IN THE SUPREME COURT OF THE STATE OF NEVADA

CASE NO. 81379

ROCHELLE MEZZANO,

Appellant,

vs.

JOHN TOWNLEY,

Respondent.

ON APPEAL FROM THE SECOND JUDICIAL DISTRICT COURT
CASE NO. DV19-01564

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

The following persons / entities are disclosed:

- F. Peter James, Esq.;
- Law Offices of F. Peter James, Esq., PLLC.

As to the Appellant, there are no other parent corporations or publicly-held companies at issue. Appellant is not using a pseudonym.

Dated this 2nd day of February, 2021

/s/ F. Peter James

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JURISDICTIONAL STATEMENT

The Nevada Supreme Court has jurisdiction over this matter pursuant to NRAP 3A(b)(8), and NRS 2.090.

The Order appealed from was filed by the district court on May 22, 2020. (A.A. at 174). Said Order was noticed by e-service on May 26, 2020. (A.A. at 179). The Notice of Appeal was filed on June 12, 2020. (J.A. at 187).

The jurisdictional deadline to file the Notice of Appeal was June 12, 2020 at the earliest. Given the Notice of Entry of Order being on May 26, 2020, the deadline was likely June 25, 2020. As the Notice of Appeal was filed on the earliest possible deadline, the same was timely filed.

STATEMENT OF THE ISSUES

Husband obtained a default Decree of Divorce. Wife was never properly served. Wife timely requested the district court to set aside the default Decree of Divorce; however, the district court denied that request even though it is crystal clear that service of process (which is jurisdictional) was patently improper.

Did the district court err in denying the request to set aside the default Decree of Divorce given the improper service of process?

STATEMENT OF THE CASE

This is an appeal from the denial of a Motion to Set Aside a default Decree of Divorce. Second Judicial District Court, Washoe County; Hon. Bridget E. Robb, District Judge, Family Division.

STATEMENT OF THE FACTS

Appellant / Defendant, Rochelle Mezzano (hereinafter "Wife"), and Respondent / Plaintiff, John Townley (hereinafter "Husband"), were married on or about September 12, 1999 in Reno, Nevada.[1] (AA 124).

On September 24, 2019, Husband filed a Complaint for Divorce. (AA 1). There were several recusals of judges and a peremptory challenge. (AA 6, 9, 13). Finally, Judge Robb accepted the case. (AA 24).

On October 4, 2019, a process server went to Wife's residence to serve the Complaint, Summons, and other documents.[2] (AA 31). When the process server arrived, an older white male came out. (*Id*.). The man was a hired hand to do work on the house and he did not know if Wife was at the house. (*Id*.). The

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[1] Husband asserts that the parties were married sometime in 2000, though he does not recall when. (AA 2).

[2] All of the facts as to what happened with service of process are from the affidavit of the process server Husband hired, not from Wife. (AA 31). There are no further affidavits / testimony as to the service of process. (*See generally* AA).

worker yelled out that a young lady was here to see her. (*Id*.). Wife responded that she was not taking visitors. (*Id*.). The worker yelled out that the lady had something to give her. (*Id*.). The process server admits that she did not what she was to give Wife and that she did not say who she was. (*Id*.). Wife's response was that she did not want it. (*Id*.). Wife never came to the door. (*Id*.). The worker verified that Wife lived there. (*Id*.). The process server posted the "serve" on the front door and then left. (*Id*.). Wife was never personally served. (*See generally* AA 31). No one of suitable age and discretion who resided at the residence ever accepted service of process / was ever served. (*Id*.).

Husband obtained a Default against Wife. (AA 39). Husband applied for a default judgment. (AA 41, 45-61). The district court held a prove up hearing on December 11, 2019. (AA 97-105). Following the hearing, the district court signed the Decree of Divorce provided by Husband. (AA 83-96).

Wife retained counsel and filed a Motion to Set Aside the default Decree of Divorce. (AA 123-140). The main argument was invalid service of process. (*Id*.). Husband opposed the Motion. (AA 142-171). The district court denied the request to set aside the default Decree of Divorce. (AA 174-178).

This appeal followed. (AA 187).

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SUMMARY OF THE ARGUMENT

The Court should reverse the district court, grant the Motion to Set Aside, set aside the default Decree and the Default, and remand the matter to the district court for a trial on the merits.

There was no proper service of process of the Summons and Complaint. The process server merely left the documents on the door—and did not serve Wife, who never even approached the door. The process server at best served a handyman working at the residence. Improper service is no service.

Service of process is jurisdictional. Without jurisdiction, a court may not take action against the defendant.

The rules for setting aside a default judgment should be liberally applied. Nevada has a strong policy of adjudicating matters on the merits. A default may be set aside for good cause. A default judgment may be set aside if it is void. Want of service of process renders a default judgment void.

A motion to set aside a void judgment may be filed outside of the six-month limitations period. As such, there is no merit to a claim that a motion to set aside a void judgment is untimely if it is filed just over the six-month limitations period. The district court here said two to four months to file was untimely, though Nevada law says six months is perfectly fine and that there is no merit to claims to the contrary.

As such, the district court abused its discretion in failing to grant the Motion to Set Aside.

ARGUMENT

The district court erred in declining to set aside the Default and the default Decree of Divorce when there was a patent lack of proper service of process. The Court should reverse the district court, grant the Motion to Set Aside, set aside the Default and the default Decree of Divorce, and remand the matter for a trial on the merits.

THE DISTRICT COURT ERRED DECLINING TO SET ASIDE THE DEFAULT AND THE DEFAULT DECREE OF DIVORCE, EVEN THOUGH THERE WAS PATENT IMPROPER SERVICE OF PROCESS

A. STANDARD OF REVIEW

A denial of a motion to set aside is reviewed for an abuse of discretion. *See Cicerchia v. Cicerchia*, 77 Nev. 158, 161, 360 P.2d 839, 841 (1961). Questions of law, however, are reviewed de novo. *See Jackson v. Groenendyke*, 132 Nev. 296, 300, 369 P.3d 362, 365 (2016).

B. ARGUMENT

The district court abused its discretion in declining to grant the Motion to Set Aside the Default and the default Decree of Divorce. Further, the district court erred in refusing to acknowledge clear, unambiguous Nevada law as to

improper service equating to no service. The default Decree of Divorce is void due to want of service of process.

"A judgment that is entered prior to the time when the defendant is validly served with process is void, unless the defendant has entered his appearance." *Thorne v. Com. of Pa.*, 77 F.R.D. 396, 398 (E.D. Penn. 1977).[3] "A default judgment entered when there has been no proper service of the complaint is, *a fortiori*, void, and should be set aside." *Gold Kist, Inc. v. Laurinburg Oil Co., Inc.*, 756 F.2d 14, 19 (3rd Cir. 1985). Improper service of process (even if the person to be served actually receives the document served) is ineffectual and is not service of process; thus, the document served improperly is deemed not served at all. *See Quinlan v. Camden USA, Inc.*, 126 Nev. 311, 236 P.3d 613 (2010) (citing many federal rules and cases).

NRCP 4.2 provides that serving an individual must be made as follows:

> **(a) Serving an Individual.** Unless otherwise provided by these rules, service may be made on an individual:

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[3] "Federal cases interpreting the Federal Rules of Civil Procedure are **strong persuasive authority**, because the Nevada Rules of Civil Procedure are based in large part upon their federal counterparts." *Executive Management, Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 872, 876 (2002) (internal quotations and citation omitted) (emphasis added). Nevada law controls, but Nevada looks at federal jurisprudence for guidance—but only when needed. *See Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. 606, 610, 245 P.3d 1182, 1185 (2010).

(1) by delivering a copy of the summons and complaint to the individual personally;

(2) by leaving a copy of the summons and complaint at the individual's dwelling or usual place of abode with a person of suitable age and discretion who currently resides therein and is not an adverse party to the individual being served; or

(3) by delivering a copy of the summons and complaint to an agent authorized by appointment or by law to receive service of process.

So, if a defendant is not personally served, substitute service may be made upon a "person of suitable age and discretion **who currently resides therein**". NRCP 4.2(a)(2) (emphasis added). "Where the evidence that the person served was not authorized by the defendant to receive service of process is uncontradicted, as in this case, such denial of authority must be taken by the court as true, for the purpose of applying NRCP 4(d)(6)."[4] *Foster v. Lewis*, 78 Nev. 330, 333, 372 P.2d 679, 680 (1962) (citations omitted). "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**." *Id*., 78 Nev. at 333, 372 P.2d at 680 (citation omitted) (emphasis added). With no valid personal service of summons, the judgment can be sustained only if there has been proper substituted service. *Id*., 78 Nev. at 333, 78 P.2d at 681. The "plaintiff has the

[4] The then-existing NRCP 4(d)(6) is the present NRCP 4.2(a).

burden of proof to demonstrate that the procedure employed to deliver the papers satisfies the requirements of the relevant portions of Rule 4." *See Mann v. Castiel*, 681 F.3d 368, 372 (D.C. Cir. 2012) (internal quotations omitted), citing 4A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1083 (3d. ed. 2002 & Supp. 2012).

A default may be set aside for good cause. *See* NRCP 55(c). When there is lack of proper service, the entry of a default is void and must be set aside. *See Insituform Technologies, Inc. v. AMerik Supplies, Inc.*, 588 F.Supp.2d 1349, 1352 (N.D. Georgia 2008); *see also In Re Van Meter*, 175 B.R. 64 (9th Cir. 1994) (with no proper service, a default judgment should be set aside as void; defendant had no obligation to respond to an unserved complaint).

Factors to consider in determining if "good cause" exists to set aside a default are: whether the default was result of culpable conduct of the plaintiff, prejudice to the plaintiff, and if there is a meritorious defense. *See Savin Corp. v. C.M.C. Corp.*, 98 F.R.D. 509 (N.D. Ohio 1983). However, the United States Supreme Court has declared that requiring a meritorious defense in a set aside matter is a violation of due process of law under the 14th Amendment to the United States Constitution. *See Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 108 S.Ct. 896 (1988). This case was adopted by Nevada twice. *See Price v. Dunn*, 106 Nev. 100, 104, 787 P.2d 785, 788 (1990); *see also Epstein v. Epstein*,

113 Nev. 1401, 1405, 950 P.2d 771, 773 (1997).

Setting aside a default judgment is a more stringent standard than setting aside a default. *Compare* NRCP 60(b) (stringent standard) *with* NRCP 55(c) (mere good cause). Couple that with requiring a meritorious defense to be a violation of due process of law, then, *a fortiori*, it is a violation of due process of law to require a meritorious defense to set aside a default. It is axiomatic that satisfying a higher standard automatically meets lesser standards. *See e.g. Hay & Forage Industries v. New Holland North America, Inc.*, 60 F.Supp.2d 1099, 1119 (D. Kansas 1998).

A defendant's obligation to respond to a complaint arises only upon service of the summons and complaint. *See Judd v. F.C.C.*, 276 F.R.D. 1, 5 (D.C. 2011). Nevada only has jurisdiction of a party when there is personal service or a legally-provided substitute—notice is not a substitute for service of process. *See C.H.A Venture v. G.C. Wallace Consulting Engineers, Inc.*, 106 Nev. 381, 384, 794 P.2d 707, 709 (1990).

Nevada has a strong policy of adjudication of cases on the merits. *See e.g. Hotel Last Frontier v. Frontier Prop.*, 79 Nev. 150, 155, 380 P.2d 293, 295 (1963); *see also Marcuse v. Del Webb Communities, Inc.*, 123 Nev. 278, 286, 163 P.3d 462, 468 (2007). Motions to set aside defaults are considered liberally with any doubt being resolved in favor of setting aside. *See Baumann v. Nev.*

Colony Corp., 44 Nev. 10, 12, 189 P. 245, 247 (1920); *see also Singer Co. v. Greever and Wlash Wholesale Textile, Inc.*, 82 F.R.D. 1, 2 (E.D. Tenn. 1977); *see also Johnson v. Harper*, 66 F.R.D. 103 (E.D. Tenn 1975). The rule authorizing a court to set aside a default judgment should be "very liberally applied" in a divorce proceeding. *See Cicerchia*, 77 Nev. at 161, 360 P.2d at 841 *citing Blundin v. Blundin*, 38 Nev. 212, 147 P. 1083, 1084 (1915).

Here, there was no valid service of process as the process server at best served a handyman working at the residence and posted the papers on the door. (AA 31). Under Nevada law, this is not proper service of process. *See* NRCP 4.2. As stated, service of process is jurisdictional. *See C.H.A Venture*, 106 Nev. at 384, 794 P.2d at 709. Without proper service, the district court had no jurisdiction to enter any orders or to take any action against Wife. *See e.g. Ex parte Gardner*, 22 Nev. 280, 39 P. 570 (1895).

Oddly, the district court found the process server's affidavit the most credible evidence provided. (AA 177). Wife relied on the process server's affidavit in her motion to evidence that there was no proper service of process. (AA 124). The district court opined that a signed return of service of process constitutes prima facie evidence of valid service that may only be overcome by strong and convincing evidence. (AA 177) (citing *S.E.C v. Internet Sols. for Bus. Inc.*, 509 F.3d 1161, 1166 (9th Cir. 2007)). This position begs the question as the

affidavit itself evidences patently improper service of process. Moreover, in the *S.E.C.* case, the defendant was personally served, which the affidavit of service confirmed. 509 F. 3d at 1164. As stated and in the present case, the affidavit of service in the present matter itself evidences ***improper*** service, not proper service. (AA 31). Still, the district court improperly relied on the *S.E.C.* case.

The district court also erred in relying on the *S.E.C.* case for another position—notice of the proceedings. The district court opined that the defendant who chooses not to put the plaintiff to its proof, but instead allows default judgment to be entered and waits until later to challenge the action, should have to bear the consequences of such delay. (AA 177 n.1).

Clear Nevada law (which is controlling) is quite the opposite from this non-controlling federal case. Nevada law controls, not federal—which is used for guidance when needed. *See Bahena*, 126 Nev. at 610, 245 P.3d at 1185. Nevada law provides that improper service is no service at all—a bright-line rule. *See Quinlan*, 126 Nev. at 311, 236 P.3d at 613. Wife cited to this case in her motion. (AA 126). Oddly, the district court failed to address or even include any reference to this controlling Nevada case, *Quinlan*. (*See generally* AA 174-178).

The district court stated that part of its decision was based on Wife's purported delay in filing to set aside the decree. (AA 177-78). The limitations period for filing to set aside a final judgment based in it being void is two years

from notice. *See Deal v. Baines*, 110 Nev. 509, 512, 874 P.2d 775, 778 (1994). The district court found that two months passed after Wife's counsel contacted Husband's counsel for the motion to be filed—and that this was not prompt enough.[5] (AA 178).

If the time before filing is four months and the limitations period is two years, then this is akin to filing after two months on a one-year limitations period and the also akin to filing one month into a six-month limitations period. This is hardly a delay worth denying a request to set aside a void decree of divorce. Nevada law provides that filing a motion to set aside based on the default judgment being void just over six months after entry of the default judgment was timely—and that any argument against it is meritless. *See Foster*, 78 Nev. at 337, 372 P.2d at 683 (a motion to set aside a void judgment is not restricted to the six-month limitations period in NRCP 60(b); thus, a motion to set aside a void judgment filed just over six months after the entry of the judgment was timely—there is no merit that the motion was untimely). As such, the Motion to Set Aside was timely filed, and the district court abused its discretion in stating that between two and four months was too long to file.

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[5] Wife asserts that this is the point of constructive knowledge of the entry of the Decree. The Motion to Set Aside was filed approximately four months after the decree was entered. (*Compare* AA at 83 *with* AA at 123).

The district court abused its discretion in denying the Motion to Set Aside. As there was no proper service of process, the district court was without jurisdiction to enter any orders and to take any action in this matter.

* * *

The Court should reverse the lower court, grant the Motion to Set Aside, set aside the default Decree of Divorce and the Default, and remand this matter to the district court for a determination on the merits.

CONCLUSION

Husband's process server did not serve Wife with the Complaint and Summons. There was no proper service of process. Nevada law is clear that improper service is no service at all. Service of process is jurisdictional. The district court had no jurisdiction over Wife and had no jurisdiction to take action against her. The district court abused its discretion in failing to grant the request to set aside the default Decree and the Default. The Motion was meritorious and timely.

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Accordingly, the Court should reverse the district court, grant the Motion to Set Aside, set aside the default Decree and the Default, and remand the matter back to the district court for a trial on the merits.

Dated this 2nd day of February, 2021

/s/ *F. Peter James*

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ROUTING STATEMENT

Pursuant to NRAP 3E(d)(1)(H), Appellant submits the following routing statement:

- This appeal is not presumptively retained by the Supreme Court pursuant to NRAP 17(a);
- This appeal is presumptively assigned to the Court of Appeals pursuant to NRAP 17(b)(5) as it is a family law matter not involving termination of parental rights or NRS Chapter 432B proceedings; and
- Appellant asserts that the matters should be routed to the Court of Appeals as there are no issues that would keep the matter with the Supreme Court.

Dated this 2nd day of February, 2021

/s/ F. Peter James

_____

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CERTIFICATE OF COMPLIANCE (Rule 28.2)

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a page reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 2nd day of February, 2021

/s/ *F. Peter James*

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CERTIFICATE OF COMPLIANCE (Rule 32)

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

   [X] This brief has been prepared in a proportionally spaced typeface using 14 point Times New Roman in MS Word 2013; or

   [ ] This brief has been prepared in a monospaced typeface using [state name and version of word processing program] with [state number of characters per inch and name of type style].

2. I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

   [X] Proportionately spaced, has a typeface of 14 points or more and contains 3,377 words (limit is 14,000 words); or

   [ ] Monospaced, has 10.5 or fewer characters per inch, and contains ___ words or ___ lines of text; or

   [X] Does not exceed 30 pages.

Dated this 2nd day of February, 2021

/s/ *F. Peter James*

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CERTIFICATE OF SERVICE

The following are listed on the Master Service List and are served via the Court's electronic filing and service system (eFlex):

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I certify that on this 2nd day of February, 2021, I caused the above and foregoing document to be served by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada to the attorney(s) / party(ies) listed below at the address(es) indicated below:

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