DA 18-0691

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 262N

MARK A. STEEN,

Plaintiff and Appellant,

v.

WOLF CREEK INVESTMENTS, LLC and
QUARRY BAY CAPITAL, LLC,

Respondents and Appellees.

APPEAL FROM: District Court of the First Judicial District,
In and For the County of Lewis and Clark, Cause No. BDV-2017-203
Honorable Michael F. McMahon, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Jordan Y. Crosby, Ugrin Alexander Zadick, P.C., Great Falls, Montana

Cynthia T. Kennedy, Kennedy Law Firm, P.C., Lafayette, Colorado

For Appellee Quarry Bay Capital, LLC:

Murry Warhank. Jackson, Murdo & Grant, P.C., Helena, Montana

Submitted on Briefs: June 26, 2019

Decided: October 29, 2019

Filed:

Clerk

Chief Justice Mike McGrath delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Mark Steen appeals two First Judicial District Court orders—a December 18, 2017 order granting Quarry Bay Capital, LLC's motion to set aside default judgment and a November 1, 2018 order granting Quarry Bay's motion for summary judgment. We reverse.

¶3 This action stems from a partnership dispute between Mark Steen, a Colorado resident, and Richard Terrance Heard, a Canadian citizen. In October 2016, judgment against Heard over this dispute was entered in a Utah court ("Utah Judgment") for $7.5 million. At the time of the judgment, Heard was the record owner of a ranch ("Property") in Lewis in Clark County, Montana. In an effort to collect against Heard, Steen registered the Utah Judgment in Montana under the Uniform Registration of Foreign Judgments Act.[1]

¶4 On November 10, 2016, shortly after entry of the Utah Judgment, Heard conveyed the Property to Wolf Creek Investments, LLC ("Wolf Creek"), a Montana limited

[1] To date, no part of the Utah Judgment has been satisfied.

liability company managed by Heard's relative.[2] On November 18, 2016, Quarry Bay Capital, LLC, a Delaware limited liability company, obtained a $1.1-million mortgage on the Property, payable "on demand," with Wolf Creek and Heard both listed as borrowers on the note. The mortgage served as security for an outstanding loan Quarry Bay made to Mayan Minerals, Ltd. ("Mayan"), a British Columbia corporation operated by Heard, prior to entry of the Utah Judgment. Quarry Bay's mortgage was junior to two liens on the Property held by First Security Bank.[3]

¶5 On December 6, 2016, Steen filed a lawsuit against Heard and Mayan in the Supreme Court of British Columbia, wherein the court issued a "Mareva" injunction, freezing Heard's assets.

¶6 On March 22, 2017, seeking to collect on the Utah Judgment, Steen filed a Complaint in Montana against Wolf Creek, claiming Heard's transfer of the Property to Wolf Creek in November 2016 was fraudulent pursuant to the Montana Uniform Fraudulent Transfer Act ("MUFTA").

¶7 On April 28, 2017, upon discovering that the Property was encumbered by the Quarry Bay mortgage, Steen filed an Amended Complaint adding Quarry Bay as a

[2] Steen notes in his Amended Complaint that prior to the Utah Judgment, Heard engaged in a number of other conveyances in British Columbia, presumably to shield his assets in anticipation of losing the Utah lawsuit.

[3] First Security's liens included a July 2012 promissory note executed by Heard, totaling $423,098 and a January 2013 promissory note in the amount of $202,912 each secured by a mortgage on the Property.

defendant. Steen restated his original claims against Wolf Creek.[4] Additionally, Steen alleged that Quarry Bay's mortgage on the Property was a fraudulent loan of Heard's personal funds to himself through his instrumentality Quarry Bay, and the Quarry mortgage was a fraudulent conveyance of interest in Property to prevent Steen from collecting on the Utah Judgment.

¶8 On May 15, 2017, Quarry Bay's registered agent was properly served with the Summons and Amended Complaint by a process server at Quarry Bay's Delaware address—its only registered business address. Quarry Bay failed to appear or respond.

¶9 On June 13, 2017, Wolf Creek filed an Amended Answer. Wolf Creek denied that Heard's transfer of the Property to Wolf Creek was fraudulent but admitted to executing a loan document to Quarry Bay in conjunction with the transfer.

¶10 On June 16, 2017, Steen requested the District Court enter default against Quarry Bay for its failure to respond. On June 20, 2017, default was entered. On September 15, 2017, Steen requested entry of default judgment against Quarry Bay. On September 25, 2017, the District Court granted Steen's motion for default judgment.

¶11 On October 18, 2017, Quarry Bay filed a motion to set aside the default judgment. In its request, Quarry Bay relied on the declaration of Tom Sharp, Quarry Bay's secretary, alleging Quarry Bay did not receive any notice of the lawsuit until September 28, 2017, when Heard emailed the motion for default judgment to Sharp.

[4] Despite the issues on appeal focusing exclusively on Quarry Bay, Wolf Creek, a Montana company, remains a party to the suit. Wolf Creek did not file a brief.

¶12 On December 18, 2017, the District Court granted Quarry Bay's motion to set aside the default judgment; however, the default remained. On December 28, 2017, Quarry Bay filed a motion to set aside default. On February 9, 2018, Steen filed a motion to reinstate the default judgment.

¶13 On March 19, 2018, the District Court granted Quarry Bay's motion to set aside the default and denied Steen's request to reinstate default judgment.

¶14 On May 16, 2018, Quarry Bay reconveyed its junior mortgage on the Property to Heard, extinguishing Quarry Bay's interest in the property; however, Quarry Bay explicitly reserved its right to collect on Heard's outstanding debt.

¶15 On August 10, 2018, Quarry Bay filed a motion for summary judgment, arguing that Steen's request for relief was moot upon Quarry Bay's reconveyance of the Property to Heard, and that the remaining alter-ego claim should be dismissed under the doctrine of forum non conveniens.

¶16 On November 1, 2018, the District Court granted Quarry Bay's motion for summary judgment and dismissed Steen's complaint without prejudice. Steen appeals.

¶17 As a preliminary matter, we address Quarry Bay's claim in their answer brief asserting that Steen's appeal of the December 2017 order setting aside default judgment is untimely because Steen failed to file an appeal within thirty days following the order, in violation of M. R. App. P. 4(2)(a) and 4(5)(a)(i). M. R. App. P. 6(3)(a) allows for an aggrieved party to appeal in civil cases "[f]rom an order made after final judgment, including an order vacating or refusing to vacate a default judgment . . . ." M. R. App. P. 4(1)(a) defines final judgment as a judgment that "conclusively determines

the rights of the parties and settles all claims in controversy in an action or proceeding, including any necessary determination of the amount of costs and attorney fees awarded or sanction imposed." Furthermore, M. R. App. P. 6(5)(a) identifies a non-exhaustive list of orders and judgments that are not appealable, including, "an order or judgment which adjudicates fewer than all claims as to all parties, and which leaves matters in the litigation undetermined . . . ." Here, Wolf Creek remains a party to the litigation, and against whom Steen maintains additional claims. Therefore, the time limit for appeal does not apply to the District Court order vacating default judgment. Steen's appeal is timely.

¶18 Steen first argues on appeal that the District Court erred in setting aside default judgment against Quarry Bay because Quarry Bay failed to meet the criteria set forth in M. R. Civ. P. 60(b)(1) for relief from a final judgment. We agree.

¶19 Two principles guide our review of a trial court's decision to set aside a default judgment: default judgments are disfavored, and trial courts enjoy "sound discretion" when considering a motion to set aside default. *Lords v. Newman*, 212 Mont. 359, 363, 688 P.2d 290, 293 (1984). We review a trial court's grant of a motion to set aside a default judgment for a manifest abuse of discretion. *Benintendi v. Hein*, 2011 MT 298, ¶ 17, 363 Mont. 32, 265 P.3d 1239. A manifest abuse of discretion is one that is obvious, evident, or unmistakable. *Shammel v. Canyon Res. Corp.*, 2003 MT 372, ¶ 12, 319 Mont. 132, 82 P.3d 912.

¶20 A default judgment is a final judgment that terminates the litigation and decides the dispute. *Essex Ins. Co. v. Jaycie, Inc.*, 2004 MT 278, ¶ 10, 323 Mont. 231, 99 P.3d

651. The burden of proof rests on the party seeking to set aside default judgment. *Empire Lath & Plaster v. American Casualty Co.*, 256 Mont. 413, 416, 847 P.2d 276, 278 (1993). A court may relieve a party from a final judgment for "mistake, inadvertence, surprise, or excusable neglect" if a motion is made no more than a year after the entry of judgment. M. R. Civ. P. 60(b)(1), (c)(1). In addition, a defaulting party must show: (1) that they proceeded with diligence in responding to the entry of judgment; (2) that their neglect was excusable; (3) that the judgment, if permitted to stand, will injure the defaulting party; and (4) a meritorious defense to plaintiff's cause of action. *Blume v. Metropolitan Life Ins. Co.*, 242 Mont. 465, 467, 791 P.2d 784, 786 (1990); *JAS, Inc. v. Eisele*, 2014 MT 77, ¶ 34, 374 Mont. 312, 321 P.3d 113.

¶21 Excusable neglect requires some justification for an error beyond mere carelessness or ignorance of law on the part of the litigant or his attorney. *In re Marriage of Castor*, 249 Mont. 495, 499, 817 P.2d 665, 667 (1991). Evidence of office mismanagement, neglect, and inattentiveness by high-level employees can support a default judgment. *Roberts v. Empire Fire & Marine Ins. Co.*, 278 Mont. 135, 140, 923 P.2d 550, 553-54 (1996). The District Court determined Quarry Bay met the excusable neglect standard based on their assertion that they lacked notice of the lawsuit prior to Heard's email to their secretary. However, proper service fairly and reasonably effectuates the purpose of giving a defendant adequate notice to defend the action. *See Mont. Prof'l Sports, LLC v. Nat'l Indoor Football League, LLC*, 2008 MT 98, ¶ 31, 342 Mont. 292, 180 P.3d 1142. Quarry Bay's registered agent was properly served at Quarry Bay's only business address, providing sufficient notice. Therefore, to demonstrate

excusable neglect, Quarry Bay was required to provide some additional justification for their failure to respond. They did not. Because Quarry Bay did not meet the excusable neglect standard, we need not address the remaining *Blume* elements. The District Court manifestly abused its discretion in setting aside default judgment against Quarry Bay.

¶22 The District Court's decision to set aside the default judgment is reversed and remanded with instruction to reinstate the default judgment against Quarry Bay. Consequently, the District Court's order granting summary judgment in favor of Quarry Bay is also reversed.

¶23 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. This appeal presents no constitutional issues, no issues of first impression, and does not establish new precedent or modify existing precedent.

¶24 Reversed and remanded with instructions consistent with this Opinion.

/S/ MIKE McGRATH

We Concur:

/S/ JAMES JEREMIAH SHEA
/S/ DIRK M. SANDEFUR
/S/ LAURIE McKINNON
/S/ INGRID GUSTAFSON