IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RAYMOND BROOKS; AND BRADY LINEN SERVICES, LLC,
Appellants,
vs.
JERRELL TURNER; AND KESHA FRYER,
Respondents.

No. 82881-COA

FILED

AUG 10 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER REVERSING AND REMANDING

Raymond Brooks and Brady Linen Services, LLC (Brady) appeal from a default judgment entered in a tort action. Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.

On September 10, 2016, respondent Kesha Fryer was involved in an automobile accident with Brooks, who was driving a truck for Brady in Las Vegas.[1] At the time of the accident, respondent Jerrell Turner was a passenger in Fryer's vehicle and allegedly sustained injury, as did Fryer. There was also property damage to Fryer's vehicle. Apparently, Fryer claimed Brooks was at fault, and Brooks claimed Fryer was at fault.

Shortly thereafter, Brooks and Brady reported the accident to their insurance carrier, Travelers. Travelers assigned Julie Belletire, a technical specialist, to investigate the accident. At the outset of her investigation, Belletire communicated by telephone and email with Robert Curtis, a Nevada attorney, who asserted that he represented Turner, Fryer, and an unnamed third person. Belletire asked orally and in writing that Curtis send a letter of representation for these clients, which Curtis repeatedly said he would provide, but he never did. Belletire asked Curtis

[1]We do not recount the facts except as necessary to our disposition.

if she could take witness statements from his clients, but he refused. She informed Curtis she had hired an appraiser to inspect the damaged automobile and that she would also provide the results of the liability investigation to him. Belletire also asked for more detailed information on the injuries claimed by Fryer and Turner, which Curtis never provided.

In October 2016, Belletire received inquiries from Fryer related to property damage to her vehicle. At this point, it had been over two weeks since Travelers had been in communication with Curtis, who had still failed to forward a letter of representation to Belletire or cooperate with her requests for additional information as to Turner and Fryer's injuries. Because Belletire had not received the letter of representation from Curtis, she spoke directly with Fryer and informed her that the claim would be denied. Belletire promptly informed Curtis of this communication and told him that, in light of his delay and failure to provide letters of representation, and given that Fryer was now communicating directly with Travelers, Belletire would be sending letters to Turner and Fryer directly notifying them of Travelers' decision to deny their claims. Later, in November 2016, Belletire learned that the Nevada Highway Patrol (NHP) was investigating the accident. Shortly thereafter, NHP issued its report and concluded that fault could not be determined. It does not appear from the record that Belletire or Travelers received any additional communications from either Curtis, Turner, or Fryer following their denial of the claim and the completion of the NHP report.

On September 10, 2018, almost two years later, and on the day that the statute of limitations expired, Turner and Fryer jointly filed a

three-count complaint against Brooks and Brady.[2] The complaint was timely served on both parties in October, but Brooks and Brady never filed a responsive pleading; and for some unclear reason, Travelers was allegedly never notified of the suit by either Brady, Brooks, Turner, or Fryer. Approximately six months later, having not received timely responsive pleadings from Brooks and Brady, Turner and Fryer submitted defaults to be entered against Brooks and Brady by the court clerk pursuant to NRCP 55(a). In response, the clerk entered the defaults on March 5, 2019.

On April 8, 2019, Turner and Fryer filed and served a "Notice of Intent to Take Default Judgment" on both Brooks and Brady, but not on Travelers. More than a year later, on April 30, 2020, Turner and Fryer filed their motion for a default judgment. Notably, Turner and Fryer expressly did not request a hearing on the motion, thereby indicating that the motion could be resolved by the district court on the papers.[3] Based on the affidavit of Belletire, Travelers first learned of the lawsuit on or about May 14, 2020; and on the same day, also received copies of the pleadings and certain medical records that Turner and Fryer claimed were related to the accident.

Within three weeks of the motion for default judgment having been filed and within a week of Travelers learning of the lawsuit, Brooks and Brady filed a motion to set aside the default, and default judgment, if

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[2]Their complaint alleged negligence, negligence per se, and negligent supervision or hiring. The complaint was not filed by Robert Curtis, Esq., but Injury Lawyers of Nevada, who now represent Turner and Fryer.

[3]*See* EDCR 2.20(b) (stating that motions filed with the designation "Hearing Not Requested" will be decided without argument on the district court's Chambers calendar).

judgment was entered before a hearing could be held.[4] In their motion, Brooks and Brady argued that Travelers' prelitigation actions demonstrated an intent to defend them and that the prelitigation communications between Belletire, Curtis, Turner, and Fryer constituted an appearance by Travelers on behalf of Brooks and Brady. Thus, they asserted that Travelers, as their representative, was required to receive a notice of intent to seek a default judgment under NRCP 55(b)(2). And because no notice was sent to Travelers, any judgment entered against them would be void. At the hearing on the motion to set aside the default, the district court heard extensive arguments from counsel for Brooks and Brady about whether Travelers' prelitigation communications established an appearance such that notice to Travelers was required.

Ultimately, the district court denied Brooks and Brady's motion to set aside the entry of default, concluding that Travelers' actions constituted simple, routine claims handling activities that did not qualify under *Christy v. Carlisle,* 94 Nev. 651, 584 P.2d 687 (1978), as sufficient evidence of a clear intent to defend, and therefore, notice to Travelers was not required. Approximately two months later, on August 6, the district court held an evidentiary hearing on Turner and Fryer's offer of proof for their default judgment against Brooks and Brady and granted a default

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[4]We note that, despite the title of the motion, a default judgment had not yet been entered. Counsel for Brooks and Brady acknowledged as much at the hearing on the motion, and the district court ultimately treated it as a motion to set aside the default pursuant to NRCP 55(c). And while this appeal does not involve the denial of setting aside a default *judgment* pursuant to NRCP 60, it does seek to vacate the default judgment because notice of intent to take default judgment was not provided to Travelers pursuant to NRCP 55(b)(2).

judgment in their favor in the total amount of $203,571.02. However, the judgment was not entered until April 2021. This appeal followed.

On appeal, Brooks and Brady argue that the district court abused its discretion in denying their motion because Travelers demonstrated a clear intent to defend the suit through its prelitigation actions, and that the default judgment is void because Travelers was not provided with the requisite notice of the intent to take default judgment. Turner and Fryer in turn argue that Brooks and Brady were given every opportunity to participate in the suit and repeatedly failed to respond. They also agree with the district court that Travelers was not required to receive notice of the intent to take default or default judgment because Travelers was engaged in routine claims handling and did not clearly manifest an intent to defend the case.

We review a district court's decision to grant, or deny, a motion to set aside an entry of default and default judgment for an abuse of discretion. *Cicerchia v. Cicerchia*, 77 Nev. 158, 161-62, 360 P.2d 839, 841 (1961), *superseded by rule on other grounds in Vargas v. J Morales Inc.*, 138 Nev., Adv. Op. 38, 510 P.3d 777 (2022). An abuse of discretion occurs when the district court's "decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Skender v. Brunsonbuilt Constr. & Dev. Co., LLC*, 122 Nev. 1430, 1435, 148 P.3d 710, 714 (2006).

As a preliminary matter, we note that the district court's order contains factual findings that are not supported by the record. First, the district court's order mischaracterized or misunderstood the parties' arguments when it stated that "[t]he sole argument raised by defendants in support of the motion to set aside the default was . . . that the default should be set aside because a copy of the summons and complaint was not served

on Travelers [ ]." The undisputed record demonstrates that was never Brooks and Brady's sole argument. Instead, they argued that Travelers, as their representative, demonstrated through prelitigation communications an intent to defend the suit, which required them to receive the three-day notice of intent to seek default judgment under NRCP 55(b)(2).[5]

Second, while the district court correctly found that "pre-litigation communications between an insurance company and a party can demonstrate the type of clear intention to defend the lawsuit that is set forth in *Christy*," and indicated that not every type of communication will qualify, the court erred when it characterized Travelers' activity as mere "simple routine claims handling activities" when the factual record demonstrates that there was considerable activity beyond that, including multiple prelitigation communications and efforts to investigate the claims made by Turner and Fryer.

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[5]The Nevada Rules of Civil Procedure were amended effective March 1, 2019, *see in re Creating a Comm. to Update & Revise the Nev. Rules of Civil Procedure*, ADKT 0511 (Order Amending the Rules of Civil Procedure, the Rules of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules, December 31, 2018). The amendments, which were applicable at the time the notices of intent to take default judgment were filed in this case, required a *seven*-day notice of intent to take default. This amendment, however, does not affect the disposition of this appeal. We also note that NRCP 55 was specifically amended to conform to its federal counterpart, and we continue to consider the federal jurisprudence related to the rule as persuasive authority. *Venetian Casino Resort, LLC v. Eighth Judicial Dist. Court*, 136 Nev. 221, 225 n.7, 467 P.3d 1, 5 n.7 (Ct. App. 2020) (stating that "[F]ederal decisions involving the Federal Rules of Civil Procedure provide persuasive authority for Nevada appellate courts considering the Nevada Rules of Civil Procedure" (internal quotations omitted)).

The default judgment must be reversed for failure to give notice to Travelers

Under NRCP 55(b)(2), "[i]f the party against whom a default judgment is sought has appeared personally, or by a representative, that party or its representative must be served with written notice of the application at least 7 days before the hearing." "The failure to serve such notice voids the judgment." *Christy v. Carlisle*, 94 Nev. 651, 654, 584 P.2d 687, 689 (1978). The Nevada Supreme Court has further extended the notice requirement of NRCP 55(b)(2) and its holding in *Christy* to prelitigation claims handling by an insurance company "when pre-suit interactions evince a clear intent to appear and defend." *Lindblom v. Prime Hospitality Corp.*, 120 Nev. 372, 376, 90 P.3d 1283, 1285 (2004).

In this case, the district court focused on "routine claims handling activities" to deny the request to set aside the defaults instead of recognizing that Travelers was undertaking this processing in the defense of its insureds. *See, e.g., Christy*, 94 Nev. at 654, 584 P.2d at 689 ("Defendant Carlisle's insurance carrier had indicated a clear purpose to defend the suit. Indeed, it was duty bound to do so, and plaintiff's counsel must have known this."). Here, Travelers attempted to reach out to Turner and Fryer's attorney multiple times for a representation letter in order to engage in negotiations and made repeated efforts to gather more information related to Turner and Fryer's alleged injuries. Travelers also made efforts to keep Turner and Fryer's attorney informed of the status of its investigation and liability determination. It was only when Travelers' efforts to obtain the necessary representation letter and information needed to evaluate Turner and Fryer's claims were unsuccessful, that it denied the claims by sending denial letters to Turner and Fryer directly. These repeated attempts to exchange correspondence with Curtis, Turner, and

Frier clearly evinced Travelers' intention to defend this action on behalf of Brooks and Brady, even though these interactions occurred prior to the litigation in this matter. *See Lindblom*, 120 Nev. at 376, 90 P.3d at 1285 (concluding that "the policy considerations underlying NRCP 55(b)(2)'s . . . notice requirement are furthered by equating pre-suit negotiations with an appearance under the rule").

Moreover, as Brooks and Brady aptly point out, by issuing a denial letter, Travelers demonstrated its intent to actively participate in the case on their behalf.[6] *Cf. Franklin v. Bartsas Realty, Inc.*, 95 Nev. 559, 565, 598 P.2d 1147, 1151 (1979) (concluding that a letter sent in response to the summons and complaint from appellant—an experienced businessman—"constituted an appearance in the action, entitling all the appellants to the three-day notice prior to the entry of default judgment required by NRCP 55(b)(2)"). As an aside, we note that within one week of receiving notice of the litigation, Travelers retained counsel for Brooks and Brady, who rapidly moved to set aside the default or default judgment.

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[6]Indeed, in *H.F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe*, a case on which *Christy* relies, the United States Court of Appeals for the District of Columbia Circuit collected cases indicating that, among other things, phone negotiations, and "a single letter by a defendant corporation to plaintiff's counsel denying the allegations in plaintiff's summons was deemed to be an 'appearance' within the meaning of Rule 55(b)(2)." 432 F.2d 689, 691-92 (D.C. Cir. 1970). The *Livermore* court concluded, in line with our own appellate court jurisprudence, that by entering into negotiations with the plaintiffs, the appellant in that case "had made its purpose to defend the suit quite plain to [respondent]; and there is nothing to suggest that it would be otherwise than diligent in doing so once the negotiations suggested by appellee itself should prove fruitless." *Id.* at 692.

Therefore, it appears that, by misunderstanding the parties' argument, the district court was led to make a finding that the activity was limited to "simple routine claims handling activities," which is too narrow to excuse the notice requirement of NRCP 55(b)(2), particularly when the undisputed record indicates a clear intent to defend by Travelers via its multiple prelitigation activities and communications. And because Travelers expressed a clear intent to defend, it was entitled to notice from Turner and Fryer under NRCP 55(b)(2) before a default judgment could be entered. Without the requisite notice being given to Travelers, the district court should not have proceeded to enter the default judgment against Brooks and Brady. *See Christy*, 94 Nev. at 654, 584 P.2d at 689. Therefore, we reverse the district court's order granting a default judgment.

The clerk's default should be set aside for good cause pursuant to NRCP 55(c)

We next consider whether the district court abused its discretion in its initial failure to set aside the clerk's entry of default as to Brooks and Brady for good cause and allow the case to proceed on the merits. Preliminarily, we note that the motions below and the briefs on appeal appear to use the terms default and default judgment interchangeably at times, failing to recognize the distinction between the procedural aspects of each. Thus, although this issue is not directly addressed in Brooks and Brady's opening brief, it is clear from the briefing as a whole that the validity of both the defaults and default judgment are being challenged in this appeal, and therefore we necessarily address both.

NRCP 55(c) permits a court to "set aside an entry of default for good cause" shown. Good cause, as used in this rule, is considered to be "broad in scope" by our appellate courts. *Intermountain Lumber & Builders Supply, Inc. v. Glens Falls Ins. Co.*, 83 Nev. 126, 129, 424 P.2d 884, 886

(1967); *see also Nev. Direct Ins. Co. v. Fields*, No. 66561, 2016 WL 797048, at *2 (Nev. Feb. 26, 2016) (Order Vacating Judgment and Remanding).[7] Further, our appellate courts have long recognized that "[a] party is required to inquire into the opposing party's intent to proceed before requesting a default." *See Landreth v. Malik*, 127 Nev. 175, 177, 251 P.3d 163, 165 (2011) (citing *Rowland v. Lepire*, 95 Nev. 639, 600 P.2d 237

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[7]In *Nevada Direct*, the supreme court, citing to *Franchise Holding II, LLC v. Huntington Restaurants Group, Inc.*, 375 F.3d 922, 926 (9th Cir. 2004), recognized that the federal cases analyze three factors when determining good cause, "(1) whether [the defaulting party] engaged in culpable conduct that led to the default; (2) whether the [defaulting party] had a meritorious defense; (3) whether reopening the default judgment would prejudice [the moving party]." *Nev. Direct*, No. 66561, 2016 WL 797048 at *2. Further, this three-part test is disjunctive, and "proof of any of these three factors may justify setting aside the default." *Joachin v. Hometown Eats, Inc.*, No. 2:18-cv-00793-GMN-CWH, 2019 WL 3323111, at *1 (D. Nev. July 24, 2019) (citing to *Brandt v. American Bankers Ins. Co. of Fla.*, 653 F.3d 1108, 1111 (9th Cir. 2011)). This remains the federal approach. *See, e.g., GemCap Lending I, LLC v. Pertl*, No. 20-55642, 843 Fed. Appx. 986 (9th Cir. 2021); *Mid-Century Ins. Co. v. Do*, 2021 WL 282788 (2021). Although the second factor regarding meritorious defense is not required to set aside a default *judgment* in Nevada, it arguably still may be analyzed when considering setting aside a clerk's default for good cause under NRCP 55(c). *See Nev. Direct*, No. 66561, 2016 WL 797048 at *3 (declining to consider extending *Epstein v. Epstein*, 113 Nev. 1401, 1405, 950 P.2d 771, 773 (1997) to NRCP 55(c)). We need not consider the three factors for finding good cause in this case because the lack of inquiry as to Travelers' intention to proceed was not made, as discussed above. Nevertheless, we conclude that there is ample proof in the record to support good cause to set aside the default, including that Turner and Fryer failed to argue or establish how they would be prejudiced by now litigating the case on the merits. Any argument regarding passage of time is unpersuasive as notable delays in prosecuting the case can be attributed to the actions of Turner and Fryer. Further, had inquiry notice to Travelers been made, it is likely that the defaults would never have been entered and the case would have been litigated on the merits commencing in early 2019.

(1979)).[8] This type of inquiry is sometimes referred to a *Landreth* inquiry. Importantly, this inquiry is separate and apart from the formal notice of intent to take default judgment that was required to be served on Travelers pursuant to NRCP 55(b)(2). *Landreth*, 127 Nev. at 189, 251 P.3d at 172.

As detailed above, Travelers' prelitigation involvement constituted an appearance in this case and demonstrated its intent to defend Brooks and Brady. And certainly, an appearance sufficient to warrant notice under NRCP 55(b)(2) is equally sufficient to warrant a *Landreth* inquiry prior to requesting a clerk's default. As Travelers clearly evinced its intent to defend the case prior to the commencement of litigation by communicating with Turner, Fryer, and their counsel, a *Landreth*

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[8]We acknowledge that other jurisdictions have construed a *Landreth* style inquiry to be a more of a professional courtesy rather than a requirement. *See, e.g., DIRECTV, Inc. v. Meyers*, 214 F.R.D. 504, 512 n.2 (N.D. Iowa 2003) (stating that while failure to comply with Iowa Rule of Professional Conduct 20, which states that "We will not cause any default or dismissal to be entered without first notifying opposing counsel, when we know his or her identity," supports a finding of good cause to set aside default, it is not a basis for sanctions); *Cent. Nat. Ins. Co. of Omaha v. Ins. Co. of N. Am.*, 513 N.W.2d 750, 755 (Iowa 1994) (concluding that failure to provide notice of default to an insurance attorney violated established custom and usage, but not Iowa law, while nonetheless remanding the case for further findings to address whether excusable neglect occurred). But in Nevada, both the Nevada Rules of Professional Conduct and our appellate jurisprudence require an inquiry into whether the opposing party intends to defend the suit before default. *See* NRPC 3.5A; *Landreth*, 127 Nev. at, 188, 251 P.3d at 171. And in considering our appellate jurisprudence on the matter, specifically, *Landreth*, in conjunction with *Christy* and *Lindblom*, we conclude that *Landreth*'s holding may be extended to a party's representative where, as here, that representative has demonstrated a clear intent to appear and defend the case. *See Christy*, 94 Nev. at 654, 584 P.2d at 689 (acknowledging that insurance carriers are duty bound to defend suits on behalf of their insured).

inquiry to Travelers, as the representative of Brooks and Brady, was required before entering the defaults pursuant to NRCP 55(a). For this reason, we conclude that the district court abused its discretion in failing to set aside the defaults under NRCP 55(c) for good cause.

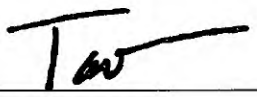
Consequently, we REVERSE and REMAND this matter to the district court with instructions to set aside the clerk's defaults and conduct further proceedings consistent with this order.

_____, C.J.
Gibbons

_____, J.
Bulla

TAO, J., concurring:

I concur in the judgment.



_____, J.
Tao

cc: Hon. Kathleen E. Delaney, District Judge
Thomas J. Tanksley, Settlement Judge
Hall Jaffe & Clayton, LLP
Injury Lawyers of Nevada
Eighth District Court Clerk