IN THE SUPREME COURT OF THE STATE OF NEVADA

RAYMOND BROOKS; AND BRADY LINEN SERVICES, LLC, Appellants, v. JERRELL TURNER; AND KESHA FRYER, Respondents.	**Supreme Court No. 82881**

APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable Kathleen Delaney, District Court Judge
District Court Case No. A-18-780839-C

APPELLANT RAYMOND BROOKS AND BRADY LINEN SERVICES, LLC'S REPLY BRIEF

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TABLE OF CONTENTS

Page

I.

TABLE OF AUTHORITIES

II.

INTRODUCTION

In their Answering Brief, Respondents go to great lengths to argue points which are not disputed by Appellants. There is no dispute, for example, that proper service was made on the Appellants. It is equally undisputed that the Court Clerk properly entered default against the Appellants in March of 2019. Instead, the only question currently in dispute between the parties is whether or not the District Court Judge abused her discretion in declining to set aside the default on the grounds that the Appellants had "appeared" in the action, through their insurer, such that the insurer was entitled to service of the three day notice of intent to take default.

On the issue of whether an appearance was in fact made, Respondents offer only three arguments. They are the following:

1. That the actions of Appellant's insurer, travelers, was not sufficient to constitute the "intent to defend" required to establish an appearance;

2. That the length of time between the initial service of the Complaint and the three day notice and the Motion to Set Aside Default indicated an "abandonment" by Appellants or Travelers; and

3. That Appellant Brady Industries or its insurer Travelers are sophisticated parties which are not entitled to benefits of the liberalized appearance interpretations established by the Nevada Supreme Court.

Respondents claim that for one or more of these reasons, the District Court Judge was within her discretion in refusing to set aside the default.

As set forth below, however, the Nevada Supreme Court has squarely rejected all of these arguments. As a result, the order of the District Court refusing to set aside the default should be reversed as an abuse of discretion.

III.

ARGUMENT

A. The actions of Travelers were more than sufficient to constitute an appearance under Nevada law

In their Answering Brief, Respondents repeatedly attempt to minimize the pre-suit activities of Defendant's insurer, Travelers Insurance Company ("Travelers") as routine claims handling activities:

> The communications between the plaintiffs and Travelers Insurance Company consisted of only information gathering efforts, including coordinating an inspection of the vehicle, obtaining the names of the individuals involved in the subject crash and obtaining a letter of representation from counsel for plaintiffs. The communications can only be described as simple, route claims handling activities.

See Respondents Answering Brief ("RAB") p. 17. Respondents carefully avoid including the fact that the Travelers' representative, Ms. Julie Belletire, orally communicated that Travelers was denying Respondent's claims and then sent each of the Respondents a letter confirming Travelers' denial.

The Nevada Supreme Court considered a very similar situation in Franklin v. Bartsas Realty Inc., 95 Nev. 559, 598 P.2d 1147 (1979). In that case,

the question was whether a simple letter declining any liability to the plaintiff constituted an appearance under Rule 55(b)(2) of Nevada Rules of Civil Procedure. In considering this issue, the Court recognized that other courts had found that informal letters denying liability were sufficient to constitute an appearance:

> A course of negotiation among attorneys is one example of conduct which courts have found to constitute an appearance for purposes of the rule. Another type of conduct which courts have also found sufficient is a layman's attempt, as in the case at hand, to "answer" a summons and complaint in a form legally insufficient to constitute a formal answer but clearly indicating an attempt to respond to the allegations of the complaint so as to avoid default judgment.
>
> In Dalminter, Inc. v. Jessie Edwards, Inc., 27 F.R.D. 491 (S.D.Tex. 1961), the court found that counsel for the plaintiff had a duty to give the notice contemplated by the federal equivalent of NRCP 55(b)(2) when the president of the defendant corporation responded to service of summons with a letter asserting that the summons was "served in error" since the corporation was not chartered until after the date of the injury alleged in the complaint. Id. at 492. Other courts have agreed that such a letter, expressly or inferentially written by a layman in response to a receipt of summons, even though not a formal "answer", provides a basis for vacating a default judgment. E.g., Kinnear Corporation v. Crawford Door Sales Company, 49 F.R.D. 3 (D.S.C. 1970) (letter of president of defendant corporation setting forth its version of the facts and stating it considered the matter "dissolved"); Woods v. Severson, 9 F.R.D. 84 (D.Neb. 1948) (writing on employer's stationery with ten factual statements, unsigned and untitled); McClintock v. Serv-Us Bakers, 103 Ariz. 72, 436 P.2d 891 (1968) (letter filed with justice of peace denying indebtedness); Maier Const., Inc. v. Ryan, 81 Wis.2d 463, 260 N.W.2d 700 (1978) (letter purporting to be defendant's "official reply" to summons and complaint).

Franklin, 95 Nev at 565, 598 P.2d at 1150.

The Court then found that the appellants one sentence letter denying liability did constitute the appearance which justified the setting aside a default. Id. 95 Nev at 565, 598 P.2d at 1151. Thus, the following statement contained in a letter was deemed to be a sufficient appearance:

> I fail to recognize any obligation to you or your client, because I had no contractual relationship with your client.

See Franklin, 95 Nev. at 560, 598 P.2d at 1148.

Despite the fact that the Franklin case directly addresses the key issue on appeal, Respondents do not even mention it, or cite to it, in their Answering Brief. This should be interpreted as an admission that Respondents see no way to profitably distinguish the facts in Franklin from the facts presented here.

Respondents do appear to argue that the absence of a settlement dialogue between Travelers and Respondents supports the conclusion that Travelers did not show an intent to defend the claim:

> In this case there were no settlement discussions between the defendants' insurance company and the plaintiffs or their counsel at all. No settlement offers were made by the defendants. No settlement demands were made by the plaintiffs.

See, RAB, p. 17.

Of course, there were no settlement discussions in Franklin. Further, there were no such discussions required by the Court in Gazin v.

Hoy, 102 Nev. 621, 730 P.2d 436 (1986). In that case, the Court found that a letter requesting an extension of time constituted an appearance. Gazin, 102 Nev. 624-25, 730 P.2d at 438. Clearly, there is no requirement of settlement discussions to establish an appearance under Rule 55(b)(2).

In this case Travelers did more than enough to demonstrate that it was going to defend this case. It investigated the subject accident, had oral and written communications with Plaintiffs and their lawyer, and then wrote denial letters to both of the Defendants. Travelers was therefore entitled to notice of Plaintiff's intent to take default.

B. The length of time between the service of the complaint and the motion to set aside the default is irrelevant

In their Answering Brief, Respondents repeatedly reference the time period between the service of the Complaint in October 2019, and the Motion to Set Aside Default in May of 2020. Respondents argue that this "gap" in time militates against setting aside the default. See RAB, pp. 25-26. The argument seems to be that the length of this gap is evidence of a lack of diligence on the part of Defendants.

What the Nevada Supreme Court opinions have made very clear, however, is that gaps of mutual inactivity prior to the entry of default are not relevant to the question of whether a defaulted defendant has acted with the requisite diligence. Instead, the question is whether the default

acted promptly once it became aware that a default judgment had been entered.

In Lindblom v. Prime Hospitality Corp., 120 Nev. 372, 90 P.3d 1283 (2004), for example, the Court noted that the defendant "immediately" moved to set aside the default judgment after it learned that collection efforts were underway against it. 120 Nev. at 374, 90 P.3d at 1284. The Court found that the defendant had thus been sufficiently diligent, even though almost a year had elapsed between the service of the complaint and the initiation of collection proceedings. See Lindblom, 120 Nev. at 375, 90 P.3d at 1285.

In Christy v. Carlisle, 94 Nev. 651, 584 P.2d 687 (1978), the Court also ignored a large gap between the service of the complaint and the motion to set aside a default judgment. In that case, the complaint was served in the first months of 1976. Christy, 94 Nev. at 653, 584 P.2d at 688. The default was taken in July of 1976, and the insurance company did not learn of the default judgment until January of 1977. Id. 94 Nev at 653, 584 P.2d at 688-89. Nonetheless, the Court allowed the defendant to set aside the default on the grounds that its insurer was not given a three day notice of intent to take default. Id.

In this case, Travelers first learned about the default judgment on May 14, 2020. (V. I, AAO42). Just 6 days later, Appellant filed their Motion to Set Aside the Default Judgment. Under these facts, there is absolutely no argument that the Appellants did not act with requisite diligence.

C. The corporate status or alleged sophistication of Brady Linen is not relevant

In their Answering Brief, Respondents repeatedly argue that because Brady Linen Services is a corporation, it should be treated differently, and should not be afforded the benefits of the notice requirement of Rule 55(b)(2). The following is just one example:

> One of the defendants, Brady Linen Services, LLC, is a corporation which certainly has the sophistication to understand the importance and necessity of filing an answer to a complaint after having been properly served with the summons and complaint.

See, RAB, pp 20-21.

The Nevada Supreme Court squarely rejected this argument in Franklin. In that case, the defendant argued that because the default was sophisticated, the "appearance" requirement in Rule 55(b)(2) should be strictly construed. This argument was dismissed by the court:

> Bartsas, however, urges that because Franklin was an experienced businessman, and had been involved in prior litigation, his letter should not be held to constitute an appearance for purposes of Rule 55(b)(2). Bartsas relies upon two cases in which the courts did stress

> that the defendant involved was sophisticated or experienced in business or legal matters. See Wilson v. Moore and Associates, Inc., 564 F.2d 366 (9th Cir. 1977); Hansher v. Kaishian, 79 Wis.2d 374, 255 N.W.2d 564 (1977). Neither case, however, can be considered as standing for the proposition that an experienced businessman, even one who has been involved in previous litigation, is not entitled to the protection of Rule 55(b)(2) when he believes that he has responded to a summons and complaint as required.

Franklin, 95 Nev. at 564-65, 598 P.2d at 1151-52. It also bears mention that the defendant in the Lindblom case, in which the default was also set aside under the rule established in Christy, was a hospitality corporation. Lindblom, 120 Nev. at 372-73, 90 P.3d at 1283-84.

The Nevada Supreme Court has never suggested that the sophistication of a defendant is relevant to the application of Rule 55(b)(2). It is therefore irrelevant to the issue on appeal.

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IV.

CONCLUSION

For all of the reasons set forth above, Appellant's appeal should be granted, and the trial court's order denying Appellant's Motion to Set Aside Default should be reversed.

DATED this 18th day of February, 2022.

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V.

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this 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 NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I further certify that this brief complies with the formatting requirements of Rule 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in size fourteen (14) point, Times New Roman font. I further certify that this brief complies with the page limitations stated in NRAP 32(a)(7) because it does not exceed fifteen (15) pages. I understand that I may be subject to sanctions in the event that the accompanying

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brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 18th day of February, 2022.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that I am an employee of HALL JAFFE & CLAYTON, LLP, and that on the 18th day of February, 2022, the foregoing **APPELLANT RAYMOND BROOKS AND BRADY LINEN SERVICES, LLC'S REPLY BRIEF** was served upon the following parties via the Supreme Court's e-filing and service program, addressed as follows:

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