

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ONEWEST BANK FSB,
Appellant,
vs.
ANTHONY BORGERT,
Respondent.

No. 72139

FILED

AUG 27 2018

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

ORDER VACATING DECISION AND REMANDING

OneWest Bank FSB appeals from an order denying a motion to set aside a default judgment in a quiet title action. Eighth Judicial District Court, Clark County; James Crockett, Judge.

OneWest claims to be the loan servicer and beneficiary of a deed of trust on a property which respondent Anthony Borgert acquired from a purchaser whose title was procured at a homeowner's association (HOA) foreclosure sale conducted pursuant to NRS Chapter 116. Borgert filed suit against OneWest and others to establish that Borgert now held the property free and clear of any encumbrances, such as OneWest's deed of trust. Borgert served OneWest pursuant to NRS 14.030 as it was a foreign entity, and OneWest failed to answer Borgert's complaint. Borgert then sought and obtained a default judgment against OneWest. OneWest moved to set aside the default judgment pursuant to NRCP 60(c) and NRCP 60(b)(1). The district court denied the motion to set aside, as well as OneWest's subsequent motion to reconsider. This appeal followed.

We review a court's decision regarding a motion to set a default judgment for an abuse of discretion. *McKnight Family, LLP v. Adept Mgmt. Servs., Inc.*, 129 Nev. 610, 617, 310 P.3d 555, 559 (2013). We will not disturb a court's factual findings regarding a motion to set aside that are supported

by substantial evidence. *See Sowers v. Forest Hills Subdivision*, 129 Nev. 99, 105, 294 P.3d 427, 432 (2013). But we cannot determine whether the district court abused its discretion in setting aside the default judgment if the court did not make the necessary findings of fact. *See McKnight*, 129 Nev. at 617, 310 P.3d at 560.

OneWest sought to have the default judgment set aside pursuant to NRCP 60(c) and NRCP 60(b)(1).¹ To set aside a default judgment pursuant to NRCP 60(c), the movant must show that it was not personally served and it timely filed a motion to set aside the judgment. *See BASF Corp., Inmont Div. v. Jafbros, Inc.*, 105 Nev. 142, 144, 771 P.2d 161, 162 (1989).² Under NRCP 60(b)(1), the district court may relieve a party from a final judgment based on “mistake, inadvertence, surprise, or excusable neglect.” Analysis of these grounds to set aside judgment requires consideration of several factors: a prompt application to set aside the judgment; lack of intentional delay of the proceedings, knowledge of

¹Borgert argues that because OneWest later transferred its interest in the subject property, it no longer has standing to bring this appeal. This argument is unpersuasive as NRCP 25(c) allows the original interest holder to remain in the action. *See Triple Quest, Inc. v. Cleveland Gear Co.*, 627 N.W.2d 379, 383 (N.D. 2001) (“The most significant feature of Rule 25(c) is that it does not require that anything be done after an interest has been transferred. The action may be continued by or against the original party, and the judgment will be binding on his successor in interest even though he is not named.”) (quoting 7C Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure: Civil 2d*, § 1958, at pp. 555, 557, 560).

²*BASF* lists another factor – a meritorious defense – but the Nevada Supreme Court has determined that a meritorious defense argument is not required. *See Epstein v. Epstein*, 113 Nev. 1401, 1405, 950 P.2d 771, 773 (1997).

procedural requirements on the part of the party seeking to set aside the judgment; good faith in seeking to set aside the judgment; and “due consideration to the state’s underlying basic policy of resolving cases on their merits whenever possible. *Yochum v. Davis*, 98 Nev. 484, 486-87, 653 P.2d 1215, 1216-17 (1982); *see also Kahn v. Orme*, 108 Nev. 510, 513-14, 835 P.2d 790, 792-93 (1992).³

Although the district court found that OneWest was served pursuant to NRS 14.030,⁴ significant time elapsed in the proceedings underlying this suit prior to the motion to set aside, and “the circumstances in which [OneWest] have found themselves are entirely of their own making,” the court did not analyze the other relevant factors, including whether OneWest lacked intent to delay the proceedings and knowledge of procedural requirements on the part of the party seeking to set aside the judgment and the general policy of resolving cases on their merits. *See Kahn*, 108 Nev. at 513, 835 P.2d at 792-93. The burden remains with OneWest to make the required showing under NRCP 60 by a preponderance of the evidence, but the district court’s order lacks findings to substantiate its denial of the motion to set aside. *See id.* at 513-14, 835 P.2d at 792-93; *see also Britz v. Consol. Casinos Corp.*, 87 Nev. 441, 446, 488 P.2d 911, 915 (1971) (noting that the trial court should not always grant relief where lack of good faith or diligence by litigants and their counsel may warrant denial).

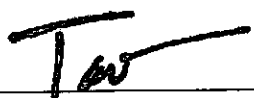
³*Yochum* and *Kahn* also list a meritorious defense factor, but, as with *BASF*, this no longer applies. *See Epstein*, 113 Nev. at 1405, 950 P.2d at 773.

⁴We agree with the district court’s determination that service of OneWest via the Secretary of State’s office is proper under the circumstances.

Accordingly, we vacate the order denying NRCP 60 relief and we remand this matter to the district court for it to consider the other relevant factors in deciding appellant's motion.

It is so ORDERED.


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. James Crockett, District Judge
Janet Trost, Settlement Judge
Wright, Finlay & Zak, LLP/Las Vegas
The Law Office of Mike Beede, PLLC
Eighth District Court Clerk