

IN THE SUPREME COURT OF THE STATE OF NEVADA

ERNESTO HERNANDEZ,
Appellant,
vs.
PETRA C. HERNANDEZ,
Respondent.

No. 40118

FILED

FEB 19 2004

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richard*
CHIEF DEPUTY CLERK

Appellant, Ernesto Hernandez, appeals from a district court order denying his motion for NRCP 60(b) relief from a default divorce decree.¹ He contends that inconsistencies in his complaint for divorce demonstrate that his attorney misdrafted the document. We affirm.

FACTUAL AND PROCEDURAL HISTORY

Ernesto Hernandez filed a complaint for divorce against his wife, respondent Petra Hernandez. The parties had no minor children at the time.

Paragraphs eight and twelve of the complaint requested that the district court declare the marital home as his wife's sole and separate property, and that the mortgage debt on the home become her sole and separate obligation. Additionally, paragraph fifteen of the complaint stated:

That the parties shall have three (3) months from the date the Decree of Divorce is entered to remove the other party's name from the marital home or refinance the home in her name. If the Defendant fails, [sic] to remove Plaintiff's name or is ten (10) days late on the mortgage the Plaintiff will take possession of the home with out [sic] a

¹See NRAP 3A.

court order, and keep as his sole and separate property; subject to one half of the equity payable to the Defendant.

Mrs. Hernandez received a copy of the complaint, which she chose not to contest. Thereafter, the district court entered a default judgment and a decree of divorce, which included the relief specified in the complaint. Mrs. Hernandez timely refinanced the mortgage in her name, and both signed a quitclaim deed transferring ownership of the home solely to her.

Following the transfer transactions, the parties argued when Mr. Hernandez sought a reconciliation, after which he demanded one half of the equity in the home. When Mrs. Hernandez refused, Mr. Hernandez filed a motion under NRCP 60(b)(1) to set aside the divorce decree and amend his complaint. He asserted that his attorney mistakenly omitted a provision in his complaint requesting an even distribution of the home equity, and the divorce decree recited this error.

The district court denied Mr. Hernandez's motion. The court found that no errors in the complaint existed, that Mr. Hernandez intended to transfer the home solely to his wife on the conditions set forth in his complaint, and that no fraud, error or ambiguity existed to warrant NRCP 60(b) relief. The court also ordered Mr. Hernandez to pay his former spouse's attorney fees. He appeals.

DISCUSSION

On appeal, Mr. Hernandez contends that an inconsistency exists between paragraphs eight and fifteen of his complaint, which shows that his attorney omitted a provision during the drafting process. Accordingly, he reasons that the district court erred by not granting his motion for NRCP 60(b) relief. We disagree.

Under NRCP 60(b), a district court may relieve a party from a final judgment on the grounds of mistake, inadvertence, surprise, or excusable neglect. A district court has broad discretion to grant or deny a party's motion for NRCP 60(b) relief and we will not reverse a denial absent an abuse of discretion.²

We have stated:

When assessing an NRCP 60(b)(1) claim [to set aside a default judgment], the district court "must analyze whether the movant: (1) promptly applied to remove the judgment; (2) lacked intent to delay the proceedings; (3) demonstrated good faith; (4) lacked knowledge of procedural requirements"³

Finally, the party seeking NRCP 60(b)(1) relief has the burden of proof to show, by a preponderance of the evidence, mistake, inadvertence, surprise, or excusable neglect, either singly or in combination.⁴

In pressing his claims of excusable neglect, Mr. Hernandez alleges that he cannot read the English language, and that he relied upon an attorney who "markets himself to the Hispanic community in Las Vegas." He alleges that he advised his counsel of the error and was under the impression that counsel would correct the problem when he signed his verification of the divorce complaint on a separate sheet of paper. He also

²Kahn v. Orme, 108 Nev. 510, 513, 835 P.2d 790, 792 (1992).

³Lesley v. Lesley, 113 Nev. 727, 732, 941 P.2d 451, 454 (1997) (quoting Bauwens v. Evans, 109 Nev. 537, 539, 853 P.2d 121, 122 (1993), overruled in part by Epstein v. Epstein, 113 Nev. 1401, 950 P.2d 771 (1997)).

⁴Kahn, 108 Nev. at 513-14, 835 P.2d at 793.

claims to have learned of the defect in the decree when he was signing the deeds at the mortgage company and when a Spanish-speaking notary translated the documents for him. Mrs. Hernandez responded to the post-decree motion by asserting that Mr. Hernandez abandoned the home, that she complied with the provisions under which she received separate title to the property in her own name, and that Mr. Hernandez only sought to set aside the decree after her refusal to reconcile.

While Mr. Hernandez contends his attorney mistakenly failed to draft the complaint to seek an even distribution of the equity in the home, there is no internal inconsistency or ambiguity within the complaint, or between the complaint and the divorce decree suggesting or implying that Mr. Hernandez sought this result or that the alleged omission occurred. Moreover, the two possible outcomes or permutations regarding the division of the home equity from the operation of paragraph fifteen are neither internally inconsistent nor inconsistent with other provisions in the complaint.

It was perfectly reasonable for Mr. Hernandez to agree to transfer sole ownership of the home to Mrs. Hernandez on the condition that he be fully exonerated from the mortgage debt. This result is consistent with the list of separate assets and debts, as well as his specifically stated request to that effect. It was also reasonable for him to agree to the arrangement as drafted within the complaint and the decree because, if she did not exonerate him, his remaining liability on the debt would affect his future credit. Thus, the district court did not abuse its discretion as affirming the original decree as written; again per the specific relief prayed for in the original complaint.

The alternative result under paragraph fifteen is also consistent with other provisions of the complaint and is consistent with the above result. If Mrs. Hernandez failed to remove Mr. Hernandez's name from the title or refinance within three months, or if she fell delinquent in the loan payments for a period of ten days, he could take sole possession of the property, but apparently Mrs. Hernandez would remain obligated on the mortgage debt. In this situation, she would lose one half of the equity in the residence. This too was a reasonable result, as it provided a financial incentive for Mrs. Hernandez to act quickly to exonerate Mr. Hernandez from the mortgage obligation. We therefore conclude that the district court did not abuse its discretion when it found no ambiguity in the complaint warranting NRCP 60(b) relief, or that Mr. Hernandez obtained the judgment via his or his attorney's excusable neglect. In short, the district court was well within its prerogatives in concluding that counsel drafted the original complaint as Mr. Hernandez actually intended.


Finally, while the district court did not explicitly apply our four-part Leslie test in its analysis of whether NRCP 60(b)(1) relief was appropriate, we conclude that the test was implicitly satisfied. While Mr. Hernandez's motion was prompt and not calculated to delay proceedings, he could not legitimately argue that he lacked knowledge of procedural requirements because counsel represented him during the divorce proceedings. Additionally, the district court could reasonably conclude, based upon Mrs. Hernandez's affidavit, that Mr. Hernandez acted in bad faith by filing his motion for relief only after a post-divorce dispute arose between the parties. These grounds provided an additional basis for the district court's denial of husband's motion for relief from the default


judgment. Finally, the district court was free to make credibility determinations as it did and conclude that Mrs. Hernandez had correctly recapitulated the events between the separation of the parties and the filing of the post-decree motion under NRCP 60(b).

CONCLUSION

The district court did not err in denying the motion for NRCP 60(b) relief. Accordingly, we

ORDER the judgment of the district court AFFIRMED.⁵


_____, J.
Rose


_____, J.
Maupin

cc: Hon. Robert E. Gaston, District Judge, Family Court Division
Veronica Lea Burris-Valentine
Samuel S. Anter
Clark County Clerk

⁵This matter was submitted for decision by a panel of this court comprised of Justices Rose, Leavitt, and Maupin. Justice Leavitt having died in office on January 9, 2004, this matter was decided by a two-justice panel.