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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Jarick Products, Inc., d/b/a Dakota Gypsum, Plaintiff, vs. MID AM Group, LLC and D. Duane Peterson, Defendants.	**SUPREME COURT NO. 20090290** Civil No. 09-08-C-04126

ON APPEAL FROM THE DISTRICT COURT
FOR CASS COUNTY
STATE OF NORTH DAKOTA

APPELLEE'S BRIEF

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

[¶1]Whether the District Court abused its discretion when it denied Appellant's motion to vacate judgment under Rule 60(b).

STATEMENT OF THE FACTS

[¶2]The following facts are drawn from the Trial Court's docket and transcripts of the proceedings below. The summons and complaint in this action were personally served on D. Duane Peterson on August 11, 2008, by the Cass County Sheriff's Department. The Complaint sought a recovery against Peterson on the basis of piercing the corporate veil between him and MID AM Group, LLC. Peterson simply did not answer the complaint. As a result, Plaintiff sought and obtained a default judgment, which was entered on October 1, 2008. Plaintiff served a Notice of Entry of Judgment on Peterson via mail on October 7, 2008. Peterson did not at that time take any action.

[¶3]In October of 2008, Plaintiff served post-judgment discovery on Peterson. Peterson again chose to ignore the matter and did not respond. On December 23, 2008, Plaintiff served on Peterson a Notice of Motion to Compel, Motion to Compel, Brief in Support of Motion to Compel, and supporting documents. Peterson did not respond to the motion. On January 16, 2009, the Court granted the motion to compel, and Plaintiff served that order on Peterson on January 21, 2009. Peterson again chose not to respond. On February 4, 2009, the Court issued an order requiring Peterson to show cause why he should not be held in contempt for failing to comply with the Court's January 16, 2009 Order. The sheriff served the show cause order on Peterson

personally on March 3, 2009. The show cause hearing was ultimately held on June 29, 2009, and the court issued the requested order. Peterson's motion to vacate followed.

[¶4]At the hearing held on June 29, 2009 for his motion to vacate, Peterson testified about his reasons for ignoring this lawsuit. He explained that he was overwhelmed by the business difficulties he was facing and so simply chose to leave Fargo for California in November 2008 and did not return until after Christmas, at which point he hired counsel and began dealing with the lawsuits against him. Tr. At 15-16. In his brief to this Court, he characterizes this decision (at ¶ 34) as follows: "simply deciding it was too much, taking some time off [6-7 months], and then later regrouping and doing something about all of the legal problems."

[¶5]Notably, there was no evidence offered by Peterson at the trial court level (or here) that Peterson was not actually served; that he was operating under any sort of disability when he was served (or later); or that he had discovered evidence not available to him at the time of service. The trial court therefore denied the motion, finding that Peterson had simply ignored the legal process. This Court should affirm this judgment.

LAW AND ARGUMENT

[¶6]It is within the trial court's discretion whether to grant or deny a motion to vacate. Soli v. Soli, 534 N.W.2d 21, 23 (N.D. 1995). Absent an abuse of this discretion, this Court will not set aside a trial court's decision on appeal. Filler v. Bragg, 1997 ND 24, ¶ 9, 559 N.W.2d 225, 228. A trial court abuses its discretion if it

acts in an arbitrary, capricious, or unreasonable manner, or if it misinterprets or misapplies the law. Weber v. Weber, 548 N.W.2d 781, 783 (N.D. 1996).

[¶7]N.D.R.Civ.P. 60(b) provides "the court may relieve a party . . . from a final judgment" for any of six reasons:

> (i) mistake, inadvertence, surprise, or excusable neglect; (ii) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (iii) fraud (whether denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (iv) the judgment is void; (v) the judgment has been satisfied, released, or discharged, or a previous judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (vi) any other reason justifying relief from the operation of the judgment.

Judgments may be reopened under this rule (1) when a motion is promptly made; (2) when the grounds stated satisfy the requirements of Rule 60; and (3) when an answer appearing to state a meritorious defense is presented. Gepner v. Fujicolor Processing, Inc., 2001 ND 207, ¶¶ 13-14, 637 N.W.2d 681. 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. Follman v. Upper Valley Special Educ. Unit, 2000 ND 72, ¶ 10, 609 N.W.2d 90.

[¶8]Here, Peterson focuses his attention almost exclusively on the third point, arguing extensively that piercing the corporate veil here is inappropriate on the underlying facts as set out in his motion. Remarkably, however, he more or less ignores the first two points; indeed, he does not even specify precisely on which subdivision of Rule 60(b) he is relying. Thus, assuming, without conceding, that

Peterson has stated a meritorious defense, the other requirements are not met.[1]

[¶9]First, the motion is not timely. With respect to timeliness, Rule 60(b) provides as follows:

> The motion must be made within a reasonable time, and for reasons (i), (ii), and (iii) not more than one year after notice that the judgment or order was entered in the action or proceeding if the opposing party appeared, but not more than one year after a judgment by default has been entered.

Here, the motion was not made in a "reasonable time." As noted below, Peterson does not even attempt to identify on which of the various grounds for relief he is proceeding here, though it seems evident that he is proceeding under subsection (i), relating to excusable neglect. This implicates the one-year limitation. However, the Court has held that while the one-year limitation is an absolute bar to motions made outside that time, a motion may still be untimely even if made within that time period. See Matter of Estate of Hansen, 458 N.W. 2d 264, 269 (N.D. 1990). The Court must therefore analyze if the motion was made in a "reasonable time."

[¶10]The determination of whether a motion has been timely filed is within the discretion of the trial court and will not be overturned on appeal unless the trial court abuses its discretion. See Brakke v. Brakke, 525 N.W.2d 687, 689 (N.D. 1994). What constitutes a reasonable time to bring a motion for relief varies from case to case and must be determined in each instance from the facts before the court. Suburban Sales v. District Court of Ramsey County, 290 N.W.2d 247 (N.D.1980).

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[1] Appellee will not address the merits of the veil-piercing issues here, because it is irrelevant to the inquiry before this Court.

[¶11]Here, the motion was not timely. First, the motion was made more than 7 months after the judgment, during which Peterson was capable of dealing with the case but simply chose to take time to "regroup." As explained in detail infra, simply choosing to regroup is not a valid basis for relief from default but rather a calculated choice, for which Rule 60(b) is not designed. Industrial Comm'n of North Dakota v. Wolf, 1999 ND App 2, ¶ 6, 588 N.W.2d 590. In light of this fact, any delay beyond a minimal amount is unreasonable.

[¶12]This Court has found requests such as this one untimely in the past. For example, in Estate of Hansen, this Court affirmed the trial court's determination that a Rule 60(b) motion, though made within a year of the judgment, was untimely. 458 N.W. 2d at 269. There, a mortgagor sought to set aside judgment foreclosing a junior mortgage, on the grounds that foreclosure and sale were void because sheriff refused to sell property in separate parcels and in sequence requested by the movant. Id. However, this Court noted that the movant knew of the mortgagee's request that the property be sold in one parcel several years earlier but did not oppose that request until the day before redemption period expired, and it then did not explain delay in seeking relief. Id. Similarly, in this case, Peterson knew of the claims against him well before the judgment was entered, and yet he simply elected to ignore them until he was on the brink of contempt sanctions.

[¶13]Moreover, the motion here was made after a series of collection proceedings, of which Peterson had notice, and all of which he elected to ignore. Indeed, it appears Peterson elected to respond to the suit only when he faced contempt sanctions. This Court has previously found a motion to vacate an underlying

judgment untimely when it was made in response to a series of collection efforts. Avco Financial Services v. Schroeder, 318 N.W.2d 910, 912-13 (N.D. 1982). Peterson thus had several opportunities to contest the judgment – indeed, his counsel even appeared at a hearing on his behalf – before he filed this motion. Under these conditions, and considering the lack of any reasonable excuse for the delay, the motion is not timely and should be denied on that basis.

[¶14]Even if the motion were timely, though, Peterson has not satisfied any of the grounds for relief allowed by Rule 60(b). In his brief, as below, Peterson does not even identify on which of the various grounds of Rule 60 he relies. Based on a reading of the record, however, the only plausible basis is subdivision (i), which allows relief in cases of "mistake, inadvertence, surprise, or excusable neglect"; the other bases are not even tangentially implicated.

[¶15]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. Follman v. Upper Valley Special Educ. Unit, 2000 ND 72, ¶ 10, 609 N.W.2d 90. "A defendant's own errors will not always constitute proper grounds for relief from a default judgment." Beaudoin v. South Texas Blood & Tissue Center, 2005 ND 120, ¶ 40, 699 N.W.2d 421. Rather, the applicable standard under Rule 60(b)(i) to relieve a party from a judgment is whether there was "mistake, inadvertence, surprise, or excusable neglect." Id. (quoting N.D.R.Civ.P. 60(b)(i)).

[¶16]Peterson cannot meet this standard. He was served with process in this action, and evidently others as well, when a real estate development project fell apart. He asserts he was under stress, though he does not claim to have been disabled in any

legal sense. He then left the state, spending several months in California, before he returned and started dealing with his problems. In sum, then, as the trial court found, Peterson simply ignored the legal process while he "regrouped" from his "sadness and tears" for a period of over a half a year.

[¶17]This Court has clearly and repeatedly held that "simple disregard of legal process is, of course, not excusable neglect under the rule." Royal Indus., Inc. v. Haugen, 409 N.W.2d 636, 638 (N.D. 1987) (quoting Bender v. Liebelt, 303 N.W.2d 316, 318 (N.D.1981)). This Court has thus consistently upheld judgments when the defendant simply chooses not to respond to the complaint, unless the relatively high standards of Rule 60(b)(i) are met. See generally State v. $33,000.00 U.S. Currency, 2008 ND 96, 748 N.W.2d 420. There is simply no evidence here to support the claim for relief, because Peterson voluntarily chose to ignore the lawsuit while he dealt with his sadness.

[¶18]In the absence of such an explanation, the Court can only infer that Peterson simply made a gamble to ignore the case, as he was certainly free to do. Of course, he must also accept the consequences of that choice, because a "Rule 60(b) motion is not to be used to relieve a party from free, calculated, and deliberate choices." Industrial Comm'n of North Dakota v. Wolf, 1999 ND App 2, ¶ 6, 588 N.W.2d 590. Such "[m]ere misjudgment or careless failure to evaluate do[es] not suffice." United States v. O'Neil, 709 F.2d 361, 373 (5th Cir.1983) (citation omitted). To the contrary, a party must live with the consequences of his or her free choices, which in this instance led to the instant judgment.

[¶19]Peterson does not, and cannot, cite a single case supporting his proposition that vacating the judgment would be appropriate here. Instead, he relies on the general limitations articulated by this Court in Cuna Mtg. Aafedt, 459 N.W.2d 801 (N.D. 1990): (1) Rule 60(b) is generally remedial and should be liberally applied; (2) decisions on the merits are preferred; and (3) where timely relief is sought and the movant has meritorious defenses, doubt should be resolved in favor of setting aside judgments. While these rules are useful guideposts, they simply do not compel a reversal here.

[¶20]Of course, the guidelines of Cuna do not replace the text of Rule 60(b). Thus, a movant must still establish that one of the bases of that rule exists, and that the motion be timely. As noted above, Peterson here has not done so. Indeed, it is useful to contrast this case with Cuna Mtg. There, one party moved for summary judgment, which the Court entered by default when the opposing party failed to respond to the motion. 459 N.W.2d at 802. The party against whom judgment was entered moved to vacate within 10 days of the entry of that judgment. Id. Moreover, the movant supplied affidavits showing that it had timely served the opposing party with its response and failed to file them through the error of its lawyer, with which the Court was reluctant to charge the party. Id. at 803.

[¶21]Here, in contrast, Peterson has pointed to no basis for his choice to ignore the case other than that he was feeling deluged with paperwork, that he was overwhelmed, and that he "felt a lot of sadness, a lot of tears." Brief at ¶ 35. Moreover, he admits it was 6-7 months before he even obtained counsel, and longer

before he moved to vacate, during which time the case was proceeding. Id. No general injunction about the remedial nature of Rule 60(b) can overcome these facts.

[¶22]Indeed, the North Dakota Supreme Court has held that simply choosing not to present evidence is not an exceptional circumstance justifying vacating a judgment. As the court has written, "Under Rule 60(b), a decision to submit only certain evidence at a stage in the proceedings generally cannot later constitute exceptional circumstances justifying relief from a judgment." Follman, 2000 ND 72, ¶ 11, 609 N.W.2d at 94 (citing Hefty v. Aldrich, 220 N.W.2d 840, 847 (N.D.1974)). In sum, Peterson has not shown that he is entitled to relief under Rule 60(b), and the Court should affirm the judgment.

CONCLUSION

[¶23]Peterson asks this Court to hold that the general stress caused by business reversals justifies ignoring legal process for up to half a year, and then for obtaining relief from the judgment that results from ignoring that process. This request is not supported by the text of Rule 60(b), this Court's precedent, or good policy. Indeed, accepting this argument would permit all unsuccessful businesspeople to deal with their creditors only at a time of their own choosing, while those creditors see assets depleted, precious time lost, and legal fees and costs wasted. This Court should reject this argument and affirm the judgment.

Respectfully submitted this 5th day of January, 2010.

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CERTIFICATE OF SERVICE

[¶24]A copy of this document in pdf format were e-filed with the North Dakota Supreme Court and served upon L. Patrick O'Day, Attorney at Law, O'Day Law Office, PC, on the 5th day of January, 2010. Specifically, this document was electronically filed and served as follows:

The North Dakota Supreme Court
supclerkofcourt@ndcourts.com

Mr. L. Patrick O'Day
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/s/ Michael S. Raum
Michael S. Raum

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