Case No. 82218

In the Supreme Court of Nevada

MAX VARGAS,

Appellant,

vs.

J MORALES INC.,

Respondent.

MOTION TO DISMISS APPEAL

Plaintiff's notice of appeal from the district court's order granting J Morales Inc.'s ("JMI's") "Emergency Motion to Set Aside Judgment and Stay Execution of Judgment" is improper, as orders granting relief under Nevada Rule of Civil Procedure 60(b) are interlocutory and not appealable. Accordingly, this appeal should be immediately dismissed.[1]

This appeal arises from an order granting a motion to set aside a default judgment under Rule 60(b)(1) and (b)(6) for "mistake, inadvertence, surprise, or excusable neglect" and "other reason that justifies relief." (Ex. 1, Order.) As a result, the default judgment was vacated and

[1] JMI's previous motion to dismiss was denied without prejudice pending the completion of settlement proceedings. On January 15, 2021, Settlement Judge Janet Trost filed the Settlement Program Early Case Assessment Report, stating that "[t]his case is not appropriate for mediation and should be removed from the settlement program." JMI thus renews its motion to dismiss.

the case is proceeding in district court, where JMI's motion to dismiss is pending.

Ordinarily, only "a final judgment" is appealable. NRAP 3A(b)(1). Although "a special order entered after final judgment" is also appealable, since 2016 this Court has made clear that an order granting NRCP 60(b) relief is "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]).[2] This makes sense, because once a judgment is vacated

[2] In a footnote in *Lindblom v. Prime Hospitality Corp.*, this Court had suggested that an order setting aside a default judgment is appealable

under Rule 60(b), there is no judgment in the case, at all.

Here, although JMI moved to set aside the default judgment more than 60 days after its entry, the district court found good cause to vacate the judgment, including under Rule 60(b)(6), and to have the case proceed on its merits. Because there is no final judgment, the district court's order is interlocutory and not appealable. The appeal should be dismissed, and the district court should continue its jurisdiction over this matter.

Dated this 19th day of January, 2021.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

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as a special order after final judgment if the motion to set aside is made more than 60 days after entry of the judgment, as it was here. 120 Nev. 372, 374 n. 1, 90 P.3d 1283, 1284 n. 1 (2004) (citing NRAP 3A(b)(8)). This Court then cited *Lindblom* in an unpublished, noncitable 2015 decision holding that an order granting a 60(b) motion filed more than 60 days after the entry of judgment was appealable, and that Adams had not timely appealed. *Estate of Adams ex rel. Adams v. Fifth Judicial Dist. Court*, No. 66521, 131 Nev. 1276, 2015 WL 234358, at *1 (2015) (unpublished table disposition); *see* NRAP 36(c)(3). In light of this Court's published 2016 opinion in *Adams*, however, which takes the opposite view of the appealability question, it appears that this Court has abrogated the footnote in *Lindblom*: now, an order setting aside a judgment under Rule 60(b) is not appealable, regardless of the basis or timing of the underlying motion.

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 19th day of January, 2021.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

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Attorneys for Respondent

CERTIFICATE OF SERVICE

I certify that on January 19, 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:

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EX. 1

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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, tostay 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").

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16. In deciding not to participate any further in the case, Jose Morales, JMI's manager, relied on advice of JMI's insurance agent, who is not an attorney.

17. On November 10, 2020, the Court held a hearing regarding the Motion on shortened time.

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

CONCLUSIONS OF LAW

1. NRCP 55(c) states, "For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with [NRCP] 60."

2. "[T]he phrase 'good cause shown' in [NRCP] 55(c) is broad in scope, and includes the 'mistake, inadvertence, surprise or excusable neglect' referred to in [NRCP] 60(b)(1)." *Intermountain Lumber & Builders Supply, Inc. v. Glens Falls Ins. Co*., 83 Nev. 126, 424 P.2d 884 (1967).

3. NRCP 60(b) states in pertinent part, "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 [or] (6) any other reason that justifies relief."

4. Under NRCP 60(c), such motion must be made within a reasonable time, and for NRCP 60(b)(1) motion, "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. The time for filing the motion cannot be extended."

5. There are four factors to consider in determining whether NRCP 60(b)(1) relief from the judgment is proper based on mistake, inadvertence, surprise or excusable neglect.:

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.

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

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

7. Most recently, in *Willard v. Berry-Hinckley Indus*., 136 Nev. Adv. Op. 53, 469 P.3d 176 (2020), the Nevada Supreme Court again affirmed the use of *Yochum* factors in determining the existence of sufficient grounds for NRCP 60(b)(1) relief from either order or judgment. Furthermore, 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."

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

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

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

(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.

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

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

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

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

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

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

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

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

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

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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:
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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.

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