1-3-2018

Nunez v. Johnson Respondent's Brief Dckt. 45136

IN THE SUPREME COURT OF THE STATE OF IDAHO

LYDIA NUNEZ,

Plaintiff/Appellant,

vs.

CARL JOHNSON,

Defendant/Respondent.

Idaho Supreme Court
Docket No. 45136

Bonneville County
Case No. CV-16-482

RESPONDENT'S BRIEF

Appeal from the District Court of the Seventh Judicial District
of the State of Idaho, in and for the County of Bonneville

Honorable Dane H. Watkins, Jr., District Judge, Presiding

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Statement of the Case

Johnson agrees, for the most part, with the Statement of the Case contained in Nunez's brief. However, Nunez's brief either omits or misstates two important facts. First, Nunez states that "Nunez' withdrawing counsel never served a copy of the order on Nunez as ordered by the court." Appellant's Brief, p. 3. At the hearing on the Motion to Set Aside Order of Dismissal, counsel for Nunez admitted that Nunez had picked up her entire file (which presumably included a copy of the Order Allowing Withdrawal of Attorney) from withdrawing counsel's office. Tr. p. 5, L. 24 – p. 6, L. 2.

Second, and perhaps more importantly, Nunez misstates what happened to the copy of the Order Allowing Withdrawal of Attorney that was sent to Nunez by the court clerk via certified mail. Nunez's brief states that "[t]he clerk mailed a copy of the Order to Nunez but it was returned to the court." Appellant's Brief, p. 3. That is incorrect. The Order sent by the clerk was returned to the post office on September 6, 2017, after notice was left for Nunez at her address. It was then held at the post office for several weeks, then sent out again and ultimately delivered to Nunez on September 27, 2016. R., p. 25.

Attorney Fees and Costs on Appeal

Pursuant to Idaho Appellate Rules 35(b)(5), 40, and 41(a), Johnson requests an award of costs and attorney fees incurred on appeal. I.A.R. 40 provides that costs shall be allowed as a matter of course to the prevailing party.

Johnson seeks an award of attorney fees on appeal pursuant to Idaho Code § 12-121. That statute allows for an award of attorney fees in a civil action to a prevailing party "when the judge finds that the case was brought, pursued or defended frivolously, unreasonably or without foundation." I.C. § 12-121. "Where the appellant fails to present any significant issue on appeal regarding a question of law, where no findings of fact made by the trial court are clearly or arguably unsupported by substantial evidence, where we are not asked to establish any new legal standards or modify existing ones, and where the focus of the case is on the application of settled law to the facts, the appeal is deemed to be without foundation. Under those circumstances, attorney fees should be awarded to the respondent." *Troche v. Gier*, 118 Idaho 740, 742, 800 P.2d 136, 138 (Ct.App. 1990).

In the instant case, the parties agree on the facts (other than those misstated in Nunez's brief, discussed above). As will be discussed below, Nunez's arguments on appeal mischaracterize the nature of the appeal, and misstate the standard of review to be applied by this Court. For these reasons, Johnson respectfully requests an award of costs and attorney fees incurred on appeal.

Argument

I. Standard of Review and Scope of Appeal

Nunez's brief misstates that standard of review in this matter. The paragraph in Nunez's brief regarding standard of review reads, in its entirety: "Failure to comply with

Idaho R. Civ. P. 11.3 creates an entitlement to relief from a default judgment. Since the grounds for relief from judgment are non-discretionary, 'the question presented is one of law upon which the appellate court exercises free review.' *Knight Ins. V. Knight*, 109 Idaho 56, 704 P.2d 960 (Idaho Ct. App. 1985)." Appellant's Brief, p. 4. What Nunez's brief fails to acknowledge is that this is not an appeal from a dismissal of a case pursuant to Rule 11.3. Rather, this is an appeal of a denial of a motion to set aside a dismissal pursuant to Rule 60(b).[1] This Court has repeatedly held that whether to grant a Rule 60(b) motion is discretionary with the trial court, and that therefore, such a decision will be reviewed under an abuse of discretion standard. *Jim & Maryann Plane Family Trust v. Skinner*, 157 Idaho 927, 342 P.3d 639, at fn. 2 (2015).[2]

This Court has stated: "It must be recalled that the sole issue on appeal from a denial of appellants' Rule 60(b) motion to set aside the judgment against them is whether the trial court abused its discretion in denying the motion. Accordingly, its decision will not be set

[1] At the time the Notice of Appeal was filed, the time for appealing either the Order for Dismissal or the Judgment of Dismissal had passed. It is also noted that the Motion to Set Aside which is the subject of this appeal only sought to set aside the Order of Dismissal, but did not seek to set aside the Judgment of Dismissal. R., pp. 15–20.

[2] In the *Skinner* case, this Court pointed out that unlike this Court, the Court of Appeals applies a de novo standard of review when a judgment is challenged as void pursuant to Rule 60(b)(4). *Jim & Maryann Plane Family Trust v. Skinner*, 157 Idaho 927, 342 P.3d 639, at fn. 2 (2015). This Court then determined that it would not decide at that time "whether to abandon the standard of review that [it] has traditionally applied in appeals from decisions applying I.R.C.P. 60(b)(4) in favor of the standard adopted by the Court of Appeals." *Id.*

aside absent a clear showing of abuse of discretion. A Rule 60(b) motion is not a substitute for a timely appeal." *Dustin v. Beckstrand*, 103 Idaho 780, 783, 654 P.2d 368, 371 (1982) (internal citations omitted).

II. The District Court did not abuse its discretion in denying the Motion to Set Aside Order of Dismissal

An "issue raised on appeal that is not supported in the brief by propositions of law or authority is deemed waived and will not be considered by this Court." *Woods v. Sanders*, 150 Idaho 53, 58, 244 P.3d 197, 202 (2010). Nunez has not argued that the district court abused its discretion in denying the Motion to Set Aside Order of Dismissal, despite the fact that abuse of discretion is the applicable standard of review for this appeal. Therefore, this Court should not consider any argument that the district court abused its discretion. In the event this Court decides to review that issue, Johnson offers the following argument.

The district court did not abuse its discretion in denying the Motion to Set Aside Order of Dismissal. "Where (1) the trial court makes findings of fact which are not clearly erroneous; (2) the court applies the proper criteria under I.R.C.P. 60(b); and (3) the court's legal conclusions follow logically from the application of such criteria to the facts found, then the court will be deemed to have acted within its sound discretion." *Bull v. Leake*, 109 Idaho 1044, 1047, 712 P.2d 745, 748 (Ct.App. 1986).

At the hearing on the Motion to Set Aside Order of Dismissal, Judge Watkins recognized that the decision whether to set aside an order under Rule 60(b) is discretionary with the trial court. Tr. p. 9, L. 15–20; Tr. p. 11, L. 16–23; Tr. p. 12, L. 2–15. Judge Watkins made findings of fact that the court clerk sent the Order Allowing Withdrawal of Attorney to Nunez, that such order was delivered to Nunez on September 27, 2016, and that Nunez also likely received the Order when she picked up her file from her withdrawing counsel's office. Tr. p.11, L. 4–10. He further made findings of fact that Nunez waited four and a half months after the Order was entered to take any action in the case, and that the technical defect on the face of the order (20 days vs. 21 days) did not make a factual difference in this case. Tr. p. 12, L. 24 – p. 13, L. 2. Judge Watkins then discussed the law pertaining to excusable neglect and applied that law to the facts of the case. Tr. p. 13, L. 7–18. Judge Watkins ultimately concluded that "allowing four months to pass, having been given notice in . . . at least two ways" was unreasonable. Tr. p. 13, L. 15–18.

Because the district court recognized the issue as one of discretion, recognized the applicable legal standard, made findings of fact which have not been challenged as erroneous, and applied the law to those facts, the district court did not abuse its discretion to denying the Motion to Set Aside Order of Dismissal. The district court's decision should be upheld by this Court.

III. The Order Allowing Withdrawal of Attorney is not void.

As discussed above, this Court applies an abuse of discretion standard to a district court's decision whether to grant relief under Rule 60(b), regardless of which subsection of Rule 60(b) is being discussed. Johnson would urge this Court not to abandon its traditional approach in favor of that taken by the Court of Appeals with respect to review of a motion under Rule 60(b)(4). As stated by this Court, "[a] Rule 60(b) motion is not a substitute for a timely appeal." *Dustin v. Beckstrand*, 103 Idaho 780, 783, 654 P.2d 368, 371 (1982). Nunez could have appealed the Judgment of Dismissal – she did not do so. Instead she filed a Motion to Set Aside the Order of Dismissal (not the Judgment), which was denied, and she now asks this Court to review that denial under a de novo standard. The practical effect of this is to extend the time for appeal of a judgment of dismissal, despite the fact that the applicable rules explicitly state that a Rule 60(b) motion does not terminate the time for an appeal. I.A.R. 14(a); *see also* I.C.R.P. 60(c)(2) ("The motion does not affect the judgment's finality or suspend its operation.").

However, in the event this Court determines that it will abandon its traditional approach and follow the standard of review applied by the Court of Appeals, Johnson offers the following argument.

Nunez argues that the Order of Dismissal was void for three reasons: (1) neither the Motion to Withdraw nor the Notice of Hearing were served on Nunez; (2) the Order

Allowing Withdrawal of Attorney ordered the matter stayed for 20 days and required an appearance by Nunez within 20 days, even though the new version of Rule 11.3 allows 21 days; and (3) the matter was stayed until Nunez was served with the Order, and Nunez's withdrawing counsel never served her with the Order. These arguments will be addressed in turn.

A. The Order of Dismissal is not void because the Motion for Withdrawal of Attorney and Notice of Hearing were not served on Nunez.

The Motion for Withdrawal of Attorney and Notice of Hearing do not appear to have been served on Nunez. That does not, however, render the Order of Dismissal void. The Court of Appeals addressed a similar issue in *McClure Engineering, Inc. v. Channel 5 KIDA*, 143 Idaho 950, 155 P.3d 1189 (Ct.App. 2006). In that case, the client of the withdrawing attorney did not timely receive the notice of hearing on the motion to withdraw. *Id.*, 143 Idaho at 955, 155 P.3d at 1189. The Court of Appeals held that "[t]his defect does not, however, invalidate the withdrawal order or the subsequent default judgment." *Id.* The Court cited I.R.C.P. 61, which "instructs that the court, at every stage of a proceeding, 'must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.'" *Id.* The Court extrapolated that "untimely notice of a hearing requires no relief on appeal unless the aggrieved parties show that the untimeliness of the notice prejudiced them in some way." *Id.* The Court of Appeals concluded:

> Here, the crux of the defendants' argument is not that they were prejudiced by the untimely service of the notice of hearing but that they did not receive notice at all, which apparently was due to Workman's failure to pick up certified mail sent to the Las Vegas address. The defendants have not shown that if the notice of hearing had been mailed earlier, or the hearing held later, the notice would have been received. The untimeliness of service of the notice of hearing on Rolig's motion to withdraw was not a cause of the claimed prejudice; it was harmless error.

Id.

In the instant case, there has been no assertion that had Nunez received the motion to withdraw and related notice of hearing, the result would have been any different. She did receive the Order Allowing Withdrawal, and could have acted then, but did nothing. Thus, her non-receipt of the motion and notice were not the cause of the dismissal, and constitute harmless error under Rule 61.

B. The Order of Dismissal is not void because the Order Allowing Withdrawal of Attorney referenced "20 days" instead of "21 days."

Similarly, the fact that the Order Allowing Withdrawal of Attorney stayed the action for 20 days and required Nunez to appear within 20 days constitutes harmless error under I.R.C.P. 61. This is a technical defect, as the current version of I.R.C.P. 11.3(c) allows 21 days for an appearance by the party or her new attorney (and a corresponding 21-day stay). There has been no argument and no evidence that the use of the phrase "20 days" instead of "21 days" in the Order caused Nunez to act any differently than she did, or in any way

affected her substantive rights.

When Idaho courts have held that an order allowing withdrawal of an attorney is void on its face, it has generally been because the order did not apprise the party of the actions she was required to take and/or the consequences for failing to take those actions. *See, e.g., Blanc v. Laritz*, 119 Idaho 359, 806 P.2d 452 (Ct.App. 1991); *Fisher Sys. Leasing v. J & J Gunsmithing & Weaponry Design*, 135 Idaho 624, 21 P.3d 946 (Ct.App. 2001); *Knight Insurance, Inc. v. Knight*, 109 Idaho 56, 704 P.2d 960 (Ct.App. 1985); *Martinez v. Brown*, 144 Idaho 410, 162 P.3d 789 (Ct.App. 2007); *Rodell v. Nelson*, 113 Idaho 945, 750 P.2d 966 (Ct.App. 1988). These cases involved orders containing defects which pertained directly to the substantive rights of the party whose attorney was withdrawing, unlike the technical defect in the order at issue here. The defect in this order constitutes harmless error under Rule 61 and is not grounds for disturbing the order or judgment.

C. The Order of Dismissal is not void because the Order Allowing Withdrawal of Attorney was not served on Nunez by withdrawing counsel.

Finally, Nunez argues that the Order of Dismissal is void because the Order Allowing Withdrawal of Attorney ordered withdrawing counsel to serve the Order on Nunez, and he never did so.

First, the Order Allowing Withdrawal of Attorney *was* served on Nunez in compliance with the current version of Rule 11.3. The rule states that "[t]he clerk of the

court will serve on all parties, including the party represented by the withdrawing attorney, an order permitting an attorney to withdraw." I.R.C.P. 11.3(c)(1). The clerk did in fact serve the order on Nunez by certified mail, as reflected in the Notice of Entry. Aug. p. 13. The tracking information shows that the Order was actually received by Nunez. R., p. 25. Thus, there was no defect in the service of the Order under Rule 11.3.

Second, the fact that the Order stated that withdrawing counsel must serve the Order on Nunez (in compliance with the old rule, rather than the new), constitutes harmless error under Rule 61. There has been no argument that Nunez failed to act when she received the Order because it came to her via certified mail from the Court, and she was relying on the language in the Order that her withdrawing counsel had to serve the Order on her.

Third, the Order *was* arguably served on Nunez by withdrawing counsel. She picked her entire file up from withdrawing counsel's office, which file presumably contained the Order. Tr. p. 5, L. 24 – p. 6, L. 2. This constitutes personal service and/or acceptance of service by Nunez.

Because the defects in the motion, notice, and order constituted harmless error, and because Nunez was served with the Order Allowing Withdrawal of Attorney in compliance with Rule 11.3, the Order of Dismissal is not void.

Conclusion

For the foregoing reasons, Johnson respectfully requests that the Court affirm the

district court's denial of Nunez's Motion to Set Aside Order of Dismissal. Johnson also respectfully requests an award of his attorney fees and costs incurred on appeal.

RESPECTFULLY SUBMITTED this 28th day of December, 2017.

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Certificate of Service

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