IN THE SUPREME COURT OF THE STATE OF NEVADA

AL REDA, AN INDIVIDUAL; AND LOUIS CHERRY, AN INDIVIDUAL,
Appellants,
vs.
JOE MCCORMACK AND JOHN A. SABA,
Respondents.

No. 40544

FILED

JUL 25 2005

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

ORDER OF AFFIRMANCE

This is an appeal from a district court order setting aside a default judgment. Eighth Judicial District Court, Clark County; Michael L. Douglas, Judge.

Respondent Joe McCormack is a resident of Memphis, Tennessee. He was sued in Nevada; however, was never served with the summons and complaint and had no notice of the proceeding against him until local counsel contacted him regarding a default judgment in excess of $10,000,000. Unbeknownst to McCormack, he had been appointed as director of CRT, a Nevada corporation, and became a named party in a lawsuit against that corporation.

McCormack filed a motion to set aside the default judgment, arguing that the judgment was void for lack of proper service and that he had not authorized counsel to represent him in the Nevada proceedings. A hearing in the district court resulted in conclusions consistent with McCormack's argument. After the court set aside the default judgment, this appeal followed.

DISCUSSION

Service of process

Appellants Al Reda and Louis Cherry ("Shareholders") are shareholders of CRT. Shareholders argue that McCormack appeared and waived the issue of defective service of process.

Objections to service of process are waived if they are not made in a timely motion or are not included in a responsive pleading.[1] Therefore, "to avoid waiver of a defense of . . . insufficiency of service of process, the defendant should raise its defenses either in an answer or pre-answer motion."[2]

The record demonstrates that while other parties, including CRT, may have litigated in the lower court proceedings, McCormack was completely uninvolved. McCormack's first appearance was his motion to set aside the default judgment for lack of proper service; therefore, he presented the insufficiency of service at his first possible opportunity.

Furthermore, challenges to void judgments can be brought at any time. In Garcia v. Ideal Supply Co., this court concluded that challenges to void judgments are different from other NRCP 60(b) motions and do not have to be brought "'within a reasonable time.'"[3] In Matter of Harrison Living Trust, we further explained that while void judgments can be brought at any time, courts retain the jurisdiction to apply lack of

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[1]Fritz Hansen A/S v. Dist. Ct., 116 Nev. 650, 656, 6 P.3d 982, 986 (2000).

[2]Id. at 656-57, 6 P.3d at 986.

[3]110 Nev. 493, 495, 874 P.2d 752, 753 (1994) (quoting NRCP 60(b)(3)).

diligence principles to void judgment challenges.[4] However, even considering lack of diligence principles, McCormack could bring his challenge. Promptly after learning of the Nevada default judgment, McCormack sought counsel in his home state and in Nevada. Counsel immediately investigated the judgment, and within three months of learning of the judgment, McCormack filed a motion to set aside the default judgment. Thus, McCormack acted promptly, and did not waive the issue of defective service of process.

"A default judgment not supported by proper service of process is void and must be set aside."[5] "'[A]n 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.'"[6]

NRCP 4(b)(6) provides that service may occur by delivering a copy of the summons and the complaint to an agent authorized by appointment or by law to receive service of process. "In the absence of actual specific appointment or authorization, and in the absence of a statute conferring authority, an agency to accept service of process will not be implied."[7] Uncontradicted evidence that a person served was not authorized to receive service must be taken by the court as true.[8]

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[4]121 Nev. ___, ___, ___ P.3d ___, ___ (2005).

[5]Browing v. Dixon, 114 Nev. 213, 218, 954 P.2d 741, 744 (1998).

[6]Yochum v. Davis, 98 Nev. 484, 487, 653 P.2d 1215, 1217 (1982) (quoting Hotel Last Frontier v. Frontier Prop., 79 Nev. 150, 155, 380 P.2d 293, 295 (1963)) (emphasis deleted).

[7]Foster v. Lewis, 78 Nev. 330, 333, 372 P.2d 679, 680 (1962).

[8]Id.

In this case, McCormack was not personally served with a summons and complaint. Instead, Shareholders' only attempted service was on attorney Fred Turner, an individual who had no connection to McCormack and who was not authorized to accept service on behalf of McCormack. Turner denied accepting service on McCormack's behalf. He stated that he did not know McCormack, did not represent him, and was not authorized to accept service on his behalf. Shareholders do not contest these facts.

Therefore, we conclude service was insufficient to support the default judgment against McCormack, and the district court did not abuse its discretion in granting the motion to set aside the default judgment.

Unauthorized representation

Shareholders argue that the district court erred in granting the motion to set aside the default judgment. However, McCormack argues that the default judgment was properly set aside because attorney Cuthbert Mack was not authorized to represent McCormack in this lawsuit. We agree.

In Nevada, courts conclusively presume that appearances by counsel are made with the client's authorization.[9] "Generally, an attorney has no right to appear as an attorney for another without the latter's authority. If there is no attorney-client relationship, the attorney does not owe a duty to appear and cannot lawfully and ethically do so."[10] Default judgments may be set aside by reason of counsel mistake, including when

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[9]Aldabe v. Aldabe, 84 Nev. 392, 398, 441 P.2d 691, 695 (1968).

[10]Foley v. Metropolitan Sanitary Dist., 572 N.E.2d 978, 984 (Ill. App. Ct. 1991).

an attorney enters an appearance on behalf of a defendant without authorization.[11]

In this case, McCormack did not authorize Cuthbert Mack (or anyone else) to appear on his behalf. McCormack never met with, spoke to, or had any communication with Mack. Although the presumption exists in Nevada that attorneys are authorized to represent their clients, McCormack presented uncontested evidence that Mack was not authorized to accept service or to represent McCormack, and even Mack admitted that he was not authorized to act on behalf of McCormack. In essence, McCormack was a victim of the unauthorized representation, and unknowing clients should not be charged with responsibility for the attorney misconduct.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Rose

_____, J.
Gibbons

_____, J.
Hardesty

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[11]Staschel v. Weaver Brothers, Ltd., 98 Nev. 559, 560-61, 655 P.2d 518, 519 (1982).

cc: Eighth Judicial District Court Dept. 11, District Judge
Louis Cherry
Al Reda
Jolley Urga Wirth Woodbury & Standish
John A. Saba
Clark County Clerk