

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

GABRIEL DUMITRU,  
Appellant,  
vs.  
KHALIQUEZ ZAMAN,  
Respondent.

No. 82607-COA

FILED

JAN 24 2022

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

ORDER OF AFFIRMANCE

Gabriel Dumitru appeals from a district court order denying a motion to set aside a default judgment. Eighth Judicial District Court, Clark County; Jerry A. Wiese, Judge.

Khaliquez Zaman agreed to sell Dumitru a restaurant for \$90,000.<sup>1</sup> However, after Dumitru took possession of the restaurant, he only paid \$70,000. As a result, Zaman filed a complaint in district court alleging, inter alia, breach of contract. After at least three failed attempts at serving Dumitru with the summons and complaint, Zaman moved the district court for permission to serve Dumitru via publication. The court granted Zaman's request, and Zaman published the summons in Nevada Legal News, but Dumitru failed to answer.

Thereafter, Zaman obtained a clerk's entry of default against Dumitru, and the district court subsequently conducted a prove-up hearing and granted a default judgment against Dumitru. About two years after entry of the judgment, Zaman was able to serve Dumitru with a motion for an order allowing examination of judgment debtor. After being served with this motion, Dumitru retained counsel and filed a motion to set aside the default judgment pursuant to NRCP 55(c). Zaman opposed the motion raising for the first time that NRCP 60 applied instead of NRCP 55 and

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<sup>1</sup>We do not recount the facts except as necessary to our disposition.

attached photographs allegedly confirming Dumitru's residence at which service was made. Dumitru did not file a reply in support of his motion to set aside. The district court denied Dumitru's motion for failure to meet the requirements of NRCP 55(c) as well as NRCP 60(b). Dumitru then filed a motion for reconsideration of the court's denial of the motion to set aside the default judgment based on NRCP 60(d)(3), fraud upon the court, which he did not raise in his initial motion to set aside the default. This alleged fraud was based on the photographs of a vehicle, purportedly owned by Dumitru in front of a residence, which were submitted by Zaman in his opposition to set aside and, which according to Dumitru, did not confirm that he lived at this residence at the time of service. The district court denied Dumitru's motion for reconsideration without a hearing in an effort to comply with the district court's COVID-19 pandemic restrictions and in accordance with EDCR 2.24(c). This appeal followed.

Dumitru makes two arguments on appeal: (1) that the district court abused its discretion when it denied Dumitru's motion to set aside default judgment, as it misanalyzed NRCP 60(b) and misapplied the four factors set forth in *Yochum v. Davis*, 98 Nev. 484, 486, 653 P.2d 1215, 1216 (1982), *overruled on other grounds by Epstein v. Epstein*, 113 Nev. 1401, 1405, 950 P.2d 771, 773 (1997); and (2) that the district court abused its discretion when it granted Zaman's motion for service by publication. Here, Dumitru failed to raise the application of NRCP 60(b) in his initial motion to set aside the default judgment, nor did he substantively address why the district court misapplied the rule in his motion for reconsideration. Further, Dumitru did not address fraud on the court in his initial motion to set aside the default. Therefore, arguably, both issues are waived on appeal for Dumitru's failure to timely raise them before the district court. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (noting

that issues not raised in the trial court are deemed waived). Nevertheless, we address them since the district court did so in its orders.

First, in the motion to set aside the default judgment heard by the district court, Dumitru's sole argument was that the district court should set aside the default judgment pursuant to NRCP 55(c).<sup>2</sup> However, NRCP 55(c) governs entries of default, not final default judgments, which are instead governed by NRCP 60(b). NRCP 55(c) applies a "good cause" standard that is inapplicable here;<sup>3</sup> whereas NRCP 60(b) requires the court to engage in a balancing test pursuant to *Yochum*. In his motion to set aside, Dumitru did not substantively discuss NRCP 60(b), or analyze the relevant *Yochum* factors. Second, Dumitru failed to dispute the district court's order granting Zaman's motion for service by publication, nor did he address the process servers' alleged failures to exercise due diligence in locating his correct residence in order to serve him with the complaint.<sup>4</sup> His only argument was the Zaman committed fraud on the court in his opposition to set aside the default judgment by suggesting that the process servers did

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<sup>2</sup>NRCP 55(c) provides that, "[t]he court may set aside an entry of default for good cause, and it may set aside a final default judgment under Rule 60(b)."

<sup>3</sup>We note that "good cause" for setting aside a default entered by a clerk may be "somewhat broader" than "mistake, inadvertence, surprise or excusable neglect" under NRCP 60(b)(1) when determining whether to set aside a final default judgment, it does not encompass "inexcusable neglect." See *Intermountain Lumber & Builders Supply, Inc. v. Glens Falls Ins. Co.*, 83 Nev. 126, 130, 424 P.2d 884, 886 (1967). In this case, however, the district court correctly applied NRCP 60(b)(1) based on the fact that a final default judgment had been entered, and the court's analyses under this rule was not challenged by Dumitru until this appeal.

<sup>4</sup>Dumitru made fleeting references to NRCP 60(b) in his motion to set aside, but only to the extent that NRCP 60(b) is referenced in the text of NRCP 55(c).

attempt to serve him at this correct address. The district court, however, dismissed Dumitru's fraud on the court argument based on the fact that the photographs allegedly showing fraud were submitted to the court well after the court allowed service by publication, and therefore, were not relied on by the court in permitting such service.<sup>5</sup>

On appeal Dumitru cogently argues for the first time that the district court abused its discretion when it (1) denied his motion to set aside the default judgment because it misapplied NRCP 60(b) and failed to properly analyze the *Yochum* factors, and (2) granted Zaman's motion for service by publication. Because Dumitru substantively raises these issues for the first time on appeal, we need not consider them. See *Old Aztec Mine, Inc.*, 97 Nev. at 52, 623 P.2d at 983; *Britz v. Consol. Casinos Corp.*, 87 Nev. 441, 447, 488 P.2d 911, 915 (1971) ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.").<sup>6</sup> However, even if we did consider

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<sup>5</sup>On appeal, Dumitru does not challenge the district court's refusal to set aside the default judgment pursuant to NRCP 60(d), only that service by publication should not have been permitted, presumably pursuant to NRCP 60(b)(1), which was not raised below.


<sup>6</sup>Even if we were to consider Dumitru's arguments on appeal, he fails to specifically demonstrate how the district court abused its discretion in denying relief under NRCP 60(b) and in applying *Yochum*, nor does he adequately address why the district court abused its discretion in permitting service by publication. Although Dumitru attempts to question the process servers' due diligence in obtaining his correct address, we note that due diligence does not include investigation of every possible avenue when determining the correct address for service. See *Mitchell v. Second Judicial Dist. Court*, 82 Nev. 377, 381-82, 418 P.2d 994, 996-97 (1966) (explaining that a plaintiff does not have to ascertain, at his peril, the defendant's actual address); *Abreu v. Gilmer*, 115 Nev. 308, 313, 985 P.2d 746, 749 (1999) (holding that due diligence is not quantifiable by reference to the number of attempts to serve a party, but rather diligence is shown as what is

them, Dumitru's motion to set aside the default judgment under NRCP 60(b)(1) was untimely as it was filed more than six months after the district court's entry of the default judgment. *See* NRCP 60(c)(1). Thus, the district court acted within its discretion when it denied Dumitru's motion.

Therefore, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Bulla

cc: Hon. Jerry A. Wiese, District Judge  
Kirk T. Kennedy  
Michael I. Gowdey  
David J. Winterton & Associates, Ltd.  
Eighth District Court Clerk

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reasonable under the circumstances and not all "possible diligence which may be conceived"). Here, however, we need not reach the merits of whether there was due diligence in attempting service on Dumitru as he failed to timely raise the issue with the district court and only cogently argued it for the first time on appeal.