

SUPREME COURT OF NORTH DAKOTA

Case No. 20120393

IRET Properties,  
Plaintiff and Appellee,  
vs.  
Josef Falkenstein, Connie  
Falkenstein, and  
Steven Falkenstein,  
Defendants and Appellants

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BRIEF OF THE APPELLANTS

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APPEAL FROM THE SOUTH CENTRAL DISTRICT COURT,  
BURLEIGH COUNTY,  
HONORABLE DAVID REICH, PRESIDING

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For the APPELLANTS:

John J. Gosbee, Esq.  
Gosbee Law Office  
P.O. Box 474  
Fort Yates, ND 58538-0474  
(701) 663-2225

February 27, 2013

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**I. ISSUES PRESENTED FOR REVIEW.**

[¶01] At what point does a person lack the suitable age **and discretion** required to accept substitute service under Rule 4(d)(2)(A)(ii), NDR CivP?

[¶02] If a default judgment is entered in an eviction case in which the Complaint demands no specific monetary relief, may a monetary judgment be entered, or is the default relief limited to eviction?

**II. STATEMENT OF THE CASE.**

**A. Nature of the Case.**

[¶03] The question in this case is whether individuals with mental retardation and serious learning disabilities have the suitable "discretion" to accept service of process on behalf of others in their household. It is a landlord-tenant eviction on appeal from denial of relief from default judgment, and from the judgment itself, in the South Central District Court, Burleigh County, the Honorable David Reich, presiding. On September 5, 2012, default judgment of eviction plus \$2,494.00 in damages and costs was entered against the Defendants, Josef Falkenstein (Josef), Connie Falkenstein (Connie), and Steven Falkenstein (Steven; collectively,

Tenants), and for the Appellees and Plaintiff, IRET Properties (Landlord) below. From the denial of relief from the judgment, and from the judgment itself, Tenants now appeal.

**B. Proceedings Below.**

**[¶04]** On August 16, 2012, Landlord issued a Notice of Intention to Evict addressed to Tenants. Doc. #02, Appx., p. 06. Personal and substitute service of the Notice of Intention to Evict was made on Tenants at 18:53 the same day. Returns of Service. Docs. #03-05, Appx., pp. 07-09.

**[¶05]** On August 22, 2012, Landlord issued a Summons, Doc. #06 and Complaint, Doc. #01, Appx., pp. 10, 04-05. Personal and substitute service of the Summons and Complaint was made on Tenants at 12:27 the next day. Returns of Service. Docs. #07-09, Appx., pp. 11-13.

**[¶06]** Tenants defaulted and judgment of eviction and monetary damages totaling \$2,494.00. Judgment, Doc. #17, Appx., pp. 14-15.

**[¶07]** Tenants filed a motion to vacate the judgment. Docs. #22-32. A hearing was held on September 12, 2012. By order entered September 12, 2012, the motion to vacate was denied. Doc. #34, Appx., pp. 16-20. On October 30, 2012, Tenants filed a timely Notice of Appeal from the judgment and

the order. Doc. #43, Appx., pp. 21-22.

**C. Statement of Facts.**

[¶08] The Falkenstein family consists of Connie, her husband Steven, and Connie's son Josef. Transcript II, 11:10-18.<sup>1</sup> "Steven has a reading and learning comprehension problem. He does not read at proper age very simple words. He does not understand anything of what's going on." *Ibid.*, 16:14-16. "Josef has a learning disability. He has retardation." *Ibid.*, 17:07-08. In the family, Connie has to handle important business affairs. *Ibid.*, 16:17-19.

[¶09] On August 16, 2012, process server Jim Hulm visited Tenants' home, met Josef Falkenstein, and served Josef with a Notice of Intention to Evict. Return of Service, Doc. #03, Appx., p. 07. Neither Steven nor Connie was home at the time, so Hulm gave Josef extra copies for each of Steven and Connie "by delivering a true and correct copy to a male

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1 Two transcripts were prepared for the appeal. Transcript I is the eviction hearing on August 30, 2012. Transcript II is the motion hearing on September 12, 2012. Citations are in the form of pp:nn-nn where p = the page number and n = the line number.

subject identified as Josef Falkenstein who also resides at the dwelling house ... ." Return of Service, Doc. #04, Appx., p. 08 (for Connie). Return of Service, Doc. #05, Appx., p. 09 (for Steven). Neither substitute service document said Josef was "of suitable age and discretion."

[¶10] Josef never told Connie or Steven about receiving the "three day notice." Transcript II, 13:08-12.<sup>2</sup>

[¶11] On August 23, 2012, at 12:27, Hulm returned to the Falkenstein apartment, this time bearing a summons and complaint for eviction. This time Steven was home, so personal service of the summons was made on Steven. Return of Service, Doc. #09, Appx., p. 13. This time neither Connie nor Josef was home, so substitute service on each was made by "delivering a true and correct copy to a male subject

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2 The cited passage refers only to Josef not telling Connie. The record does not affirmatively show that Josef didn't tell Steven. However, that was mentioned in argument on the motion to vacate (Transcript II, 10:18-20) and wasn't disputed. Argument instead focused on whether the service on Josef was sufficient for substitute service on Connie and Steven.

identified as Steven Falkenstein who also resides at the dwelling house ... ." Return of Service, Doc. #07, Appx., p. 11 (for Connie). Return of Service, Doc. #08, Appx., p. 12 (for Josef). Neither substitute service document said Steven was "of suitable age and discretion."

[¶12] Steven never told Connie about Hulm's August 23 visit. We know that because Connie didn't find out about the three day notice or the eviction itself until September 6 - when she learned the sheriff was about to evict her family. Transcript II, 11:19-13:10. Special Execution, September 5, 2012. Doc. #18.

[¶13] Once Connie learned of the looming eviction, she contacted counsel and the eviction was stayed pending a hearing on a motion to vacate the judgment. Transcript II, 13:07. Docs. ##22-32. Order, September 8, 2012. Doc. #21.

[¶14] As previously noted, the motion to vacate the judgment was denied, and Tenants are now before this Court asking whether substitute service is valid when made on people with disabilities precluding having suitable discretion, and whether a money judgment can be entered by default when no request for a monetary sum is made in the complaint.



### III. ARGUMENT.

#### A. Suitable Age and Discretion.

[¶15] Issue: At what point does a person lack the suitable age **and discretion** required to accept substitute service under Rule 4(d)(2)(A)(ii), NDR CivP?

[¶16] To the extent that the issue involves an undisputed fact - namely that neither substitute recipient in fact provided the documents to the intended recipients, the trial court's decision is fully reviewable. To the extent the decision is one of fact - that the substitute recipients were of suitable discretion, it is reviewed under the clearly erroneous standard - which is met because in fact each substitute recipient demonstrated his lack of discretion by not providing the documents to the intended recipients.

[¶17] Service of a summons may be made by delivering a copy of the summons to "a person of suitable age and discretion who resides" with the party being served. Rule 4(d)(2)(A)(ii), NDR CivP. The phrase "and discretion" is not defined and there is a surprising paucity of case law applying the phrase. Tenants believe that, if a person has retardation or other learning disability, and in fact fails to deliver the summons to its intended recipient, there is a failure to meet

the "and discretion" element.

[¶18] In our case, there are three people in the Falkenstein household - Connie, her husband Steven, and her son Josef. Both Steven and Josef have retardation or other learning disabilities. Connie is responsible for the business affairs of the family. Connie never received the Notice of Intention to Evict or the Summons and Complaint, until long after it was too late to do anything about it.

[¶19] Counsel's research has found but one case dealing with the "and discretion" element. The case involved a New York tax foreclosure where a critical document had to be served on the taxpayer by delivery to "a person of suitable age and discretion." *Granger v. Bain*, 32 Misc.2d 70, 71, 220 N.Y.S. 2d 801. (N.Y. Supreme Court, Washington County, 1960).<sup>3</sup> Dorothy Bain, the person receiving the papers, "had the mentality of a nine-year-old child, although she was at the time of the trial 33 years old." *Ibid.*, at 72. The court held she had insufficient discretion to be the basis of substitute service.

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3 A copy of the cited case was provided to the trial court.  
Doc. #30. Tenants' counsel added the red underscoring.

[¶20] The *Bain* opinion does not state either way whether Dorothy Bain gave the papers to other people living in the home. Here we have evidence that both Josef and Steven failed to do so. That fact alone shows that each lacked suitable discretion. The rule anticipates the substitute recipient will realize the importance of the matter and be sure to give the documents to the intended recipient - otherwise there would be no point in adding the phrase "and discretion."

**B. Trial Court's Lack of Personal Jurisdiction.**

[¶21] If the documents are improperly served, naturally the trial court lacks personal jurisdiction. For a court to have jurisdiction over a tenant in an eviction case for nonpayment of rent, the tenant must be served with both a Notice of Intention to Evict and a Summons and Complaint for Eviction. NDCC §§47-32-01(4), 47-32-02. Because none of the Tenants was ever properly served with both documents, the trial court never acquired personal jurisdiction over any of the Tenants.

[¶22] Lack of personal jurisdiction can be raised at any time. *Farrington v. Swenson*, 210 N.W.2d 82 (N.D. 1973) (judgment against county void because summons not served on proper county official, and so amenable to collateral attack).

Therefore, because none of Connie, Steven, and Josef was properly served with both the Notice of Intention to Evict and the Summons, the trial court never acquired jurisdiction, and the judgment should be reversed.

**C. Improper Money Judgment.**

[¶23] Issue: If a default judgment is entered in an eviction case in which the Complaint demands no specific monetary relief, may a monetary judgment be entered, or is the default relief limited to eviction?

[¶24] The trial court's decision was one of law and is therefore fully reviewable by this Court.

[¶25] It is undisputed that Tenants defaulted at the eviction hearing on August 30. "The Court finds that the [Tenants] are not present today, ... ." Transcript I, 05:24-25. It is also undisputed that Landlord offered certain evidence at that hearing, and that the evidence was admitted. *Ibid.*, 05:02.

[¶26] Most importantly, it is undisputed that the Complaint asked for no specific dollar amount. Doc. #01. One searches the Complaint in vain for a phrase such as, "Tenants owe \$950 for rent." True, the Complaint does ask for "such damages and other relief as the Court may deem proper."

Complaint, p. 2. Doc. #01, Appx., p. 05. The judgment awards Landlord a total of \$2,494 in damages. Judgment, part II. Doc. #17, p. 2, Appx., p. 15.

[¶27] In light of the failure of the Complaint to ask for a specific monetary award, the rules prohibit entry of such a judgment. "A default judgment must not differ in kind from, or exceed in amount, *what is demanded in the pleadings.*" Rule 54(c), NDR CivP, emphasis added.

[¶28] There is good reason for that, especially in an eviction case. A tenant might be perfectly willing to throw in the towel on being evicted, especially if the tenant perceives there will be no monetary judgment on top of the eviction. A surprise monetary judgment after a default brings up constitutional due process issues. A defendant is entitled to know his maximum exposure if he does nothing.

We further recognize that *Rule 54(c), N.D.R. Civ.P., is primarily for the protection of a defaulting party* and is premised on the belief that "it would be fundamentally unfair to give greater or different relief from that prayed for" since a defaulting party may have relied on the relief requested in deciding not to appear and defend the action.

*Vande Hoven v. Vande Hoven*, 399 N.W.2d 855, 859 (N.D. 1987), citations omitted, emphasis added.

[¶29] The trial court held that Landlord had “carried its burden of proving damages at the [ ] eviction hearing.” Order, September 12, 2012, p. 5. Doc. #34, p. 5, Appx., p. 20. Had Tenants appeared and defended, the trial court’s conclusion would have been sound. But Tenants didn’t appear. To allow the monetary judgment to stand would be to deny Tenants the presumptive relief described in Vande Hoven: Tenants “may have relied on the relief requested in deciding not to appear and defend the action.”

[¶30] Therefore, even if the trial court had proper personal jurisdiction over all three tenants, the monetary judgment should be vacated.

#### **IV. SUMMARY AND STATEMENT OF RELIEF SOUGHT.**

[¶31] Because of the disabilities of Josef and Steven, no tenant was validly served with both the Notice of Intention to Evict and the Summons and Complaint for Eviction, and the trial court never acquired personal jurisdiction over any of the Tenants. Further, even if there was valid personal jurisdiction, Landlord’s failure to ask for a monetary award precludes Landlord from obtaining a default judgment for monetary damages.

[¶32] Therefore Tenants ask that the judgment below be

reversed for lack of jurisdiction, and that the case be remanded with instructions to dismiss. In the alternative, Tenants ask that the monetary judgment be reversed and the case remanded with instructions to limit the judgment to the eviction.

[¶33] Dated February 27, 2013.

\_\_\_\_\_/s/ **John J. Gosbee**  
John J. Gosbee (#3967)  
Attorney for Appellants  
P.O. Box 474  
Fort Yates, ND 58538-0474  
(701) 663-2225

**CERTIFICATE OF SERVICE**

[¶34] In accordance with Rule 25(d), NDRAppP, and Administrative Order 14, certify that I have served the Appellants' Brief and the Appellants' Appendix to the Briefs by e-mail to:

David D. Schweigert, Esq.  
dschweigert@bkmpc.com

[¶35] I certify that I have tested the e-mail to the Clerk of the North Dakota Supreme Court, and the e-mail to Mr. Schweigert, for viruses, and the virus-check reported none.

[¶36] Dated February 27, 2013.

          /s/ John J. Gosbee            
John J. Gosbee