

IN THE SUPREME COURT OF THE STATE OF NEVADA

RANDY STRAUB AND ANITTA STRAUB,

Appellants,

vs.

MITCHELL BLASCHE,

Respondent.

No. 35710

FILED

JAN 16 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT

BY *J. Richards*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order setting aside a default and default judgment in a wrongful death action. Appellants contend, in part, that the district court erred in setting aside the default judgment pursuant to NRCP 55(b) (2) because respondent had not made an appearance in the action to trigger the application of that provision. Having reviewed the briefs and the record, we affirm the order because respondent did appear in the action and, hence, was entitled to notice under NRCP 55(b) (2).

The underlying action arose from an automobile-motorcycle collision, which resulted in the death of the motorcycle rider. On December 9, 1999, appellants Randy and Anitta Straub, the parents of the deceased, filed an action for wrongful death against respondent Mitchell Blasche, the driver of the automobile. The Straubs effected service of process upon Blasche. At the time, Blasche was incarcerated at the Clark County Detention Center, charged with driving under the influence. Although prior to the lawsuit some settlement negotiations had been conducted between counsel provided by Blasche's insurance carrier and the Straubs' attorney, the Straubs did not provide a copy of the complaint to Blasche's insurance counsel.

On December 30, 1999, a default was entered against Blasche, who had not answered the complaint.¹ On January 7, 2000, insurance counsel contacted the Straubs' attorney regarding this matter. According to insurance counsel, he requested that the default be set aside so that he could defend Blasche, but the Straubs' attorney informed him that an application for default judgment had already been submitted to the district court. Default judgment against Blasche was signed by the district judge on January 7, 2000, and filed on January 10, 2000.

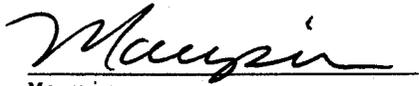
On January 13, 2000, insurance counsel moved to set aside the default and default judgment. The motion asserted, in part, that relief should be granted under NRCP 55(b)(2) (default judgment may be set aside where minimum three-day written notice of application for entry of default judgment was not given). Following a hearing, the district court entered an order granting the motion to set aside the default and default judgment. The Straubs appealed from the order.

A plaintiff must give written notice of an application for a default judgment to any defendant that has appeared in the action. See NRCP 55(b)(2). "An appearance for purposes of NRCP 55(b)(2) does not require a presentation or submission to the court; indeed, a course of negotiation between attorneys is sufficient to constitute an appearance for purposes of NRCP 55(b)(2) where the defendant has indicated a clear purpose to defend the suit." *Gazin v. Hoy*, 102 Nev. 621, 624, 730 P.2d 436, 438 (1986). The failure to serve such a written notice voids the judgment. See *Christy v. Carlisle*, 94 Nev. 651, 654, 584 P.2d 687, 689 (1978).

The Straubs contend the district court erroneously concluded that settlement negotiations conducted between the

¹Blasche asserts that, being incarcerated at the time of service of process, he assumed that his insurance company would be notified of the complaint and would defend him.

parties prior to the commencement of the action satisfied the appearance requirement set forth in NRCP 55(b)(2). We need not reach this issue, however, as their attorney acknowledges that the opposing party contacted him on January 7, 2000, regarding this case--after the action commenced and before the default judgment was entered. See NRCP 58(c) (a judgment is entered when it is filed by the clerk of the court). On this date, Blasche made his intent to defend the suit known and made an appearance in the action for purposes of NRCP 55(b)(2). See Christy, 94 Nev. at 654, 584 P.2d at 689 (where insurance carrier had indicated a clear intent to defend, it was entitled to notice under NRCP 55(b)(2)). Further, "[i]t is our underlying policy to have each case decided upon its merits." Id. Therefore, the district court properly set aside the default and default judgment for failure to serve the written notice of application for default judgment, and we affirm the order of the district court.²

 C.J.
Maupin
 J.
Leavitt
 J.
Becker

cc: Hon. Allan R. Earl, District Judge
Sylvester & Polednak, Ltd.
Hafen, Talbot, Porter & Greene, Ltd.
Clark County Clerk

²We deny respondent's motion to dismiss this appeal on jurisdictional grounds. Pursuant to NRAP 34(f)(1), we have determined that oral argument is not warranted in this appeal.