

Case No. 82218

In the Supreme Court of Nevada

MAX VARGAS,

Appellant,

vs.

ORTIZ FAMILY LLC D/B/A EL SELLITO
ROJO; J MORALES INC.; DOE
BOUNCERS I-V; DOES VI-X; AND ROE
CORPORATIONS X-XV, INCLUSIVE,

Respondent.

Electronically Filed
Jan 11 2021 05:19 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

District Court Case No.
A82218

MOTION TO DISMISS APPEAL

Plaintiff's Notice of Appeal seeking the Supreme Court's review of the District Court's Order Granting J Morales Inc.'s Emergency Motion to Set Aside Judgment and Stay Execution of Judgment, entered on November 24, 2020, is improper, as orders granting relief under Nevada Rule of Civil Procedure 60(b) are interlocutory and therefore not appealable. Accordingly, this appeal should be immediately dismissed.

I.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Files Suit and Obtains Default Judgment

On February 5, 2018, appellant Max Vargas ("Appellant") commenced the underlying district court matter pending as *Vargas v. Ortiz*

Family LLC, et. al., Eighth Judicial District Ct. Case No. A-18-768988-C (“District Ct. Proceeding”), against J Morales, Inc. (“JMI” or alternatively, “Respondent”) and Ortiz Family LLC d/b/a El Sellito Rojo (“Ortiz Family”). (District Ct. Proceeding docket.) The case was assigned to Hon. Rob Bare in Department 32 of the Eighth Judicial District Court (“District Court”).¹

In his District Court Complaint, Plaintiff alleges he sustained injuries at El Sellito Rojo, the nightclub owned and operated by Defendant Ortiz Family, on March 22, 2017. (Ex. 1, Compl. ¶¶10-19.) El Sellito Rojo’s principal place of business is 3977 E. Vegas Valley Drive, Las Vegas, Nevada, 89121 (APN 161-07-701-002) (the “Property”). (Ex. 1, Compl. ¶8.) In his Complaint, Plaintiff claims that “at all times pertinent hereto” JMI “owned, or is the successor in interest of the entity that owned” the Property. (Ex. 1, Compl. ¶9.) However, JMI was not the owner of the Property when the alleged incident occurred.

JMI never made an appearance in the District Court matter to defend against Plaintiff’s allegations as set forth in the Complaint. Thus,

¹ As of January 4, 2020, the District Court matter has been reassigned to Hon. David Jones in Department 29.

Default was filed against JMI on April 13, 2018. (*See* Ex. 2, District Ct. Proceeding docket.) Plaintiff then sought default judgment against both Defendants by filing an Application on September 19, 2018. (*Id.*) After a prove-up hearing held on June 18, 2019, the default judgment was entered on July 25, 2019 against both Defendants in the amount of \$1,706,214.75 (“Judgment”). Notice of Entry of Default Judgment was filed on August 6, 2019.

JMI Requests Default and Judgment Be Set Aside

On or about September 29, 2020 – a full year after entry of the Judgment – Jose Morales (“Morales”), JMI’s manager of record, discovered that JMI’s bank account had been garnished in the amount of \$5,397.96 from JMI’s Wells Fargo bank account. On October 27, 2020, JMI filed a Motion to Set Aside Judgment and Stay Execution of Judgment (“Motion to Set Aside Judgment”) after its bank account was garnished on or about September 29, 2020. In its Motion to Set Aside Judgment, JMI requested setting aside the Judgment and allowing the case to be heard on its merits. JMI also requested a stay of execution of the Judgment to prevent any further seizure of JMI’s assets prior to the Court’s final determination on the Motion to Set Aside Judgment. JMI

argued that it was not the owner of the Property when the alleged incident occurred, and therefore has a meritorious defense against Plaintiff's allegations. On November 6, 2020, Plaintiff filed his Opposition to the Motion. (*Id.*) On November 9, 2020, JMI filed its Reply in support of the Motion. (*Id.*)

Court Vacates Default and Judgment Against JMI

Following oral arguments, on November 24, 2020, the District Court entered its Order Granting J Morales Inc.'s Emergency Motion to Set Aside Judgment and Stay Execution of Judgment ("Order"). In its Order, the District Court found there were valid grounds for setting aside the Judgment for "mistake, inadvertence, surprise, or excusable neglect" and "other reason that justifies relief" under NRCP 60(b)(1) and (b)(6). (Ex. 3, Order.) Pursuant to the Order, the District Court granted JMI's Motion to Set Aside Judgment and ordered that the Default filed against JMI and the Default Judgment filed as to JMI be vacated. (*Id.*) The District Court further ordered that the dispute over the funds already garnished by Plaintiff from JMI's bank account would be determined in the future when the case is heard on the merits. (*Id.*)

JMI Files Motion to Dismiss in Lower Court Proceeding

The District Court ordered JMI to file a responsive pleading within ten (10) days of entry of the Order. (*Id*). On December 1, 2020, JMI filed its Motion to Dismiss the Plaintiff's Complaint, arguing that Plaintiff sued the wrong party and JMI was not a party in interest to Plaintiff's allegations. (*See* Ex. 2, District Ct. Proceeding docket.) The Motion to Dismiss is still pending.

Appellant Initiates Appeal Seeking Review of Order

On December 11, 2020, Appellant commenced the instant appeal by filing a Notice of Appeal with the District Court seeking the Supreme Court's review of the Court's Order Granting the Motion to Set Aside Judgment. (Dkt. No. 20-45368.)

II.

THE DISTRICT COURT CORRECTLY APPLIED ESTABLISHED LEGAL PRINCIPLES IN ITS DETERMINATION TO VACATE THE DEFAULT JUDGMENT

Plaintiff is appealing the District Court's ruling to set aside the default judgment against JMI under NRCP 60(b)(1,6). In its Order, the District Court found there were valid grounds for setting aside the Judgment for "mistake, inadvertence, surprise, or excusable neglect"

and “other reason that justifies relief.” (Ex. 3, Order.) Specifically, the District Court applied the four factors set forth in *Yochum v. Davis* (653 P.2d 1215, 98 Nev. 484 (1982)) as affirmed in *Rodriguez v. Fiesta Palms, LLC* (134 Nev. 654, 428 P.3d 255, n.2 (2018)) and, most recently, *Willard v. Berry-Hinckley Indus.* (136 Nev. Adv. Op. 53, 469 P.3d 176 (2020)). (Ex. 3, Order.) In *Willard*, the District Courts were instructed to “issue explicit and detailed findings with respect to the four *Yochum* factors to facilitate . . . appellate review of NRCP 60(b)(1) determinations for an abuse of discretion.”

As defined in *Yochum*, the District Court is to weigh the following four factors when considering setting aside a judgment under NRCP 60(b): (1) prompt application to remove the judgment; (2) absence of an intent to delay; (3) lack of knowledge of procedural requirements; and (4) good faith. After diligently assessing the four prongs, the District Court issued its detailed findings in favor of JMI. (Ex. 3, Order.)

In its Order, the District Court noted that JMI failed to make a formal appearance in the case until almost fifteen (15) months after the Notice of Entry of Default Judgment, in direct contravention of NRCP 60(c), which mandates that a motion to set aside a default under NRCP

60(b)(1) must be made “not more than 6 months after the date of the proceeding or the date of service of written notice of entry of the judgment or order, whichever date is later.” (*Id.*) Thus, the District Court concluded that although JMI’s application failed the first factor, *i.e.*, prompt application to remove the judgment, it found that the remaining three factors – as well as the state’s underlying basic policy of deciding a case on the merits whenever possible – favored setting aside the Default Judgment as to JMI. (*Id.*)

III.

THE DISTRICT COURT’S ORDER UNDER NRCP 60(B) IS NOT RIPE FOR APPELLATE REVIEW

A. Appealable Determinations Under NRAP 3A

NRAP 3A(b) sets forth the ten (10) categories of judgments and orders of a district court in a civil action which are appealable, as follows:

- (1) a final judgment entered in an action or proceeding commenced in the court in which the judgment is rendered;
- (2) an order granting or denying a motion for a new trial;
- (3) an order granting or refusing to grant an injunction or dissolving or refusing to dissolve an injunction;
- (4) an order appointing or refusing to appoint a receiver or vacating or refusing to vacate an order appointing receiver;

- (5) an order dissolving or refusing to dissolve an attachment;
- (6) an order changing or refusing to change the place of trial only when a notice of appeal from the order is filed within 30 days;
- (7) an order entered in a proceeding that did not arise in a juvenile court that finally establishes or alters the custody of minor children;
- (8) ***a special order entered after final judgment, excluding an order granting a motion to set aside a default judgment under NRCP 60(b)(1) when the motion was filed and served within 60 days after entry of the default judgment;***
- (9) an interlocutory judgment, order or decree in an action to redeem real or personal property from a mortgage or lien that determines the right to redeem and directs an accounting;
- (10) an interlocutory judgment in an action for partition that determines the rights and interests of the respective parties and directs a partition, sale or division.

(NRAP 3A(b)(1-10) (*emphasis added*).)

B. Orders Granting Relief Under NRCP 60(b) Are Interlocutory and As Such, Not Appealable

The Nevada Supreme Court has previously held that district court orders granting NRCP 60(b) motions to set aside final judgments are “interlocutory in nature and, thus, may not be appealed until there has been a final judgment.” *Estate of Adams ex rel. Adams v. Fallini*, 386

P.3d 621 (Nev. 2016) (citing Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2871 (3d ed. 2016) [stating that "[a]n order granting a motion under [federal] Rule 60(b) and ordering a new trial is purely interlocutory and not appealable"]; *Am. Ironworks & Erectors , Inc. v. N. Am. Constr. Corp.*, 248 F.3d 892, 897 (9th Cir. 2001) [noting that "a party may appeal interlocutory orders after entry of final judgment because those orders merge into that final judgment"]; *Consol. Generator–Nev., Inc. v. Cummins Engine Co.*, 114 Nev. 1304, 1312, 971 P.2d 1251, 1256 (1998) [noting that the Supreme Court may review an interlocutory order in the context of an appeal from a final judgment]).

Although JMI failed to timely file its Motion to Set Aside the Default Judgment against it, the District Court concluded that good cause nonetheless exists to vacate the Judgment and have the case proceed on its merits. As such, JMI awaits the District Court's adjudication of its submitted Motion to Dismiss which lays bare JMI's valid defenses against Vargas's lawsuit. Appellant's request for review of the District Court's Order under NRCP 60(b)(1) and (b)(6) is not proper as the Order

is an interlocutory order and not a final one. The appeal should be dismissed, and the District Court should continue its jurisdiction over this matter.

CONCLUSION

The Order Granting JMI's Motion to Set Aside the Default is an interlocutory order and is not ripe for consideration by the Supreme Court at this time. Respondent respectfully requests that the Court dismiss the Petitioner's pending appeal as the Order is neither a final judgment nor is the appeal seeking review of the Order within the context of a final judgment, and therefore is procedurally premature.

Dated this 11th day of January, 2021.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: /s/ Ogonna M. Brown
OGONNA M. BROWN (SBN 7589)
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Attorneys for Respondent

NRAP 26.1 DISCLOSURE

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:

Respondent J Morales, Inc. ("JMI") is a corporation. No publicly traded company owns more than 10% of its stock.

JMI is represented by Ogonna M. Brown, Esq. and Adrienne Brantley-Lomeli, Esq. at Lewis Roca Rothgerber Christie LLP.

Dated this 11th day of January, 2021.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

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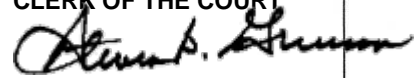
CERTIFICATE OF SERVICE

I certify that on January 11, 2021, I submitted the foregoing “Motion to Dismiss Appeal” for filing *via* the Court’s eFlex electronic filing system. Electronic notification will be sent to the following:

Oscar Peralta
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EX. 1



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DISTRICT COURT

CLARK COUNTY, NEVADA

MAX VARGAS,

Plaintiff,

v.

ORTIZ FAMILY LLC d/b/a EL SELLITO
ROJO; J MORALES INC.; DOE BOUNCERS
I-V; DOES VI-X; and ROE CORPORATIONS
X-XV, inclusive,

Defendants.

A-18-768988-C

Case No. :

Dept. No.:

Department 32

COMPLAINT

COMES NOW, Plaintiff, MAX VARGAS, by and through his attorney of record, Oscar Peralta, Esq. of Peralta Law Group, and for his causes of action against Defendants, and each of them, alleges and complains as follows:

Jurisdiction

1. All of the material facts and circumstances that give rise to the subject lawsuit occurred in Clark County, Nevada.
2. Plaintiff, MAX VARGAS, is, and at all times mentioned in this Complaint was, a resident of Clark County, Nevada.

1 3. Defendant, ORTIZ FAMILY LLC d/b/a EL SELLITO ROJO, is a Domestic Limited-
2 Liability Company, qualified to do business and doing business in the State of Nevada.

3 4. Defendant, J MORALES INC. is a Domestic Corporation, qualified to do business and
4 doing business in the State of Nevada.

5 5. DOES BOUNCERS I-V were employees of ORTIZ FAMILY LLC d/b/a EL SELLITO
6 ROJO and were acting within the course and scope of their employment and were, upon
7 information and belief, residents of Las Vegas, Nevada, County of Clark.

8 6. The true names and capacities, whether individual or corporate, associate, partnership or
9 otherwise of Defendants herein designated as DOES VI through X and ROE CORPORATIONS X
10 through XV are unknown to Plaintiff at this time. Therefore, Plaintiff sues these Defendants by such
11 fictitious names and when their true names and capacities are ascertained, Plaintiffs will amend this
12 Complaint accordingly. Plaintiffs believe that each of these Defendants designated as a DOE or
13 ROE CORPORATION is responsible in some manner for the injuries and damages suffered by
14 Plaintiff.

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18 **Specific Allegations**

19 7. At all times herein mentioned, all of the Defendants were agents, servants, and employees of
20 each and every other Defendant and were working and acting within the course of said employment
21 and agency.

22 8. At all times pertinent hereto, Defendant ORTIZ FAMILY LLC d/b/a EL SELLITO ROJO
23 maintained premises, or is the successor in interest of the entity that maintained premises, located at
24 3977 E. Vegas Valley Drive, Las Vegas, County of Clark, State of Nevada 89121, that operate as a
25 night club under the name EL SELLITO ROJO, where the public is invited for the purposes of
26 drinking alcohol, dancing, and listening to music.
27
28

1 9. At all times pertinent hereto, Defendant J MORALES INC. owned, or is the successor in
2 interest of the entity that owned, the premises located at 3977 E. Vegas Valley Drive, Las Vegas,
3 County of Clark, State of Nevada 89121, that operate as a night club under the name EL SELLITO
4 ROJO, where the public is invited for the purposes of drinking alcohol, dancing, and listening to
5 music.
6

7 10. On or about March 22, 2017, Plaintiff was legally and lawfully upon the aforementioned
8 premises of Defendant ORTIZ FAMILY LLC d/b/a EL SELLITO ROJO and/or any predecessor in
9 interest of this Defendant (henceforth referred to collectively as Defendant ORTIZ FAMILY LLC
10 d/b/a EL SELLITO ROJO) and Defendant J MORALES INC. and/or any predecessor in interest of
11 this Defendant (henceforth referred to collectively as Defendant J MORALES INC.) as a customer,
12 guest, and patron of EL SELLITO ROJO night club located in Las Vegas, Nevada.
13

14 11. Plaintiff and a friend of his, Arturo Mondragon, Jr., settled at a table and ordered drinks.
15

16 12. Approximately two hours later, Plaintiff and Mr. Mondragon exited the establishment to
17 purchase food from a taco stand located just outside of the premises.
18

19 13. Once Plaintiff and Mr. Mondragon finished their food, they attempted to reenter the night
20 club, at which time they were stopped by a DOE BOUNCER who refused them entry.
21

22 14. Plaintiff protested, explaining to DOE BOUNCERS that he and Mr. Mondragon had just
23 been inside the night club and still had drinks at their table.
24

25 15. DOE BOUNCER became aggressive as Plaintiff attempted to reason with him and punched
26 Plaintiff in the face with a right fist that knocked Plaintiff unconscious and to the ground.
27

28 16. When Plaintiff hit the ground, DOE BOUNCER proceeded to kick Plaintiff's prostrate
body.

1 17. Upon seeing DOE BOUNCER's relentless onslaught against his unconscious friend, Mr.
2 Mondragon attempted to intervene; however, he was punched in the neck by DOE BOUNCER.

3 18. Other DOE BOUNCERS were present at the scene of the incident and they assisted in, or
4 ratified, the attack against Plaintiff, or otherwise failed to take reasonable measures to stop the
5 attack.
6

7 19. As a result of the attack, Plaintiff MAX VARGAS suffered damages, including bodily
8 injury, medical specials, and pain and suffering.

9 20. The said acts were done within the course and scope of the employment of Defendants DOE
10 BOUNCERS I-V and were authorized/ratified by Defendant ORTIZ FAMILY LLC d/b/a EL
11 SELLITO ROJO and Defendant J MORALES INC.
12

13 **First Cause of Action – Negligence**

14 21. Plaintiff repeats and restates the allegations set forth in paragraphs 1 through 20, inclusive,
15 as though fully set forth herein and incorporate the same by reference.

16 22. Defendant ORTIZ FAMILY LLC d/b/a EL SELLITO ROJO and Defendant J MORALES
17 INC. at all times mentioned herein had a duty toward Plaintiff to maintain their premises in a
18 reasonably safe condition for the general public and to ensure that their employees/agents do not
19 assault, batter, or harass their guests.
20

21 23. Because Defendant ORTIZ FAMILY LLC d/b/a EL SELLITO ROJO and Defendant J
22 MORALES INC. failed to maintain their premises in a reasonably safe condition for the general
23 public and failed to ensure that their employees/agents do not assault, batter, or harass their guests,
24 Defendant ORTIZ FAMILY LLC d/b/a EL SELLITO ROJO and Defendant J MORALES INC.
25 breached that duty.
26
27
28

1 24. As a proximate result of that breach, Plaintiff's jaw was broken in multiple places and he
2 sustained traumatic brain injuries, among other bodily injuries; as well as further associated
3 damages, including, but not limited to, medical specials, pain and suffering, and severe emotional
4 distress.
5

6 **Second Cause of Action – Negligent Use of Excessive Force**

7 25. Plaintiff repeats and restates the allegations set forth in paragraphs 1 through 24, inclusive,
8 as though fully set forth herein and incorporate the same by reference.

9 26. Defendants DOE BOUNCERS I-V had a duty to protect the guests of the premises and to
10 refrain from using unreasonable or excessive force against any guest.

11 27. The acts and conduct of Defendants DOE BOUNCERS I-V were done with unnecessary
12 force and violence, not rendered reasonable or justifiable by any act of Plaintiff. These acts by
13 Defendants DOE BOUNCERS I-V were done with a reckless disregard for Plaintiff's health and
14 wellbeing and Defendants knew or should have known that their conduct would cause Plaintiff to
15 sustain the injuries described herein.
16

17 28. Because Defendants DOE BOUNCERS I-V failed to protect Plaintiff and failed to refrain
18 from using unreasonable or excessive force against Plaintiff, DOE BOUNCERS I-V breached that
19 duty.
20

21 29. As a proximate result of that breach, Plaintiff suffered damages as described in Paragraph
22 24.
23

24 **Third Cause of Action – Assault and Battery**

25 30. Plaintiff repeats and restates the allegations set forth in paragraphs 1 through 29, inclusive,
26 as though fully set forth herein and incorporate the same by reference.
27
28

1 31. Defendants DOE BOUNCERS I-V intentionally placed Plaintiff in reasonable apprehension
2 of immediate bodily harm.

3 32. Defendants DOE BOUNCERS I-V willfully and unlawfully used force and violence upon
4 the person of Plaintiff.
5

6 33. Plaintiff did not consent to any physical contact by DOE BOUNCERS I-V or engage in any
7 conduct or behavior warranting physical contact by DOE BOUNCERS I-V.

8 34. As a result of Defendants DOE BOUNCERS I-V's intentional actions, Plaintiff suffered
9 damages as described in Paragraph 24.
10

11 **Fourth Cause of Action – Negligence Per Se**

12 35. Plaintiff repeats and restates the allegations set forth in paragraphs 1 through 34, inclusive,
13 as though fully set forth herein and incorporate the same by reference.

14 36. Nevada Revised Statutes 200.471 through 200.481 prohibit any person from committing
15 assault and/or battery against another person.

16 37. These statutes are intended to protect classes of persons like Plaintiff.
17

18 38. These statutes are intended to, among other things, prevent injuries similar to the injuries
19 suffered by Plaintiff.

20 39. Because Defendants DOE BOUNCERS I-V intentionally placed Plaintiff in reasonable
21 apprehension of immediate bodily harm, and willfully and unlawfully used force and violence upon
22 the person of Plaintiff, Defendants DOE BOUNCERS I-V were negligent per se.

23 40. As a result of Defendants DOE BOUNCERS I-V's negligence per se, Plaintiff suffered
24 damages as described in paragraph 24.
25

26 ///

27 ///

28

1 **Fifth Cause of Action – Intentional Infliction of Emotional Distress**

2 41. Plaintiff repeats and restates the allegations set forth in paragraphs 1 through 40, inclusive,
3 as though fully set forth herein and incorporate the same by reference.

4 42. Plaintiff was assaulted and battered by Defendants DOE BOUNCERS I-V without
5 provocation or reasonable basis when Plaintiff had not engaged in any criminal or illegal activity.

6 43. The acts and conduct of Defendants DOE BOUNCERS I-V were extreme and outrageous.

7 44. Defendants DOE BOUNCERS I-V intended to cause, or acted with a reckless disregard for
8 causing, emotional distress to Plaintiff.

9 45. As a proximate result DOE BOUNCERS I-V's outrageous conduct, Plaintiff suffered severe
10 emotional distress and other damages as described in paragraph 24.

11 **Sixth Cause of Action – Vicarious Liability - Respondeat Superior**

12 46. Plaintiff repeats and restates the allegations set forth in paragraphs 1 through 45, inclusive,
13 as though fully set forth herein and incorporate the same by reference.

14 47. Defendants DOE BOUNCERS I-V were employees of Defendant ORTIZ FAMILY LLC
15 d/b/a EL SELLITO ROJO at the time of the subject incident and were in the course and scope of
16 such employment when they attacked Plaintiff and caused him damages as described in paragraph
17 24.

18 48. Accordingly, Defendant ORTIZ FAMILY LLC d/b/a EL SELLITO ROJO is vicariously
19 liable for the negligent, intentional, and wrongful conduct of Defendants DOE BOUNCERS I-V as
20 alleged in this Complaint.

21 **Seventh Cause of Action – Negligent Hiring, Training, Retention, and Supervision**

22 49. Plaintiff repeats and restates the allegations set forth in paragraphs 1 through 48, inclusive,
23 as though fully set forth herein and incorporate the same by reference.

1 50. Defendant ORTIZ FAMILY LLC d/b/a EL SELLITO ROJO had a duty to exercise due care
2 in its dealings with Plaintiff and in the selection, training, supervision, oversight, direction,
3 retention, and control of its employees and/or agents, retained by it to provide security services.

4 51. Defendants, and each of them, unlawfully caused Plaintiff to be brutally beaten at
5 Defendants' premises, and such assault and battery was unreasonable under the circumstances.
6

7 52. Because Defendant ORTIZ FAMILY LLC d/b/a EL SELLITO ROJO failed to exercise due
8 care in its dealings with Plaintiff and in the selection, training, supervision, oversight, direction,
9 retention, and control of its employees and/or agents, Defendant ORTIZ FAMILY LLC d/b/a EL
10 SELLITO ROJO breached that duty.
11

12 53. As a proximate result of that breach, Plaintiff suffered damages as described in Paragraph
13 24.

14 **Conclusion**

15 Plaintiff has been required to retain the services of an attorney to prosecute this action.

16 WHEREFORE, Plaintiff, expressly reserving the right to amend this Complaint, prays for
17 judgment against Defendants as follows:
18

- 19 1. General damages in excess of \$15,000;
- 20 2. Special damages in excess of \$15,000;
- 21 3. Punitive damages;
- 22 3. Attorney's fees and costs;
- 23 4. Interest at the statutory rate; and
24

25 ///

26 ///

27 ///

5. For such other and further relief as the Court deems just and proper.

DATED this 5th day of February, 2018.

PERALTA LAW GROUP


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Attorney for Plaintiff

EX. 2

[Skip to Main Content](#) [Logout](#) [My Account](#) [Search Menu](#) [New District Civil/Criminal Search](#) [Refine Search](#) [Back](#) Location : District Court Civil/Criminal [Help](#)

REGISTER OF ACTIONS

CASE NO. A-18-768988-C

Max Vargas, Plaintiff(s) vs. Ortiz Family, LLC, Defendant(s)

§
§
§
§
§
§
§
§

Case Type: **Negligence - Other Negligence**

Date Filed: **02/05/2018**

Location: **Department 29**

Cross-Reference Case Number: **A768988**

Supreme Court No.: **82218**

PARTY INFORMATION

Defendant	J. Morales, Inc.	Lead Attorneys Adrienne R. Brantley <i>Retained</i>
Defendant	Ortiz Family, LLC <i>Doing Business As</i> El Sellito Rojo	Adrienne R. Brantley <i>Retained</i>
Plaintiff	Vargas, Max	Oscar Peralta <i>Retained</i> 702-758-8700(W)

EVENTS & ORDERS OF THE COURT

DISPOSITIONS

07/25/2019 **Default Judgment Plus Legal Interest** (Judicial Officer: Bare, Rob)
Debtors: Ortiz Family, LLC (Defendant)
Creditors: Max Vargas (Plaintiff)
Judgment: 07/25/2019, Docketed: 07/25/2019
Total Judgment: 1,706,214.75

11/24/2020 **Amended Judgment Vacated** (Judicial Officer: Bare, Rob) Reason: Vacated
Debtors: J. Morales, Inc. (Defendant)
Creditors: Max Vargas (Plaintiff)
Judgment: 11/24/2020, Docketed: 11/25/2020
Total Judgment: 1,706,214.75

07/25/2019 **Judgment Plus Legal Interest** (Judicial Officer: Bare, Rob)
Debtors: J. Morales, Inc. (Defendant)
Creditors: Max Vargas (Plaintiff)
Judgment: 07/25/2019, Docketed: 11/25/2020
Total Judgment: 1,706,214.75

OTHER EVENTS AND HEARINGS

02/05/2018 **Complaint**
Complaint

02/05/2018 **Summons Electronically Issued - Service Pending**
Summons - Ortiz Family LLC d/b/a El Sellito Rojo

02/05/2018 **Summons Electronically Issued - Service Pending**
Summons - J Morales, Inc.

04/03/2018 **Affidavit of Service**
Affidavit of Service

04/03/2018 **Affidavit of Service**
Affidavit of Service

04/13/2018 **Default**
Default

04/13/2018 **Default**
Default

04/17/2018 **Notice of Entry of Default**
Notice of Entry of Default - Ortiz Family LLC d/b/a El Sellito Rojo

04/17/2018 **Notice of Entry of Default**
Notice of Entry of Default - J Morales Inc.

09/19/2018 **Memorandum of Costs and Disbursements**
Memorandum of Costs and Disbursements

09/19/2018 **Application for Default Judgment**
Application for Default Judgment

09/19/2018 **Affidavit in Support of Default Judgment**
Affidavit in Support of Default Judgment

03/22/2019 **Order to Statistically Close Case**
Civil Order to Statistically Close Case

04/16/2019 **Minute Order** (3:00 AM) (Judicial Officer Bare, Rob)
[Minutes](#)

04/24/2019 **Minute Order** (3:00 AM) (Judicial Officer Bare, Rob)
Result: Minute Order - No Hearing Held

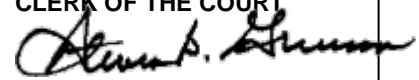
	Minutes
06/18/2019	Result: Minute Order - No Hearing Held Prove Up (10:30 AM) (Judicial Officer Bare, Rob) <i>Prove-up Re: Plaintiff's Motion for Default Judgment</i> Parties Present Minutes <i>04/25/2019 Reset by Court to 06/18/2019</i>
07/25/2019	Result: Default Entered Default Judgment <i>Default Judgment</i>
08/06/2019	Notice of Entry <i>Notice of Entry of Order</i>
09/24/2020	Notice of Appearance <i>Notice of Appearance</i>
09/24/2020	Writ Electronically Issued <i>Writ of Execution Wells Fargo Bank - Bank Accounts and CDs</i>
09/24/2020	Writ Electronically Issued <i>Writ of Execution - Wells Fargo Safe Deposit Boxes</i>
10/27/2020	Motion to Set Aside Default Judgment <i>Emergency Motion to Set Aside Judgment and Stay Execution of Judgment on an Order Shortening Time</i>
11/06/2020	Minute Order (3:00 AM) (Judicial Officer Bare, Rob) <i>Formal Request to Appear Remotely</i> Minutes Result: Minute Order - No Hearing Held
11/06/2020	Opposition <i>Plaintiff's Opposition to Defendant J MORALES INC.'s Motion to Set Aside Judgment</i>
11/09/2020	Reply <i>Reply In Support Of Emergency Motion To Set Aside Judgment And Stay Execution Of Judgment</i>
11/10/2020	Motion to Set Aside (11:00 AM) (Judicial Officer Bare, Rob) <i>Emergency Motion to Set Aside Judgment and Stay Execution of Judgment</i> Parties Present Minutes <i>11/30/2020 Reset by Court to 11/10/2020</i>
11/12/2020	Result: Motion Granted Minute Order (3:00 AM) (Judicial Officer Bare, Rob) <i>Emergency Motion to Set Aside Judgment and Stay Execution of Judgment</i> Minutes Result: Minute Order - No Hearing Held
11/24/2020	Order Granting Motion <i>Order Granting J Morales Inc.'s Emergency Motion to Set Aside Judgment and Stay Execution of Judgment</i>
11/24/2020	Notice of Entry of Order <i>Notice Of Entry Of Order Granting J Morales Inc. s Emergency Motion To Set Aside Judgment And Stay Execution Of Judgment</i>
12/01/2020	Motion to Dismiss <i>Motion to Dismiss</i>
12/02/2020	Clerk's Notice of Hearing <i>Notice of Hearing</i>
12/11/2020	Notice of Appeal <i>Notice of Appeal</i>
12/11/2020	Case Appeal Statement <i>Case Appeal Statement</i>
12/28/2020	Reporters Transcript <i>Request for Transcript of Proceedings</i>
01/04/2021	Case Reassigned to Department 29 <i>Judicial Reassignment to Judge David M. Jones</i>
01/06/2021	Notice of Non Opposition <i>Notice Of Non-Opposition To Defendant J Morales Inc. s Motion To Dismiss Plaintiff s Complaint</i>
01/07/2021	Errata <i>Errata To Notice Of Non-Opposition To Defendant J Morales Inc. s Motion To Dismiss Plaintiff s Complaint</i>
01/19/2021	CANCELED Motion to Dismiss (9:00 AM) (Judicial Officer Jones, David M) <i>Vacated</i> <i>Motion to Dismiss</i> <i>01/14/2021 Reset by Court to 01/19/2021</i>

FINANCIAL INFORMATION

	Defendant J. Morales, Inc.		
	Total Financial Assessment		17.50
	Total Payments and Credits		17.50
	Balance Due as of 01/11/2021		0.00
11/09/2020	Transaction Assessment		3.50
11/09/2020	Efile Payment	Receipt # 2020-63468-CCCLK	J. Morales, Inc. (3.50)
11/24/2020	Transaction Assessment		3.50
11/24/2020	Efile Payment	Receipt # 2020-66715-CCCLK	J. Morales, Inc. (3.50)
12/01/2020	Transaction Assessment		3.50
12/01/2020	Efile Payment	Receipt # 2020-67603-CCCLK	J. Morales, Inc. (3.50)
01/06/2021	Transaction Assessment		3.50

01/06/2021	Efile Payment	Receipt # 2021-00853-CCCLK	J. Morales, Inc.	(3.50)
01/07/2021	Transaction Assessment			3.50
01/07/2021	Efile Payment	Receipt # 2021-00950-CCCLK	J. Morales, Inc.	(3.50)
Plaintiff Vargas, Max				
	Total Financial Assessment			314.00
	Total Payments and Credits			314.00
	Balance Due as of 01/11/2021			0.00
02/05/2018	Transaction Assessment			270.00
02/05/2018	Efile Payment	Receipt # 2018-08406-CCCLK	Vargas, Max	(270.00)
09/25/2020	Transaction Assessment			10.00
09/25/2020	Efile Payment	Receipt # 2020-53724-CCCLK	Vargas, Max	(10.00)
09/25/2020	Transaction Assessment			10.00
09/25/2020	Efile Payment	Receipt # 2020-53725-CCCLK	Vargas, Max	(10.00)
12/11/2020	Transaction Assessment			24.00
12/11/2020	Efile Payment	Receipt # 2020-70000-CCCLK	Vargas, Max	(24.00)

EX. 3



OGM

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Counsel for Defendant J Morales Inc.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

MAX VARGAS, individually;

Plaintiff,

v.

ORTIZ FAMILY LLC, d/b/a EL SELLITO
ROJO; J MORALES INC.; DOE
BOUNCERS I – V; DOES VI – X; and ROE
CORPORATIONS I through X-XV, inclusive,

Defendants.

Case No.: A-18-768988-C

Dept. No.: 32

**ORDER GRANTING J MORALES INC.'S
EMERGENCY MOTION TO SET ASIDE
JUDGMENT AND STAY EXECUTION
OF JUDGMENT**

Date of Hearing: November 10, 2020

Time of Hearing: 11:00 a.m.

Judge: Hon. Rob Bare

On November 10, 2020, this matter came on for hearing on shortened time on Defendant J Morales Inc.'s ("JMI") Emergency Motion to Set Aside Judgment and Stay Execution of Judgment ("Motion") in Department XXXII of the Eighth Judicial District Court, Clark County, Nevada, with Hon. Rob Bare presiding. Adrienne Brantley-Lomeli, Esq. of the law firm of Lewis Roca Rothgerber Christie LLP appeared on behalf of JMI, and Oscar Peralta, Esq. of the law office of Peralta Law Group appeared on behalf of Plaintiff, Max Vargas ("Plaintiff").¹ The Court having considered the Motion and filings related thereto, having heard the arguments presented by the Parties concerning the Motion, taking this matter under advisement after entertaining the oral argument of the Parties, and good cause appearing therefor, the Court hereby finds and concludes as follows:

...

...

¹ Collectively, the Plaintiff and the Defendants shall be referred to hereinafter as the "Parties".

FINDINGS OF FACT

1. This Court refers to and adopts those Findings of Fact and Conclusions of Law as already set forth in its November 12, 2020, Minute Order: Motion to Set Aside Judgment and Stay Execution of Judgment, and incorporates them as though fully set forth herein.

2. This case stems from an alleged incident that occurred on March 22, 2017.

3. Plaintiff alleges that he was a customer at the El Sellito Rojo nightclub and he was assaulted by the bouncer at the nightclub, which was owned by Defendants JMI and/or Ortiz Family, LLC (“OFLLC”) (collectively, JMI and OFLLC shall be referred to hereinafter as “Defendants”).

4. El Sellito Rojo’s principal place of business is 3977 E. Vegas Valley Drive, Las Vegas, Nevada, 89121 (APN 161-07-701-002) (the “Property”).

5. Plaintiff filed his Complaint on February 5, 2018.

6. Per Affidavits of Service filed with the Court on April 3, 2018, Defendants were personally served via their registered agents.

7. Defendants failed to file an Answer or otherwise make an appearance.

8. Thus, Default was filed against each Defendant on April 13, 2018.

9. Plaintiff then sought default judgment by filing an Application on September 19, 2018.

10. After a prove-up hearing held on June 18, 2019, the default judgment was entered on July 25, 2019 against both Defendants (“Judgment”).

11. Notice of Entry of Default Judgment was filed on August 6, 2019.

12. Defendant JMI filed the instant Motion on October 27, 2020 after its bank account was garnished sometime in September 2020.

13. In its Motion, JMI requested setting aside the Judgment and allowing the case to be heard on its merits, to stay of execution of the Judgment to prevent any further seizure of JMI’s assets prior to the Court’s final determination on the Motion.

14. On November 6, 2020, Plaintiff filed his Opposition to the Motion (“Opposition”).

15. On November 9, 2020, JMI filed its Reply in support of the Motion (“Reply”).

18. To the extent any of the foregoing Findings of Fact are more properly deemed a Conclusion of Law, they may be so construed.

- a. (1) Prompt application to remove the judgment;
- b. (2) absence of an intent to delay;
- c. (3) lack of knowledge of procedural requirements; and
- d. (4) good faith.

1 *Yochum v. Davis*, 653 P.2d 1215, 98 Nev. 484 (1982). *See also Rodriguez v. Fiesta Palms, LLC*,
2 134 Nev. 654, 428 P.3d 255, n.2 (2018) (affirming the application for the above-mentioned *Yochum*
3 factors, but noting that the fifth requirement for tendering a meritorious defense was abrogated.)

4 6. In addition, the Court must also consider the state's underlying basic policy of
5 deciding a case on the merits whenever possible. *Id.*

6 7. Most recently, in *Willard v. Berry-Hinckley Indus.*, 136 Nev. Adv. Op. 53, 469 P.3d
7 176 (2020), the Nevada Supreme Court again affirmed the use of *Yochum* factors in determining the
8 existence of sufficient grounds for NRCP 60(b)(1) relief from either order or judgment.
9 Furthermore, the District Courts were instructed to "issue explicit and detailed findings with respect
10 to the four *Yochum* factors to facilitate . . . appellate review of NRCP 60(b)(1) determinations for
11 an abuse of discretion."

12 8. Under NRCP 62(b), with posting of a security, the court may stay execution of a
13 judgment pending disposition of NRCP 60 relief from a judgment or order.

14 9. Accordingly, the Court **FINDS** that the default judgment was properly obtained.
15 Defendant JMI failed to make a formal appearance in the case until October 27, 2020. This was
16 almost 15 months after the Notice of Entry of Default Judgment was filed on August 6, 2019 even
17 though both Defendants were validly served with complaint and summons.

18 10. The Court **FINDS** that the correct standard to use for setting aside the judgment for
19 mistake under NRCP 60(b)(1) is the 4-factor test set forth in *Yochum*, *Rodriguez*, and *Willard*, as
20 follows:

- 21 (1) Prompt application to remove the judgment;
- 22 (2) absence of an intent to delay;
- 23 (3) lack of knowledge of procedural requirements; and
- 24 (4) good faith.

25 11. Defendant JMI, as the party seeking to set aside the default judgment, has the burden
26 of proof under preponderance of the evidence standard.

27 12. Although Plaintiff argues that this standard is conjunctive, the standard actually
28 appears to be a balancing test.

1 13. Although the word “and” is indeed used, in *Rodriguez*, the Nevada Supreme Court
2 ruled that the District Court must “balance the preference for resolving cases on the merits with the
3 importance of enforcing procedural requirements” and it analyzed all four factors in affirming the
4 order of the District Court that denied motion to set aside the judgment, which it need not do if the
5 factors were indeed conjunctive.

6 14. The Court **FINDS** that the balancing of the factors militates in favor of granting the
7 motion and setting aside the default judgment.

8 15. The Court **FINDS** that as to the first factor, prompt application to remove the
9 judgment, this factor does not favor JMI. JMI failed to file its Motion until October 27, 2020, almost
10 15 months after the Notice of Entry of Default Judgment was filed on August 6, 2019. Thus, under
11 NRCP 60(c), which requires such motion to be filed within 6 months, the motion is presumptively
12 untimely.

13 16. The Court **FINDS** that as to the second factor, absence of an intent to delay, this
14 factor favors JMI. JMI makes a credible argument that once it became actually aware of the default
15 judgment due to the Writ of Garnishment executed in September 2020, it immediately retained
16 counsel and sought to set it aside to protect its financial interests without an intent to delay the
17 proceedings. Plaintiff does not make any specific argument against this factor.

18 17. The Court **FINDS** that as to the third factor, lack of knowledge of procedural
19 requirements, this factor favors JMI. Plaintiff makes an argument that Defendants were owned by
20 sophisticated businessmen who simply chose to sit on their rights and refused to participate in the
21 case, but JMI’s actions show otherwise. Instead of consulting with an attorney, JMI simply consulted
22 with their insurance agent, who is not an attorney, and mistakenly relied on the statement that since
23 it did not own the nightclub at the time of the incident, that it is not liable.

24 18. The Court **FINDS** that as to the four factor, good faith, this factor also favors JMI as
25 Plaintiff does not make any specific argument that JMI's motion was not made in good faith.

26 19. The Court **FINDS** that as to JMI's argument regarding the meritorious defense, it is
27 not a factor under *Rodriguez* and *Willard* for NRCP 60(b)(1) analysis. However, it can be considered
28 under a NRCP 60(b)(6) analysis in considering any other reason that justifies relief. Specifically, if

JMI can prove that it was not the owner of the nightclub and had no role in Plaintiff's injuries, setting aside the default judgment, which awarded Plaintiff in excess of \$1.7 million, is justified.

20. Furthermore, although JMI mistakenly relied on what appears to be legal advice by a non-attorney, such mistaken reliance also justifies relief under 60(b)(6).

21. The Court **FINDS** that the basic policy of deciding a case on the merits also undoubtedly favors JMI.

22. To the extent any of the foregoing Conclusions of Law are more properly deemed a Finding of Fact, they may be so construed.

ORDER

Therefore, based upon the foregoing Findings of Fact and Conclusions of Law,

1. **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that Defendant JMI's Motion shall be **GRANTED**.

2. **IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that Default against Defendant JMI filed on April 13, 2018 and Default Judgment filed on July 25, 2019 shall be **VACATED** as to Defendant JMI.

3. **IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that Defendant JMI shall file its Answer within 10 days of the filing of this Order.

4. **IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that the dispute over the funds already garnished by Plaintiff from JMI's bank account shall be determined in the future when the case is heard on the merits.

Dated this 24th day of November, 2020.



DISTRICT COURT JUDGE

ROB BARE

HGL

Respectfully Submitted:
LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: /s/ Ogonna Brown
Ogonna Brown, Esq. (NBN 7589)
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Approved as to form:
PERALTA LAW GROUP

By: /s/ Oscar Peralta
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From: Oscar Peralta <oscar@peraltalawgroup.com>
Sent: Monday, November 23, 2020 5:28 PM
To: Brown, Ogonna
Cc: Jackson, Kennya; Dale, Margaret
Subject: Re: Order Granting Motion to Set Aside Judgment(112817796.1).docx

[EXTERNAL]

Confirmed. Thank you

On Mon, Nov 23, 2020 at 5:09 PM Brown, Ogonna <OBrown@lrrc.com> wrote:

Thanks, Oscar. Please confirm that I may affix your electronic signature. Have a good night.

Ogonna Brown

Partner
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COVID-19 questions?
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for answers and resources.

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