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Dorion v. Keane Appellant's Reply Brief Dckt. 38519

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IN THE SUPREME COURT OF THE STATE OF IDAHO

DAVE DORION

Plaintiff/Respondent,

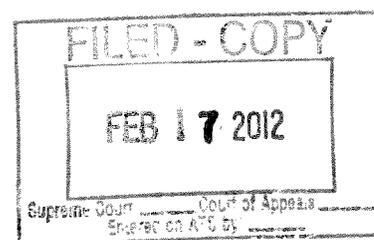
vs.

RICHARD KEANE and LISA KEANE,
husband and wife, KEANE LAND
COMPANY, PLLC, an Idaho Limited
Liability Company, KEANE AND CO.
CONSTRUCTION, INC., an Idaho
corporation, and JOHN DOES 1-5,

Defendants/Appellants.

Docket No. 38519-2011

APPELLANTS' REPLY BRIEF



APPELLANTS' REPLY BRIEF – RICHARD KEANE and LISA KEANE, husband and wife, KEANE LAND COMPANY, PLLC, an Idaho Limited Liability Company, KEANE AND CO. CONSTRUCTION, INC., an Idaho corporation

Appeal from the District Court of the Second Judicial District
of the State of Idaho, in and for the County of Nez Perce
Honorable Jeff M. Brudie, District Judge, Presiding

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INTRODUCTION

Appellants Richard and Lisa Keane, Keane Land Company, PLLC, and Keane and Co. Construction, Inc. (collectively “the Keanes”), assert that the default judgment entered on January 14, 2011, is void. Respondent Dave Dorion (“Dorion”) filed a Motion for Entry of Default within twenty-three (23) days from the date of service of the Order Permitting Leave to Withdraw to the Keanes in contravention of Rule 11(b)(3) and Rule 6(e)(1). Rule 60(b)(4) relieves a party from the judgment when it is void. Therefore, the district court erred in failing to relieve the Keanes from that judgment pursuant to Rule 60(b)(4) so this matter could be determined on the merits.

In addition, the district court erred in failing to set aside the September 8, 2010, entry of default. The Keanes demonstrated good cause for setting aside the default and the district court abused its discretion in failing to consider the Keanes’ arguments and defenses.

ARGUMENT

A. The District Court Abused Its Discretion in Failing to Set Aside the Default.

Dorion contends that “[t]he district court’s Second Entry of Default was a proper exercise of discretion.” However, the issue raised on appeal is whether the district court abused its discretion in failing to deny the Keanes’ Motion to Set Aside Default, which is examined under a “good cause” standard, not whether the grant of the entry of default was a proper exercise of discretion. Nevertheless, Dorion analyzes the “good cause” factors, to which the Keanes will now respond.

In moving to set aside an entry of default, the more lenient “good cause” standard is applied, as opposed to the more stringent standards established in Rule 60(b) for setting aside a default judgment. *McFarland v. Curtis*, 123 Idaho 931, 936, 854 P.2d 274, 279 (Ct. App. 1993). In determining whether “good cause” exists, there are three primary considerations: (1) whether the default was willful; (2) whether setting aside the default would prejudice the opposing party; and (3) whether a meritorious defense has been presented. *Id.*

In reaching its decision in the Opinion and Order on Defendants’ Motion to Set Aside Default and Plaintiff’s Motion for Entry of Default Judgment (“December 29, 2010 Order”), the district court failed to find that the Keanes’ conduct was willful or that Dorion would be prejudiced by setting aside the default. (R. Vol. I, p. 90.) The lack of findings on these “good cause” factors is an abuse of discretion in and of itself. Regardless, the Keanes’ conduct was not willful, Dorion would not have been prejudiced, and the Keanes presented a meritorious defense. The district court abused its discretion in failing to set aside the entry of default.

1. The Keanes Offered a Meritorious Defense.

In regard to whether the Keanes had presented a meritorious defense, in the December 29, 2010 Order the district court looked to its May 21, 2009 Order, where it stated that the affidavit presented in support of the Keanes’ Motion to Set Aside Default “was weak at best in presenting a meritorious defense.” (R. Vol. I, p. 90.) The court then stated that the affidavit filed in support of the current Motion to Set Aside Default offered no additional facts demonstrating a meritorious defense. (*Id.*)

The court's review and reliance on the affidavit submitted with respect to the May 21, 2009 Order shows the burden of establishing a meritorious defense was met with respect to the December 29, 2010 Order. Weak or not, the "meritorious defense" factor was met then and should likewise have been met now. The failure of the later filed affidavit to offer additional facts is irrelevant if the first affidavit was sufficient. What met the burden once cannot be diminished simply because nothing new was added.

Regardless, there were additional facts supporting a meritorious defense. The Keanes' Answer (filed after the earlier default proceedings) offered additional facts demonstrating a meritorious defense, including that Dorion's claimed interest and ownership in real property was not in writing as required under the statute of frauds. (R. Vol. I, pp. 46-47.) This goes beyond the mere notice requirements in a pleading. *See Herzinger v. Lockwood Corp.*, 109 Idaho 18, 20, 704 P.2d 350, 352 (Ct. App. 1985). The district court's failure to consider the additional facts pled in the Answer demonstrate that the court failed to reach its decision through an exercise of reason.

The district court ruled once before that the Keanes had met their burden of showing a meritorious defense. That it was a "weak" showing is of no consequence. The burden does not change the second time around. If the burden was met the first time, it should have been met the second. Nor does a second motion to set aside a default require additional facts especially if the original facts worked. Regardless, there were additional facts presented, which the district court failed to consider. The district court abused its discretion in not finding a meritorious defense.

2. The Keanes' Failure to Appear Was Not Willful and Did Not Cause Prejudice to Dorion.

The district court failed to consider or address the Keanes' argument that they had been offered an extension of time by opposing counsel in which to hire a new attorney and that was the reason no appearance was made within the relevant time frame. Instead, the court based its denial of their motion to set aside default on its perception that the Keanes should have known from the first default proceedings the need to be timely, that the Keanes were neglectful twice now, and that while an excuse is good once it cannot be used twice. (R. Vol. I, p. 90.) The court had no basis for its finding that the Keanes were "neglect[ing] the lawsuit" over the two years of its pendency, nor is such a finding a proper ground for entry of default under Rule 55(a).¹

In essence, the district court was basing its decision on credibility issues, without finding the Keanes' conduct was in fact willful or that Dorion would in fact suffer prejudice. First, after the court set aside the first default, the Keanes fully defended Dorion's prosecution of the case until their counsel withdrew on August 5, 2010. The Keanes filed their Answer, opposed Dorion's Motion for Temporary Restraining Order and Motion to Strike through briefing and submission of affidavits, and participated in a mediation on April 5, 2010. (*See* R. Vol. I, pp. 3-5.)

Instead of addressing and considering the new arguments presented by the Keanes as to why they failed to file a timely written appearance, the court seems to find that "Defendant

¹ It should be noted that there is no basis in the record for Dorion's statement that "[t]he district court concluded that Keane's actions demonstrated a pattern of failing to timely appear, and asserting through new counsel, a fictitious and incredible agreement for an equally fictitious and indefinite extension of time for the new counsel to appear." (Respondent's Brief, p. 8.)

Keane's excuse" in the September 17, 2010, Motion to Set Aside Default was the same "excuse" as that offered in the earlier Motion to Set Aside Default. This is a clear misunderstanding of the Keanes' argument and of the bases for not timely appearing. In moving to set aside the first default, the Keanes asserted they believed they had retained an attorney but there was a miscommunication and they had not, in fact, retained an attorney. (R. Vol. I, pp. 30-31.) In moving to set aside the September 8, 2010, entry of default, the Keanes' retained counsel asserted that his understanding was that counsel for Dorion had agreed to allow him an extension of time to enter an appearance in the case. (Tr. Nov. 18, 2010 Hr'g, R. Vol. I.)

The court failed to address the Keanes' new and different reason that they were given an extension of time, failed to find that the Keanes were willful in their actions, failed to consider the meritorious defenses presented by the Keanes' Answer, and failed to address how Dorion would be prejudiced by setting aside the default. The December 29, 2010 Order is in stark contrast to the court's earlier May 21, 2009, Opinion and Order on Defendants' Motion to Set Aside Default ("May 21, 2009 Order"), in which the court analyzed each consideration and granted the motion and set aside the earlier default. (R. Vol. I, pp. 41-42.) Specifically, the court found that "the failure of the Defendants to timely respond was not a willful omission" and "no prejudice would result" to Dorion by setting aside the default. (R. Vol. I, pp. 41-42.) Dorion has also not offered any evidence on appeal as to how he would be prejudiced outside of referencing the time and money he spent litigating with no disposition. It is the entry of default that resulted in Dorion not receiving a disposition, thus if the default were set aside he would

suffer no prejudice. Therefore, the district court abused its discretion in refusing to set aside the default so that the case could proceed on its merits.

B. The District Court Erred in Denying the Keanes' Rule 60(b) Motion Because the Default Judgment Was Void Pursuant to Rule (11)(b)(3).

The judgment here was void because proceedings affecting the Keanes' rights occurred within the twenty-three (23) day period prescribed in Rule 11(b)(3).

1. Proceedings Occurred Within the Twenty-Three (23) Day Period That Affected the Keanes' Rights.

Idaho Rule of Civil Procedure 11(b)(3) requires, whenever an attorney is granted leave to withdraw, "no further proceedings can be had in that action which will affect the rights of the party of the withdrawing attorney for a period of 20 days after service or mailing of the order of withdrawal to the party." I.R.C.P. 11(b)(3). Dorion contends that only the entry of default within the twenty-three day period invokes Rule 11(b)(3). Such a narrow application of this rule would defeat its very purpose.

There must be strict compliance with Rule 11(b)(3) to obtain a valid judgment.

Martinez v. Brown, 144 Idaho 410, 412, 162 P.3d 789, 791 (Ct. App. 2007). The reasoning for this strict compliance requirement is as follows:

Rule 11(b)(3) provides a readily identifiable, straightforward requirement for counsel and the courts to satisfy. Compliance with the rule obviates any need for judges to weigh conflicting evidence of actual notice or to speculate concerning a litigant's state of mind. An entitlement to relief [when there is strict compliance with the rule] produces consistent, predicable results, unaffected by the varying philosophies that underlie exercises of discretion by individual judges.

Martinez, 144 Idaho at 412, 162 P.3d at 791 (citing *Knight Ins., Inc. v. Knight*, 109 Idaho 56, 60, 704 P.2d 960, 964 (Ct. App. 1985).

Rule 1(a) states that “[t]hese rules shall be liberally construed to secure the just, speedy and inexpensive determination of every action and proceeding.” I.R.C.P. 1(a) (emphasis added).

This elevates a proceeding to a legal right and clearly a motion is a proceeding.

This motion also affected the Keanes’ rights. Dorion’s motion seeking default was the prerequisite to entry of default and without a default there can be no default judgment. This proceeding had the ultimate effect on the Keanes’ rights – the complete dismissal of their defenses, a money judgment against them, and the loss of real property.

The process established by Rule 11(b)(3) satisfies due process requirements. *See Sherwood & Roberts, Inc. v. Riplinger*, 103 Idaho 535, 538, 650 P.2d 677, 680 (1982). The fact that due process rights attach to the default process is proof that the process affects rights.

For instance, Rule 55(a)(2) provides that default proof shall not be presented to the court prior to the expiration of the period of time allowed by the rules. I.R.C.P. 55(a)(2). Thus, default proof (presumably in the form of a motion) cannot be presented to the court within the prescribed time period. Rule 11(b)(3) prescribes a time period of twenty days (plus three for mailing). The rules contemplate that allowing default proof within that time period would affect a party’s due process rights. Filing a motion should be treated the same.

Disallowing a motion for default to be filed during the time prescribed by Rule 11(b)(3) supports the purpose behind the rule, which is to obviate any need for judges to weigh conflicting evidence of actual notice or to speculate concerning a litigant’s state of mind. Allowing motions

for default to be filed within the time period prescribed by Rule 11(b)(3) raises issues of notice, time to respond, and whether the unrepresented defendant properly understood the import of the motion. This would be counter to the purpose of Rule 11(b)(3).

Dorion's motion was a proceeding affecting the Keanes' rights, which occurred within the twenty-three (23) day prescribed period. This makes the judgment void.

2. The District Court's Entry of Default Did Not Strictly Comply With Rule 11(b)(3).

Under Dorion's heading that the court's entry of default strictly complied with Rule 11(b)(3), Dorion argues that the Rule 11(b)(3) order did strictly comply with the rule. As part of this argument, he asserts that the Keanes' attorney drafted the Rule 11(b)(3) order, but he provides no record support for this assertion. Regardless, the author of the order is irrelevant. Strict compliance is for the protection of the unrepresented litigant. Besides, the district court entered the order, which is the error, not whether the author drafted it properly. The Rule 11(b)(3) order did not strictly comply with the rule and thus the judgment was voidable and should have been set aside as a matter of law. *See Reinwald v. Eveland*, 119 Idaho 111, 112, 803 P.2d 1017, 1018 (Ct. App. 1991).

There must be strict compliance with Rule 11(b)(3) to obtain a valid judgment. *Id.* As stated *supra*, the reasoning for this strict compliance requirement is as follows:

Rule 11(b)(3) provides a readily identifiable, straightforward requirement for counsel and the courts to satisfy. Compliance with the rule obviates any need for judges to weigh conflicting evidence of actual notice or to speculate concerning a litigant's state of mind. An entitlement to relief [when there is strict compliance with the rule] produces consistent, predictable results, unaffected by the varying

philosophies that underlie exercises of discretion by individual judges.

Martinez v. Brown, 144 Idaho 410, 412, 162 P.3d 789, 791 (Ct. App. 2007) (citing *Knight Ins., Inc. v. Knight*, 109 Idaho 56, 60, 704 P.2d 960, 964 (Ct. App. 1985)). While Dorion seeks to distinguish Idaho cases on their facts, the rule remains the same.

In *Reinwald*, there was an appeal from an order denying a motion to set aside a default judgment. Quoting Rule 11(b)(3), the Court of Appeals specifically noted the language of the last sentence holding that it had particular significance. That sentence states:

If such party fails to file and serve an additional written appearance in the action . . . within such 20 day period, such failure shall be sufficient ground for entry of default and default judgment against such party or dismissal of the action of such party, with prejudice, without further notice, which shall be stated in the order of the court.

I.R.C.P. 11(b)(3) (emphasis added.) The Court of Appeals determined that the order in that case did not notify the defendant that, in addition to the possible consequences of the entry of a default, a judgment by default also could be taken against her without further notice. *Reinwald*, 119 Idaho at 112, 803 P.2d at 1018. The Court of Appeals ruled that the trial court erred as a matter of law in not granting the motion to set aside the default for failure to include these words because it is strict compliance, not substantial compliance, that is required by Rule 11(b)(3). *Id.* The difficulties encountered by failing to craft or tailor to the particular circumstances of a case can be avoided by quoting, verbatim, the wording of Rule 11(b)(3).

In *Martinez*, the district court's order of withdrawal failed to notify Martinez that his claim could be dismissed "with prejudice" should he fail to appoint a new attorney or appear on

his own behalf within the designated period. 144 Idaho at 412, 162 P.3d at 791. The Court of Appeals found that “the rule requires the order of withdrawal to specifically inform the now unrepresented party that the failure to make a new written appearance in person or through new counsel shall be sufficient grounds for entry of a default judgment or dismissal of the party’s claims ‘with prejudice, without further notice.’” *Id.* (emphasis in original). Thus, the Court of Appeals indicated the order of withdrawal must include all those words and, for lack of the two words, “with prejudice,” in the order of withdrawal, the Court of Appeals held that the default judgment entered against Martinez was invalid for failing to strictly satisfy the plain requirements of Rule 11(b)(3). *Id.*

Dorion also cites to *Sherwood & Roberts, Inc. v. Riplinger*, 103 Idaho 535, 650 P.2d 677 (1982), in support of his proposition that the order contained the proper language here. However, the Court in *Riplinger* did not address whether the language in the order was sufficient. Instead, the appellant argued that he should have been provided with written notice of the application for judgment as required under Rule 55(b)(2) and that his verbal contact with the court clerk was sufficient to constitute an appearance. 103 Idaho at 537-39, 650 P.2d at 679-81. He also raised a due process argument. *Id.* at 549, 650 P.2d at 681. The appellant did not contend that the order had failed to strictly comply with Rule 11(b)(3) and thus Dorion’s reliance on this authority is misplaced.

Adopting Dorion’s interpretation of the rule to consider the facts and circumstances of the case would create a situation where judges once again have to weigh conflicting evidence or speculate concerning a litigant’s state of mind, contrary to the stated purpose of requiring strict

compliance with Rule 11(b)(3). As stated above, Rule 11(b)(3) is meant to relieve the district court of its discretion by requiring absolute compliance. The Rule 11(b)(3) order here did not strictly comply with the language of the rule. Therefore, the district court's entry of default did not strictly comply with Rule 11(b)(3).

C. The Order Permitting Leave to Withdraw Failed to Comply With Rule 11(b)(3).

Dorion contends that, even if the district court's Order Permitting Leave to Withdraw failed to comply with Rule 11(b)(3), the Keanes have failed to show an effect on the Keanes' rights or prejudice to the Keanes. Strict compliance, by definition, eliminates any requirement to show an effect or prejudice. That is why none of the cases cited by either party discuss whether a party was prejudiced.

Under Rule 11(b)(3), any failure to comply with the specific wording of the rule makes a judgment void. *Martinez*, 144 Idaho at 412, 162 P.3d at 791. The words missing from the district court's Order Permitting Leave to Withdraw are words that are required by the rule and their absence makes the judgment void.

Therefore, the district court erred in refusing to grant the Keanes' Rule 60(b) Motion and the default judgment entered against the Keanes on January 14, 2011, should be deemed void.

D. The Keanes' Rule 60(b) Motion Was Timely Filed.

Dorion asserts that the Keanes' March 21, 2011, Rule 60(b) Motion was untimely and thus the Keanes' arguments raised therein should not be considered on appeal. The Keanes filed their motion nine weeks after judgment was entered, which easily falls within a reasonable time as required by Rule 60(b).

Rule 60(b) sets forth the following guideline for timeliness: “The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than six (6) months after the judgment, order, or proceeding was entered or taken.” The Keanes based their March 21, 2011, Rule 60(b) Motion on the contention that the default judgment was void, which is “reason” (4) under Rule 60(b), to which the reasonable time period applies. In *Wright v. Wright*, 130 Idaho 918, 950 P.2d 1257 (1998), a motion was made under Rule 60(b)(4) and the Idaho Supreme Court stated that to obtain relief under Rule 60(b)(4), the motion must be made within a reasonable time. 130 Idaho at 922, 950 P.2d at 1261. In *Wright*, five years passed between the entering of the judgment and the Rule 60(b)(4) motion and the Court found, based on the facts of that case, that the Rule 60(b)(4) motion was filed within a reasonable time. *Id.* The Court did not apply the six month requirement from Rule 60(b). Therefore, the six month requirement does not apply here.

The basis of the Keanes’ Rule 60(b) motion, and the Keanes’ arguments on appeal, is that the judgment, entered January 14, 2011, was void. The Keanes could not have brought a Rule 60(b)(4) motion until such judgment was entered because the rule, by its plain language, applies to judgments. *See McFarland v. Curtis*, 123 Idaho 931, 935, 854 P.2d 274, 278 (Ct. App. 1993) (“The clerk’s entry of default is not a final judgment or order, unlike the default judgment.”) Thus, Dorion’s arguments that the Keanes neglected to raise the argument in their September 17, 2010, motion to set aside default, or within a reasonable time after the September 8, 2010, entry of default, are without merit.

The Keanes filed their Rule 60(b) motion nine weeks after the judgment was entered. Dorion has pointed to no facts or circumstances establishing that the Keanes unreasonably delayed by filing their motion nine weeks after the judgment was entered and this period objectively falls within a reasonable time frame.

E. The Keanes Have Not Abandoned Their Affirmative Defenses.

Dorion presents a circular argument that the Keanes' appeal should be denied because they have abandoned their affirmative defenses by not timely appearing after receipt of the Order Permitting Leave to Withdraw. The case cited by Dorion in support of his argument states that a failure to comply with Rule 11(b)(3) justifies a presumption that a party abandoned his defense and the district court may enter a default judgment. *See Sherwood & Roberts, Inc. v. Riplinger*, 103 Idaho 535, 540, 650 P.2d 677, 682 (1982). Should this Court determine the district court did not abuse its discretion in denying the Keanes' Rule 60(b) motion, the case would not go forward and any such abandonment is moot. Should the Court determine the district court did abuse its discretion in denying the Keanes' Rule 60(b) motion, the "presumption of abandonment" would not be applicable. Thus, this argument asserted by Dorion is without merit.

F. The Keanes Are Entitled to Attorney Fees on Appeal.

Should the Keanes prevail on appeal, they are entitled to attorney fees pursuant to I.C. § 12-120(3). The basis of Dorion's claims against the Keanes is a commercial transaction. (R. Vol. I, pp. 12-21.) "The court must always award attorney fees to the prevailing party 'in commercial transactions.'" *Meyers v. Hansen*, 148 Idaho 283, 292, 221 P.3d 81, 90 (2009) (quoting I.C. § 12-120(3)). Dorion contends that even if the Keanes prevail on appeal, they are

not entitled to attorney fees because they have not prevailed on the underlying claim, and he cites to *Mackay v. Four Rivers Packing Co.*, 145 Idaho 408, 179 P.3d 1064 (2008), in support of that proposition. However, the full cite from *Mackay* is as follows:

Mackay is the prevailing party on appeal but it remains to be seen whether he will be the prevailing party in the action, and, therefore, entitled to attorney fees under I.C. § 12-120(3). The district court, upon final resolution of the case, may consider fees incurred on appeal when it makes a determination as to the prevailing party.

145 Idaho at 415, 179 P.3d at 1071. Thus, the Supreme Court must still make a determination whether the Keanes are entitled to attorney fees on appeal in order to preserve their right to receive the award should they prevail in the district court.

G. Dorion Is Not Entitled to Attorney Fees.

If Dorion is the prevailing party on appeal, he is entitled to an award of attorney fees on appeal. However, Dorion is not entitled to an award of attorney fees for the underlying matter as the district court did not award him attorney fees below and he has not filed a cross-appeal raising the issue. See *Wattenbarger v. A.G. Edwards & Sons, Inc.*, 150 Idaho 308, 324 n. 5, 246 P.3d 961, 977 n. 5 (2010) (“The district court did not err in denying the fee request based on the statute. Respondents did not cross-appeal this issue and we do not, therefore, consider the matter on appeal.”).

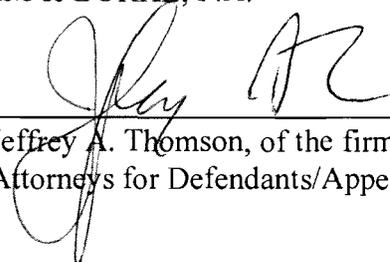
CONCLUSION

The Keanes respectfully request that this Court reverse the district court’s denial of their Rule 60(b) Motion and/or find that the district court abused its discretion in failing to set aside the entry of default and reverse and remand for a trial on the merits.

DATED this 17 day of February, 2012.

ELAM & BURKE, P.A.

By: _____

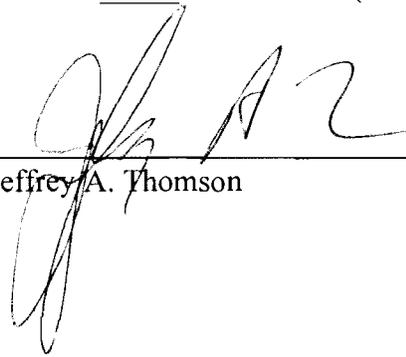

Jeffrey A. Thomson, of the firm
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17 day of February, 2012, I caused a true and correct copy of the foregoing document to be served as follows:

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