

IN THE SUPREME COURT OF THE STATE OF NEVADA

HEALTHCARE CONSULTING AND
MANAGEMENT, LLC, A NEVADA
LIMITED LIABILITY COMPANY,
Appellant,
vs.
ROBERT E. LOCKE,
Respondent.

No. 40837

FILED

NOV 09 2004

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. P. [Signature]*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

Appeal from district court order dismissing with prejudice Healthcare Consulting and Management, LLC's complaint, and a subsequent order denying NRCP 60(b) relief. Second Judicial District Court, Washoe County; Janet J. Berry, Judge.¹

On September 25, 2000, appellant Healthcare Consulting and Management, LLC filed suit against respondent Robert E. Locke for conversion, breach of contract, interference with contractual obligations and injunctive relief. On March 29, 2002, nearly two years later and just prior to the commencement of trial, scheduled for April 8, 2002, the district court granted a motion by Healthcare's then-counsel to withdraw, continued the trial and ordered Healthcare to retain new counsel within thirty days. On May 7, 2002, the district court ordered Healthcare to appear and show cause why it had yet failed to retain counsel. Ultimately, the district court, on June 3, 2002, determined that Healthcare had failed

¹The orders issued on March 29, 2002 and June 3, 2002, were signed by the Honorable James W. Hardesty. Judge Hardesty withdrew from this case on July 9, 2002. The case was thereafter assigned to the Honorable Janet J. Berry.

to show good cause and ordered Healthcare to pay Locke a \$1,000 sanction within ten days of its order, with the warning that, if Healthcare failed to fully comply with the orders, Healthcare's case would be dismissed.

On June 13, 2002, Healthcare retained new counsel, gave that attorney a check, to hold, for \$1,000 payable to the district court, and moved for reconsideration of the sanction order. Healthcare filed, on July 30, 2002, a notice to reset the case for trial; and on August 16, 2002, Healthcare served Locke with discovery requests. Locke refused to respond to the discovery requests, and on October 4, 2004, Healthcare moved to compel production. On November 18, 2002, the district court granted Healthcare's motion to compel, denied Healthcare's motion to reconsider sanctions and again ordered Healthcare to remit payment pursuant to the prior sanction order. Thereafter, on November 27, 2002, Locke moved to dismiss, with prejudice, Healthcare's complaint for failure to comply with the sanction order. Locke also moved for and was granted an enlargement of time in which to comply with Healthcare's requested discovery. Healthcare filed an untimely opposition to Locke's motion to dismiss.

On December 18, 2002, the district court dismissed Healthcare's complaint with prejudice. On that same date, for the first time, Healthcare tendered to Locke's counsel the \$1,000 sanction. Healthcare then moved the district court to reconsider its order of dismissal. Healthcare also moved for relief from judgment under NRCP 60(b). The district court denied both motions. Healthcare now appeals

from the order of dismissal and the district court's subsequent denial of Healthcare's motion for relief from judgment.²

We conclude that the district court did not abuse its discretion in granting the motion to dismiss and in denying Healthcare's motion for relief from judgment.

In the context of a dismissal with prejudice for failure to abide by discovery rules, we have noted that "[w]here the discovery sanctions are within the power of the district court, this court will not reverse the particular sanctions imposed absent a showing of abuse of discretion."³ Similarly, we review a decision granting or denying a motion to set aside a judgment under NRCP 60(b) for an abuse of discretion.⁴ "However, this discretion is a legal discretion and cannot be sustained where there is no competent evidence to justify the court's action."⁵

Healthcare argues that its failure to timely pay a \$1,000 sanction was not a proper basis to dismiss its case. Healthcare further argues that its failure to tender the check within ten days was excusable

²Healthcare also purports to appeal from the post-judgment order denying its motion for reconsideration of the dismissal order. However, such an order is not appealable as a special order after final judgment under NRAP 3A(b)(2). See Alvis v. State, Gaming Control Bd., 99 Nev. 184, 186, n.1, 660 P.2d 980, 981, n.1 (1983) (holding that a post-judgment order denying a motion for rehearing, which was actually a motion for reconsideration, is not appealable).

³Young v. Johnny Ribeiro Building, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990).

⁴Cook v. Cook, 112 Nev. 179, 181-82, 912 P.2d 264, 265 (1996).

⁵Stoecklein v. Johnson Electric, Inc., 109 Nev. 268, 271, 849 P.2d 305, 307 (1993).

because the November 18, 2002 order was ambiguous as to the time frame for payment, and Healthcare tendered the check within thirty days of November 18, 2002. Healthcare contends that it was prosecuting its case diligently in spite of Locke's refusal to participate in discovery or follow court orders. Finally, Healthcare argues that the district court abused its discretion by refusing to set aside the judgment under NRCP 60(b) because Healthcare promptly moved to set aside the judgment, the motion was made in good faith and with no intent to delay the proceedings and public policy favors resolution on the merits. As Healthcare focuses primarily on this last argument, we address that argument first.

In determining whether a party's neglect resulting in a dismissal or default judgment is excusable, the district court should consider (1) whether the party seeking relief from judgment promptly acted to remove the judgment; (2) whether the party acted with or without an intent to delay the proceedings; (3) whether the party knew the procedural requirements; and (4) whether the party's conduct was in good faith.⁶ The district court also should consider "the state's underlying basic policy of deciding a case on the merits whenever possible."⁷

Here, Healthcare did promptly move to set aside the judgment. The district court entered its judgment and dismissal with prejudice on December 18, 2002, and the notice of entry of judgment was filed on December 26, 2002. On December 27, 2002, Healthcare filed its motion for reconsideration, and three days later, its motion for relief from judgment under NRCP 60(b).

⁶Id.

⁷Id.

The record is not so clear as to whether Healthcare intended to delay the proceedings. The record reflects that Healthcare initially filed its complaint on September 25, 2000. Locke answered the complaint, and on November 30, 2000, the district court issued a pretrial order requiring the parties to set a mandatory pretrial discovery conference within sixty days of the order. At some point, trial was set for April 8, 2002. The record is devoid of any activity by plaintiff to move its case along from November 30, 2000, until March 20, 2002, when Healthcare's then-counsel moved to withdraw because of Healthcare's failure to pay counsel. As mentioned, the district court granted counsel's motion to withdraw, continued the trial and gave Healthcare thirty days to obtain new counsel or to show cause why the complaint should not be dismissed under WDCR 21, presumably as a sanction.⁸ Healthcare failed to timely retain counsel as ordered, and so the district court ordered a show cause hearing. On

⁸WDCR 21 provides:

If a party or an attorney fails or refuses to comply with these rules, the court may make such orders and impose such sanctions as are just, including, but not limited to the following:

1. Hold the disobedient party or attorney in contempt of court.

2. Continue any hearing until the disobedient party or attorney has complied with the requirements imposed.

3. Require the disobedient party to pay the other party's expenses, including a reasonable attorney's fee, incurred in preparing for and attending such hearing.

4. Enter an order authorized by N.R.C.P.
37.

June 3, 2002, the district court sanctioned Healthcare \$1,000 and gave Healthcare fifteen days to obtain counsel. Healthcare now relies upon the trial court's order of November 18, 2002, reminding Healthcare to pay its sanction, to claim in this court that it paid within thirty days of being ordered to do so.

Healthcare ultimately retained the law firm of Bader & Ryan, Ltd., and on June 13, 2002, Kevin P. Ryan entered a notice of appearance of counsel. After obtaining new counsel, Healthcare began to pursue its case. Healthcare filed a motion for reconsideration of the sanction, noticed a trial setting and obtained a new trial date. Within two weeks of setting a new trial date, Healthcare propounded discovery requests, including interrogatories, requests for admissions and requests for production of documents. When Locke refused to respond to the discovery requests, Healthcare filed a motion to compel on October 4, 2002, which the district court granted. Locke did not provide the discovery, but filed a motion to dismiss on or about November 27, 2002 and a motion to resolve the discovery dispute or to enlarge time for production on or about December 6, 2002.

Healthcare failed to timely oppose Locke's motion to dismiss. Locke filed his motion to dismiss on or about November 27, 2002. Healthcare did not file its opposition to the motion to dismiss until December 16, 2002. As of that date, the \$1,000 sanction had not yet been paid. Because of Healthcare's failure to timely tender the \$1,000 sanction to Locke and because of its failure to timely oppose the motion to dismiss, the district court granted the motion to dismiss with prejudice.

From these facts, the district court was within its sound discretion in granting the motion to dismiss with prejudice. Healthcare's

former counsel was not diligent, likely because Healthcare failed to pay for counsel's services.⁹ Healthcare's subsequent counsel missed the deadline to oppose the motion to dismiss and until the day Healthcare's case was dismissed, it had not paid a sanction ordered over six months earlier.

Next, Healthcare argues that it lacked knowledge of procedural requirements in that the district court's order denying Healthcare's motion for reconsideration of the sanction order was not clear as to when Healthcare was required to deliver the \$1,000 sanction to Locke. The district court's June 3, 2002, order required Healthcare to pay the \$1,000 sanction to Locke within ten days. Healthcare filed a motion to reconsider, during which time it claims to have delivered a check to its counsel for \$1,000, payable to the district court pending resolution of the motion for reconsideration. Yet, Healthcare never applied to the district court for relief from the order pending reconsideration. On November 18, 2002, the district court denied the motion for reconsideration and again ordered Healthcare to pay Locke pursuant to the previous court order. Healthcare did not pay until one month later. Healthcare argues that the ten-day time frame for payment pursuant to the original order already had lapsed, and therefore, Healthcare had paid Locke within a reasonable time frame after denial of the motion for reconsideration. Healthcare's argument lacks merit. A reasonable reading of the district court's order denying reconsideration of its sanctions order and requiring payment pursuant to the original order would have required Healthcare to pay Locke promptly.

⁹Locke's conduct was not without fault, as Locke failed to comply with the district court's order requiring Locke to produce discovery.

Next, Healthcare argues that its motion for relief from judgment was made in good faith. Healthcare argues that its case has a potential value exceeding \$1 million and that it diligently prosecuted its case after obtaining new counsel. Healthcare contends that it paid Locke the sanction amount within a reasonable time. Therefore, Healthcare asserts that the judgment of dismissal came as a complete surprise and that Healthcare responded quickly by moving for reconsideration and for relief from judgment. Healthcare argues that it acted in good faith at all times.¹⁰

The term “good faith” describes “a state of mind denoting honesty of purpose and freedom from intent to defraud.”¹¹ Healthcare’s efforts prior to obtaining new counsel were not diligent. Healthcare missed the deadline to oppose the motion to dismiss, although the record does not reveal that Healthcare did so in bad faith. The district court was, however, entitled in its discretion to find that Healthcare engaged in bad faith based upon its repeated failures to pay the \$1,000 sanction.

Finally, Healthcare argues that, even when considered in the worst light possible, the facts of this case are not so egregious as to warrant dismissal with prejudice, especially in light of the public policy favoring resolution on the merits. Healthcare argues that, if the district

¹⁰Locke counters that Healthcare never had a case against Locke and especially not one for over \$1 million, implying that Healthcare’s suit was frivolous. Locke further asserts that the district court expressly found that Healthcare never had a case. Our review of the record reveals no evidentiary basis for this assertion, and the district court never made any such finding.

¹¹Stoecklein, 109 Nev. at 273, 849 P.2d at 309.

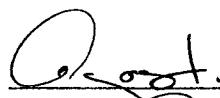
court found that Healthcare had delayed paying the sanction, it could have found Healthcare in contempt and ordered further monetary sanctions.


Healthcare, however, failed to timely deliver the sanction to Locke and to timely oppose the motion to dismiss. Because the district court had expressly warned Healthcare that failure to pay could result in dismissal of its action and because “[f]ailure of the opposing party to serve and file his written opposition may be construed as an admission that the motion is meritorious and a consent to granting the same,”¹² we conclude that the district court did not abuse its discretion by dismissing with prejudice Healthcare’s complaint or by denying Healthcare relief from judgment under NRCP 60(b). Substantial evidence supports the district court’s decision.

Accordingly, we

ORDER the judgment and order of the district court
AFFIRMED.


_____, J.
Becker


_____, J.
Agosti


_____, J.
Gibbons

¹²DCR 13(3).

cc: Hon. Janet J. Berry, District Judge
Bader & Ryan
Nick A. Moschetti Jr.
Washoe District Court Clerk