

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Bobby Bell and Heidi Roberson,

Plaintiffs,

Bobby Bell,

Appellant,

v.

Pro Tune Plus and Patrick Riepl,

Defendants/Appellees.

Supreme Court No. 20130068

District Court No. 08-2012-CV-00881

Small Claims Court No. 08-2012-SC-117

**BRIEF OF DEFENDANTS/APPELLEES PRO TUNE PLUS AND
PATRICK RIEPL**

On Appeal from Orders of the District Court
dated December 31, 2012, and February 7, 2013
South Central Judicial District
Burleigh County, North Dakota
The Honorable David E. Reich

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STATEMENT OF THE ISSUES

[¶ 1] I. Whether the district court’s orders are appealable under N.D.C.C. § 28-27-02.

[¶ 2] II. Whether the district court abused its discretion when it denied Bobby Bell’s motion under N.D.R.Civ.P. 60(a) to reverse the district court’s order remanding the case to small claims court.

STATEMENT OF THE CASE

[¶ 3] Pro Tune Plus and Patrick Riepl (collectively “Pro Tune Plus”) concur with Bell’s Statement of the Case.

STATEMENT OF THE FACTS

[¶ 4] Pro Tune Plus concurs with Bell’s Statement of the Facts, with the additions below.

[¶ 5] On January 8, 2013, Bell filed a “Motion for Relief from Order” under Rule 60 of the North Dakota Rules of Civil Procedure. See App. 26. Pro Tune Plus filed a response brief on January 24, 2013, stating, in pertinent part:

Defendants originally removed this case from small claims court to district court. At this time, Defendants do not oppose the case being remanded back to small claims court. The damages at issue are relatively minimal. In addition, the parties’ and court’s resources would be more efficiently utilized by proceeding in small claims court.

See App. 39.

[¶ 6] The district court made note of Pro Tunes Plus’s position regarding remand in its order denying Bell’s Rule 60 motion. See App. 41. In addition, the district court cited N.D.C.C. § 27-08.1-04, stating that “election by the plaintiff to proceed in small claims

court is irrevocable.” Id. Along with its denial of Bell’s motion, the district court offered an explanation of the proper procedure for Bell to bring his claim in district court, “If the Plaintiff wants to proceed in district court, N.D.C.C. § 27-08.1-04 permits him to seek an order dismissing the small claim action without prejudice. He could then re-commence this action in district court if he so desires.” See App. 42.

[¶ 7] Pro Tune Plus disputes Bell’s assertion in his Statement of Facts that “[i]n its order denying Bell’s motion for relief, the district court wholly failed to address or consider the clerical error causing the Claim Affidavit and Answer to not be filed in district court.” See Appellant’s Brief at ¶ 7. The district court noted Bell’s argument, then stated the reasons for its decision to deny the motion, as explained above.

STANDARD OF REVIEW

[¶ 8] This Court must first determine whether the district court’s orders are orders from which an appeal may be brought. In re Estate of Hollingsworth, 2012 ND 16, ¶ 7, 809 N.W.2d 328 (citing State v. Walker, 2010 ND 214, ¶ 17, 790 N.W.2d 484; Investors Title Ins. Co. v. Herzig, 2010 ND 138, ¶ 23, 785 N.W.2d 863; Brummund v. Brummund, 2008 ND 224, ¶ 4, 758 N.W.2d 735). “The right to appeal is a jurisdictional matter governed solely by statute.” Id. This determination is a two-step process:

First, the order appealed from must meet one of the statutory criteria of appealability set forth in N.D.C.C. § 28-27-02. If it does not, [the Supreme Court’s] inquiry need go no further and the appeal must be dismissed. If it does, then Rule 54(b), N.D.R.Civ.P., [if applicable,] must be complied with. If it is not, we are without jurisdiction.

Id. at ¶ 9 (quoting In re Estate of Stensland, 1998 ND 37, ¶ 10, 574 N.W.2d 203).

[¶ 9] Bell brought his motion under Rule 60(a) of the North Dakota Rules of Civil Procedure. See App. 27. Rule 60(a) provides, in pertinent part, “The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with notice.” N.D.R.Civ.P. 60(a). North Dakota’s Rule 60 was adopted from Rule 60 of the Federal Rules of Civil Procedure. Roth v. Hoffer, 2006 ND 119, ¶ 9, 715 N.W.2d 149 (citing Gruebele v. Gruebele, 338 N.W.2d 805, 811 n.5 (N.D. 1983)). Therefore, federal case law can be used to interpret N.D.R.Civ.P. 60. Id. (citing Gruebele, 338 N.W.2d at 811 n.5). “Denials of Rule 60(a) motions are reviewed for abuse of discretion.” Alpern v. UtiliCorp United, Inc., 84 F.3d 1525, 1539 (8th Cir. 1996) (citing L.Z. v. Parrish, 733 F.2d 585, 588 (8th Cir. 1984)). A district court “abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner, or when it misinterprets or misapplies the law.” Palmer v. State, 2012 ND 237, ¶ 6, 824 N.W.2d 406 (quoting Am. Bank Ctr. v. Schuh, 2010 ND 124, ¶ 9, 784 N.W.2d 468).

ARGUMENT

I. The district court’s orders are not appealable under N.D.C.C. § 28-27-02.

[¶ 10] Section 28-27-02 of the North Dakota Century Code lists the types of orders that can be appealed to this Court. The statute provides, in pertinent part:

The following orders when made by the court may be carried to the supreme court:

1. An order affecting a substantial right made in any action, when such order in effect determines the action and prevents a judgment from which an appeal might be taken;

N.D.C.C. § 28-27-02(1). Bell argues the district court's orders are appealable under subsection 1, because the orders ended the district court action and affected a substantial right. See Appellant's Brief at ¶¶ 25-39.

[¶ 11] This Court has explained that orders to dismiss without prejudice are generally not appealable:

An order dismissing an action without prejudice is not appealable under NDCC § 28-27-02. Johnson v. King, 325 N.W.2d 254 (N.D.1982); City of Minot v. Minot Highway Center, Inc., 120 N.W.2d 597 (N.D.1963). Because either side may commence another action, the order dismissing this action neither "determines the action" nor "prevents a judgment from which an appeal might be taken." NDCC § 28-27-02(1). Nor does the order of dismissal involve the merits of the action or some part thereof. NDCC § 28-27-02(5).

Runck v. Brakke, 421 N.W.2d 487, 488 (N.D. 1988). This Court has stated further:

However, a dismissal without prejudice may be final and appealable if the plaintiff cannot cure the defect that led to dismissal, Lopez v. City of Needles, 95 F.3d 20, 22 (9th Cir.1996), or if the dismissal has the practical effect of terminating the litigation in the plaintiff's chosen forum, Triple Quest, Inc. v. Cleveland Gear Co., 2001 ND 101, ¶¶ 8-10, 627 N.W.2d 379.

Rodenburg v. Fargo-Moorhead Young Men's Christian Ass'n, 2001 ND 139, ¶ 12, 632 N.W.2d 407.

[¶ 12] In this case, the district court remanded the case to small claims court, effectively dismissing the action in district court. See App. 23-24. In the district court's order denying Bell's Rule 60 motion, the court explained, "If the Plaintiff wants to proceed in district court, N.D.C.C. §27-08.1-04 permits him to seek an order dismissing the small claims action without prejudice. He could then re-commence this action in district court if he so desires." See App. 42. Because the district court gave Bell the option to file a

new action in district court, the dismissal of the current action from district court was without prejudice. The district court's orders are, therefore, not appealable. Runck, 421 N.W.2d at 488 (citing Johnson, 325 N.W.2d 254; City of Minot, 120 N.W.2d 597).

[¶ 13] Bell asserts the district court's remand of the case to small claim court affected a substantial right. See Appellant's Brief at ¶¶ 35-39. Bell notes that he is "no longer entitled to the procedural and substantive formalities of the district court, including appellate review, right to a trial by jury before a district court judge, application of the Rules of Civil Procedure and Rules of Evidence, and consequently the mechanisms for discovery." See Appellant's Brief at ¶ 36. Bell also notes that he can no longer be awarded attorney's fees under N.D.C.C. § 27-08.1-04, which provides, "If the defendant elects to remove the action from small claims court to district court, the district court shall award attorney's fees to a prevailing plaintiff." See Appellant's Brief at ¶ 37; N.D.C.C. § 27-08.1-04. These are not rights to which Bell is entitled, however, because he chose to proceed in small claims court. If he wanted the procedural and substantive formalities afforded by district court, he could have initiated the action in district court. As the district court explained, "election by the plaintiff to proceed in small claims court is irrevocable." See App. 41 (citing N.D.C.C. § 27-08.1-04).

[¶ 14] In his brief, Bell states "the small claims court may only dismiss the action without prejudice 'if the judge determines . . . the case may not be fairly disposed of in small claims court.' N.D.C.C. § 27-08.1-04.1." See Appellant's Brief at ¶ 38. This is a mischaracterization of the statute. Section 27-08.1-04.1 states in full:

If the judge determines at any stage of the proceedings that the case may not be fairly disposed of in small claims court, the judge may dismiss the case without prejudice. A determination that a case may not

be fairly disposed of in small claims court must be based on complexity of factual or legal issues or a determination that relief other than money damages or cancellation of an agreement is necessary to dispose of the case. If a case is dismissed under this section, the filing fee must be refunded to the plaintiff.

N.D.C.C. § 27-08.1-04.1. The statute is permissive, not restrictive. It allows a judge to dismiss a small claims court case due to complexity, but it does not state that is the only way a small claims court case can be dismissed without prejudice. The statute says nothing about whether a small claims court plaintiff can move to dismiss the case without prejudice in order to bring an action in district court.

[¶ 15] In Ennis v. City of Ray, 1999 ND 104, 595 N.W.2d 305, the plaintiff brought a claim in small claims court, then successfully sought dismissal of his claim without prejudice. Ennis, 1999 ND 104, ¶ 3. The dismissal was not the subject of the appeal, but the Court's and parties' failure to raise the issue indicates such dismissal without prejudice is permitted. The district court's remand of this case to small claims court did not affect any of Bell's substantial rights. He is not entitled to the formalities afforded by district court. Therefore, the district court's orders are not appealable and this Court must dismiss Bell's appeal.

II. The district court did not abuse its discretion when it denied Bell's motion under Rule 60(a).

[¶ 16] Bell argues the district court erred when it denied his motion under Rule 60(a), in which he requested that "the Court vacate its Order dismissing the action and remanding to Small Claims Court because a clerical mistake as to Defendants' filing of a copy of the Claim Affidavit and Defendants' Answer occurred." See App. 27. The district court denied Bell's motion, stating, "Because the plaintiff made the decision to commence this

action in small claims court and because N.D.C.C. §27-08.1-04 does not give the plaintiff the right to remove the case to district court, plaintiff's motion for relief from the Order for remand is DENIED." See App. 42.

[¶ 17] Rule 60(a) of the North Dakota Rules of Civil Procedure provides:

(a) Corrections Based on Clerical Mistakes; Oversights and Omissions. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with notice. But after an appeal has been docketed in the Supreme Court and while it is pending, such a mistake may be corrected only with the Supreme Court's leave.

N.D.R.Civ.P. 60(a). As explained above, "Denials of Rule 60(a) motions are reviewed for abuse of discretion." Alpern, 84 F.3d at 1539 (citing Parrish, 733 F.2d at 588). A district court "abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner, or when it misinterprets or misapplies the law." Palmer, 2012 ND 237, ¶ 6 (quoting Am. Bank Ctr., 2010 ND 124, ¶ 9).

[¶ 18] This Court has described the types of errors that can be corrected under Rule 60(a):

The basic distinction between "clerical mistakes" and mistakes that cannot be corrected pursuant to Rule 60(a) is that the former consist of "blunders in execution" whereas the latter consist of instances where the court changes its mind, either because it made a legal or factual mistake in making its original determination, or because on second thought it has decided to exercise its discretion in a manner different from the way it was exercised in the original determination. See United States v. Griffin, 782 F.2d 1393, 1397 (7th Cir.1986).

Roth, 2006 ND 119, ¶ 9 (quoting Blanton v. Anzalone, 813 F.2d 1574, 1577 n.2 (9th Cir. 1987)). This Court has also explained:

"Generally, Rule 60(a) can only be used to make the judgment or record speak the truth and cannot be used to make it say something other

than what originally was pronounced. We believe it clear that Rule 60(a) was not designed to affect substantive portions of a judgment or order, nor to act as a substitute for appeal. The rule is appropriately utilized only for ‘the correction of irregularities which becloud but do not impugn [the judgment].’” United States v. Stuart, 392 F.2d 60, 62 (3d Cir. 1968). The problem is essentially one of characterization. Kelley v. Bank Building and Equipment Corporation of America, 453 F.2d 774, 778 (10th Cir. 1972). It must be determined “whether a substantive change or amendment was made or whether the amended conclusions and judgment were in the nature of corrections.” Kelley, supra.

“A court may correct, pursuant to Rule 60(a), errors created by oversight or omission that cause the judgment to fail to reflect what was intended at the time of trial. However, Rule 60(a) is not a vehicle for relitigating matters that have already been litigated and decided, nor to change what has been deliberately done.” (Citations, footnote omitted.)

Id. at ¶ 8 (quoting Gruebele, 338 N.W.2d 805 at 811-12).

[¶ 19] Pro Tune Plus concedes the district court’s December 31, 2012 order remanding the case to small claims court contained an error, because the order stated the proper documents had not been filed with the district court. See App. 23-24. Pro Tunes Plus did comply with the requirements of N.D.C.C. § 27-08.1-04 when it removed the case to district court, as Bell notes. However, the district court’s error is one that cannot be corrected under Rule 60(a). Bell argues the district court’s error was a “blunder in execution” on the part of the clerk’s office, i.e. not filing the proper documents in the district court docket. See Appellant’s Brief at ¶¶ 15-24. Instead, the district court’s error is more akin to “a factual mistake in making its original determination.” Roth, 2006 ND 119, ¶ 9 (quoting Blanton, 813 F.2d at 1522 n.2).

[¶ 20] In Roth, the district court issued an order under Rule 60(a) to clarify the percentage of a 401(k) plan the movant was to receive in a divorce judgment. Id. at ¶¶ 3-4. This Court upheld the Rule 60(a) order, stating, “The amended judgment comports

with the district court's initial memorandum decision and is not relitigation of a matter that had already been decided." Id. at ¶ 12. In Volk v. Volk, 435 N.W.2d 690 (N.D. 1989), the district court issued an order under Rule 60(a) in a divorce action requiring the Defendant to pay all back taxes on the real estate that the Plaintiff was to receive. Volk, 435 N.W.2d at 692. The district court stated that "[a]lthough the issue of unpaid taxes was not brought up at the hearing, it was the Court's intent that Plaintiff would receive the property free and clear of all liens, including tax liens." Id. The Supreme Court upheld the order. Id. at 693.

[¶ 21] In his Rule 60(a) motion, Bell asked the district court to reexamine the record and change its mind regarding whether Pro Tune Plus properly removed the case from small claims court to district court. Bell argued that the court should have "changed its mind" because it made a "factual mistake in making its original determination." Roth, 2006 ND 119, ¶ 9 (citing Blanton, 813 F.2d at 1577 n.2). This is exactly the type of error that Rule 60(a) cannot be used to correct. Id. (citing Blanton, 813 F.2d at 1577 n.2). Therefore, the district court did not abuse its discretion, and its denial of Bell's motion was proper.

[¶ 22] In addition, the district court explained in its February 17, 2013 order that Bell's decision to proceed in small claim court is irrevocable. See App. 41 (citing N.D.C.C. § 27-08.1-04). Pro Tune Plus did not oppose remanding the case to small claims court. See App. 39, 41. These are accurate statements of the facts and law. The district court clearly stated its reasons for denying Bell's Rule 60(a) motion and did not act arbitrarily or unreasonably. Therefore, the district court did not abuse its discretion and its order should be upheld.

CONCLUSION

[¶ 23] The district court's orders are not appealable because they dismissed this case from district court without prejudice. In addition, the orders did not affect any substantial rights to which Bell was entitled. Therefore, Appellees respectfully request that this Court dismiss this appeal. If the appeal is not dismissed, Appellees respectfully request that the district court's orders be upheld, because the error Bell cites is not one that can be corrected under Rule 60(a) of the North Dakota Rules of Civil Procedure.

Dated at Bismarck, North Dakota, this 8th day of May, 2013.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Bobby Bell and Heidi Roberson, <div style="text-align: right;">Plaintiffs, -----</div> Bobby Bell, v. Pro Tune Plus and Patrick Riepl, <div style="text-align: right;">Defendants/Appellees.</div>	Supreme Court No. 20130068 District Court No. 08-2012-CV-00881 Small Claims Court No. 08-2012-SC-117
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AFFIDAVIT OF SERVICE

STATE OF NORTH DAKOTA)
)ss.
COUNTY OF BURLEIGH)

Stefanie Schettler, being first duly sworn on oath, deposes and says that she is a citizen of the United States over the age of eighteen years and not a party to, nor interested in, the above-entitled action.

That on the 8th day of May, 2013, this affiant electronically filed a true and correct copy of the following document with the North Dakota Supreme Court:

1. Brief of Defendants/Appellees Pro Tune Plus and Patrick Riepl

That said document was sent electronically to the following:

Rebecca L. Binstock
rbinstock@zkslaw.com

A courtesy copy of said document was sent via United States mail, postage prepaid, to the following:

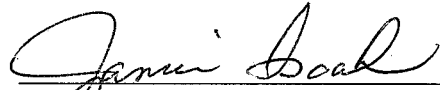
Heidi Roberson
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To the best of affiant's knowledge, information, and belief, such e-mail address as given above is the e-mail address of the party intended to be so served.


Stefanie Schettler

Subscribed and sworn to before me this 8th day of May, 2013.

JANICE ISAAK
Notary Public
State of North Dakota
My Commission Expires August 22, 2018


Notary Public