.

Respondents then filed an NRCP 60(b) motion to set aside the default judgment, which the district court denied. After respondents filed a motion to reconsider, the district court set aside the default judgment.¹ This appeal followed.

Simplex contends that the district court erred in setting aside the default judgment because Vita failed to demonstrate that its failure to file an answer was the result of excusable neglect or mistake. Respondents argue that if Simplex's contentions are correct, there is an alternative basis for upholding the district court's decision because Vita's January response letter to Simplex indicated a clear purpose to defend the suit and the default judgment was void, as Simplex did not serve respondents with a three-day notice. We agree.

NRCP 55(b)(2) provides that a plaintiff must give any defendant that has appeared in an action written notice of an application for a default judgment at least three days prior to a hearing. This rule is "interpreted liberally and includes attorney negotiations 'where the defendant has indicated a clear purpose to defend the suit.'"² Once a


¹Although Simplex argues that the district court lacked jurisdiction to consider the motion to reconsider, we conclude that the district court had jurisdiction to consider the timely filed motion.

²Milton v. Gesler, 107 Nev. 767, 769-70 n.4, 819 P.2d 245, 247 n.4 (1991) (quoting Gazin v. Hoy, 102 Nev. 621, 624, 730 P.2d. 436, 438 (1986))

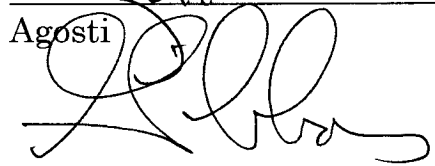
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“defendant has made an appearance in an action, the failure to give the notice prescribed under NRCP 55(b)(2) renders a subsequent default judgment void.”³ Pre-suit negotiations may constitute an appearance.⁴

Construing the rule liberally, we conclude that Vita’s January letter to Simplex’s counsel, in which Vita indicated that it owed a disputed amount of money to Simplex, displayed a clear purpose to defend the matter. Because Simplex did not serve respondents with a three-day notice before the default judgment hearing, we conclude that the default judgment was void. Therefore, we affirm the district court order setting aside the default judgment.⁵

 _____, J.
Becker

 _____, J.
Agosti

 _____, J.
Gibbons

... continued

(indicating that an appearance does not necessarily require some presentation or submission to the court), superseded by rule on other grounds as stated in *Fritz Hansen A/S v. Dist. Ct.*, 116 Nev. 650, 6 P.3d 982 (2000).

³Gazin, 102 Nev. at 624, 730 P.2d at 438.

⁴Lindblom v. Prime Hospitality Corp., 120 Nev. ___, ___, 90 P.3d 1283, 1285 (2004).

⁵Because we affirm on this ground, we decline to consider whether the district court abused its discretion in granting the motion to set aside the default judgment on the grounds of excusable neglect or mistake.

cc: Hon. Allan R. Earl, District Judge
Beckley Singleton, Chtd./Las Vegas
Haney, Woloson & Mullins
McGuinness & Associates
Hutchison & Steffen, Ltd.
Trafton & Chatlin, Ltd.
Van & Ralphs, Chtd.
Clark County Clerk