

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

AE2S Construction, LLC,	Supreme Court No. 20200180
Plaintiff-Appellee,	Williams County District Court
-vs-	53-2019-CV-01518
Hellervik Oilfield Technologies LLC	Northwest Judicial District
d/b/a Hellervik RDO	Honorable Josh B. Rustad
Defendant-Appellant,	
and	
Whiting Oil and Gas, Corporation,	
Defendant.	

APPEAL FROM FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
FOR JUDGMENT DATED MAY 12, 2020 (DKT. NO. 55)

BRIEF OF APPELLANT HELLERVIK OILFIELD TECHNOLOGIES LLC
D/B/A HELLERVIK RDO

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ORAL ARGUMENT REQUESTED

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STATEMENT OF THE ISSUES

[¶1] Whether the district court erred by denying Hellervik Oilfield Technologies LLC's motion to vacate the default judgment under N.D. R. Civ. P. 60(b)(1).

[¶2] Whether the district court erred by denying Hellervik Oilfield Technologies LLC's motion to vacate the default judgment under N.D. R. Civ. P. 60(b)(6).

[¶3] Whether the district court erred by concluding Hellervik Oilfield Technologies LLC did not make any appearance necessitating notice of the application for default judgment when Hellervik appeared through counsel before commencement of the lawsuit but after AE2S recorded a well construction lien securing the same obligation at issue in the lawsuit.

STATEMENT OF THE CASE

[¶4] In the fall of 2018, Hellervik Oilfield Technologies, LLC ("Hellervik") engaged AE2S Construction LLC ("AE2S") as a subcontractor to provide electrical services for construction of a gas facility at the Whiting Oil and Gas P-Thomas 13-3 well pad location in Williams County. AE2S provided equipment, materials, supplies, and labor over the course of eight weeks on the project. Whiting Oil and Gas Corporation ("Whiting") cancelled the work order for the project prior to completion.

[¶5] AE2S recorded a well construction lien against the leasehold interest owned by Whiting where the gas facility project was located on May 15, 2019. The lien covered \$364,638.36 that AE2S claimed to be owed for unpaid materials and labor. AE2S sent a copy of the lien statement to Hellervik in May 2019.

[¶6] An attorney representing Hellervik spoke with an attorney for AE2S about the lien on June 11, 2019. On the same day, counsel for AE2S provided a copy of the lien to counsel for Hellervik by email.

[¶7] About one month later, counsel for AE2S again contacted Hellervik's attorney indicating he was under pressure to start a foreclosure action. The next day Hellervik's attorney informed counsel for AE2S he had a conflict and asked counsel for AE2S to get back in touch with him if he did not hear from a new attorney for Hellervik the following week.

[¶8] A few months later AE2S commenced the action seeking foreclosure and repayment of the amount covered by the lien. The registered agent for Hellervik received the Summons and Complaint in Bismarck on or about September 9, 2019. The registered agent's custom was to forward all legal documents to Hellervik's corporate office in Minnesota. Because Hellervik had been represented by counsel, who was already in contact with counsel for AE2S about the lien, the registered agent did not take further action with the Summons and Complaint and assumed counsel would handle the matter for Hellervik.

[¶9] Hellervik did not serve an answer to the Complaint within 21 days. On October 14, 2019, AE2S sent Hellervik a Notice of Filing Suit. The same day, AE2S also filed an Application for Default Judgment against Hellervik but only served the Application on counsel for Whiting. Judgment by default was entered against Hellervik on October 17, 2019. A few days later, AE2S and Whiting stipulated to dismissal of their claims against each other.

[¶10] On October 21, 2019, Minard contacted the Serkland Law Firm about representation of Hellervik. This happened soon after AE2S sent Hellervik the Notice of

Filing Suit. The undersigned contacted counsel for AE2S by email and phone on October 23. It was through this contact Hellervik learned about the default judgment. Hellervik engaged the Serkland Law Firm the following day.

[¶11] Hellervik moved to vacate the default judgment on November 12, 2019. AE2S opposed the motion. A hearing occurred before the Williams County District Court on January 28, 2020. After the hearing, the parties each submitted their proposed findings of fact, conclusions of law, and order for judgment. The district court adopted the proposed findings of fact, conclusions of law, and order for judgment submitted by AE2S. The district court denied Hellervik's motion and upheld the entry of default judgment by order entered on May 12, 2020. (App. 17-31). Hellervik filed its Notice of Appeal on July 9, 2020. (Dkt. #62).

STATEMENT OF FACTS

[¶12] Whiting issued a work order to Hellervik for construction of a gas capture facility. (App. 7, ¶ 9). The facility was planned for construction at the Whiting P-Thomas 13-3 well pad located in Williams County. Id. The gas facility was referred to as the Hellervik 5MMscf/d. (Dkt. #49, ¶ 6).

[¶13] In the fall of 2018 Hellervik engaged AE2S as a subcontractor to provide electrical services for construction of the gas facility. Id. at ¶ 7. Over an eight-week period AE2S provided equipment, materials, supplies, and labor to wire components of the gas facility. Id. During this time, AE2S employees were involved in safety incidents at the site. Id. at ¶ 8. A North Dakota electrical inspector also inspected the services performed by AE2S and determined the work did not meet the electrical code requirements. Id. at ¶ 9.

[¶14] Whiting ultimately cancelled the work order for the gas facility. Id. at ¶ 8. Hellervik was not fully compensated by Whiting for the project. Id. at ¶ 12.

[¶15] AE2S alleged Hellervik failed to pay for services rendered by AE2S. On May 8, 2019, AE2S executed a Statement of Oil & Gas Well Lien (hereafter “Lien”). (Dkt. #3). The Lien covered the amount of \$364,638.36. Id. A copy of the Lien was sent to Hellervik at its business address in Bismarck, and to its registered agent, Gary Minard (“Minard”). Id. AE2S recorded the Lien against the leasehold interest owned by Whiting on May 15, 2019. Id.

[¶16] Fredrikson & Byron, P.A. represented Hellervik on June 11, 2019. On that day, counsel for Hellervik spoke with counsel for AE2S. (Dkt. #34). The conversation pertained to the Lien recorded by AE2S. Id. Hellervik knew of the communication between counsel for the parties. (Dkt. #32, ¶ 5).

[¶17] One month later, counsel for AE2S again contacted counsel for Hellervik regarding the Lien. (Dkt. #34). Counsel for AE2S wrote:

Mike, can you provide me with an update on this matter? I am getting some pressure to commence a foreclosure action. Thanks.

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Id. Counsel’s reference to “a foreclosure action” clearly pertained to the recorded Lien and the amount AE2S claimed to be due. The following day, counsel for Hellervik wrote:

Randy,

Thanks for the reminder. I meant to email you. We will not be handling this. We had a conflict we missed initially and I have referred the client out. If you do not hear from someone next week let me know and I can help coordinate with Hellervik to make sure there are open lines of communication.

Thanks and have a good weekend.

Best regards,

Michael S. Raum

Id. Hellervik's attorney expressly requested to be contacted "to make sure there are open lines of communication" if a new attorney did not make contact with counsel for AE2S by the following week. Id. At some point Minard learned that Fredrikson & Bryon had a conflict of interest in representing Hellervik against AE2S. (Dkt. #32, ¶ 6).

[¶18] Minard, as registered agent, received a Summons and Complaint at the post office in Bismarck on or around September 9, 2019. Id. at ¶ 7. As registered agent, Minard provided legal documents to the Hellervik corporate office in Minnesota for distribution and processing. Id. at ¶ 8. Because Hellervik had been represented by counsel, who was in contact with to counsel for AE2S about the Lien, Minard did not take further action with the Summons and Complaint. Id. at ¶ 9. Minard believed the matter would be handled by counsel. Id. at ¶ 9.

[¶19] Hellervik did not serve an answer within 21 days after service. On October 14, 2019, AE2S sent Hellervik a Notice of Filing Suit. (Dkt. #10). The same day, AE2S filed an Application for Default Judgment against Hellervik and served it only on counsel for Whiting. (Dkt. #11, #18). AE2S did not serve a copy of the Application for Default Judgment upon Hellervik.

[¶20] Judgment by default was entered against Hellervik on October 17, 2019. (Dkt. #21). There is nothing in the record indicating a copy of the Judgment was sent by AE2S to Hellervik.

[¶21] On October 21, 2019, Hellervik contacted the Serkland Law Firm. (Transcript (“T.”), 7:16-20). The undersigned contacted counsel for AE2S by email and phone on October 23. (T. 7:20-23). It was through this contact that Hellervik learned about the default judgment. (T. 7:23-25). Hellervik was not aware of the default judgment before seeking a new attorney. (Dkt. #32, ¶ 13). Hellervik engaged new counsel on October 24, 2019. Id. at ¶ 12); (T. 7:25 – 8:2).

[¶22] Hellervik moved to vacate the default judgment on November 12, 2019. (Dkt. #29). Hellervik submitted a proposed Answer and Counterclaim with the motion. (Dkt. #31). AE2S opposed the motion. (Dkt. #43). A hearing occurred on January 28, 2020. At the close of the hearing the district court directed the parties to file proposed findings, conclusions, and an order. (T. 31:25 – 32:2).

[¶23] Hellervik and AE2S filed their proposals on February 18, 2020. (Dkt. #52); (Dkt. #53). On May 12, 2020, the district court adopted and signed the findings of fact, conclusions of law, and order for judgment submitted by AE2S. (App. 17-31). AE2S served a notice of entry of order on May 13, 2020. (Dkt. #56, #57). Hellervik filed a notice of appeal on July 9, 2020. (App. 32-34).

STANDARD OF REVIEW

[¶24] The standard of review “in cases in which the lower court has denied a motion to vacate a default judgment is whether or not the lower court abused its discretion.” First Nat’l Bank of Jamestown v. Hoggarth, 331 N.W.2d 271, 273 (N.D. 1983). An abuse of discretion is never assumed; the burden is on the party seeking relief to establish it. Beaudoin v. South Texas Blood & Tissue Center, 2005 ND 120, ¶ 33, 699 N.W.2d 421. “A district court abuses its discretion when it acts arbitrarily, unreasonably,

or unconscionably, or when it misinterprets or misapplies the law.” Warnke v. Warnke, 2011 ND 212, 806 N.W.2d 606. “A trial court acts in an arbitrary, unreasonable, or unconscionable manner when its decision is not the product of a rational mental process by which the facts and law relied upon are stated and considered together for the purpose of achieving a reasoned and reasonable determination.” Beaudoin, 2005 ND 120, ¶ 33.

LEGAL ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION BY DENYING HELLERVIK’S MOTION TO VACATE THE DEFAULT JUDGMENT.

[¶25] The district court abused its discretion by denying Hellervik’s motion to vacate the default judgment filed just 26 days after the entry of default. Hellervik acted diligently to retain counsel as soon as it received the Notice of Filing Suit served by AE2S on October 14, 2019. The district court erred by determining there was no excusable neglect or other reasons justifying relief under Rule 60(b). This Court should reverse the district court’s decision and remand for a determination on the merits.

A. The district court abused its discretion by denying Hellervik relief from the default judgment under N.D. R. Civ. P. 60(b)(1).

[¶26] The district court should have vacated the default judgment under Rule 60(b)(1). The rule allows a judgment to be vacated for “mistake, inadvertence, surprise, or excusable neglect.” N.D. R. Civ. P. 60(b)(1). Sufficient grounds existed for the default judgment against Hellervik to be vacated under the rule. The district court misapplied the law by not accepting Hellervik’s mistake, inadvertence, or excusable neglect as grounds for relief, and by not liberally construing and applying the rule.

[¶27] The inherent power of a court to vacate or otherwise grant relief from a judgment in the interest of justice has long been recognized in this state, and the adoption of

Rule 60(b) has expanded that long-standing principle. Kopp v. Kopp, 2001 ND 41, ¶ 9, 622 N.W.2d 726. Rule 60(b) attempts to strike the proper balance between the conflicting principles that litigation must be brought to an end and that justice should be done. Rule 60(b) is to be liberally construed and applied.

[¶28] This Court has indicated that district courts should be more lenient in granting motions to vacate default judgments than in vacating judgments in cases which have been tried on their merits. Beaudoin, 2005 ND 120, ¶ 33. This Court encourages trial courts to be more lenient when entertaining a Rule 60(b) motion to vacate a default judgment as distinguished from litigated judgments entered after a trial on the merits. Id. (citing CUNA Mortgage v. Aafedt, 459 N.W.2d 801, 803 (N.D. 1990)). A district court's discretion on a Rule 60(b) motion should be limited by three important considerations: Rule 60(b) is remedial in nature and should be liberally construed and applied; decisions on the merits are preferable to those by default; and, where timely relief is sought from a default judgment and the movant has a meritorious defense, doubt should be resolved in favor of the motion to set aside the judgment so cases may be decided on the merits. Id.

[¶29] Remedial relief under Rule 60(b)(1) is appropriate here. Hellervik's registered agent received the Summons and Complaint in Bismarck on or around September 9, 2019. (Dkt. #32, ¶ 7). It was customary for Hellervik's registered agent to then transmit any legal documents to the corporate office in Minnesota for distribution and processing. Id. at ¶ 8. Hellervik, a few months prior to service, was represented by its longtime counsel, who was in contact with counsel for AE2S about the Lien. Id. at ¶ 5; (Dkt. #34). The Lien secured the same obligation AE2S alleged Hellervik owed in the lawsuit. Because of Hellervik's prior representation, the registered agent did not take any

further action with the Summons and Complaint because he believed the matter would be handled by counsel. (Dkt. #32, ¶ 9).

[¶30] AE2S filed an application for default judgment against Hellervik on October 14, 2019. (Dkt. #11, #18). AE2S did not send a copy of the application to Hellervik or otherwise provide notice. AE2S, however, did send Hellervik a Notice of Filing Suit on the same day. (Dkt. #10). AE2S secured the default judgment on October 17, 2019. (Dkt. #19). Four days later, apparently after receiving the Notice of Filing Suit, Hellervik contacted the Serkland Law Firm about representation. (T. 7:16-20). The undersigned contacted counsel for AE2S by email and phone on October 23. (T. 7:20-23). It was through this contact that the undersigned learned about the default judgment. (T. 7:23-25). Hellervik was unaware of the default judgment prior to October 23. (Dkt. #32, ¶¶ 12, 13); (T. 7:25 – 8:2).

[¶31] Hellervik moved to vacate the default judgment on November 12, 2019. (Dkt. #29). At the time of filing the motion, Hellervik also filed a proposed Answer and Counterclaim. (Dkt. #31). The proposed Answer and Counterclaim set out meritorious defenses to payment and compulsory counterclaims. Hellervik alleged AE2S was not entitled to payment for failure of consideration and failing to satisfy conditions precedent due to AE2S performing deficient work on the project. *Id.* at ¶¶ 21, 24, 27, 30, and 31. Hellervik also alleged AE2S was not entitled to payment for failing to provide adequate services and materials, and alleged the services were not rendered in a good and workmanlike manner. *Id.* at ¶ 33. Hellervik also alleged counterclaims for breach of contract and breach of warranty which, if proven, at the very least would result in a reduction in the amount claimed by AE2S.

[¶32] The district court abused its discretion by refusing to vacate the default judgment under these circumstances. Hellervik filed the motion less than one month after the entry of default judgment. Hellervik diligently sought new counsel less than a week after AE2S sent the Notice of Filing Suit on October 14, 2019. Hellervik retained new counsel without any knowledge of the default judgment. There was no prejudice to AE2S because the default judgment was entered less than a month before Hellervik filed its motion, and AE2S knew Hellervik had previously been represented by counsel after AE2S filed the Lien. This case presents an exceptional situation because Hellervik was represented by counsel when discussing the Lien claim, but was forced to retain new counsel after a conflict of interest was discovered. Hellervik was not aware that its prior counsel did not receive notice of the suit, the Summons, the Complaint, or any notice regarding the judgment. (Dkt. #32, ¶ 13). The above circumstances satisfy Rule 60(b)(1) and the district court abused its discretion by not vacating the default judgment.

[¶33] The district court relied entirely upon State v. \$33,000 U.S. Currency, 2008 ND 96, in denying Hellervik's motion to vacate the default judgment. (App. 24-25). In that case, the State commenced a civil action for forfeiture by serving the defendant, who was represented by counsel only in the criminal case. 2008 ND 96, ¶ 2. The State did not serve the defendant's criminal defense attorney. Id. The defendant ignored the action, but two weeks after the entry of a default judgment he filed a motion to vacate. The defendant argued reliance on his criminal defense attorney, but acknowledged the criminal defense attorney had not been retained for the civil forfeiture action. Id. at ¶ 13. This Court affirmed a denial of the motion to vacate indicating the

defendant's disregard of the summons and complaint did not constitute excusable neglect, inadvertence, mistake, or surprise. Id. at ¶ 14.

[¶34] Here, the district court determined Hellervik's registered agent did not take any action after being served because he assumed the matter would be handled by counsel, and that like the defendant in \$33,000 U.S. Currency this did not constitute excusable neglect. (App. 27). There is a noticeable and important distinction between this case and the \$33,000 U.S. Currency case. In the \$33,000 U.S. Currency case, the defendant retained counsel for representation solely in a criminal matter. Also, there is no indication the defendant had a long-standing relationship with the attorney. Here, Hellervik was initially represented by counsel who specifically corresponded with AE2S about the Lien, which secured the same obligation subject to the lawsuit later filed by AE2S. Thus, Hellervik did have counsel involved for the same transaction and occurrence that later became subject to the lawsuit by AE2S. In addition, according to Minard, Hellervik had a long-standing attorney-client relationship with the Fredrikson & Byron firm. (Dkt. #32, ¶¶ 3, 4). It was therefore reasonable for Minard to believe counsel would handle the lawsuit. Hellervik knew Fredrikson & Byron had already been in contact with counsel for AE2S regarding the Lien. Id. at ¶ 5. The Lien was a subject of the lawsuit so the prior communication involved the same dispute. (App. 8). The situation here is much different than a criminal defendant believing his criminal defense attorney would automatically respond to a separate and distinct civil lawsuit.

[¶35] This Court has permitted vacation of a default judgment when a defendant misplaced the summons and complaint for nearly five months after service. Beaudoin, 2005 ND 120, ¶¶ 30-31. There is no dispute here that the registered agent for Hellervik

received the Summons and Complaint on or about September 9, 2019. The question is whether Hellervik should be relieved of the consequences of erroneously believing or misunderstanding that a response would be made by its long-time counsel. In Beaudoin, this Court clarified that relief under Rule 60(b)(1) is not foreclosed when the defendant personally erred. Id. at ¶¶ 35-36. A party may be relieved from the consequences of its own mistake, inadvertence, surprise, or excusable neglect. Id. at ¶ 37 (citing case law allowing relief from errors assignable to a defendant). Hellervik’s belief or misunderstanding that the Summons and Complaint – which sought foreclosure of the same Lien its counsel had been in contact with counsel for AE2S about – would be handled by its counsel falls squarely within the language and intent of Rule 60(b)(1). This is by definition a case of mistake, inadvertence, or excusable neglect. The district court’s reliance upon State v. \$33,000 U.S. Currency, which is factually and procedurally dissimilar to this case, is a misapplication of the law. When a district court’s decision is guided by a misinterpretation or misapplication of the law, “rather than a rigorous analysis of the facts, reversal . . . is the proper remedy.” Beaudoin, 2005 ND 120, ¶ 40.

[¶36] The record also discloses without question that Hellervik has meritorious defenses to the claims by AE2S and compulsory counterclaims. Those meritorious defenses are set forth in the proposed Answer and Counterclaim filed by Hellervik with its motion. (Dkt. #31). Hellervik also acted diligently to retain new counsel even *before* it had knowledge of the entry of default judgment. Hellervik was in contact with new counsel less than a week after AE2S sent the Notice of Filing of Suit. Hellervik filed its motion to vacate less than one month after the entry of default judgment. Nothing in the record discloses Hellervik chose to deliberately ignore the Summons and Complaint, or

impede the legal process. These factors favor a remedial and liberal application of Rule 60(b)(1), and the default judgment against Hellervik should be vacated. See Beaudoin, 2005 ND 120, ¶ 39 (recognizing the defendant was equipped with a meritorious defense and reacted to the default judgment as soon as possible).

[¶37] The district court misapplied Rule 60(b)(1) by failing to determine Hellervik’s mistake, inadvertence, and excusable neglect warranted vacating the default judgment. The district court also misapplied Rule 60(b)(1) by failing to liberally construe and apply the rule to the circumstances of this case. These misapplications of law are an abuse of discretion warranting reversal.

B. The district court abused its discretion by denying Hellervik relief from the default judgment under N.D. R. Civ. P. 60(b)(6).

[¶38] The district court concluded Hellervik “failed to meet its burden” for relief under Rule 60(b)(6) after denying relief under Rule 60(b)(1). Again, the district court failed to liberally construe and apply the provisions of Rule 60(b). The district court’s decision should be reversed.

[¶39] Rule 60(b)(6) is “a ‘catch-all’ provision that allows a district court to grant relief from a judgment for ‘any other reason that justifies relief.’” Kautzman v. Doll, 2018 ND 23, ¶ 12, 905 N.W.2d 744 (citation omitted); N.D. R. Civ. P. 60(b)(6). “This broad language gives the courts ample power to vacate judgments whenever such action is appropriate to accomplish justice.” In re Braun, 145 N.W.2d 482, 484 (N.D. 1966). “Of course, this power is not provided in order to relieve a party from free, calculated and deliberate choices he has made.” Id. “The party remains under a duty to take legal steps to protect his interests.” Id. But if it is unjust that a judgment be enforced, Rule 60(b)(6) provides an avenue for escape from the judgment, unhampered by detailed restrictions.

Id. at 484-85. “The moving party bears the burden of establishing sufficient grounds for disturbing the finality of the judgment, and relief should be granted only in exceptional circumstances.” Kautzman, 2018 ND 23, ¶ 14.

[¶40] Relief under Rule 60(b)(6) is justified here. This case presents an unusual situation. Hellervik was initially represented by counsel, who made an informal appearance after AE2S filed the Lien against the project claiming money owed to it by Hellervik. Then, when contacted about a potential lien foreclosure by counsel for AE2S, Hellervik’s attorney disclosed a conflict but made clear he wanted to ensure there were open lines of communication between Hellervik and AE2S about the dispute. Hellervik’s former counsel even requested to be contacted directly if counsel for AE2S did not hear from another attorney representing Hellervik the following week. AE2S moved ahead with the lawsuit, disregarded that Hellervik had been represented by counsel, and proceeded to secure a default judgment without notice when Hellervik did not serve an answer. Hellervik then, without any knowledge of the default judgment, contacted a new attorney. It was only then that Hellervik learned of the default judgment and it acted diligently to seek relief from the judgment. These circumstances justify relief under Rule 60(b)(6) when the rule is liberally construed and applied as required by North Dakota law.

[¶41] The long-standing precedent in North Dakota is that “[d]ecisions on the merits are preferable to those by default.” Bender v. Liebelt, 303 N.W.2d 316, 318 (N.D. 1981) (citing City of Wahpeton v. Drake-Henne, Inc., 228 N.W.2d 324, 330 (N.D. 1975)). This Court is “more inclined to reverse an order denying defendant’s motion to vacate a default judgment than an order vacating a judgment and allowing a trial.”

Wilson v. Wilson, 364 N.W.2d 113, 114 (N.D. 1985). The district court misapplied the law by failing to recognize this long-standing precedent. The district court misapplied the law by failing to liberally apply Rule 60(b)(6) to the circumstances of this case. This Court should reverse the denial of Hellervik's motion seeking to vacate the default judgment.

II. THE DEFAULT JUDGMENT IS VOID BECAUSE AE2S FAILED TO PROVIDE NOTICE OF THE APPLICATION TO HELLERVIK.

[¶42] AE2S obtained a default judgment by application without notice to Hellervik. Hellervik should have been provided notice of the request for default judgment because Hellervik made an informal appearance through its prior counsel in July 2019 about the same matters underlying the eventual lawsuit. The default judgment is therefore void.

[¶43] Rule 55, N.D. R. Civ. P., provides “[i]f a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise appear and the failure is shown by affidavit or otherwise, the court may direct the clerk to enter an appropriate default judgment in favor of the plaintiff.” “A party who has appeared is entitled to written notice of the application for a default judgment.” State by Workers Comp. Bureau v. Kostka Food Service, Inc., 516 N.W.2d 278, 280 (N.D. 1994). The term “appearance” is to be construed broadly in North Dakota. Fed. Land Bank of St. Paul v. Lillehaugen, 370 N.W.2d 517, 519 (N.D. 1985). Whether particular conduct is sufficient to constitute an “appearance” is a question of law. Hatch v. Hatch, 484 N.W.2d 283, 286 (N.D. 1992). “A default judgment entered in violation of Rule 55 is voidable by the defaulting party.” Warnke, 2011 ND 212, ¶ 5.

[¶44] This Court recognizes a default judgment must normally be viewed as available only when the adversary process has been halted because of an essentially unresponsive party. Perdue v. Sherman, 246 N.W.2d 491, 495 (N.D. 1976). The notice requirement of Rule 55 is a “device intended to protect those parties who, although delaying in a formal sense by failing to file pleadings within the [proscribed] period, have otherwise indicated to the moving party a clear purpose to defend the suit.” Id. Communication between the parties’ counsel regarding an intent to defend constitutes an appearance which necessitates notice of a motion for default judgment. See id. at 494-496.

[¶45] Hellervik’s prior counsel communicated directly with counsel for AE2S before AE2S commenced this lawsuit. (Dkt. #32, ¶ 5); (Dkt. #34). The communications were about the Lien filed by AE2S; the same Lien at issue in this lawsuit. There was an initial telephone discussion between counsel and then an exchange of emails. (Dkt. #34). Counsel for AE2S later wrote that he was “getting some pressure to commence a foreclosure action.” Id. In response to this communication, Hellervik’s former counsel indicated he would “not be handling this” due to a conflict that was “missed initially.” Id. Hellervik’s former counsel also requested that he be contacted if counsel for AE2S did not hear from a new attorney; he wanted to “help coordinate with Hellervik to make sure there [were] open lines of communication.” Id. AE2S knew or should have known by these communications that Hellervik contested AE2S’ claim. These communications at the very least constituted an informal appearance by Hellervik requiring notice of the request for default judgment.

[¶46] At least one jurisdiction recognizes an appearance can be something other than an answer or response occurring after a lawsuit is commenced. In Ellison v. Process Systems Inc. Const. Co., 50 P.3d 658 (Wash. Ct. App. 2002), the court held an informal

appearance can occur prior to the commencement of a lawsuit and still necessitate notice of a request for default judgment. In Ellison, the plaintiff was terminated from her employment with the defendant. She consulted an attorney, who then sent a letter to an attorney for the defendant alleging wrongful termination and seeking reinstatement with back pay. An attorney for the defendant responded to the letter indicating the plaintiff's termination was for cause and not wrongful. The plaintiff sued the defendant for wrongful discharge and served the summons and complaint on the registered agent for the defendant. The defendant failed to respond and the plaintiff secured an order for default. It was not until two years later that the defendant moved to vacate the default judgment. The lower court granted the motion reasoning the parties' exchange of letters prior to the lawsuit constituted an informal appearance and that the judgment taken without notice was void.

[¶47] The appellate court affirmed and upheld the conclusion that the exchange of letters between counsel prior to commencement of the lawsuit constituted an informal appearance. Ellison, 50 P.3d at 662. The appellate court noted that in the normal course a party appears when the party answers, demurs, makes any application for an order, or gives the plaintiff written notice of an appearance. Id. at 661. The court, however, recognized these methods were not exclusive and, in certain situations, informal acts may constitute an appearance. Id. The court found the letters between counsel prior to service of the summons and complaint sufficiently communicated the defendant's intention to defend a lawsuit. Id. Accordingly, the letters constituted an informal appearance and required the plaintiff to serve notice of the request for default judgment. Id. at 661-662.

[¶48] Here, the district court erroneously found Hellervik failed to make any appearance when there were communications between counsel for the parties prior to service of the Summons and Complaint. (App. 18). The pre-suit communications pertained directly to an issue involved in this lawsuit – the Lien filed by AE2S. The fact that Hellervik later had to seek new counsel due to a conflict discovered by its prior counsel should not defeat the informal appearance made by Hellervik prior to the lawsuit.

[¶49] In accordance with Rule 55, Hellervik was entitled to notice of the request for default judgment made by AE2S. Instead, AE2S filed an application and made no effort to advise Hellervik of the request for default. The district court erred in finding Hellervik failed to make an appearance and concluding Hellervik was not entitled to notice. The default judgment should therefore be vacated as void.

CONCLUSION

[¶50] Hellervik respectfully asks this Court to reverse the district court's order denying Hellervik's Motion to Vacate Default Judgment. This case should be remanded to the district court to allow Hellervik to file its proposed Answer and Counterclaim and this case should be decided on the merits.

REQUEST FOR ORAL ARGUMENT

[¶51] Hellervik hereby requests oral argument. The opportunity to present oral argument will allow the parties to address particular questions or concerns of the Court.

Dated this 13th day of October, 2020.

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CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for Appellant Hellervik Oilfield Technologies LLC d/b/a Hellervik RDO in the above-captioned matter, and as the author of the above brief, hereby certify, in compliance with Rule 32(a)(5) and Rule 32(8)(a) of the North Dakota Rules of Appellate Procedure, that the above Brief of Appellant was prepared with proportional typeface and the total number of pages in the above brief is 23.

Dated this 13th day of October, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on October 14, 2020, the following document:

**BRIEF OF APPELLANT HELLERVIK OILFIELD TECHNOLOGIES LLC
D/B/A HELLERVIK RDO**

was filed electronically with the Clerk of Court through the Supreme Court E-filing Portal for electronic service through the E-filing Portal on the following:

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I hereby certify that on October 13, 2020, the following document:

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