IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVEN MORRIS,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE JENNIFER TOGLIATTI, DISTRICT JUDGE,
Respondents,
and
LOLIMAR GONCALVES-FIGUEIRA,
Real Party in Interest.

No. 40227

FILED

JUN 0 5 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER DENYING PETITION
FOR WRIT OF MANDAMUS OR PROHIBITION

Through this original petition for a writ of mandamus or prohibition, petitioner seeks to compel the district court to vacate its order that set aside a default, vacated an amended order/default judgment and allowed the real party in interest to file an answer in the underlying personal injury action. We have reviewed the petition and supporting documents, and we conclude that our intervention by way of extraordinary writ is not warranted.

A writ of mandamus may issue to compel the district court to perform a required act,[1] or to control an arbitrary or capricious exercise of

[1]NRS 34.160.

03-09442

discretion,[2] and a writ of prohibition may issue to arrest proceedings that exceed the district court's jurisdiction.[3] An extraordinary writ is generally only available when there is no plain, speedy and adequate remedy at law,[4] and the decision whether to grant a writ petition is discretionary.[5] Here, petitioner has not argued or demonstrated that the district court exceeded its jurisdiction, so a writ of prohibition is not warranted. Setting aside a default and default judgment is a discretionary act, not a duty,[6] so a writ of mandamus would only be warranted if the district court exercised its discretion arbitrarily or capriciously. Petitioner has not established that it did so.

This court has repeatedly emphasized its strong preference for having each case decided upon its merits, and has also observed that it will more likely affirm an order setting aside a default judgment than an order declining to do so.[7] NRCP 55(c) provides that the district court may

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[2]Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 637 P.2d 534 (1981).

[3]NRS 34.320.

[4]NRS 34.170 (mandamus); NRS 34.330 (prohibition).

[5]Smith v. District Court, 107 Nev. 674, 677, 818 P.2d 849, 851-52 (1991).

[6]See Roventini v. District Court, 81 Nev. 603, 407 P.2d 725 (1965).

[7]E.g., Price v. Dunn, 106 Nev. 100, 787 P.2d 785 (1990); Christy v. Carlisle, 94 Nev. 651, 584 P.2d 687 (1978); Hotel Last Frontier v. Frontier Prop., 79 Nev. 150, 380 P.2d 293 (1963).

set aside an entry of default for good cause shown and, if a default judgment has been entered, may likewise set it aside in accordance with Rule 60. According to the documents and affidavits presented to the court, the default was entered in the underlying personal injury action in September 2001, but the real party in interest, her insurer and her attorney did not learn of the lawsuit until February 2002 and thus had good cause for not answering the complaint.

NRCP 60(c) provides that when a default judgment has been taken against a party who was not personally served with the summons and complaint, the court may vacate the judgment upon a motion made within six months from the judgment's date and allow the party to answer. Since the real party in interest was not personally served with the summons and complaint, and filed her motion within six months of the amended order/default judgment's entry, NRCP 60(c) authorized the court to vacate the default judgment and permit her to file an answer.

Finally, because petitioner's counsel had entered into settlement negotiations with the real party in interest's insurance company before filing suit, petitioner was required to serve the insurance company with notice of his application for default judgment at least three days before any hearing on the application.[8] Petitioner's counsel said he served notice; the insurance company said it never received any notice. A copy of the certificate of mailing suggests that a single copy of the notice

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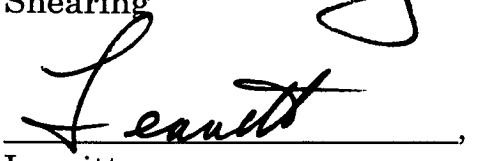
[8]NRCP 55(b)(2); Christy, 94 Nev. 651, 584 P.2d 687.

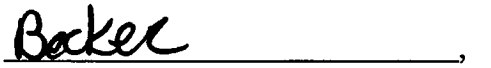
may have been mailed, addressed both to the real party in interest at her last known address and to the insurance company at its address. Although the certificate of mailing states that the notice was sent certified, return receipt requested, petitioner's counsel did not submit any delivery receipt or any affidavit from the person who signed the certificate of mailing. Given the fact that the real party in interest was not personally served with process, the dispute regarding notice and the strong policy favoring resolution on the merits, the district court did not act arbitrarily or capriciously by vacating the amended order/default judgment. Accordingly, we

ORDER the petition DENIED.[9]

_____, J.
Shearing



_____, J.
Leavitt



_____, J.
Becker

cc: Hon. Jennifer Togliatti, District Judge
Albert D. Massi, P.C.
Emerson & Manke, LLP
Clark County Clerk

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[9]See NRAP 21(b).