

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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

BRIEF OF APPELLEE AE2S CONSTRUCTION, LLC

APPEAL FROM FINDINGS OF FACT, CONCLUIONS OF LAW, AND ORDER FOR
JUDGMENT DATED MAY 12, 2020 (INDEX # 55)

ORAL ARGUMENT REQUESTED

Dated: November 12, 2020.

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STATEMENT OF THE ISSUES

[1] Whether the district court abused its discretion in denying Hellervik Oilfield Technologies LLC's ("Hellervik") Motion to Vacate Default Judgment under N.D.R.Civ.P. 60(b)(1) when Hellervik failed to establish the existence of mistake, inadvertence, or excusable neglect in failing to answer or otherwise respond to the Summons and Complaint properly served by AE2S Construction, LLC ("ACL").

[2] Whether the district court abused its discretion in denying Hellervik's Motion to Vacate Default Judgment under N.D.R.Civ.P. 60(b)(6) when Hellervik failed to establish extraordinary circumstances preventing it from answering or otherwise responding to the Summons and Complaint properly served by ACL.

[3] Whether the district court abused its discretion when it held that communications between Hellervik's former counsel and ACL that occurred prior to the commencement of this lawsuit did not constitute an appearance by Hellervik.

STATEMENT OF THE CASE

[4] This is an appeal from the Honorable Joshua B. Rustad's denial of Hellervik's Motion to Vacate Default Judgment (Index # 29). Hellervik failed to timely answer or otherwise respond to the *Summons* and *Complaint* served on September 9, 2019. Thereafter, on October 15, 2019, ACL properly filed an *Application for Default Judgment*. (Index # 11). The district court granted ACL's *Application for Default Judgment*, and Judgment was entered against Hellervik on October 17, 2019. (Index # 21). The Judgment

amount is \$373,722.57, with post-judgment interest to accrue thereon at the statutory rate of 8.5%.

[5] On November 12, 2019, Hellervik moved to vacate the Judgment, asserting that ACL was required to provide it with “notice” of ACL’s *Application for Default Judgment*, and further arguing it was entitled to relief under N.D.R.Civ.P. 60(b)(1) and (b)(6). Following extensive briefing by both parties and oral argument held on January 28, 2020, the district court entered its *Findings of Fact, Conclusions of Law, and Order for Judgment* (the “*Order*”), wherein it denied Hellervik’s request to vacate the Judgment. (Index # 55). Hellervik now appeals the *Order*.

STATEMENT OF FACTS

[6] This lawsuit arises from Hellervik’s failure to pay ACL for labor, equipment, skills, and other services provided to Hellervik for use in Hellervik’s construction of a mobile gas capture plant. *Complaint*, ¶ 7 (Index # 1). After Hellervik failed to pay ACL any amount, ACL recorded a “Statement of Oil & Gas Well Lien” (the “Lien”) against the well site where ACL performed work. *Statement of Oil and Gas Well Lien* (Index # 3). The amount of the Lien is \$364,638.36, which was the principal amount owed to ACL (\$357,488.59) plus accrued interest as of the date of the Lien. On September 9, 2019, ACL commenced this lawsuit via service of a *Summons* and *Complaint* on Gary Minard, Hellervik’s registered agent. *Affidavit of Service* (Index # 4). Hellervik did not answer or otherwise respond to the *Complaint* within the 21-day deadline set forth in N.D.R.Civ.P. 12(a)(1)(A).

[7] In email correspondence dated February 21, 2019, Gary Minard, the President of Hellervik, presented a payment plan to ACL that proposed repayment of the entire principal amount of \$357,488.59. *Email Correspondence from Gary Minard to Dan Lamberson*

dated February 21, 2019 (Index # 46). Gary Minard also confirmed, in writing, that as of December 31, 2018, Hellervik was indebted to ACL in the amount of \$357,488.59. *Affidavit of Craig Pietruszewski*, December 5, 2019 (Index # 44); *Email Correspondence from Gary Minard to Dan Lamberson dated March 6, 2019* (Index # 45). Hellervik never contested that ACL was owed the principal amount of \$357,488.59, and even admitted, in writing, that ACL was owed this amount. It was not until November 2019, when it filed its Motion to Vacate Default Judgment (Index # 29), that Hellervik first disputed ACL's claims and right to payment.

[8] Hellervik devotes the bulk of its "Statement of Facts" to discussing events that occurred before this lawsuit was commenced – none of which are relevant to the issues before this Court. Hellervik alleges that ACL was involved in safety incidents during the course of its work for Hellervik, and that its work was defective, resulting in termination of Hellervik's contract with Whiting Oil & Gas Corporation ("Whiting"). *Appellant's Brief*, ¶13. These facts are not established, and are in dispute. This assertion is based solely on the second *Affidavit of Gary Minard* (Index # 49), which was filed with Hellervik's *Reply Brief in Support of Motion to Vacate Default Judgment*. The second *Affidavit of Gary Minard* does not attach any emails or correspondence from Whiting supporting these assertions, nor are there any affidavits from the North Dakota electrical inspector corroborating the hearsay testimony of Gary Minard. None of this is in the record. However, even if any of these assertions are true, none are germane to the issue before this Court, which is whether the district court abused its discretion in failing to vacate the Judgment.

[9] Hellervik also alleges that “because Hellervik had been represented by counsel, who was in contact with counsel for AE2S about the Lien, Minard did not take further action on the Summons and Complaint” and “Minard believed the matter would be handled by counsel.” *Appellant’s Brief*, ¶ 18. The email from Minard’s former counsel advising of his conflict of interest was sent on July 12, 2019 (Index # 34). Hellervik was properly served with the *Summons* and *Complaint* on September 9, 2019. Hellervik does not dispute that it failed to take any action with respect to the *Summons* and *Complaint*, despite knowing for nearly two months that its former counsel could not represent it in this lawsuit. It is undisputed that Hellervik simply did nothing after being properly served with the *Summons* and *Complaint*.

LAW AND ARGUMENT

I. HELLERVIK FAILED TO ESTABLISH ANY MISTAKE, INADVERTENCE, OR EXCUSABLE NEGLIGENCE UNDER N.D.R.CIV.P. 60(b)(1) OR EXTRAORDINARY CIRCUMSTANCES ENTITLING IT TO RELIEF UNDER N.D.R.CIV.P. 60(b)(6).

[10] Hellervik argues that it is entitled to relief from the Judgment due to mistake, inadvertence, and excusable neglect under N.D.R.Civ.P. 60(b)(1), and for other reasons justifying relief under N.D.R.Civ.P. 60(b)(6). As more fully set forth below, Hellervik failed to demonstrate mistake, advertence, excusable neglect, or extraordinary circumstances entitling it to relief under N.D.R.Civ.P. 60(b)(1) or (6). Further, even if it established the right to relief under N.D.R.Civ.P. 60(b)(1), it failed to establish a meritorious defense to ACL’s claims.

[11] In order to prevail on this appeal, Hellervik must establish that the district court abused its discretion in denying its Motion to Vacate Default Judgment. A motion to vacate a judgment under N.D.R.Civ.P. 60(b)(1) lies within the sound discretion of the trial court, and

the trial court's decision will not be disturbed on appeal absent an abuse of discretion. *Gepner v. Fujicolor Processing, Inc.*, 2001 ND 207, ¶ 13, 637 N.W.2d 681 (citations omitted). A court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner. *Id.* "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." *Id.* "An abuse of discretion by the district court is never assumed and must be affirmatively established, and this Court will not overturn a court's decision merely because it is not the one it would have made had it been deciding the motion." *Bickler v. Happy House Movers, L.L.P.*, 2018 ND 177, ¶ 12, 915 N.W.2d 690. Hellervik cannot meet this heightened standard of review, and the district court's *Order* must be affirmed.

A. Hellervik has failed to establish any evidence of mistake, inadvertence, excusable neglect under N.D.R.Civ.P. 60(b)(1).

[12] Rule 60(b)(1) of the North Dakota Rules of Civil Procedure, provides, in part:

"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment or order in any action or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . ."

It is well established that a motion under N.D.R.Civ.P. 60(b) "is not to be used to relieve a party from free, calculated, and deliberate choices," and "[a] party remains under a duty to take legal steps to protect his own interests." *Kukla v. Kukla*, 2013 ND 192, ¶ 25, 838 N.W.2d 434. Further, a simple disregard of legal process is not excusable neglect under N.D.R.Civ.P. 60(b)(1). *State v. \$33,000 U.S. Currency*, 2008 ND 96, ¶ 14, 748 N.W.2d 420; *See also First Am. Bank & Trust v. McLaughlin Inv.*, 407 N.W.2d 505, 508 (N.D. 1987). Furthermore, a Rule 60(b) motion is not "a substitute for an appeal." *Bickler*, 2018 ND 177, ¶ 12.

[13] In \$33,000 U.S. Currency, the State brought a civil action for forfeiture arising out of law enforcement's seizure of \$33,000 in a criminal matter. 2008 ND 96, ¶ 8. The Summons and Complaint were properly served upon defendant. *Id.* The State did not serve the Summons and Complaint upon the attorney the State knew to be representing the defendant in the criminal matter. *Id.* The defendant did not file an answer or otherwise respond to the Summons and Complaint. *Id.* The State then filed an application for default judgment with the district court; neither the defendant nor his criminal defense attorney was served with the State's application for default judgment. *Id.* at ¶ 3. The district court granted the application for default judgment. *Id.* Approximately two weeks after the default judgment had been entered, the defendant filed a motion to vacate the default judgment pursuant to N.D.R.Civ.P. 60(b). *Id.* at ¶ 4. The defendant argued that because he was semi-literate and had retained and was relying upon his counsel for the underlying criminal matter, his failure to read and respond to the Complaint constituted excusable neglect, inadvertence, or mistake. *Id.* at ¶ 13. The defendant conceded the summons and complaint were properly served upon him. *Id.* However, he argued that he "assumed if any papers were served involving [him] then his attorney would receive them and take care of all matters" although he acknowledged that his criminal attorney had not been retained for the civil forfeiture action. *Id.* The North Dakota Supreme Court affirmed the trial court's decision stating that the fact that the defendant "ignored the summons and complaint, properly served upon him, does not constitute excusable neglect, inadvertence, mistake, or surprise under Rule 60(b)(1), N.D.R.Civ.P" explaining:

Like the party moving to vacate default judgment in *Royal Industries*, Tran completely disregarded service of process and failed to seek the advice of counsel because he assumed his criminal defense attorney would "take care of all matters." Tran's disregard of service does not constitute excusable neglect

under Rule 60(b)(i). *Id.* Tran did not review the documents. Nor did he immediately seek the advice of his attorney and timely submit the documents to his attorney for review. The district court did not abuse its discretion in denying Trans' motion to vacate on this ground.

Id. at ¶ 14.

[14] Like the defendant in *\$33,000 U.S. Currency*, Gary Minard acknowledged that he did not take any action after being served with the *Summons* and *Complaint* on September 9, 2019 because he assumed “such matters would be handled by counsel.” *Affidavit of Gary Minard* at ¶ 9 (Index # 32). However, Mr. Minard also acknowledged that he was notified in July 2019 that Fredrikson & Byron, P.A. had a conflict of interest and would not be able to represent Hellervik. *Id.* at ¶ 6. According to an email from Mr. Raum, Fredrikson & Byron, P.A. had referred Hellervik to other counsel on or before July 12, 2019, approximately two months before Hellervik was served the *Summons* and *Complaint*. (Index #34). Further, like the defendant in *\$33,000 US Currency*, Mr. Minard mistakenly believed that Mr. Raum would handle responding to the *Summons* and *Complaint*, despite knowing Mr. Raum had a conflict. However, as the Court held in *\$33,000 US Currency*, this type of mistake does not constitute excusable neglect, nor relieve a defendant from the duty to timely respond to a properly served *Summons* and *Complaint*.

[15] Recently, this Court addressed an appeal from an order denying a motion to vacate a default judgment. In *Discover Bank v. Bolinske*, 2020 ND 228, the defendant, Robert Bolinske, moved to set aside a default judgment entered against him, arguing that he mistakenly sent his answer and counterclaim to the wrong address. *Id.* at ¶ 12. This Court disagreed, finding that Mr. Bolinske's own negligence in “misaddressing a responsive pleading and thereby missing the deadline for a timely response” did not entitle him to relief under N.D.R.Civ.P. 60(b)(1). Importantly, the Court held that since Mr. Bolinske did not cite

to any precedent supporting his argument that his mistake in addressing his answer and counterclaim constituted excusable neglect, the Court would not consider his argument. *Id.* The Court held that the district court did not abuse its discretion by denying Mr. Bolinske's motion to vacate based on his own mistake, inadvertence, or excusable neglect.

[16] Unlike Mr. Bolinske, who at least *attempted* to timely file and serve a response to the lawsuit after it was served upon him, Hellervik took no steps to respond. If Mr. Bolinske's mistake in addressing his responsive pleading does not constitute excusable neglect, then Hellervik's blatant disregard for the *Summons* and *Complaint* certainly should not constitute "excusable neglect." Further, similar to Mr. Bolinske, Hellervik has not cited to any case law to support its proposition that Mr. Minard's own mistake in believing Mr. Raum would respond to the *Summons* and *Complaint* constitutes excusable neglect justifying relief under N.D.R.Civ.P. 60(b)(1). It is difficult to fathom how this could be considered "excusable neglect", considering Mr. Raum advised Hellervik, in July 2019, that he had a conflict and Mr. Minard acknowledged he knew Mr. Raum had a conflict. *July 12, 2019 email from Michael Raum to Randy Sickler* (Index # 34); *Affidavit of Gary Minard*, ¶ 6 (Index # 32). Further, Mr. Minard admitted that after receiving the *Summons* and *Complaint*, he took "no further action." *Id.* at ¶ 9. This lack of action is a prime example of "disregard for legal process", which is not excusable neglect under North Dakota law. Accordingly, the district court did not abuse its discretion in refusing to vacate the Judgment pursuant to N.D.R.Civ.P. 60(b)(1).

B. There are no extraordinary circumstances which justify relief under Rule 60(b)(6), and the district court did not abuse its discretion in refusing to grant Hellervik relief under this rule.

[17] Under N.D.R.Civ.P. 60(b)(6), this Court may relieve a party from a final judgment for “any other reason that justifies relief.” Although the North Dakota Supreme Court has referred to N.D.R.Civ.P. 60(b)(6) as a “catch-all” provision, it should only be invoked “when extraordinary circumstances are present.” *Kautzman v. Doll*, 2018 ND 23, ¶ 14, 905 N.W.2d 744. Further, N.D.R.Civ.P. 60(b)(6) it is not without limitations:

[T]he use of the rule is limited in many considerations. It is not to be used as a substitute for appeal. It is not to be used to relieve a party from free, calculated, and deliberate choices he has made. It is not to be used in cases where subdivisions (1) to (5) of Rule 60(b) might be employed—it and they are mutually exclusive. **Yet 60(b)(6) can be used where the grounds for vacating a judgment or order are within any of subdivisions (1) to (5), but something more or extraordinary which justifies relief from the operation of the judgment must be present.**

Kautzman, 2018 ND 23, ¶ 14 (*quoting Hildebrand v. Stolz*, 2016 ND 225, ¶ 16, 888 N.W.2d 197) (citation omitted) (emphasis added). “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.” *Shull v. Walcker*, 2009 ND 142, ¶ 14, 770 N.W.2d 274.

[18] Having sought a remedy under N.D.R.Civ.P. 60(b)(1) due to excusable neglect, which it failed to establish, Hellervik must establish “something more” or “extraordinary” justifying relief from the *Judgment*. *Hildebrand*, 2016 ND 225, ¶ 16, 888 N.W.2d 197. However, Hellervik fails to allege *anything more* or any “extraordinary” justifying relief under N.D.R.Civ.P. 60(b)(6). Instead, Hellervik argues only that the district court erred when it failed to “liberally apply” N.D.R.Civ.P. 60(b)(1). *Appellant’s Brief*, ¶ 41. (Index #30). Hellervik’s sole argument is that ACL was required to provide it with “notice” of the *Application for Default Judgment*. Of course, Hellervik is incorrect. Rule 55(a)(3),

N.D.R.Civ.P, unambiguously states that notice of a motion for default judgment need only be served on a party who “appeared personally or by a representative.” Hellervik did neither, and accordingly was not entitled to notice of ACL’s *Application for Default Judgment*.

[19] Hellervik failed to establish any extraordinary circumstances justifying relief and disturbing the finality of the Judgment. Because Hellervik failed to meet its burden, the district court did not err in denying the Motion to Vacate Default Judgment.

C. Hellervik has failed to assert a meritorious defense.

[20] Even if the Court were to find that the district court abused its discretion in refusing to find mistake, inadvertence, or excusable neglect under N.D.R.Civ.P. 60(b)(1), Hellervik is still not entitled to relief. Under North Dakota law, a party moving to vacate a judgment is also permitted to raise a meritorious defense under N.D.R.Civ.P. 60(b). *\$33,000 U.S. Currency*, 2008 ND 96, ¶ 17. However, in order to be entitled to relief under N.D.R.Civ.P. 60(b)(1), the movant must establish both grounds for relief under N.D.R.Civ.P. 60(b)(1) and a meritorious defense. *Federal Sav. & Loan Ins. Corp. v. Albrecht*, 379 N.W.2d 266, 269 (N.D. 1985)(citing *Bender v. Liebelt*, 303 N.W.2d 316, 318 (N.D. 1981)). Hellervik has failed to raise a meritorious defense to the claims of ACL.

[21] In considering what is required for stating a meritorious defense to set aside a default judgment, the North Dakota Supreme Court has turned to the federal interpretation of Rule 55(c) of the Federal Rules of Civil Procedure, which is the federal rule for setting aside a default judgment if the movant can show a meritorious defense. *\$33,000 U.S. Currency*, 2008 ND 96, ¶ 17:

Generally, under F.R.Civ.P. 55(c), the party moving to set aside the judgment must show the basis of the meritorious defense, but must deliver something more than “[a] mere conclusory statement that such a defense exists” and such a conclusory statement, without more “will generally be regarded as

insufficient for this purpose.” 29 A.I.R.Fed.7, at S (6)(a) (1976). See also 49 C.J.S. Judgments & 405 (1997) (“The requisite meritorious defense must be set forth in sufficient detail . . . to permit the court to determine whether or not it is meritorious and sufficient. . . . The allegations set forth to establish a meritorious defense, for the purpose of setting aside a default judgment, must be more than bare legal assertions; they must counter the allegations in the complaint with specific legal grounds substantiated by a basis of credible fact.”).

Id. In order to successfully raise a meritorious defense under N.D.R.Civ. P. 60(b), Hellervik was required to provide enough facts to allow the district court the opportunity to measure whether the claim or defense has any potential. See *Dockter v. Dockter*, 2018 ND 219, ¶ 23, 918 N.W.2d 35. Hellervik did not meet this burden.

[22] Hellervik’s entire argument as to why it has a meritorious defense is found in one sentence in *Appellant’s Brief*, which reads: “The record also discloses without question that Hellervik has meritorious defenses to the claims by AE2s and compulsory counterclaims.” *Appellant’s Brief*, ¶ 36. Hellervik provides no analysis under the standard set forth in \$33,000 US Currency as to why this bare assertion, as well as the bare legal assertions set forth in its proposed *Answer and Counterclaim* (Index # 31), raise a meritorious defense to the claims of ACL. Further, if the proposed *Answer and Counterclaim* is reviewed, it becomes evident that Hellervik does not have a meritorious defense.

[23] Hellervik’s “Affirmative Defenses” include, among standard boilerplate defenses, the defenses of: failure of consideration, failure of a condition precedent, and failure to provide adequate services and materials and the materials and services provided were not rendered in a good and workmanlike manner. *Proposed Answer and Counterclaim*, ¶¶ 30-31, 33 (Index # 31). Hellervik also proposes to bring counterclaims for Breach of Contract and Breach of Warranty. *Id.* However, Hellervik does not identify or provide the contractual agreement containing any “condition precedent” that ACL failed to satisfy, or any express warranty

provided by ACL. In fact, Hellervik does not allege that ACL provided any express warranty at all. Hellervik's Breach of Warranty counterclaim appears to allege that ACL violated an implied warranty of fitness for a particular purpose. *Proposed Answer and Counterclaim*, ¶¶ 61. The North Dakota Supreme Court has held that the implied warranty of fitness for a particular purpose may apply to construction contracts if the following is established: (1) the contractor holds himself out, expressly or by implication, as competent to undertake the contract; and the owner (2) has no particular expertise in the kind of work contemplated; (3) furnishes no plans, designs, specifications, details, or blueprints; and (4) tacitly or specifically indicates his reliance on the experience and skill of the contractor, after making known to him the specific purposes for which the building is intended. *Dobler v. Malloy*, 214 N.W.2d 510, 516 (N.D. 1973). Hellervik does not allege the four factors set forth above with "credible facts", and its bare assertion of a breach of implied warranty is not sufficient to raise a "meritorious defense" under the standard adopted in *\$33,000 US Currency*.

[24] Furthermore, Hellervik has admitted that ACL is entitled to payment in the amount of \$357,488.59, which was the principal amount Hellervik owed ACL at the time ACL submitted its *Application for Default Judgment*. (Index #11). On February 5, 2019, ACL sent a letter to Hellervik requesting that it confirm the correctness of the amount due to ACL from Hellervik as of December 21, 2018, which was \$357,488.59. See Exhibit A to the *Affidavit of Craig Pietruszewski* (Index # 44). Hellervik had the opportunity to dispute the amount due when responding to this letter. It did not. Instead, Gary Minard signed and returned it to ACL on March 6, 2019, at which time he did not challenge and/or raise any concerns with the amount ACL was alleging was due and owing. *Id.* This was not the only time Hellervik acknowledged the total amount due and owing to ACL. On February 21, 2019, Minard sent

an email along with a proposed payment plan to Dan Lamberson (“Lamberson”), an employee of ACL. *See Exhibit B* to the *Affidavit of Craig Pietruszewski* (Index # 46). This proposed payment plan acknowledges that as of February 12, 2019, Hellervik owed ACL an outstanding principal balance of \$357,488.59. *Id.* On April 15, 2019, Lamberson sent an email to Minard reminding him that, per the payment schedule proposed by Hellervik, Hellervik agreed to make a payment to ACL in the amount of \$30,000 on or before April 15, 2019. *See Exhibit C* to the *Affidavit of Craig Pietruszewski* (Index # 47). Minard responded suggesting that it would not be making a payment because the parties had not agreed to a satisfactory payment plan. *Id.* On April 23, 2019, Lamberson sent another email to Minard asking why Hellervik had not made a payment in the amount of \$30,000 per the payment plan it proposed. *Id.* Again, Minard stated that Hellervik did not plan on sending anything until an agreement was in place. *Id.* At no time did Hellervik challenge the total amount due and owing to ACL and/or raise concerns about the quality of the work performed by ACL. That did not happen until after default was entered.

[25] As set forth above, in addition to failing to establish mistake, inadvertence or excusable neglect under N.D.R.Civ.P. 60(b)(1), or other reasons justifying relief under N.D.R.Civ.P. 60(b)(6), Hellervik has failed to raise a meritorious defense. Accordingly, the district court did not abuse its discretion in denying the Motion to Vacate Default Judgment, and the *Order* should be affirmed.

II. THE JUDGMENT IS VALID AND ENFORCEABLE BECAUSE ACL PROPERLY APPLIED FOR DEFAULT JUDGMENT AND WAS NOT REQUIRED TO PROVIDE HELLERVIK, WHO FAILED TO APPEAR, WITH NOTICE OF ITS APPLICATION FOR DEFAULT JUDGMENT.

[26] It is undisputed that Hellervik failed to answer the *Complaint* or otherwise take any steps after the *Summons* and *Complaint* were served constituting an appearance or that

otherwise put ACL on notice that Hellervik intended to contest ACL's claims. Hellervik argues, however, that the default judgment is void because it was entered without notice. Specifically, Hellervik argues that notice of ACL's *Application for Default Judgment* was required pursuant to N.D.R.Civ.P. 55(a)(3) because pre-suit communication between Hellervik's prior counsel and ACL's counsel constituted an "informal appearance" by Hellervik in this proceeding. This argument is not supported by the facts or the law and should be rejected by this Court. The district court did not abuse its discretion, and its decision to deny the Motion to Vacate Default Judgment should be affirmed.

[27] Under the North Dakota Rules of Civil Procedure, a district court may enter default judgment against a party who fails to plead or "otherwise appear." N.D.R.Civ.P. 55(a). "If the party against whom a default judgment is sought has appeared personally or by a representative, that party or its representative must be served with a motion for judgment." N.D.R.Civ.P. 55(a)(3). However, if the party against whom a default judgment is sought has not appeared, either personally or by a representative, the moving party is under no obligation to provide notice of its intent to take default judgment. *See First Nat'l Bank v. Hoggarth*, 331 N.W.2d 271, 274 (N.D. 1983).

[28] Whether an appearance has been made for purposes of N.D.R.Civ.P. 55(a) is a question of law. *Hatch v. Hatch*, 484 N.W.2d 283, 286 (N.D. 1992). "A party must factually demonstrate an appearance in order to obtain relief from judgment." *US Bank Nat'l Ass'n. v. Arnold*, 2001 ND 130, ¶ 12, 631 N.W.2d 150. "If the district court's interpretation of disputed facts is not clearly erroneous, [the North Dakota Supreme Court] will fully review whether the facts support the ultimate legal conclusion of an appearance." *Id.*

[29] The North Dakota Supreme Court has defined the term “appearance” as “any response sufficient to give the plaintiff or his or her attorney notice of an intent to contest the claim.” *State v. \$33,000 United States Currency*, 2008 ND 96, ¶ 8, 748 N.W.2d 420 (quoting *Thronset v. Hawkenson*, 532 N.W.2d 394, 397 (N.D. 1995) (citations omitted)). The North Dakota Supreme Court has acknowledged that the words “appear,” “appearing,” or “appearance” are words of art in the legal sense. *Lawrence v. Delkamp*, 2008 ND 111, ¶ 21, 750 N.W.2d 452 (citing *Black’s Law Dictionary* 94 (7th ed. 1999) (defining “appearance” as “[a] coming into court as a party or an interested person, or as a lawyer on behalf of a party or interested person.”)). Although case law in North Dakota defines appearance broadly, relief shall be denied when a party is unable to factually demonstrate an appearance. *U.S. Bank Nat’l Ass’n v. Arnold*, 2001 ND 130, ¶ 14, 631 N.W.2d 150 (citing *Hatch*, 484 N.W.2d at 286 (holding that a phone call to counsel for the opposing party “with regards to this action” is not an appearance); *Federal Land Bank v. Lillehaugen*, 370 N.W.2d 517, 519 (N.D. 1985) (identifying several cases in which the North Dakota Supreme Court considered whether there was an appearance made). Furthermore, the North Dakota Supreme Court has explicitly stated that the appearance must take place in the context of the proceeding at issue. *\$33,000 U.S. Currency*, 2008 ND 96, ¶ 9, 748 N.W.2d 420.

[30] Hellervik argues that the communications between Michael Raum from Fredrickson & Byron, P.A. and ACL’s counsel that occurred approximately two months prior to the commencement of this lawsuit constitutes an appearance on behalf of Hellervik. *Appellant’s Brief*, ¶ 45. Hellervik has not cited to any North Dakota case law wherein the alleged “appearance” occurred prior to the commencement of the lawsuit. A civil action is commenced by the services of a summons. N.D.R.Civ.P. 3. This lawsuit was commenced on

September 9, 2019. (Index #7). There is no dispute that Hellervik did not file an answer or make any type of appearance in this proceeding after it was served with the *Summons* and *Complaint*. (Index #19); *Affidavit of Gary Minard*, ¶ 9 (Index #32). All communications between Mr. Raum and ACL’s counsel occurred months before September 9, 2019. (Index #34). Therefore, those communications are irrelevant to the issue of whether Hellervik made an appearance in this proceeding prior to ACL seeking entry of judgment by default.

[31] Even if the pre-suit communications are considered, the content of those communications was not sufficient to give ACL or its counsel notice of its intent to contest the claim. *See \$33,000 United States Currency*, 2008 ND 96, ¶ 8, 748 N.W.2d 420 (defining the term “appearance” as “any response sufficient to give the plaintiff or his or her attorney notice of an intent to contest the claim.”); *See also US Bank Nat’l Ass’n v. Arnold*, 2001 ND 130, ¶ 19, 531 N.W.2d 150 (concluding that motion to vacate a default judgment was properly denied where defendant presented no evidence that an attorney, who called plaintiff’s counsel, was representing him or intending to file a notice of appearance on defendant’s behalf, or that the defendant was going to contest the claim). Contrary to Hellervik’s argument, Mr. Raum’s communication on July 12, 2019 was the opposite of an appearance. He advised counsel for ACL that he *was not appearing* for Hellervik, and in fact could not represent Hellervik due to a conflict of interest. Mr. Raum’s emails to ACL’s counsel only show that he a) requested copies of the Lien, and b) had a conflict of interest, and was not representing Hellervik. Importantly, the record is devoid of any communications from counsel for Hellervik or any agent or representative of Hellervik advising that Hellervik intended to contest ACL’s claims – which is required to establish an “appearance” under North Dakota law.

[32] Hellervik cites to *Ellison v. Process Systems Inc. Const. Co.*, 50 P.3d 658 (Wa. Ct. App. 2002), a Washington Court of Appeals case, as authority for the proposition that “an informal appearance can occur prior to the commencement of a lawsuit and still necessitate notice of a request for default judgment.” *Appellant’s Brief*, ¶ 46. *Ellison* is, at best, persuasive authority. However, as explained below, it is factually distinguishable.

[33] In *Ellison*, an attorney for Ms. Ellison, an employee who alleged she was terminated in retaliation for speaking out against the sexual harassment of her co-workers, wrote a letter to her former employer’s counsel. *Ellison*, 50 P.3d 658, 659. This letter was responded to by an attorney for her former employer, PSI, advising that the employee had been terminated for cause, and denied that the dismissal was pretextual. *Id.* The same attorney who wrote the first letter wrote again a few weeks later, advising that remedial action had been taken. *Id.*

[34] Thereafter, Ms. Ellison sued PSI, and obtained a default judgment. *Id.* Approximately two years later, PSI sought to vacate the default judgment, arguing fraud, misrepresentation, other misconduct, void judgment, unavoidable casualty, or misfortune, and “other reasons” permitting vacation. *Id.* The trial court granted the motion to vacate, finding that the pre-suit letters constituted an “informal appearance.” *Id.* at 660.

[35] On appeal, the Washington Court of Appeals affirmed the trial court’s finding that PSI had “appeared” based on its attorneys’ letters advising Ms. Ellison’s counsel that PSI contested her claims and intended to contest them. The Washington Court of Appeals held that “[w]hether a party has appeared is generally a question of intention, as evidenced by acts or conduct, such as the indication of a purpose to defend.” *Id.* “CR 55 is intended to protect those parties who, although delaying in the formal sense by failing to file pleadings within the prescribed period, have otherwise indicated to the moving party a clear purpose to defend the

lawsuit.” *Id.* at 661. “[T]he issue should not turn on when the acts occurred, but on whether the acts sufficiently communicated PSI’s intention to defend the lawsuit.” *Id.* Ultimately, the Washington Court of Appeals affirmed the trial court because the two pre-suit letters from counsel for PSI “sufficiently communicated PSI’s intent to defend Ms. Ellison’s claims for wrongful discharge.” *Id.* at 662.

[36] *Ellison* is distinguishable from the case before this Court. In *Ellison*, there were two pre-suit letters from counsel for PSI advising Ms. Ellison that it disputed her claims and would defend them. Here, Mr. Raum’s sole communication is to advise ACL’s counsel that it was not representing Hellervik due to a conflict of interest and had “referred the client out.” (Index #34). Nowhere in the email correspondence, or anywhere else in the record, is there evidence that Hellervik intended to contest ACL’s claims if a foreclosure action was commenced. (Index. #34). After Hellervik was served with the *Summons* and *Complaint*, it did not contact ACL’s counsel nor did any attorney contact ACL’s counsel notifying them that Hellervik intended to contest the claims set forth in the *Complaint*. *Affidavit of Craig Pietruszewski* at ¶ 16 (Index # 44). Conversely, the record contains evidence that Hellervik did not, in fact, contest ACL’s claims at all, as it admitted to owing ACL the entire principal amount due. (Index # 45). Thus, even if the pre-suit communication from Mr. Raum is considered, it is not an “appearance” under North Dakota law because it does not convey an intent by Hellervik to contest ACL’s claims.

[37] Hellervik has not met its burden of factually demonstrating that it made an appearance in this case prior to the district court entering default judgment. Because Hellervik did not appear, ACL was not required to provide it with notice under N.D.R.Civ.P. 55(a)(3). Thus, the district court did not abuse its discretion in refusing to find that notice of ACL’s

Application for Default Judgment was required, and its decision to deny the Motion to Vacate Default Judgment should be affirmed.

REQUEST FOR ORAL ARGUMENT

[38] ACL requests oral argument. Oral argument will assist the Court by allowing counsel for Hellervik and ACL to address any specific questions the Court may have.

CONCLUSION

[39] Hellervik has failed to establish the existence of mistake, inadvertence, or excusable neglect under N.D.R.Civ.P. 60(b)(1), or other reasons justifying relief under N.D.R.Civ.P. 60(b)(6). The Judgment was properly entered against Hellervik after its default, and it was not required to receive notice of ACL's intention to seek judgment by default. Accordingly, the district court did not abuse its discretion in denying Hellervik's request for relief. For these reasons, the *Order* should be affirmed.

Dated this 12th day of November, 2020.

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CERTIFICATE OF COMPLIANCE

[40] The undersigned, as attorney for AE2S Construction, LLC, the Appellee in this matter, and as author of this Appellee's Brief, hereby certifies that the total number of pages of Appellee's Brief complies with North Dakota Rule of Appellate Procedure 32(a)(8), as Appellee's Brief is 24 pages long

Dated this 12th day of November, 2020.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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

AFFIDAVIT OF SERVICE

STATE OF NORTH DAKOTA)
 : ss.
COUNTY OF STARK)

[1] Cora Seiler, being first duly sworn upon oath, deposes and says: That she is a citizen of the United States, of legal age, and not a party to nor interested in the above-entitled matter.

[2] That on November 12, 2020, in accordance with the provisions of the North Dakota Rules of Civil Procedure, this affiant served upon the persons hereinafter named a true and correct copy of the following document in said matter:

BRIEF OF APPELLEE AE2S CONSTRUCTION, LLC

by causing the same to be filed electronically with the Supreme Court through ECF, and that ECF will send a Notice of Electronic Filing (NEF) to the following person:

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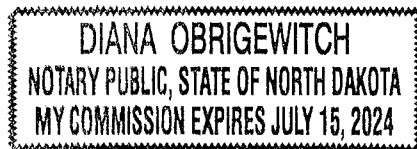
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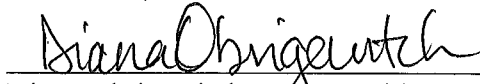
[3] That to the best of affiant's knowledge, information, and belief such addresses as given above are the actual post office address of the parties intended to be so served.

Dated: November 12, 2020.


Cora Seiler

Subscribed and sworn to before me November 12, 2020.




Diana Obrigewitch, Notary Public