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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Robert M. Hall, Plaintiff and Appellant, vs. John F. Hall, Deborah E. Hall, Leslie Hall, a/k/a Leslie Hall Butzer, and all unknown heirs, devisees, successors, and creditors of Myles Franklin Hall, Myles F. Hall, a/k/a Myles Hall, deceased, and all other persons unknown claiming any estate or interest in, or lien or encumbrance upon, the property described in the Complaint, Defendants and Appellees.	Supreme Court No. 20190169 Williams Co. Civil No. 53-2018-CV-00744

APPELLANT'S SUPPLEMENTAL BRIEF

Appeal from the Judgment dated November 21, 2019, and the Order Granting Motion to Vacate Default Judgment dated October 1, 2019
Case No. 53-2018-CV-00744
County of Williams, Northwest Judicial District
The Honorable Benjamen J. Johnson

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE ISSUE

[¶ 1] Plaintiff Robert M. Hall ("Hall") obtained a default judgment against John F. Hall ("John") that was entered on August 20, 2018, after proper notice and service were attempted and accomplished multiple times. *See* Dkt. ID #22, 28, 29, 73. The Estate had the opportunity to motion the district court to vacate the default judgment against John and also motion this Court for a temporary remand to the district court so it could make a determination on the Estate's motion to vacate. *Id.* at #14; *see also* Dkt. ID #135. This Court agreed to temporarily remand the case to answer this question and the district court answered it in the affirmative, despite ample evidence that notice and service were properly accomplished. *Id*. at #22; *see also* Dkt. ID #155. Upon the parties' stipulation for final judgment, Hall filed his amended notice of appeal on the supplemental issue: Should this Court reverse the district court's decision to vacate the default judgment as to John F. Hall, n/k/a Estate of John F. Hall?

STATEMENT OF THE CASE

[¶ 2] In addition to Hall's prior Statement of the Case, shortly before an Appellee brief was due from Deborah and Leslie in response to Hall's primary brief, their counsel filed a Motion for Extension of Time to File Brief. *See* NDSC Seq. #11. During this granted extension, the Estate motioned the district court to vacate the default judgment against John and for a temporary remand to the district court so it could make a decision on the Estate's motion to vacate. *See id*. at #14; *see also* Dkt. ID # 135-141. The district court granted the motion. *See* Dkt. ID #155. Once the parties stipulated to a final judgment, Hall appealed the district court's order to vacate. *See* Dkt. ID #161, 171. The case is now before this Court to collectively address all issues.

STATEMENT OF THE FACTS

[¶ 3] In addition to Hall's prior Statement of Facts, the facts pertinent to this portion of the appeal include that service by mail was attempted on John, but was unsuccessful. *See* Dkt. ID #8, 28, 29. Additionally, personal service was attempted on John three times, including two times that resulted in conversations with a "Mrs. Edwards," who stated that there was not a John Hall living at that residence and that she did not know the Halls and had not heard of them. *See* Dkt. ID #22. However, in Appellant Robert M. Hall's response to the Estate's motion for temporary remand, there are sworn affidavits that contain statements to the contrary. *See* NDSC Seq. #16. Not only is there evidence that proper service was attempted and made, but when the burden shifted to John and/or his Estate, no evidence was submitted to affirmatively show his whereabouts at the time service was attempted and made. Rather, speculation and conjecture in the forms of opinionated affidavits stated that Hall could have contacted John's New York attorneys to track him down in order to satisfy the service requirements. *See* Dkt. ID #140-41. By that reasoning, Leslie and Deborah – who were both also involved in the parties' New York litigation – should have used John's New York attorneys to locate him. Instead, their affidavits of service that show their answers and counterclaims were sent to the same Wisconsin address for John that the summons and complaint in this case were sent to. *See* Dkt. ID #15, 52.

STANDARD OF REVIEW

[¶ 4] "A district court's decision on a Rule 60(b) motion to vacate a default judgment is reviewed under an abuse of discretion standard." *Warnke v. Warnke*, 2011 ND 212, ¶ 4, 806

N.W.2d 606 (citing *Luger v. Luger*, 2009 ND 84, ¶ 6, 765 N.W.2d 523 (citation omitted)). "A district court abuses its discretion when it acts arbitrarily, unreasonably, or unconscionably, or when it misinterprets or misapplies the law." *Id*.

LAW AND ARGUMENT

The district court abused its discretion in vacating the default judgment.

[¶ 5] John's failure to plead or appear after mailed service and personal service were attempted and published notice was accomplished resulted in a valid default judgment. In *Warnke*, the defendant failed to appear after receiving notice of a second default hearing and argued that the address indicating "Avenue" instead of "Drive" was the cause for his failure of receipt of the notice. *Id*. at ¶¶ 6, 8. However, the defendant had received notice of the first default hearing when it was addressed the same. *Id*. Additionally, none of the notices sent by the court or the plaintiff's attorney were returned as undeliverable by the post office. *Id* at ¶ 7. This Court stated that when a party has failed to plead or otherwise appear, the court may direct entry of default judgment. *Id*. at ¶ 10. "[T]he court, before directing the entry of judgment, must require the necessary proof to enable it to determine and grant any relief to the plaintiff." *Id*. (citing N.D.R.Civ.P. 55(a)(2)). Here, mailed and personal service were attempted multiple times. *See* Dkt. ID #22, 28, 29. When none of those attempts were successful, Hall had the notice of summons and of no personal claim published in the Williston Herald, as provided under the North Dakota Rules of Civil Procedure, Rule 4(e). *See* Dkt. ID #59.

[¶ 6] The Estate *admits* that the procedures followed were proper in order to effectuate the service by publication. *See* Dkt. ID #136, ¶ 22. Yes, Hall knew of John's location in Wisconsin, which is why notice was mailed and personal service was attempted there. *See* Dkt. ID #22, 28, 29. The Estate's argument that John was likely not a subscriber to the Williston Herald

is a red herring. *See* Dkt. ID #136, ¶ 22. The publication was made in the county paper where the property is located, as required. N.D.R.Civ.P. 4(e)(3). The Estate has not provided any evidence of John's whereabouts at the time service was attempted.

[¶ 7] This Court has said that "we do not determine whether the trial court was substantively correct in entering the judgment from which relief is sought, but determine only if the trial court abused its discretion in ruling that sufficient grounds for disturbing the finality of the judgment were not established." *Warnke* at ¶ 13. An abuse of discretion occurs when it acts arbitrarily, unreasonably, or in an unconscionable manner. *Id*.; *see also Key Energy Services, LLC v. Ewing Construction Co., Inc.*, 2018 ND 121, ¶ 8, 911 N.W.2d 319. Additionally, "a Rule 60(b) motion is not a substitute for appeal and should not be used to relieve a party from free, calculated and deliberate choices he or she has made." *Key Energy Services, LLC* at ¶ 13. [1] A "defendant who chooses not to put the plaintiff to its proof, but instead allows a default judgment to be entered and waits, for whatever reason, until a later time to challenge the plaintiff's actions, should have to bear the consequences of such delay." *Id*..

[¶ 8] The district court abused its discretion in granting the Estate's motion to vacate. The Estate's motion to vacate and accompanying brief and affidavits provided no evidence the district court could rely on along with the law in order to reach a reasoned and reasonable determination. *See* Dkt. ID #134-142. The Estate failed to overcome the rebuttable presumption that service was proper, as evidenced by the affidavit of non-service. *See* Dkt. ID #22. Besides, as an *in rem* action, personal service was not absolutely necessary and the service by publication

[1] The Estate was fully aware of what the outcome would be if it were allowed to appear at such a late stage of the proceedings because its arguments and position are the same as its co-defendants, thereby indicating a calculated choice to avoid service and then later appear with a known outcome.

was sufficient. N.D.R.Civ.P. 4(e)(1)(b)(iii); *see also* 72 C.J.S. PROCESS § 42 (2019 Update) ("[P]rocess is not ordinarily necessary where the proceeding is *in rem*").

[¶ 9] Contrary to the Estate's argument in its motion to vacate, this was not an exceptional circumstance warranting the decision to vacate and there was not clear and convincing evidence establishing the judgment was obtained through fraud, misrepresentation, or misconduct. *See* Dkt. ID #136, ¶ 29. Not to mention that the Estate's baseless argument that Hall was obligated to contact New York attorneys to locate John. *See* Dkt. ID #140, 141, 136 at ¶¶ 8, 30. A diligent inquiry was conducted as evidenced by the Register of Actions. *See* Dkt. ID #23-27. Further, the affidavit of Hall's New York attorney, Louis J. Maione, provides that *John's attorneys did not even know of their client's whereabouts*. *See* Dkt. ID #148. Not only did the Estate irrationally assert that somehow a diligent inquiry includes tracking one's location via foreign lawsuits and attorneys, it provided no law to support such assertion. *See* Dkt. ID #136, p. 7, ¶ 30 (generic statement asserting the rules governing a diligent search). Nor did it satisfy the requirements that there was a mistake, inadvertence, excusable neglect depriving John or his Estate of due process, or fraud, misrepresentation, or misconduct under Rule 60(b)(3), N.D.R.Civ.P. These are nothing more than conclusory terms in the Estate's motion that did not satisfy its burden. *McComb v. Aboelessad*, 535 N.W.2d 744, 747-48 (N.D. 1995).

[¶ 10] The district court's decision is contrary to law and should be reversed. Hall followed the rules for service and default judgment. *See* Dkt. ID #22, 28, 29. The Estate failed to show sufficient grounds for relief from the judgment. *See* Dkt. ID #136, 140, 141. Without factual evidence to apply to the law, the district court acted in an arbitrary, capricious, or unreasonable manner and abused its discretion. *See Overboe v. Brodshaug*, 2008 ND 112, ¶ 7, 751 N.W.2d 177. No reasoned and reasonable determination was made from a rational mental process by which the

facts and law were stated and considered together. *Id*. No facts were considered in the district court's order. *See* Dkt. ID. #155. "A claim of insufficient process, unsupported by facts and documentation, is not enough to upset a judgment." *McComb*, 535 N.W.2d at 747. The rule provides that "the court *may* relieve a party . . . from a final judgment," not that it *must*. N.D.R.Civ.P. 60(b) (emphasis added). Without factual evidence to apply to the law in reaching its conclusion, the district court abused its discretion because Hall followed the law on service. *See* Dkt. ID #155. The Estate's motion and district court's order defeat the purpose of our service rules to grant a party's motion to vacate default judgment when, and only when, that party knows the outcome of its interest in the case should its motion be granted.

CONCLUSION

[¶ 11] The district court's decision to vacate the default judgment against John F. Hall, n/k/a the Estate of John F. Hall, was an abuse of discretion and contrary to law warranting reversal.

[¶ 12] The undersigned attorney certifies that this supplemental brief is 10 pages, all inclusive.

Dated this 6th day of December, 2019.

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

Annette Kirschenheiter, being first duly sworn, deposes and says that on the 6th day of December, 2019, she electronically filed with the Supreme Court through the Supreme Court's E-Filing Portal *Appellant's Supplemental Brief* and that said document was served through the Supreme Court's E-Filing Portal to the following:

Attorney for Leslie Butzer, Deborah E. Hall, Lyn Hall (PR of Estate of John F. Hall
William C. Black
Larson Latham Huettl
wblack@bismarcklaw.com

Annette Kirschenheiter

Subscribed and sworn to before me this 6th day of December, 2019.

Notary Public

LINDA M REIS
Notary Public
STATE OF NORTH DAKOTA
My Commission Expires
March 25, 2022