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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Key Energy Services, LLC, Plaintiff-Appellee, vs. Ewing Construction Co. Inc.; Defendant-Appellant, And Bridger Construction Services Inc.; Jensen & Son Construction, Inc.; Oil-Well Lubricant Dispense Systems, Inc.; Crane-Tec, Inc.; The Sherwin-Williams Company; Harper Ready Mix Company; Gaston Engineering & Surveying, P.C.; Selid Plumbing and Heating, Inc.; Distribaire, Inc.; Alliance Steel, Inc.; Ahern Rentals, Inc.; Cal's Carpet Inc.; Wagner Concrete Corp.; Fargo Glass & Paint Company; Alpha Overhead Door, Inc.; Warner Enterprises, Inc. d/b/a Energy Electrical Distribution Co.; KLE Construction LLC; C4, LLC; Dakota Fire Protection, Inc.; WE Integrage, LLC; James Dean McMains d/b/a D & M Steel Buildings; and all other persons unknown claiming any estate or interest in, or lien or encumbrance upon, the property described in the complaint, Defendants,	Supreme Court No. 20170324 Williams Co. No. 53-2015-cv-00113

APPEAL FROM ORDER DENYING DEFENDANT EWING CONSTRUCTION CO., INC.'S MOTION FOR RELIEF FROM DEFAULT JUDGMENT, DATED JULY 28, 2017.

THE DISTRICT COURT OF WILLIAMS COUNTY, NORTH DAKOTA
NORTHWEST JUDICIAL DISTRICT
THE HONORABLE BENJAMEN J. JOHNSON, PRESIDING

BRIEF OF APPELLANT

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STATEMENT OF THE ISSUE

1. The District Court erred in denying Ewing Construction Co., Inc.'s motion for relief from the default judgment entered against it for $951,191.62.

I. STATEMENT OF THE CASE

[¶1] Ewing Construction Co., Inc. ("Ewing") appeals the District Court's denial of relief from default judgment in the amount of $951,191.62. This is simply too large and too complex a case to be decided via default judgment.

[¶2] Ewing served as general contractor for Key Energy Services, LLC's ("Key Energy") P3 Service Center Project. Key Energy filed suit in January 2015, responding to construction liens filed against its property. Among the 23 defendants was Ewing. Key Energy alleged Ewing failed to pay its subcontractors, prompting this suit.

[¶3] Ewing argues Key Energy owes it and its subcontractors in excess of $913,213.16 for work done pursuant to the contract documents, as well as additional work completed by Ewing. Key Energy acknowledges it owes Ewing at least $425,098.20. Ewing maintains it was not responsible for the damages Key Energy seeks in its lawsuit, and therefore judgment should not be entered against it. If this case had gone to trial, these issues would have been properly litigated, and Key Energy would not have obtained the judgment it did, due to the large amount of funds it owes Ewing and its subcontractors.

[¶4] Key Energy moved for default judgment in June 2016, against numerous non-answering parties, including Ewing.[1] Judgment was entered against Ewing on June 22, 2016 in the sum of $951,191.62. Ewing moved for relief from default judgment on May 12, 2017, arguing it had not been properly served, and the Return of Officer submitted by Key Energy was defective. In the alternative, Key Energy argued excusable neglect. The District Court, based on a new,

[1] There were eleven non-answering defendants in this case, including international corporations like the Sherwin-Williams Company. See App. at 60.

revised return filed by Key Energy, found Ewing was properly served, and that it did not move to vacate in a timely fashion.

II. STATEMENT OF THE FACTS

[¶5] In August 2012, Key Energy hired Ewing to design and serve as the general contractor for the P3 Service Center, in Williston, North Dakota. App. at 41 ¶ 2. The P3 Service Center is located at the following described real property:

> A sixty (60) acre tract in NE 1/4 of the NE 1/4, E 1/2 of the NW 1/4 of the NE 1/4, Section 24, Township 154 North, Range 102 West.

App. at 13 ¶ 8.

[¶6] The contract between Key Energy and Ewing required Key Energy to pay Ewing $6,811,908.58 in exchange for Ewing designing and constructing the P3 Service Center. App. at 13 ¶ 9. Key Energy and Ewing agree that Key Energy has yet to fully pay Ewing and its subcontractors, but disagree as to the amount owed to Ewing. App. at 13-14 ¶ 9. Key Energy acknowledged it owes Ewing at least $425,098.20, but Ewing alleged in response that Key Energy owes Ewing and its subcontractors in excess of $913,213.16. App. at 41 ¶ 3.

[¶7] The P3 Service Center was completed in March 2014. App. at 41 ¶ 4. Following the project's completion, Ewing and Key Energy met multiple times to review documents and final payments to Ewing and to its subcontractors. App. at 41 ¶ 4. All balances due were confirmed in writing. App. at 41 ¶ 4. On May 30, 2014, Key Energy sent a "Notification of Corrective Work" seeking to impose additional construction obligations and/or duties upon Ewing beyond what was negotiated. App. at 42 ¶ 4. After meeting with Key Energy, Ewing disputed this notification in writing on June 13, 2014. App. at 42 ¶ 4. Ewing maintains Key Energy failed to make the agreed-upon payouts to Ewing and its subcontractors. App. at 42 ¶ 4.

[¶8] Key Energy alleged it served a summons upon Bill Ewing Jr. as representative of Ewing. App. at 45. Ewing Jr. does not recall being served, and after a diligent search of Ewing's records, no record of service can be found. App. at 41, 42 ¶ 3, 5.

[¶9] In the summer of 2016, Ewing Jr. became aware Key Energy was preparing to file bankruptcy. App. at 43 ¶ 6. In late June 2016, Ewing Jr. received notice through the mail that Key Energy had filed a Motion for Default Judgment for all "Non-Answering Defendants." App. at 43 ¶ 6.

[¶10] In February 2017, Ewing Jr. was served with a lawsuit attempting to enforce or "domesticate" the default judgment in the 28th District Court of Nueces County, Texas. App. at 43 ¶ 7. At that time Ewing Jr. retained attorneys in Texas and North Dakota to address the lawsuit. App. at 43 ¶ 7.

III. ARGUMENT

A. STANDARD OF REVIEW

[¶11] The standard of review in this case is whether "the trial court abused its discretion in denying" a motion to vacate default judgment. See King v. Montz, 219 N.W.2d 836, 839 (N.D. 1974). "A court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner, when it misinterprets or misapplies the law, or when its decision is not the product of a rational mental process leading to a reasoned determination. Meier v. Meier, 2014 ND 127, ¶ 7, 848 N.W.2d 253 (citation omitted).

[¶12] The Court abused its discretion in denying Ewing's motion for relief from default judgment, because the Court did not have personal jurisdiction over Ewing, due to improper service of process, and because the default judgment was the result of excusable neglect.

B. JUDGMENT ON THE MERITS IS PREFERRED TO DEFAULT JUDGMENT

[¶13] "[D]ecisions on the merits are preferable to those by default." Throndset v. L.L.S., 485 N.W.2d 775, 778 (N.D. 1992) (citing CUNA Mortgage v. Aafedt, 459 N.W.801, 803 (N.D. 1990)); see also Bender v. Liebelt, 303 N.W.2d 316, 318 (N.D. 1981); Warnke v. Warnke, 2011 ND 212, ¶ 29, 806 N.W.2d 606; Breyfogle v. Braun, 460 N.W.2d 689, 693 (N.D. 1990); Murdoff v. Murdoff, 517 N.W.2d 402, 403 (N.D. 1994); First Nat. Bank of Crosby v. Bjorgen, 389 N.W.2d 789, 795 (N.D. 1986).

[¶14] "This court has long encouraged trial courts to be more lenient when entertaining Rule 60(b) motions to vacate default judgments as distinguished from 'litigated' judgments, that is, judgments entered after trial on the merits." CUNA Mortgage v. Aafedt, 459 N.W.2d 801, 803 (N.D. 1990). In fact, the Court noted that:

> [N]o cases were discovered in which our trial courts were held to have abused their discretion in vacating judgment, but citing several occasions in which our trial courts abused their discretion in refusing to vacate a judgment under Rule 60(b)).

Overboe v. Brodshaug, 2008 ND 112, ¶ 8, 751 N.W.2d 177 (*citing* Suburban Sales & Serv., Inc. v. District Court of Ramsey County, 290 N.W.2d 247, 252 (N.D. 1980)).

[¶15] "Because we prefer decisions on the merits, trial courts should be more lenient when entertaining motions to vacate default judgments as distinguished from judgments entered after a trial on the merits." State v. $33,000.00 U.S. Currency, 2008 ND 96, ¶ 6, 748 N.W.2d 420, 424. "[W]e are more inclined to reverse an order denying vacation of a default judgment than one granting vacation, because we favor trial on the merits." Id. (*citing* Workers Comp Bureau v. Kostka Food Serv. Inc., 516 N.W.2d 278, 280 (N.D. 1994).

[¶16] This Court's preference for judgments based on the merits should be especially true where there are complex issues involved. This case, with the plaintiff filing bankruptcy, multiple

nationally known defendants, and a judgment of almost one million dollars, should be decided on its merits. Research indicates this Court has not come close to sustaining a default judgment of this size. To Ewing's knowledge, the largest default judgment addressed by this Court was Thompson v. Goetz, 455 N.W.2d 580 (N.D. 1990), and was for $390,000.00. And this Court found in favor of vacating the default judgment. Thompson, 455 N.W.2d at 588. This is simply too large and too complex a case to be decided via default judgment. There are too many factors in play, and too many issues upon which the parties disagree.

C. THE COURT DID NOT HAVE PERSONAL JURISDICTION OVER EWING, DUE TO IMPROPER SERVICE OF PROCESS

[¶17] "Generally, personal jurisdiction over a party is acquired by service of process in compliance with N.D.R.Civ.P. 4." Monster Heavy Haulers, LLC v. Goliath Energy Servs., LLC, 2016 ND 176, ¶ 13, 883 N.W.2d 917; see also Alliance Pipeline L.P. v. Smith, 2013 ND 117, ¶ 18, 833 N.W.2d 464. "Absent valid service of process, even actual knowledge of the existence of a lawsuit is insufficient to effectuate personal jurisdiction over a defendant." Id.; see also Olsrud v. Bismarck-Mandan Orchestral Ass'n, 2007 ND 91, ¶ 9, 733 N.W.2d 256. "[A] judgment based on service where the procedural requirements of the rule have not been followed is void." Garaas v. Cass Cty. Joint Water Res. Dist., 2016 ND 148, ¶ 24, 883 N.W.2d 436, 443 (citation omitted).

[¶18] N.D.R.Civ.P. 4(d)(3) governs how service of process may be made outside of the state of North Dakota. It reads:

> Service on any person subject to the personal jurisdiction of the courts of this state may be made outside the state:
> (A) In the same manner as service within this state, with the force and effect as though service had been made within this state.
> (B) Under the law of the place where service is made for service in that place in an action of any of its courts of general jurisdiction; or
> (C) As directed by court order.

N.D.R.Civ.P.4(d)(3) (emphasis added).

[¶19] As there was no court order directing service in this matter, Key Energy, to properly serve Ewing, would have to comply with either North Dakota or Texas's law for service. Ewing is a corporation, and so the rules for service upon a corporation must be followed.

[¶20] North Dakota requires service to be made upon a domestic or foreign corporation, partnership, or other unincorporated association, by:

> (i) Delivering a copy of the summons to an officer, director, superintendent or managing or general agent, or partner, or associate, or to an agent authorized by appointment or by law to receive service of process on its behalf, or to one who acted as an agent for the defendant with respect to the matter on which the plaintiff's claim is based and who was an agent of the defendant at the time of service;
> (ii) If the sheriff's return indicates no person upon whom service may be made can be found in the county, then service may be made by leaving a copy of the summons at any office of the domestic or foreign corporation, partnership, or unincorporated association within this state with the person in charge of the office or;
> (iii) Any form of mail or third-party commercial delivery addressed to any of the foregoing persons and requiring a signed receipt and resulting in delivery to that person.

N.D.R.Civ.P. 4(d)(2)(D) (emphasis added). North Dakota Rules further provide that if served by a sheriff or other officer, proof of service must be made by the officer's certificate of service. N.D.R.Civ.P. 4(i)(1).

[¶21] Pursuant to the Texas Rules, a true copy of the "pleading, plea, motion, or application to the court for an order" must state the grounds, must set forth the relief or order sought, and must be served on all other parties. Tex. R. Civ. P. 21(a).

[¶22] Tex. R. Civ. P. 21a governs methods of service. Service may be made by delivering a copy to the party to be served, or the party's duly authorized agent or attorney of record in a manner specified within the rule. Tex. R. Civ. P.21a(a). Notice may be served by a party to the suit, an attorney of record, a sheriff or constable, or by any other person competent to testify.

TexR.Civ.P.21a(d). "[T]he return of the officer, . . . shall be prima facie evidence of the fact of service." Tex.R.Civ.P.21a(e). "Nothing herein shall preclude any party from offering proof that the document was not received, . . ." Tex. R.Civ.P.21a(e).

[¶23] Key Energy alleges it served Ewing via a Nueces County, Texas constable. App. at 45. The return of the sheriff upon any process or notice is prima facie evidence of the facts stated in such return. N.D.C.C. § 11-15-16. The parties challenging the sheriff's return have the burden of establishing its insufficiency or falsity. Dakota Bank & Tr. Co. of Fargo v. Fed. Land Bank of Saint Paul, 437 N.W.2d 841, 843 (N.D. 1989) (citation omitted). Ewing, therefore, has the burden of establishing the insufficiency of the sheriff's return. One "against whom a presumption is directed has the burden of proving that the nonexistence of the presumed fact is more probable than its existence." Farm Credit Bank of St. Paul v. Stedman, 449 N.W.2d 562, 564 (N.D. 1989) (citation omitted).

[¶24] Ewing more than overcomes the presumption that it was properly served, because the purported return of officer does not satisfy the requirements of either North Dakota or Texas law. There are several issues with the Return that should give the Court pause. First, the Return was not notarized, despite a clear and conspicuous place on the Return calling for notarization. App. at 45. Second, there is no evidence any documentation was served upon Ewing. App. at 45. The Return purports that it delivers "this citation" to Bill Ewing Jr. "together with the accompanying copy of the _____." App. at 45. The purported Constable did not fill in the blank, specifying what exactly was served upon Ewing. There is no indication anything was served beyond the citation from the officer. Both North Dakota and Texas require service of the pleadings upon the defendant. This return in no way indicates service was completed to the standards required by law. Third, portions of the form are scribbled out, and

replaced with indecipherable writing, muddying the clarity of the form. App. at 45. Finally, the serving deputy's signature is illegible, and does not appear to match the name of the constable who stamped the document as served. App. at 45. Compare the Return of Officer for Ewing with the other Returns of Officer on Record for the other defendants, and the document's deficiencies become even more obvious and troubling. App. at 46-54. Specifically, compare it to the Return of Officer for Distribaire, Inc., another defendant, whose service took place in Texas. App. at 53. The Return of Officer for Ewing is clearly deficient when compared to those of the other defendants.

[¶25] The evidence offered by Key Energy does not meet the North Dakota requirements for service on a foreign corporation. The Return of Officer offered by Key Energy does not show the summons and complaint were delivered to an appropriate individual, nor does it indicate the summons was left at an appropriate office as required by the North Dakota Rules of Civil Procedure. Similarly, Key Energy has not shown the Texas requirements were followed. Thus, service was not appropriately accomplished under N.D.R.Civ.P. 4(d)(3).

[¶26] Bill Ewing Jr., the individual that Key Energy purports to have served, submitted a sworn affidavit to that effect, indicating he had had no memory of being served by Key Energy, and Ewing has no file or record of the documents Key Energy had purportedly served upon it. App. at 40-44. The documents were not served upon Ewing.

[¶27] After Ewing raised concerns as to validity of the Return of Officer, Key Energy filed an amended, "corrected" proof of service, which is wholly ineffective. App. at 56. A review of this document shows it is a completely new document, apparently copied from the original, only with the blanks filled in and the document notarized. App. at 56. Key Energy clearly read Ewing's brief, and then "fixed" the problems, in an attempt to make its proof of service acceptable.

[¶28] This second Return of Officer is not based on personal knowledge or memory. It was based on a presumption of what happened. The Court cannot allow this to stand. The public policy implications of allowing a party to correct deficiencies in service are too problematic. If a party is allowed to correct deficiencies after an opposing party objects, the Rules of Civil Procedure no longer have meaning. If Key Energy wishes to correct the deficiencies of service and proof of service, they may either re-serve Ewing construction, or they may petition the Court. See Cahoon v. North Dakota Workers Compensation Bureau, 482 N.W.2d 865 (N.D. 1992) ("[A]n inaccurate but timely filed proof of service may be the basis for a hearing to determine the actual facts surrounding the service upon proper motion."); see also McDonald v. North Dakota Com'n on Medical Competency, 492 N.W.2d 94, 96 (N.D. 1992) ("[A] party who otherwise files a proof of service within the required time limits, but fails to file a document which accurately reflects the actual service which took place, they may, with leave of court, file a corrected proof of service."). Key Energy did not do this.

[¶29] Because Ewing was not properly served, the District Court did not have personal jurisdiction over it, and the judgment against it must be thrown out.

D. DEFAULT JUDGMENT SHOULD BE VACATED BECAUSE IT WAS THE RESULT OF MISTAKE, INADVERTENCE, SURPRISE, OR EXCUSABLE NEGLECT

[¶30] N.D.R.Civ.P. 60 allows for relief from a judgment or order. Specifically, Ewing requests relief based upon N.D.R.Civ.P. 60(b):

> On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
> (1) Mistake, inadvertence, surprise, or excusable neglect;
> (2) Newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
> (3) Fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
> (4) The judgment is void;

(5) The judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
(6) Any other reasons that justifies relief.

[¶31] This Court, in King v. Montz, 219 N.W.2d 836 (N.D. 1974), held that neglect was excusable after Defendant Montz had forwarded service to the Defendant's insurance company, which then lost the documents and failed to file an answer. King v. Montz, 219 N.W.2d 836, 840 (N.D. 1974).

[¶32] Building on the King precedent that lost documents may lead to excusable neglect, this Court more recently found that a Defendant who was properly served and then lost or misplaced the service, could have its motion to vacate default judgment granted. Beaudoin v. South Texas Blood & Tissue Center, 2005 ND 120, 699 N.W.2d 421 (2005).

[¶33] In Beaudoin, Defendant South Texas asserted defective service in support of its motion to vacate default judgment and to dismiss for lack of personal jurisdiction. Id. at ¶ 1. The district court denied the motion, but this Court reversed "the trial court's denial of the motion to vacate the default judgment." Id. at ¶ 41. This Court found in Beaudoin, that:

> [A] professional process server served Beaudoin's summons and complaint on South Texas at its headquarters in San Antonio, Texas on August 19, 2002. South Texas's Executive Office Manager, Betty Nickerson, accepted the documents. Nickerson then submitted the papers to Norman D. Kalmin, M.D., South Texas's President/CEO and Medical Director. Kamlin turned the summons and complaint over to Mary Beth Fisk, Vice President of Tissue Services. Fisk sent a copy of the papers to Donna Respondek, Vice President of Financial Services, requesting that Respondek file a claim with their insurance company. Respondek was on vacation at the time, and the copy of the summons and complaint were accidently misfiled in the Financial Services Department. The company took no further action. This went undiscovered until January 8, 2003, when a call was received from Beaudoin's attorney informing South Texas of the default judgment.

Id. at ¶ 31.

[¶34] The Beaudoin Court cited CUNA Mortgage v. Aafedt, 459 N.W.2d 801, 803 (N.D. 1990), where it found:

> First, Rule 60(b) is remedial in nature, and should be liberally construed and applied. Second, decisions on the merits are preferable to those by default. Third, as a consequence of the first two considerations, where timely relief is sought from a default judgment and the movant has a meritorious defense, doubt if any, should be resolved in favor of the motion to set aside the judgment so that cases may be decided on their merits.

Id. at ¶ 33 (emphasis added).

[¶35] The District Court, when denying South Texas's motion to vacate, found that South Texas was equipped with a meritorious defense, and that it was "uncontested that they reacted to the default judgment as soon as possible." Id. at ¶ 34. However, the District Court found that because the mistake and neglect was the Defendant's own, and not that of a third party, "the Court must also take into account *who* was responsible for the alleged mistake or neglect giving rise to default." Id. (emphasis in original). Because the mistake and neglect were found to be that of South Texas, the District Court denied the motion to vacate judgment. Id.

[¶36] On appeal, this Court noted that "[a]lthough the district court is correct in noting we are reluctant to attribute a third party's errors to an innocent defendant, this fact does not foreclose N.D.R.Civ.P. 60(b)(i) relief when a defendant has personally erred." Id. at ¶ 36 (emphasis added). North Dakota case law "has frequently permitted relief from errors assignable to a defendant." Id. at ¶ 37 (*citing* U.S. Bank Nat'l Ass'n v. Arnold, 2001 ND 130, ¶¶ 25-28, 632 N.W.2d 150; Red River State Bank v. Reierson, 533 N.W.2d 683, 688-89 (N.D. 1995); Suburban Sales & Serv. Inc. v. District Court of Ramsey County, 290 N.W.2d 247, 253-54 (N.D. 1980); Sioux Falls Constr. Co. v. Dakota Flooring, 109 N.W.2d 244 (N.D. 1961)). This Court found the District Court's conclusion "that Rule 60(b)(i) relief is only appropriate when the error is attributable to a third party, misinterprets and misapplies our law." Id. at ¶ 38.

[¶37] It is therefore, appropriate to overturn a default judgment, even if the error in question is attributable to the defendant, if timely relief is sought from the default judgment, and the movant has a meritorious defense.

[¶38] If this Court finds that Ewing was served, then a foreign corporation was served and the document was misfiled or misplaced, leading to a default judgment. The Beaudoin Court found that this neglect, even though it was neglect on behalf of the defending party, was excusable. Beaudoin, 2005 ND 120, 699 N.W.2d 421 (2005). Ewing Construction has searched its records, and has found no record of the alleged service. App. at 42-43 ¶ 5. This is further evidence that Ewing was not properly served, as it has no record of the summons and complaint. At the very least, it is clear that Ewing has misplaced or misfiled the documents, and the Beaudoin precedent applies. "When a defaulting party has a meritorious defense and timely seeks relief, doubt, if any, should be resolved in favor of the motion to set aside the judgment." Monster Heavy Haulers, LLC v. Goliath Energy Services, LLC, 2016 ND 176 ¶ 27, 883 N.W.2d 917 (*citing* State v. $33,000.00 U.S. Currency, 2008 ND 96, ¶ 17, 748 N.W.2d 420).

i. EWING CONSTRUCTION SOUGHT RELIEF IN A TIMELY MANNER

[¶39] Default judgment was entered against Ewing on June 24, 2016, with notice served via mail on June 27, 2016. Ewing moved the District Court for relief from said default judgment on May 12, 2017.

[¶40] To act in a timely manner, a party must show it did what it could do to act in a timely fashion. Meier v. Meier, 2014 ND 127, ¶ 8, 848 N.W.2d 253 (citation omitted). "What constitutes a reasonable time varies from case to case and must be determined in each instance from the facts before the court." Id. at ¶ 7. N.D.R.Civ.P. 60(c) states that for mistake, inadvertence, surprise, or excusable neglect, a motion must be made no more than a year after a default judgment

has been entered. Ewing took the necessary action to act in a timely fashion. Ewing did not have knowledge of the default judgment until Bill Ewing Jr. was served with a lawsuit attempting to domesticate the default judgment in February 2017. Upon learning what happened, Ewing worked quickly and promptly with his attorneys in Texas to find local counsel and move for relief from judgment in North Dakota, within a year of default judgment being entered.

ii. EWING CONSTRUCTION PRESENTS A MERITORIOUS DEFENSE

[¶41] Ewing presents a meritorious defense in this matter, arguing Key Energy has breached the Design-Build Contract, and openly acknowledges it still owes Ewing at least $425,098.20. App. at 41 ¶ 3; App. at 14 ¶ 13 Ewing further argues it is not the party responsible for the damages Key Energy seeks in its lawsuit. Ewing contends it held multiple meetings with Key Energy at the completion of the project, and confirmed all balances due in writing. App. at 41-42 ¶ 4. The costs proposed by Key Energy are erroneous, grossly overstated, invalid, and not performed by Key Energy, arguments Ewing presented in writing. App. at 41-42 ¶ 4.Further, Key Energy owes Ewing in excess of $672,182.28 under the contract documents, and $241,030.88 for pending change orders. App. at 41 ¶ 3.

IV. CONCLUSION

[¶42] For the foregoing reasons, the District Court's order denying Ewing Construction relief from default judgment should be reversed and remanded with an instruction to grant Ewing's motion.

Dated this 4th day of January, 2018.

SMITH PORSBORG SCHWEIGERT
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CERTIFICATE OF COMPLIANCE

[¶43] The undersigned certifies the above brief is in compliance with N.D.R.App. P. 32(a)(7)(A) and the total number of words in the brief, excluding words in the table of contents, table of authorities, signature block, certificate of service, and this certificate of compliance totals 5,358 words.

Dated this 4th day of January, 2018.

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CERTIFICATE OF SERVICE

[¶44] I hereby certify that on the 4th day of January, 2017, a true and correct copy of the foregoing **BRIEF OF APPELLANT** was served as follows:

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1710 Highway 81 North
P.O. Box 5327
Grand Forks, ND 58206-5327

WE Integrate, LLC
c/o Derek Bieri
525 20th Avenue SE
Minot, ND 58701-6636

Ebel, Inc
d/b/a Ebel Electric
2407 2nd Ave W
P.O. Box 2201
Williston, ND 58802-2201

By */s/ Scott K. Porsborg*
SCOTT K. PORSBORG

CERTIFICATE OF SERVICE

[¶44] I hereby certify that on the 9th day of January, 2017, a true and correct copy of the foregoing **BRIEF OF APPELLANT** was served as follows:

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c/o Michelle Wagner
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