IN THE SUPREME COURT OF THE STATE OF NEVADA

GREGORY D. POWELL,
Appellant,
vs.
JOANNE M. POWELL,
Respondent.

No. 42791

FILED

MAY 19 2005

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

ORDER REVERSING, VACATING AND REMANDING

This is an appeal from a default divorce decree and a district court order denying an NRCP 60 motion to set aside the decree. Fourth Judicial District Court, Elko County; Andrew J. Puccinelli, Judge.

DISCUSSION

Joanne Powell and Gregory Powell were married on August 23, 1997, in Reno, Nevada. On September 25, 2003, Joanne filed a verified complaint for a divorce and a request for a permanent restraining order in Elko County, Nevada. On October 20, 2003, Gregory filed a motion to change venue, mistakenly thinking that such a motion tolled the statutory time to file an answer to the complaint.

Joanne then sent Gregory a three-day notice of intent to enter default, which read, in pertinent part, "Plaintiff herewith gives its three day notice of intent to enter the default of Defendant." Gregory wrote to Joanne's attorney on October 30, 2003, stating that he was in receipt of the three-day notice, but would not be answering because he had filed a motion to change venue. A default was entered in favor of Joanne on November 3, 2003, due to Gregory's failure to file an answer.

On November 10, 2003, defendant's motion to change venue was denied. On November 14, 2003, Joanne filed an application for entry of a default decree of divorce, and submitted a proposed "findings of fact,

conclusions of law, judgment of decree of divorce" for execution by the district court. Gregory received no notice of Joanne's application for entry of the default decree. A prove-up hearing was held on November 17, 2003, without Gregory present. The court entered the default decree of divorce[1] on November 17, 2003.

Gregory filed an answer to the complaint in early December 2003, along with a motion to set aside the default decree. On January 7, 2004, the Elko County district court denied Gregory's motion, citing no excusable neglect to warrant setting aside the default decree. Gregory then brought this appeal.

Gregory argues that the district court erred when it did not set aside the default decree. Because Gregory believed that the motion to change venue would toll the statutory twenty-day time limit, he contends that his failure to timely answer the complaint should be considered excusable neglect or mistake under NRCP 60. Additionally, Gregory argues that he made an appearance pursuant to his letter of October 30, 2003, and therefore the three-day notice provision of NRCP 55(b)(2) should apply. Since Gregory never received notice of the hearing on the default divorce decree, and was therefore precluded from participating in the prove-up hearing, he claims that the decree should be set aside under this court's precedent in Epstein v. Epstein.[2]

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[1]Although NRCP 55(b) refers to entry of "default judgment," here the judgment was a decree of divorce, so we will use the term "default decree" instead.

[2]113 Nev. 1401, 950 P.2d 771 (1997) (holding that a default divorce decree was invalid where one party did not get sufficient notice under NRCP 55(b)(2)).

Under NRCP 60(b)(1), a judgment may be set aside if a party is able to demonstrate the judgment was the result of a mistake, inadvertence, excusable negligence, or fraud.[3]

The standard of review for an order denying a motion to set aside a default judgment is whether the district court abused its discretion.[4]

NRCP 55 directs a two-step process for a default. Under NRCP 55(a), default may be entered by the clerk of the court when a party against whom a default is sought fails to defend. Thereafter, NRCP 55(b)(1) and (2) provide for two methods of judgment by default. Only NRCP 55(b)(2) applies here:

> If 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.

Because Gregory failed to timely respond to Joanne's complaint, an entry of default pursuant to NRCP 55(a) was properly entered. Gregory's motion to change venue did not toll his statutory time to answer, but rather constituted an appearance triggering the notice

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[3]NRCP 60. RELIEF FROM JUDGMENT OR ORDER

> (b) **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.** On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect[.]

[4]Cicerchia v. Cicerchia, 77 Nev. 158, 161, 360 P.2d 839, 841 (1961).

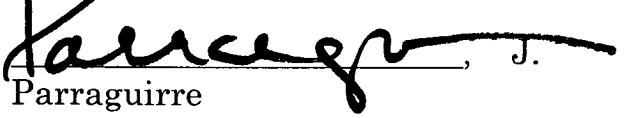
requirement under NRCP 55(b)(2) for judgment by default. As Gregory had made an appearance, he was entitled to receive notice of Joanne's intent to obtain a default judgment pursuant to NRCP 55(b)(2). Thus, the district court erred in concluding that the three-day notice provided to Gregory before the entry of the default judgment was sufficient. We conclude Joanne failed to meet the notice requirements for a judgment by default pursuant to NRCP 55(b)(2), thus rendering the default divorce decree entered by the district court void.[5]

As the default decree is void, we do not reach appellant's arguments that the district court abused its discretion in denying his NRCP 60(b) motion on the basis of excusable neglect.[6] Accordingly, we

REVERSE the order of the district court denying the motion to set aside the divorce decree, VACATE the decree and REMAND this matter to the district court for further proceedings on the prove-up of Joanne's verified complaint for divorce upon default under NRCP 55.

 , J.
Maupin

 , J.
Douglas

 , J.
Parraguirre

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[5]Lindblom v. Prime Hospitality Corp., 120 Nev. 372, 375, 90 P.3d 1283, 1285 (2004) ("[A] judgment entered without notice when required under NRCP 55(b)(2) is void and subject to a motion to set aside.")

[6]We note, however, that the district court did not consider in making its determination all four factors articulated in Hotel Last Frontier v. Frontier Prop., 79 Nev. 150, 155, 380 P.2d 293, 295 (1963).

cc: Hon. Andrew J. Puccinelli, District Judge
Stanley J. Steiber
Joanne M. Powell
Elko County Clerk