ORIGINAL

20030200

IN THE SUPREME COURT

FOR THE STATE OF NORTH DAKOTA

Deplazes Redi Mix,	)	
	)	Supreme Court No. 20030200
Plaintiff - Appellant,	)	
	)	
vs.	)	District Court No. 65-02-C-083
	)	
Art Rinas and Phyllis Rinas; Marty Werner, Myron Wittwer a/k/a Mike Wittwer, both individually and d/b/a WW Masonry,	)	
	)	
Defendants-Appellee.	)	

APPEAL FROM ORDER VACATING DEFAULT JUDGMENT
NORTHEAST JUDICIAL DISTRICT

THE HONORABLE JOHN C. McCLINTOCK, JR., PRESIDING

BRIEF OF APPELLANT

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I. STATEMENT OF CASE

This is an action in which Deplazes Redi Mix seeks to collect for redi-mix concrete and other materials delivered to Art and Phyllis Rinas' property. The district court entered default judgment in Deplazes' favor on December 31, 2002. On April 2, 2003, Rinas filed a Motion to Vacate Judgment and for Stay of Execution. The Towner County, North Dakota sheriff satisfied the Execution on April 15, 2003 after levying on Rinas' bank account. On May 8, 2003, the court mailed a Memorandum Opinion which vacated the default judgment and which ordered that the execution be vacated. Notice of Appeal was filed on July 3, 2003. The Order Vacating Default Judgment was entered on July 31, 2003.

II. STATEMENT OF FACTS

Deplazes Redi Mix delivered rock, sand, gravel and redi-mix concrete to Rinas' property between August 17 and September 17, 2001, but Deplazes never received payment for this material. App. 3-4. Deplazes served a Summons and Complaint on Rinas by personal service on November 19, 2002. App. 5. On November 22, 2002, Deplazes counsel received a letter from Rinas in which Rinas denied liability for the debt. Rinas later mailed an Answer to Deplazes counsel on December 13, 2002, but Rinas never filed their Answer with the court. On December 16, 2002, Deplazes served Rinas with a Notice of Motion for Partial Default Judgment. Rinas filed a Motion to Deny Motion for Partial Default Judgment on December 23, 2002, and Deplazes responded with a letter to the court dated December 31, 2002. The court entered Judgment on

Default in Deplazes' favor on December 31, 2002, and Notice of Entry of Judgment was mailed to Rinas on January 6, 2003.

The Judgment was transcribed to Towner County, North Dakota on March 14, 2003, and an Execution was issued to the sheriff of Towner County, North Dakota on March 26, 2003. Rinas filed a Notice of Motion and Motion to Vacate the default judgment under Rule 60(b)(vi) on April 3, 2003, and Deplazes filed a Brief in Opposition to Rina's Motion to Vacate Judgment. The Towner County sheriff satisfied the Execution on April 15, 2003. Rinas then filed a Motion for Stay of Execution on April 21, 2003, and Deplazes filed a Brief in Opposition to Motion for Stay of Execution on April 25, 2003. The court, in an undated Memorandum Opinion, granted Rinas' Motion to vacate the default judgment and ordered that the execution be vacated and that the money levied on be returned to Rinas. The court's memorandum opinion was mailed to Deplazes' and Rinas' counsel on May 8, 2003.[1] The Order Vacating the Default Judgment was entered on July 31, 2003, and this appeal followed.

III. ISSUES

1. DID THE DISTRICT COURT ABUSE ITS DISCRETION WHEN IT VACATED THE DEFAULT JUDGMENT AND VACATED THE EXECUTION AND ORDERED THAT MONEY LEVIED ON BE RETURNED TO RINAS?

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[1]The Memorandum Opinion issued by the district court was not dated, but the Certificate of Service attached to the Memorandum Opinion and signed by the Court Reporter indicates that the Memorandum Opinion was mailed to counsel on May 8, 2003.

IV. LAW AND ARGUMENT

1. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT VACATED THE DEFAULT JUDGMENT AND VACATED THE EXECUTION AND ORDERED THAT MONEY LEVIED ON BE RETURNED TO RINAS.

While a memorandum order itself is not appealable, an "appeal from an order or memorandum decision will be treated as an appeal from a subsequently entered consistent judgment, if one exists." Zueger v. Carlson, 542 N.W.2d 92, 94 n.2 (N.D. 1996). The record herein contains an Order Vacating Default Judgment dated July 31, 2003 which is consistent with the May 8, 2003 memorandum opinion. Since the record herein "contains a subsequent [order] which is consistent with the memorandum opinion," this appeal is properly before North Dakota Supreme Court. Id.

a. The trial court misinterpreted and misapplied the law.

A motion under Rule 60(b)(vi) "is left to the sound discretion of the trial court and will not be disturbed on appeal unless the court abused that discretion." First National Bank of Crosby v. Bjorgen, 389 N.W.2d 789, 794 (N.D. 1986).

"A trial court abuses its discretion when it misinterprets or misapplies the law. . . ." Woodworth v. Chillemi, 1999 ND 43, ¶7, 590 NW2d 446. The trial court misinterpreted and misapplied Rules 12 and 55, N.D.R.Civ.P. when it issued its Memorandum Opinion. In its Memorandum Opinion, the court found that "Plaintiffs issued a summons and complaint against the defendants which was

served upon them on November 19, 2002. Pursuant to Rule 55, the defendants then had 20 days to respond to the Complaint." App. 15. However, Rule 12(a) N.D.R.Civ.P. is the rule that requires a defendant who is served with a summons to answer within 20 days after service of the summons, while Rule 55 N.D.R.Civ.P. pertains to default. N.D.R.Civ.P. 12(a). Under Rule 12(a) N.D.R.Civ.P., Rinas was required to serve an answer on Deplazes no later than December 9, 2003. N.D.R.Civ.P. 12(a). Rinas totally failed to comply with Rule 12(a) N.D.R.Civ.P. since they did not mail their Answer until December 13, 2002, four days after the time for serving an Answer had expired.[2] Rinas never filed their answer with the court.

> The trial court determined that since the defendants had appeared,
>
> they were entitled to an additional notice of motion for default judgment. This notice was apparently sent to the defendants on December 16, 2002, and gave the defendants an additional eight days within which to file an answer with the clerk of court.

App. 15. However, neither Rule 55, N.D.R.Civ.P. nor United Accounts, Incorporated v. Lantz, 145 NW2d 488 (N.D. 1966) gives Rinas an additional eight days to file an Answer with the court.

In United Accounts, Incorporated v. Lantz, the plaintiff moved for default judgment after the defendant appeared, but without providing the defendant

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[2] In Rinas Brief in Support of Motion to Deny Motion for Partial Default Judgment, Rinas admit that their Answer to Deplazes Summons and Complaint was due on December 9, 2002. See, Brief in Support of Motion to Deny Motion for Partial Default Judgment dated December 23, 2002, docket entry number 8.

eight (8) days notice of plaintiff's motion for default judgment as required by N.D.R.Civ.P. 55. The Court held that when an Answer is

> served after the time specified in the summons or our rules [N.D.R.Civ.P. 12(a)]. . . it nevertheless does constitute an appearance under Rule 55 . . . and the plaintiff under such Rule [55] is required to serve the notice of application for judgment at least eight days prior to the hearing on the application for a default judgment.

United Accounts, Incorporated v. Lantz, 145 NW2d at 491. However, United Accounts does not grant an additional eight days within which to file an Answer, and it does not extend or expand the 20 days mandated under Rule 12(a) N.D.R.Civ.P. for a defendant to serve an answer when they have appeared in an action.

Rule 55 of the North Dakota Rules of Civil Procedure requires that when default judgment is sought against a defendant who has appeared after having been served with a Summons and Complaint, that the defendant must be "served with written notice of the application for judgment at least eight days before the hearing on the application." N.D.R.Civ.P. 55(a)(3).[3] Rule 55 N.D.R.Civ.P. does not mandate an evidentiary hearing or hearing with oral argument before entry of default judgment. Workers Comp. Bureau v. Kostka Food Service, 516 N.W.2d 278, 280 (N.D. 1994). Rather,

> [w]hen the defendant has made an appearance, a party seeking

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[3] Rule 55 N.D.R.Civ.P. was amended effective March 1, 2003. Rule 55 as cited above reflects Rule 55 N.D.R.Civ.P. in effect when Default Judgment was entered herein on December 31, 2002.

> default judgment must notify the defendant either that a hearing will be held or that the motion will be submitted on briefs. If the latter, the movant must notify the defendant that the application for default will be considered on the affidavits and briefs under NDROC 3.2 unless a hearing is timely requested and scheduled.

Id. at 281.

Deplazes Redi Mix complied with the requirements of Rule 55 N.D.R.Civ.P. and with the Court's holding in Kostka Food Service. On December 16, 2002, Deplazes Redi Mix served the following documents on Rinas:

1. Notice of Motion for Partial Default Judgment Against Art Rinas and Phyllis Rinas and Myron Wittwer a/k/a Mike Wittwer d/b/a WW Masonry
2. Notice of Motion (Rule 3.2)
3. Motion for Partial Default Judgment
4. Brief in Support of Motion for Partial Default Judgment
5. Affidavit of no Answer, Identification, Non-Military Status, Amount Due, and Costs and Disbursements
6. Judgment on Default
7. Findings of Fact, Conclusions of Law and Order for Judgment
8. Reply to Counterclaim
9. Plaintiff's First Set of Interrogatories to Defendant Phyllis Rinas and Demand for Production of Documents
10. Plaintiff's First Set of Interrogatories to Defendant Art Rinas and Demand for Production of Documents

App. 9-10. Deplazes served two (2) Notices of Motion on Rinas on December

16, 2002, and both Notices provided Rinas with notice of Deplazes' intent to obtain default judgment against Art Rinas and Phyllis Rinas. Deplazes' first notice captioned "Notice of Motion for Partial Default Judgment against Art Rinas and Phyllis Rinas and Myron Wittwer a/k/a Mike Wittwer d/b/a WW Masonry" contained the language required by Rule 55 N.D.R.Civ.P. and informed Rinas that:

> 1. Deplazes had filed an Application for Partial Default Judgment against them pursuant to Rule 55;
>
> 2. Copies of the Application for Partial Default Judgment and supporting documents were attached;
>
> 3. The Application was submitted pursuant to a 3.2 Motion and that no hearing had been scheduled;
>
> 4. If Rinas wished to have a hearing they should contact the District Court within eight days;
>
> 5. If Rinas did not request a hearing, that the court would decide the Motion based upon the court file.

App. 6. Deplazes' second notice captioned "Notice of Motion" contained the language required by Rule 3.2 N.D.R.Ct. and informed Rinas that:

> 1. Deplazes had filed a Motion for Partial Default Judgment against them under Rule 3.2(c) N.D.R.Ct.;
>
> 2. Rinas had ten (10) days after service of the motion and brief within which to serve and file an answer brief;
>
> 3. Upon the filing of briefs, the Motion was deemed submitted and taken under advisement by the Court;
>
> 4. No hearing was requested by Deplazes and the matter will be decided upon briefs unless Rinas timely requests oral argument.

App. 8. The Motion for Partial Default Judgment, Affidavit of No Answer, Findings of Fact and Judgment were all included with Deplazes' motion for partial default judgment and all were served upon Rinas. App. 9-10. Deplazes' Notices of Motion contained the notices and language required under, and in conformity with, Rule 55 N.D.R.Civ.P. and with Rule 3.2 N.D.R.Ct., and informed Rinas of Deplazes' intention to immediately obtain a default judgment. See, Workers Comp. Bureau v. Kostka Food Service, 516 N.W.2d 278, 281 (N.D. 1994).

Deplazes followed the procedure required to obtain a default judgment under Rule 55, N.D.R.Civ.P., and provided Rinas both with eight days notice of Deplazes' intent to obtain default judgment and with documents supporting Deplazes' motion. Rinas was aware of Deplazes' intention to obtain judgment by default and responded by filing a Motion to Deny Motion for Partial Default Judgment. Rinas chose to rely upon the briefs and arguments filed with the court, and Rinas chose not to request a hearing on Deplazes' motion for default judgment. "A Rule 60(b) motion is not to be used to relieve a party from free, calculated, and deliberate choices." First National Bank of Crosby v. Bjorgen, 389 N.W.2d 789, 796 (N.D. 1986). Based upon the pleadings on file, the court entered judgment on default in Deplazes' favor.

In First Federal Savings and Loan Association v. Hulm, 328 NW2d 837 (N.D. 1982), the North Dakota Supreme Court reviewed a number of decisions involving the reopening of default judgments and observed:

> [I]n each case in which this Court has set aside a default judgment under Rule 60(b), N.D.R.Civ.P., the movant provided an explanation for having permitted the entry of the default judgment which, in the court's opinion, constituted a sufficient justification for setting aside the default judgment to allow the case to be heard on its merits."

Id. at 840. Rinas did not provide an explanation for having permitted the entry of default judgment in the first place, and Rinas do not assert that their failure to request a hearing on Deplazes' Motion for Partial Default Judgment was anything other than a free and deliberate choice. Rinas were personally served with a Summons and Complaint, and Rinas' failure to timely file an Answer does not constitute excusable neglect and it also does not provide sufficient justification for setting aside the default judgment. First American Bank & Trust of Carrington v. McLaughlin Investments, 407 NW2d 505, 507-08 (N.D. 1987). To avoid the consequences of the Rules of Civil Procedure, parties who have been served with a Summons and Complaint must do more than express surprise and generally deny liability. US Bank v. Arnold, 2001 ND 130 ¶25, 631 NW2d 150 (quoting the district court). Disregard of the legal process does not constitute excusable neglect. First American Bank & Trust of Carrington v. McLaughlin Investments, 407 NW2d 505, 507 (N.D. 1987).

A Rule 60(b) motion to vacate judgment "may not be used to relitigate factual questions and present evidence which was available to be presented at trial." Heller v. Heller, 367 NW2d 179, 183 (N.D. 1985). As part of their affidavits in support of their Motion to Vacate Default Judgment, Rinas submitted an

alleged contract between themselves and WW Masonry and copies of cancelled checks they wrote to WW Masonry to the court. These documents were available to Rinas when Deplazes filed for default judgment, and Rinas should have submitted these documents as part of their response to Deplazes' Motion for Partial Default Judgment rather than submitting them more than 3 months after judgment was entered. Rinas chose not to submit these documents as part of their reply to Deplazes' Motion for Partial Default Judgment, and Rinas chose not to appeal the entry of default judgment. If Rinas objected to the default judgment entered by the court, Rinas "should have appealed from that judgment instead of waiting [over 3 months] and using a 60(b) motion [since a] 60(b) motion is not to be used as a substitute for an appeal." First National Bank of Crosby v. Bjorgen, 389 NW2d 789, 796 (N.D. 1986).

The trial court clearly misinterpreted the requirements of Rules 12 and 55, N.D.R.Civ.P. and misapplied those rules to the facts of this case when it entered its Memorandum Opinion and Order Vacating Default Judgment. This misinterpretation and misapplication constitutes an abuse of discretion that requires the North Dakota Supreme Court to reverse the Order Vacating Default Judgment.

b. The trial court acted in an arbitrary, unreasonable or unconscionable manner.

A trial court abuses its discretion "when its decision is not the product of

a rational mental process leading to a reasoned determination." Woodworth v. Chillemi, 1999 ND 43, ¶7, 590 NW2d 446. The court is required to utilize a rational mental process to consider the facts and law together "for the purpose of achieving a reasoned and reasonable determination." Ringsaker v. N.D. Workers Compensation Bureau, 2003 ND 122, ¶12 (quoting Kopp v. Kopp, 2001 ND 41, ¶7). With due respect to the trial court, the May 8, 2003 Memorandum Opinion, upon which the Findings of Fact and Order Vacating Default Judgment were based,[4] is not the product of a rational mental process demonstrating a thoughtful consideration of the both the facts and law for purposes of achieving a reasoned and reasonable decision. In its Memorandum Opinion, the trial court found that "partial default judgment was entered on January 8, 2003, and default judgment was entered on January 10, 2003. Notice of entry of judgment was sent to the defendants on January 10, 2003." App. 16. These findings are both irrational and incorrect, and they evidence the lack of a rational mental process. The trial court entered Judgment on Default on December 31, 2002, and Notice of Entry of Judgment was mailed to Rinas on January 6, 2003. App. 11-14.

In its Memorandum Opinion the court also found that Deplazes' December 16, 2002 Notice of Motion for Partial Default Judgment "gave the

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[4] Both the Findings of Fact and Order Vacating Default Judgment contain bracketed language [ ]. The bracketed language was inserted by Deplazes' counsel in effort to indicate corrections, and the bracketed language was not contained in the trial court's memorandum order.

defendants an additional eight days within which to file an answer with the clerk of court." App. 15. This finding by the court is not only a misinterpretation of law, but it is also an incorrect finding of fact. Deplazes Notice of Motion for Partial Default Judgment did not give Rinas an additional eight days to file an answer. Instead, it informed Rinas that if Rinas wished to have a hearing on Deplazes' Motion for Partial Default Judgment, Rinas was required to contact the District Court's office within eight days after receiving the Notice. A simple review of the court record readily indicates that the trial court was not rationally cognizant of the pleadings herein when it entered its Memorandum Opinion which vacated the default judgment.

As argued above, the court misinterpreted and misapplied Rules 12 and 55 N.D.R.Civ.P. The combination of the court's misinterpretation and misapplication of the law together with the court's erroneous analysis of undisputed facts prevented the court from utilizing a rational mental process leading to a reasoned determination. Therefore, the court abused its discretion when it entered its Memorandum Opinion and Order Vacating Default Judgment, and this constitutes an abuse of discretion which requires the North Dakota Supreme Court to reverse the trial court's decision.

V. CONCLUSION

The trial court abused its discretion by misinterpreting the requirements of Rules 12 and 55, N.D.R.Civ.P. and by misapplying those rules to the facts of this case when it entered its Memorandum Opinion and Order Vacating Default

Judgment. The trial court also abused its discretion since its May 8, 2003 Memorandum Opinion, upon which the Findings of Fact and Order Vacating Default Judgment are based, is not the product of a rational mental process demonstrating a cognitive consideration of the both the facts and law and leading to a reasoned decision. This abuse of discretion requires the North Dakota Supreme Court to reverse the Order Vacating Default Judgment and REINSTATE the Judgment on Default.

Respectfully submitted this 4th day of September, 2003.

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Attorney for Plaintiff-Appellant

STATE OF NORTH DAKOTA)
)ss.
COUNTY OF PIERCE)

Affidavit of Service by Mail

Dawn Opdahl, being duly sworn, on oath deposes and says: That she is a citizen of the United States, over 18 years of age, and that on the 4th day of SEPTEMBER, 2003, this affiant served the attached Brief of Appellant and Appendix of Appellant upon Kenneth Bulie, by placing a true and correct copy thereof in an envelope addressed to the last reasonably ascertainable post office address as follows:

Kenneth Bulie
Attorney at Law
416 Main Street
Cando, North Dakota 58324

and depositing said envelope with postage prepaid in the United States Mail at Rugby, North Dakota.

Dawn Opdahl
Dawn Opdahl

Subscribed and sworn to before me this 4th day of SEPTEMBER 2003.

William R. Hartl
Notary Public, North Dakota
My Commission Expires 1-25-2007.