IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RONALD ALAN BARBER,
Appellant,
vs.
BRIANNA TEAL BARBER,
Respondent.

No. 83201-COA

ORDER OF REVERSAL AND REMAND

Ronald Alan Barber (Alan) timely appeals from a district court order denying a motion to set aside a default judgment.[1] Eighth Judicial District Court, Family Court Division, Clark County; Bryce C. Duckworth, Judge.

Alan and Brianna Teal Barber were married in 2013 and have two children: O.B., born in 2005, and E.B., born in 2013.[2] One day, O.B. told Brianna that Alan had been sexually assaulting her for an extended period of time. Brianna immediately alerted law enforcement and following an investigation, Alan was arrested. Thereafter, Brianna was granted a temporary restraining order against Alan on behalf of herself, O.B., and E.B. Alan was later released from custody while the case progressed through the criminal justice system, but his whereabouts were unknown to Brianna.

Brianna ultimately filed an amended complaint for divorce with the district court, requesting (1) sole legal and physical custody of the minor children without any parenting time for Alan, (2) child support, and (3)

[1]The Honorable Jerome T. Tao, Judge, did not participate in the decision of this matter.

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

division of the community property. To effectuate service, Brianna's attorney delivered a copy of the summons and amended complaint to Ryan Helmick, Esq., who was representing Alan in the pending criminal matter related to the sexual assault allegations. Helmick apparently signed the acceptance of service on behalf of Alan. Alan never answered the amended complaint. Later, Brianna served a three-day notice of intent to take default, which Helmick again apparently signed for. After failing to receive any response from Alan, the court clerk entered a notice of default on the amended complaint for divorce, and Brianna moved the district court to enter a default judgment. The district court set the matter for a prove-up hearing.

At the hearing, the district court found that Alan was properly served with the amended complaint of divorce via service on Helmick and proceeded to hear testimony from Brianna. Brianna testified regarding O.B.'s sexual assault allegations and Alan's approximate salary for the court's child support determination. However, the district court decided that Brianna's testimony as to the specific assets and debts of the community was unnecessary for the court to determine the division of community property.

Thereafter, the district court entered a decree of divorce based on Alan's default and the prove-up proceedings. Because the decree distributed 100 percent of the marital home to Brianna, Brianna subsequently filed a motion requesting that the clerk of the court execute a quitclaim deed on behalf of Alan so that she would have sole ownership of the marital home as provided for in the decree.

At or near this time, Alan became aware of the divorce proceedings and retained counsel to file an opposition to Brianna's motion

regarding the quitclaim deed and a countermotion to set aside the divorce decree based on lack of service of the complaint or amended complaint. Further, Alan argued that the divorce decree should be set aside because the district court failed to make specific findings regarding the best interest of the children when determining custody, failed to properly determine child support, and failed to make findings supporting the division of community property.

The district court conducted a hearing to resolve the outstanding motions and ultimately denied Alan's countermotion. Specifically, as to Alan's argument that service was invalid because he never gave Helmick consent to accept service on his behalf, the district court stated that it did not "have enough information given the fact that it appears acceptance of service was signed by – service was accepted by an attorney who was . . . duly licensed to practice in the state of Nevada." Nevertheless, based on the countermotion as written, the district court did not deem the service of the amended complaint to be invalid. As to the other issues raised by Alan, although the district court acknowledged that a motion to set aside a default is properly considered under NRCP 60(b)(1), the court refused to consider Alan's countermotion under NRCP 60(b)(1) because Alan never alleged mistake, inadvertence, surprise, or excusable neglect pursuant to NRCP 60(b)(1) in the countermotion itself, and therefore, the district court did not address the remainder of Alan's arguments as to why the default should be set aside.[3] Alan now appeals.

On appeal, Alan primarily argues that the divorce decree should be set aside because he was never properly served with the amended

[3]Alan failed to cite to NRCP 60(b) below or in the instant appeal.

complaint pursuant to NRCP 4, or any other documentation related to the divorce proceedings. Specifically, Alan argues that Brianna improperly served the amended complaint on his criminal attorney Helmick, whom he never authorized to accept service on his behalf. Conversely, Brianna argues that service was proper because Helmick signed the acceptance of service, and Helmick was representing Alan in the criminal case, which demonstrated an agency relationship between Helmick and Alan. In addition to the service issue, Alan also argues that the divorce decree should be set aside because the district court failed to consider the best interests of the children in determining custody, failed to properly calculate child support, and failed to value the community assets before distribution. Brianna generally contends that the district court made sufficient factual findings, so the court's order should be affirmed on appeal.

A motion to set aside a default judgment "is addressed largely to the sound discretion of the court, and will not be disturbed on review unless there has been an abuse of discretion." *Cicerchia v. Cicerchia*, 77 Nev. 158, 161, 360 P.2d 839, 841 (1961) (internal citations omitted). "A default judgment not supported by proper service of process is *void* and must be set aside." *Browning v. Dixon*, 114 Nev. 213, 218, 954 P.2d 741, 744 (1998) (emphasis added); *see C.H.A. Venture v. G.C. Wallace Consulting Eng'rs., Inc.*, 106 Nev. 381, 383-84, 794 P.2d 707, 709 (1990) (reversing judgment because service was not properly effectuated, jurisdiction did not attach, and the district court had no power to enter a valid judgment). However, a default judgment may be *voidable* if the proof exhibited by the district court had "a legal tendency to show a case of jurisdiction." *Vaile v. Eighth Judicial Dist. Court*, 118 Nev. 262, 271, 44 P.3d 506, 513 (2002) (quoting *Moore v. Moore*, 75 Nev. 189, 193, 336 P.2d 1073, 1075 (1959)),

abrogated on other grounds by Senjab v. Alhulaibi, 137 Nev., Adv. Op. 64, 497 P.3d 618 (2021). Even where said proof was "slight and inconclusive, the action of the court will be valid until it is set aside by a direct proceeding for that purpose." *Id.* To elaborate, where the district "court acts without authority . . . the action of the court is *void*"; whereas if "the court only errs in judgment upon a question properly before the court for adjudication . . . [then] the order or decree of the court is only voidable." *Id.*

In this case, the district court found that service of process was proper based on Helmick's purported signature on the acceptance of service forms, which supported that Alan had authorized Helmick to accept service on his behalf in the divorce action. *See Huckabay Props., Inc. v. NC Auto Parts, LLC*, 130 Nev. 196, 204, 322 P.3d 429, 434 (2014) (recognizing that, under "general agency principles," "an attorney's act is considered to be that of the client in judicial proceedings when the client had expressly or impliedly authorized the act"). Thus, when the district court entered the default judgment in this case, there was a colorable case for jurisdiction, and therefore the default judgment entered would not be considered void. *See Kaur v. Singh*, 136 Nev., Adv. Op. 77, 477 P.3d 358, 362 (2020). However, the default judgment would be voidable if the district court did not in fact have jurisdiction at the time it entered the default judgment. *Id.*; *Browning*, 114 Nev. at 218, 954 P.2d at 744.

In his countermotion, Alan argued that the default judgment should have been set aside because he was never properly served, stating that he never gave Helmick consent to receive service on his behalf in the

divorce matter.[4] *See Foster v. Lewis*, 78 Nev. 330, 333, 372 P.2d 679, 680 (1962) ("Where the evidence that the person served was not authorized by the defendant to receive service of process is uncontradicted . . . such denial of authority must be taken by the court as true . . . ."); *see also United States v. Ziegler Bolt & Parts Co.*, 111 F.3d 878, 881 (Fed. Cir. 1997) ("The mere relationship between a defendant and his attorney does not, in itself, convey authority to accept service."). If Alan's allegations in his countermotion are taken as true, Alan created a factual controversy as to whether service of the amended complaint was proper, and thus whether the district court in fact had jurisdiction at the time it entered the default judgment. But the district court, although recognizing the typical application of NRCP 60(b) in setting aside a default judgment, failed to construe Alan's countermotion to set aside the default judgment under NRCP 60(b) for lack of service, and therefore did not consider whether the default judgment should have been set aside. *See Cicerchia*, 77 Nev. at 161, 360 P.2d at 841 (noting that NRCP 60(b) "is to be very liberally applied in a divorce proceeding" (internal quotation marks omitted)); *see also Carlson v. Carlson*, 108 Nev. 358, 361-62, 832 P.2d 380, 382 (1992) ("Rule 60 should . . . be liberally construed." (quoting *Nev. Indus. Development, Inc. v. Benedetti*, 103 Nev. 360, 364, 741 P.2d 802, 805 (1987))). Moreover, even though the district court at the hearing properly recognized that it did not "have enough information"

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[4]Attached to Alan's countermotion to set aside the default judgment is a sworn affidavit whereby Alan states that the contents of the countermotion are true or that he reasonably believes them to be true. Thus, Alan's assertion in his countermotion that Helmick "was not authorized or retained to accept service or otherwise act" on Alan's behalf was supported by a general affidavit and uncontroverted, as there was nothing in the record from Helmick which evidenced his authority to receive service on Alan's behalf.

related to the service issue, it nevertheless did not find the service of the amended complaint to be invalid and upheld the default judgment without taking further evidence.

Thus, we agree with Alan that the district court abused its discretion in failing to resolve the factual dispute as to whether Alan gave Helmick consent to accept service on his behalf. Instead, the court appears to have concluded that service was valid merely because a Nevada attorney signed the acceptance of service, without first determining that the attorney was authorized to do so. *See Foster*, 78 Nev. at 333, 372 P.2d at 680 ("In the absence of actual specific appointment or authorization, and in the absence of a statute conferring authority, an agency to accept service of process will not be implied."). Therefore, we reverse the denial of the motion to set aside and remand this matter to the district court to resolve the factual dispute and determine whether Helmick had Alan's consent to accept service on Alan's behalf. If, on remand, the district court determines service was improper and the default should be voided, then a new decree of divorce will necessarily be considered and entered. If, however, the district court determines service was valid, the court, in the first instance, should then evaluate the merits of Alan's other arguments for setting aside certain portions of the decree pursuant to a proper analysis of NRCP 60(b).[5] *See*

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[5]Specifically, the district court should consider whether any of the following portions of the divorce decree should be set aside pursuant to NRCP 60(b): (1) custody of the minor children; (2) calculation of child support; and (3) distribution of community property. *See Davis v. Ewalefo*, 131 Nev. 445, 51, 352 P.3d 1139, 1143 (2015) (stating that the district court must make "express findings as to the best interest of the child in custody and visitation matters"); NAC 425.015, 425.120 (outlining how the district court must determine the monthly gross income of an obligor after considering all financial or other information relevant to the earning

Carlson, 108 Nev. at 361-62, 832 P.2d at 382 (stating that courts should liberally construe NRCP 60(b)). Accordingly, we

ORDER this matter REVERSED AND REMAND to the district court for proceedings consistent with this order.[6]

_____, C.J.
Gibbons

_____, J.
Bulla

cc: Hon. Bryce C. Duckworth, District Judge, Family Court Division
Lansford W. Levitt, Settlement Judge
The Law Office of Lisa M. Szyc, Esq. PC
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Kainen Law Group
Eighth District Court Clerk

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capacity of the obligor); *see also Blanco v. Blanco*, 129 Nev. 723, 731-32, 311 P.3d 1170, 1175 (2013) (concluding that "[t]he equal disposition of community property may not be dispensed with through default"; further elaborating that "community property and debt must be divided in accordance with law" and the district court must "make findings on the division of property in accordance with [NRS 125.150]").

[6]Insofar as we have not addressed the merits of Alan's additional arguments on appeal, we are unable to do so until the district court addresses these additional arguments in the first instance should it be necessary.