

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID L. HERMISTON AND WILMA
M. HERMISTON,
Appellants,
vs.
SUMMEX EXPLORATION CO., LTD., A
NEVADA CORPORATION,
Respondent.

No. 42645

FILED

NOV 16 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT

J. Richard
CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

This is an appeal from an order denying a NRCP 60(b) motion to set aside a default judgment and from an order in aid of enforcement. Second Judicial District Court, Washoe County; Peter I. Breen, Judge.

Appellant David Hermiston is a mining prospector who located a mining concession in Mexico. Hermiston sought investors to aid in the project, which led to the formation of respondent Summex Exploration. Eventually, Hermiston attempted to wrest control of Summex from the other directors by filing an action in Nevada. Summex in turn filed a third party action against Hermiston alleging fraud and other claims.

After some stipulated dismissals in the suit, Summex filed a second amended third party complaint against Hermiston. Hermiston failed to answer and default was entered in October 1999. In February 2001 Summex applied for default judgment, again there was no response by Hermiston, and default judgment was entered. Immediately prior to the NRCP 60(b) six-month deadline to set aside a default judgment, Hermiston filed a motion to set aside the judgment, alleging the default judgment was obtained by fraud upon the court. The district court denied

the motion. Summex requested, and obtained, an order in aid of enforcement of judgment to use in litigation in Mexico between the parties concerning the Campo Morado and La Alina mining concessions. Hermiston objected that the order in aid of enforcement expanded the scope of the original judgment and he filed a motion to alter or amend the order. The district denied the motion.

The Hermistons appeal arguing that default judgment was entered in error because it was obtained by fraud upon the court and that the order in aid of enforcement expanded the scope of the original judgment.

Set aside of default judgment

An order denying a motion to set aside a default judgment due to fraud upon the court will not be disturbed absent an abuse of discretion.¹ The burden is on the moving party to establish fraud by clear and convincing evidence.² In Occhiuto v. Occhiuto, we defined fraud on the court:

‘Generally speaking, only the most egregious misconduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated, will constitute a fraud on the court. Less egregious misconduct, such as nondisclosure to the court of facts

¹Occhiuto v. Occhiuto, 97 Nev. 143, 146 n.2, 625 P.2d 568, 570 n.2 (1981).

²Id.

allegedly pertinent to the matter before it will not ordinarily rise to the level of fraud on the court.³

We further defined fraud upon the court: “in order to set aside a judgment or order because of fraud upon the court under Rule 60(b) . . . it is necessary to show an unconscionable plan or scheme which is designed to improperly influence the court in its decision.”⁴

We have stated certain guidelines for the district court to consider in deciding whether to set aside a default judgment. The moving party must show some excuse for its failure to answer or otherwise defend, and the district court should recognize the basic underlying policy to have each case decided on its merits.⁵ Although dismissal of an action is a harsh sanction, it may be imposed in cases of willful noncompliance with a court’s orders.⁶ “Default judgments will be upheld where the normal adversary process has been halted due to an unresponsive party, because

³Id. (quoting United States v. International Telephone & Tel. Corp., 349 F. Supp. 22, 29 (D. Conn. 1972)) (internal citations omitted) (emphasis added).

⁴Id. (quoting England v. Doyle, 281 F.2d 304, 309 (9th Cir. 1960)) (emphasis added).

⁵Sealed Unit Parts v. Alpha Gamma Ch., 99 Nev. 641, 643, 668 P.2d 288, 289 (1983) (overruled in part by Epstein v. Epstein, 113 Nev. 1401, 1405, 950 P.2d 771, 773 (1997) (holding that no showing of meritorious defense is required)).

⁶Temora Trading Co. v. Perry, 98 Nev. 229, 231, 645 P.2d 436, 437 (1982).

diligent parties are entitled to be protected against interminable delay and uncertainty as to their legal rights.”⁷

Noting that the Fidel Gonzalez affidavit was the main basis for the fraud allegation, the district court found that the Hermistons failed to establish by clear and convincing evidence that fraud upon the court occurred. The district court stated that Gonzalez testified that, while he did remember speaking to Summex attorney Steve Wenzel, he simply could not remember giving the affidavit. Also, Gonzalez never denied being present at the attorney’s office in Mexico at the time the affidavit was supplied. The district court noted that this does not establish fraud by clear and convincing evidence. We agree.

The district court weighed the credibility of the evidence pertaining to fraud upon the court and determined it did not exist. The Hermistons had the burden to show by clear and convincing evidence that fraud occurred, which they were unable to do. Therefore, the district court did not abuse its discretion in evaluating the motion to set aside default judgment. It is clear that the district court considered the issue of fraud upon the court as it is specifically stated in the order. As the Hermistons did not meet their burden of establishing fraud upon the court, the district court properly considered the length of time that the Hermistons took to remedy the default judgment entered against them.

We have also considered the Hermistons’ remaining arguments regarding the conduct and statements of attorney Steve

⁷Skeen v. Valley Bank of Nevada, 89 Nev. 301, 303, 511 P.2d 1053, 1054 (1973).

Wenzel, laches, clean hands and consideration of the merits of the defense and conclude they are without merit.

Motion to amend order in aid of enforcement of judgment

To the extent that the Hermistons challenge the order denying their motion to amend that followed the order in aid of enforcement of judgment, that challenge is not jurisdictionally cognizable. However, Summex's suggestion that the order in aid of enforcement is not substantively or procedurally appealable lacks merit. The order expands the judgment's reach from the Campo Morado concession to the "Campo Morado claim . . . and the La Alina claim." As such, it constitutes an appealable special order after final judgment under NRAP 3A(b)(2). The notice of appeal is timely, as the Hermistons filed a timely tolling motion challenging the enforcement order.⁸ Therefore, Summex's dismissal argument lacks merit.

The default judgment awarded interest "in the Mexican mining concession(s) or claim(s) commonly known as Campo Morado, shall be and the hereby are declared to be held in trust for the benefit of SUMMEX" The order in aid of enforcement stated:

Summex Exploration Co. Ltd. or its successor(s) in interest are therefore entitled to execute upon the Judgment and to recover from the Third Party Defendants DAVID L. HERMISTON and WILMA M. HERMISTON the following: (1) the money judgment in the principal amount of \$646,991.16, plus interest on the Judgment at the legal rate


⁸Under NRCP 54(a) a judgment includes any order from which an appeal lies. NRAP 3A(b)(2) permits an appeal from any special order made after final judgment. NRAP 4(a)(2) qualifies that a timely motion made under NRCP 59(e) stays the time for taking an appeal.

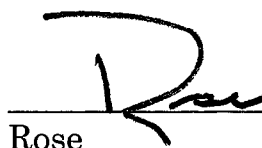
permitted by Nevada law from the date of the Judgment until paid in full; (2) any and all ownership or other beneficial interest(s) that either Third Party Defendant may have or hold in the two mining claims or concessions, namely the Campo Morado claim . . . and the La Alina claim . . .; and (3) any and all other benefits and interests awarded them by the judgment.

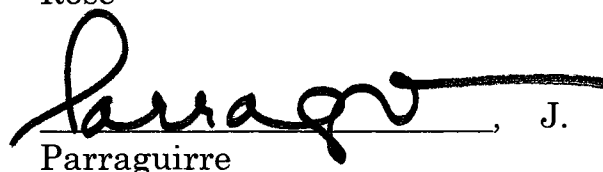
The order in aid of enforcement of judgment exceeded the scope of the original default judgment to the extent the judgment purports to award interest in the La Alina claim. La Alina was not part of the original judgment and should not have been included in the order in aid of enforcement. We therefore hold that the district court erred in expanding the scope of the original judgment by adding the La Alina claim and remand this matter for entry of a corrected order. We leave application of the corrected order in aid of enforcement in the courts of Mexico to the Mexican judiciary.

Accordingly, we affirm the district court's order denying the NRCP 60(b) motion, affirm in part and reverse in part the district court's order in aid of enforcement, and remand this matter to the district court for the entry of a corrected order.

It is so ORDERED.

 _____, J.
Douglas

 _____, J.
Rose

 _____, J.
Parraguirre

cc: Hon. Peter I. Breen, District Judge
Law Office of Mark Wray
Steve E. Wenzel
Washoe District Court Clerk