IN THE SUPREME COURT OF THE STATE OF NEVADA

ELECTRO-CHEMICAL TECHNOLOGIES, LTD.,
Appellant,
vs.
ROSS VAN WINKLE,
Respondent.

No. 42453

FILED

JUL 12 2006

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

ORDER OF AFFIRMANCE

This is an appeal from an order denying Electro-Chemical's NRCP 60(b) motion to set aside a judgment on an arbitration award. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge. We affirm the district court's order. In this, we conclude that the judgment was not void under former NRCP 60(b)(3).[1]

FACTS AND PROCEDURAL HISTORY

Respondent Ross Van Winkle sued appellant Electro-Chemical, on a promissory note. Following court-annexed arbitration in which the arbitrator awarded Van Winkle $81,800.00,[2] Electro-Chemical filed a timely request for a trial de novo in the district court. Shortly before trial, Electro-Chemical's counsel withdrew as counsel of record. According to the clerk's minutes of the proceedings below, after Electro-

[1]NRCP 60 was amended, effective January 1, 2005. When Electro-Chemical moved to set aside the district court's judgment, the provision regarding void judgments was contained in subsection (b)(3). The provision regarding void judgments is now NRCP 60(b)(4).

[2]This sum includes the principal of the note, $30,000, plus $63,000 in interest due, less $11,200 in payments made. See NAR 16(B) stating "[t]he maximum award that can be rendered by the arbitrator is $40,000, exclusive of attorney's fees, interest and costs."

Chemical's new counsel failed to appear at the scheduled calendar call for trial, the district court orally ordered that the request for trial de novo be stricken and that the arbitration award be reinstated. More particularly, the minutes reflect new counsel's attempts to contact opposing counsel to request an agreed continuance, new counsel's attempts through her office to telephonically contact the district court about the conflict and to request a continuance through the court's executive assistant, Van Winkle's opposition to the continuance, new counsel's request to postpone the calendar call for one-half hour, and Van Winkle's oral motion to strike. In the written judgment filed March 5, 2003, the district court reinstated the arbitrator's award on the note and the arbitrator's award of attorney fees, awarded further attorney fees under NRCP 68 and NRS 17.115, and awarded costs, for a total recovery of $89,763.89. The judgment itself further recites the district court's reasons for striking the request for trial de novo. Notice of entry of the judgment was received by new counsel for Electro-Chemical on March 6, 2003.

Electro-Chemical did not immediately appeal from this judgment. On March 18, 2003, Electro-Chemical filed a "motion for trial," which the district court denied as untimely. Electro-Chemical then filed a motion for rehearing, which the district court granted, but the district court ultimately affirmed its original order. In that order, the court recited the failure of Electro-Chemical's counsel to either attend the calendar call or otherwise attempt to have substitute counsel in attendance. On September 8, 2003, Electro-Chemical filed a motion to set aside the judgment under former NRCP 60(b)(1) and (3). On October 29, 2003, the district court denied the motion as untimely, because Electro-

Chemical filed the motion more than six months after entry of the March 5, 2003 judgment.[3]

On December 3, 2003, Electro-Chemical filed its notice of appeal from the judgment on the arbitration award, the post-judgment order denying the "motion for trial," and the order denying its NRCP 60(b) motion to set aside the judgment. In a prior order, we dismissed the direct appeal from the judgment on the arbitration award and the order denying Electro-Chemical's "motion for trial" on jurisdictional grounds.[4] We did, however, accept jurisdiction over the appeal from the district court's denial of relief under former NRCP 60(b), noting as follows:

> However, we are satisfied that a timely appeal was filed on December 3, 2003, with respect to the order denying appellant's NRCP 60(b)(3) motion to set aside the default judgment. The order denying the motion to set aside the default judgment was entered on October 29, 2003, and notice of entry was served by mail on November 4, 2003. As the October 29 order was a special order made after final judgment, it was appealable under NRAP 3A(b)(2). Because the December 3 notice of appeal was timely filed within thirty days after notice of entry was served,

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[3]Under former NRCP 60(b)(1), the movant had six months from the entry of the judgment to seek relief. Under the current version of NRCP 60(b)(1), the movant has six months from the notice of entry of judgment to seek such relief.

[4]We dismissed the direct appeal from the judgment as untimely and the appeal from the "motion for trial" on the ground that the latter was either not timely or was not substantively appealable. See Order Dismissing Appeal In Part and Reinstating Briefing, filed December 6, 2004.

> this court has jurisdiction over the appeal from the October 29 order.

(Footnotes omitted.) We went on to state in the previous order that, while the district court correctly denied Electro-Chemical's NRCP 60(b) motion as untimely under former NRCP 60(b)(1), the district court failed to address its reasons for rejecting Electro-Chemical's former NRCP 60(b)(3) arguments that the judgment should be set aside as void. Since arguments based on former NRCP 60(b)(3) are not time-restricted,[5] we concluded that summary affirmance was not appropriate, and reinstated briefing for the limited purpose of addressing Electro-Chemical's former NRCP 60(b)(3) claims. We now affirm.

DISCUSSION

Notice

Electro-Chemical characterizes the March 5, 2003 judgment as a default judgment. Accordingly, it seeks relief under former NRCP 60(b)(3) on the ground that the judgment was void for lack of notice under NRCP 55(b)(2). NRCP 55(b)(2) states that a "party entitled to a judgment by default shall apply to the court therefor," and "[i]f the party against whom judgment by default is sought has appeared in the action, the party . . . shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application." In Lindblom v. Prime Hospitality Corp., we recognized that "a judgment entered without notice when required under NRCP 55(b)(2) is void and subject to a motion

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[5]See Lindblom v. Prime Hospitality Corp., 120 Nev. 372, 90 P.3d 1283 (2004).

to set aside" under former NRCP 60(b)(3).[6] We agree with Electro-Chemical that, if the district court's judgment were indeed a default judgment, it would be void for lack of notice.

We have, however, previously held that no written notice is required under NRCP 55(b)(2) where a district court enters judgment as a sanction.[7] As noted, the district court specifically stated in the March 5, 2003 judgment that it granted Van Winkle's motion to strike based upon counsel's failure to appear at the calendar call. We therefore conclude that the March 5, 2003 judgment was not a default judgment, but rather, was a judgment imposed as a sanction. Accordingly, because Electro-Chemical was not entitled to written notice before the district court proceeded to grant Van Winkle's motion to strike the trial de novo request, the judgment is not void under former NRCP 60(b)(3).

Young v. Johnny Ribeiro

Electro-Chemical next argues that the district court failed to apply the principles set forth in Young v. Johnny Ribeiro Building[8] before entering judgment on the arbitration award as a sanction. Accordingly, Electro-Chemical reasons that it was denied due process of law, rendering the judgment void under former NRCP 60(b)(3). In Young, we mandated that "every order of dismissal with prejudice as a discovery sanction be supported by an express, careful and preferably written explanation of the

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[6]Id. at 375, 90 P.3d at 1285 (citing Christy v. Carlisle, 94 Nev. 651, 654, 584 P.2d 687, 689 (1978)).

[7]Durango Fire Protection v. Troncoso, 120 Nev. 658, 662, 98 P.3d 691, 693 (2004).

[8]106 Nev. 88, 787 P.2d 777 (1990).

court's analysis" of the factors the district court considered in issuing dismissal.[9] Additionally, "[i]f the party against whom dismissal may be imposed raises a question of fact as to any of these factors, the court must allow the parties to address the relevant factors in an evidentiary hearing."[10] Beyond stating that it entered the judgment for Electro-Chemical's counsel's failure to attend calendar call, the district court provided no careful, written explanation of the factors it considered in issuing the judgment on the arbitration award as a sanction.

While the district court may have erred in failing to apply Young, we conclude that former NRCP 60(b)(3) was not an available vehicle through which Electro-Chemical could litigate this error. Generally, "[f]or a judgment to be void, there must be a defect in the court's authority to enter judgment through either lack of personal jurisdiction or jurisdiction over subject matter in suit."[11] In this case, the

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[9]Id. at 93, 787 P.2d at 780. The Young court set out a nonexhaustive list of eight factors that a court should consider before imposing a sanction of dismissal including "(1) the degree of willfulness of the offending party; (2) the extent to which the non-offending party would be prejudiced by a lesser sanction; (3) the severity of dismissal relative to the severity of the abusive conduct . . . ; (4) whether evidence has been irreparably lost; (5) the feasibility and fairness of alternative and less severe sanctions; (6) the policy favoring adjudication on the merits; (7) whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney; and (8) the need to deter both the parties and future litigants from similar abuses." GNLV Corp. v. Service Control Corp., 111 Nev. 866, 870, 900 P.2d 323, 325-26 (citing Young, 106 Nev. at 93, 787 P.2d at 780).

[10]Nevada Power v. Fluor Illinois, 108 Nev. 638, 645, 837 P.2d 1354, 1359 (1992).

[11]Gassett v. Snappy Car Rental, 111 Nev. 1416, 1419, 906 P.2d 258, 261 (1995); see also Foster v. Lewis, 78 Nev. 330, 372 P.2d 679 (1962);

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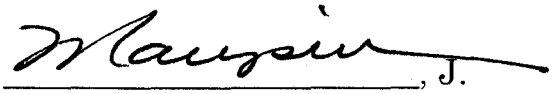
lower court had jurisdiction to issue the judgment, and as previously noted, the judgment is not void for lack of notice. Going further, there was no due process violation here. Rather, Young simply provides additional protection, not ascending to a constitutional due process right, to confrontation when the ultimate sanction of dismissal is to be imposed.

In short, Electro-Chemical should have raised this alleged error by timely filing an appeal of the March 5, 2003 order, or by moving for relief under former NRCP 60(b)(1) within six months of the rendition of judgment.

CONCLUSION

While entry of the March 5, 2003 judgment probably constituted an abuse of discretion, the judgment is not void under former NRCP 60(b)(3) for lack of notice or for lack of an express analysis of the factors the court considered in entering judgment. Because Electro-Chemical failed to attack the judgment via direct or appeal or within six months under former NRCP 60(b)(1), it has waived its right to challenge the alleged abuse of discretion. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



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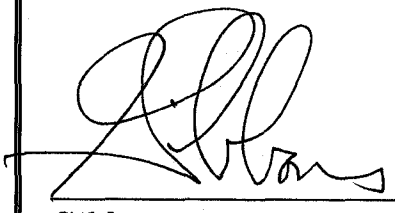
Maupin



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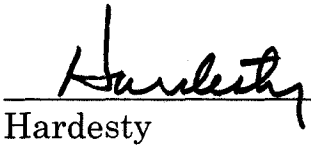

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Osman v. Cobb, 77 Nev. 133, 360 P.2d 258 (1961); La Potin v. La Potin, 75 Nev. 264, 339 P.2d 123 (1959).

cc: Hon. Sally L. Loehrer, District Judge
Irsfeld & Associates, LLC
Amesbury & Schutt
Clark County Clerk