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STATE OF NORTH DAKOTA

IN THE SUPREME COURT OF THE
STATE OF NORTH DAKOTA

Hustle Proof Corporation and Chinedu Ilogu a/k/a BIG REENO, Plaintiffs, v. Ryan Matthews d/b/a The R Music Group & WTF Touring and Zachary Beck a/k/a FUTURISTIC, Defendants.	)	Supreme Court No. 20190239 Civil No. 09-2017-CV-00915

APPELLANT ZACHARY BECK a/k/a FUTURISTIC'S BRIEF

Appeal from Cass County District Court's Order Entered July 29, 2019, Denying Zachary Beck's Motion for Relief from Default Judgment by the Honorable Steven E. McCullough

ORAL ARGUMENT REQUESTED

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Oral Argument

Oral argument has been requested to emphasize and clarify the Petitioner's written arguments on their merits and to address the procedural issues related to this lawsuit.

STATEMENT OF THE ISSUES

[1] Whether the District Court erred in denying Appellant's Rule 60(b) Motion for Relief from default judgment entered on February 22, 2018.

STATEMENT OF THE CASE

[2] This is an appeal from an order of the Cass County District Court denying Zachary Beck a/k/a Futuristic's (hereinafter "Beck") motion for relief from judgment under Rule 60(b) of the North Dakota Rules of Civil Procedure.

[3] The Plaintiffs/Appellees in this matter, Hustle Proof Corporation and Chinedu Ilogu a/k/a Big Reeno (hereinafter "Ilogu") sued Beck and co-defendant Ryan Matthews d/b/a The R Music Group & WTF Touring (hereinafter "Matthews") by personal service in the state of North Dakota alleging a breach of contract.

[4] Following personal service on himself and co-defendant Matthews, Beck was lead to believe that the litigation was being dealt with or otherwise resolved by Matthews. Beck heard nothing further regarding the lawsuit until around March 22, 2019, when Plaintiffs took steps to collect on a judgment in the principal amount of $227,790.00. Thereafter, Beck learned that Plaintiffs had obtained a default judgment against him on February 22, 2018.

[5] Beck brought a Motion for Relief from Judgment under Rule 60(b) of the North Dakota Rules of Civil Procedure seeking to vacate the judgment and permit him to answer the complaint on the grounds that he did not receive notice of the motion for summary judgment and was not aware that the case was proceeding without his involvement. Plaintiffs attempted service on him at an address at which he has never resided and which, in any event, was not his last known address.

STATEMENT OF FACTS

[6] Beck is a rap artist who performs under the name "Futuristic." (App. 54). During the incident with Ilogu, Beck was under contract with Matthews as his agent. (*Id.*). Prior

to signing Beck, Matthews had organized a Florida Limited Liability Company by the name of "The R Music Group, LLC". (App. 61). The R Music Group, LLC was organized on January 8, 2010, before becoming inactive and being administratively dissolved on September 23, 2011, due to its failure to file an annual report. (*Id.*). The Florida Secretary of State's record for The R Music Group, LLC identifies its principal address as 1775 James Avenue, #111, Miami Beach, FL 33139. However, its registered agent was United States Corporation Agents, Inc., 5575 S. Semoran Boulevard, Suite 36, Orlando, FL 32822. (*Id.*).

[7] On October 11, 2013, Ilogu entered into a tour agreement with "The R Music Group & WTF Touring" for the "FUTURISTIC – Winter Tour 2014", to perform as an opening act. (App. 24). At that time, The R Music Group, LLC had already been dissolved. The tour agreement did not make any reference to The R Music Group, LLC. It is unknown why Ilogu would believe that The R Music Group, LLC (as differentiated from Matthews d/b/a The R Music Group & WTF Touring) had any involvement in this matter.

[8] Matthews oversaw all aspects of the FUTURISTIC – Winter Tour 2014. (App. 54). He set the dates and venues, hired the opening acts, and handled all money related to the tour. (*Id.*). Beck did not execute any agreements with opening acts, including Ilogu. (*Id.*). The FUTURISTIC – Winter Tour 2014 ultimately lost money. Beck performed at approximately thirty shows during the tour and none of the shows attracted more than 115 attendees. (*Id.*). In fact, most of the shows averaged twenty to forty attendees. (*Id.*). The record is not clear as to why Ilogu did not perform with Beck, but email exchanges between Ilogu and Matthews suggests that Matthews went ahead with the tour without

notifying Ilogu. (App. 30-41). Matthews and Ilogu had later discussions regarding a possible collaboration between Ilogu and Beck. (App. p. 12, ¶ 17; 30-41). These discussions were apparently in the nature of settlement negotiations for Matthews' failure to include Ilogu in the FUTURISTIC – Winter Tour 2014. (App. 92-93). Beck had no knowledge of these discussions. (App. 54).

[9] On September 9, 2016, Beck and Matthews were in Fargo, North Dakota for a concert. (App. 16-17). At that time, they were both personally served with the Summons and Complaint, dated September 8, 2016. (*Id.*). Although the Summons and Complaint was served on September 9, 2016, the case was not filed with the district court until April 4, 2017. (App. 4).

[10] Following the concert, Beck reviewed the Summons and Complaint with Matthews at the hotel. (App. 54). Matthews took the documents from Beck. (*Id.*). Over the next two weeks, Beck inquired with Matthews about the situation and what was happening with it. (*Id.*). Matthews informed Beck that it was "handled" and that it "wasn't a big deal". (App. 54-55). Beck fired Matthews in June of 2018 for issues that were unrelated to the lawsuit but which were related to other wrongful acts committed by Matthews. (App. 55).

[11] Beck heard nothing further about this matter until March 22, 2019, when a Notice of Entry of Foreign Judgment was served on his attorney in Arizona. (App. 55). Beck made multiple attempts to contact Matthews about the lawsuit but never received a response. (*Id.*). On April 16, 2019, Beck's bank accounts were garnished by Ilogu. (*Id.*).

[12] Beck retained local counsel and only then learned that default judgment had been entered against him on February 22, 2018. For reasons unknown to Beck, Plaintiff waited

over one year from the time he obtained the default judgment until filing it in Maricopa County, Arizona, where Beck lived, and garnished Beck's bank accounts. It was also learned that all filings in this case, save for the Summons and Complaint and Notice of Entry of Foreign Judgment, were served on Beck via United States Mail, First Class Postage Paid, and addressed:

> c/o The R Music Group, LLC
> 1775 James Avenue, #111
> Miami Beach, FL 33139.

(App. 20, 22, 23, 27, 28, 29, 46, 47, and 48). Additionally, the docket reflects numerous instances of mailings to this address being returned as undeliverable. (App. 5, 7, 8, 68-86).

[13] Beck has never lived in Miami Beach, FL. (App. 55). During the relevant times, Beck has been a resident of Mesa, AZ and Los Angeles, CA. (*Id.*). Further, his status as a well-known rapper has meant that Plaintiffs were able to keep track of his location, including being able to serve him with the Summons and Complaint while he was in Fargo for the September 9, 2016 concert. Beck maintains an active social media presence, of which Plaintiff was aware. (App. 91). Plaintiff was also able to locate him in Arizona such that they knew to transcribe the judgment to Maricopa County, Arizona and garnish his bank accounts. (App. 55).

[14] Nor does it appear that Matthews was residing at 1775 James Avenue, #111, Miami Beach, FL 33139 since 2011. Beck believed that Matthews had moved to Seattle, WA in 2016. (App. 55). The contract executed by Matthews and Ilogu identifies a different address for Matthews and/or The R Music Group & WTF Touring:

> 1990 Marseille Drive, Suite #303
> Miami Beach, FL 33141.

(App. 15). The contract is dated October 11, 2013, over three years after The R Music Group, LLC's Articles of Organization were filed with the Florida Secretary of State and two years after The R Music Group, LLC was administratively dissolved.

[15] Upon learning of the default judgment, Beck acted expeditiously by hiring local counsel and filing a Rule 60(b) Motion for Relief from Judgment within a month. (App. 52-53). Beck also filed a proposed Answer to Plaintiffs' Complaint in this matter. (App. 49-51). Since learning that the lawsuit existed, Beck has vigorously defended himself.

[16] The district court summarily denied Beck's motion on May 7, 2019. (App. 56). Beck then brought a Motion for Expedited Consideration of Motion for Reconsideration and Motion to Stay Execution of Judgment requesting that the court review its May 7, 2019 denial. (App. 57-58). Following briefing and hearing on the matter, the district court entered its present order denying the Rule 60 motion for relief on July 29, 2019. (App. 64-65). The July 29 order is the basis of this appeal.

ARGUMENT

A. Standard of Review.

[17] This Court reviews a district court's order on a motion under Rule 60(b) for abuse of discretion. *Nieuwenhuis v. Nieuwenhuis*, 2014 ND 130, ¶ 10, 851 N.W.2d 130. "A trial court abuses its discretion if it acts in an arbitrary, unreasonable, or unconscionable manner, its decision is not the product of a rational mental process leading to a reasoned determination, or it misinterprets or misapplies the law." *Johnson v. Nodak Mut. Ins. Co.*, 2005 ND 12, ¶ 18, 699 N.W.2d 45 (citing *Schaefer v. Souris River Telecomms. Coop.*, 2000 ND 187, ¶ 10, 618 N.W.2d 175).

[18] The district court in this matter summarily denied Beck's Motion for Relief from Judgment under Rule 60 on May 7, 2019. Beck then brought a motion for reconsideration which was also summarily denied. In doing so, the district court made no findings of fact that might explain its reasoning or any considerations or factors that the district court considered in denying Beck's motion. Where there exists no findings of fact to support a district court's decision, this Court can look to the record to determine the basis for the district court's decision. *Wigginton v. Wigginton*, 2005 ND 108, ¶ 18, 692 N.W.2d 108.

B. Beck Meets the Preliminary Requisites to Vacate the Judgment.

[19] Rule 60 of the North Dakota Rules of Civil Procedure provides that:

> On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
>
> (6) any other reason that justifies relief.

N.D. R. Civ. P. 60(b).

[20] A motion for relief under 60(b)(1)-(3) must be brought within one year after notice of entry of judgment if the opposing party appeared, but not more than one year after default judgment has been entered. N.D. R. Civ. P. 60(c)(1). Default judgment was entered against Beck on February 22, 2018. Beck was unaware of the ongoing lawsuit or judgment until March 22, 2019 when Beck's Arizona attorney was served with the Notice

of Entry of Foreign Judgment. Beck did not receive any of the documents that Plaintiff attempted to serve on him through the defunct The R Music Group, LLC. Beck had no knowledge of the February 22, 2018 entry of judgment until over a year had passed. While Beck believes he would otherwise have a valid claim for bringing a motion for relief under one or more of the other subsections of Rule 60(b), Plaintiff's "non-action" for over a year effectively limited Beck's available remedies to a Motion for Relief from Judgment under Rule 60(b)(6) for "any other reason that justifies relief."

[21] This Court has consistently stated a strong preference for granting relief from default judgment as opposed to granting relief from a judgment entered after trial on the merits. *See e.g. Throndset v. L.L.S.*, 485 N.W.2d 775 (N.D. 1992); *CUNA Mtg. v. Aafedt*, 459 N.W.2d 801 (N.D. 1990); *First National Bank of Crosby v. Bjorgen*, 389 N.W.2d 789 (N.D. 1986); *Suburban Sales & Serv., Inc. v. District Court of Ramsey*, 290 N.W.2d 247 (N.D. 1980).

[22] In *CUNA Mtg.*, this Court stated the policy reasons and the important considerations behind the increased leniency where default judgment is the basis of the Rule 60(b) motion.

> This court has long encouraged trial courts to be more lenient when entertaining Rule 60(b) motions to vacate default judgments as distinguished from "litigated" judgments, that is, judgments entered after trial on the merits. *E.g., Suburban Sales v. District Court of Ramsey*, 290 N.W.2d 247, 252 (N.D. 1980); *Perdue v. Sherman*, 246 N.W.2d 491, 496 (N.D. 1976). While a trial court certainly has discretion to grant or deny a Rule 60(b) motion to vacate a default judgment [*First Federal Savings and Loan Ass'n v. Hulm*, 328 N.W.2d 837 (N.D. 1982)], the range of that discretion is limited by three important considerations. *See Schwab v. Bullock's Inc.*, 508 F.2d 353, 355 (9th Cir. 1974). First, Rule 60(b) is remedial in nature and should be liberally construed and applied. *Sioux Falls Construction Co. v. Dakota Flooring*, 109 N.W.2d 244, 247 (N.D. 1961). Second, decisions on the merits are preferable to those by default. *Bender v. Liebelt*, 303 N.W.2d 316, 318 (N.D. 1981). Third, as a

> consequence of the first two considerations, "'[w]here timely relief is sought from a default judgment and the movant has a meritorious defense, doubt, if any, should be resolved in favor of the motion to set aside the judgment so that cases may be decided on their merits.'" *King v. Montz*, 219 N.W.2d 836, 839 (N.D. 1974) [quoting 7 Moore's Federal Practice § 60.19, at p. 60-156].

CUNA Mtg. v. Aafedt, 459 N.W.2d 801, 803 (N.D. 1990).

[23] This Court has also recognized that a district court's failure to vacate a judgment may constitute an abuse of discretion.

> "In reviewing the cases from this court which have considered this matter, we have found none in which the trial court was held to have abused its discretion in vacating a judgment. This court has, however, on several occasions held that the trial court abused its discretion in refusing to vacate a judgment under Rule 60(b)." *See e.g.*, *Perdue v. Sherman*, 246 N.W.2d 491 (N.D. 1976); *In re Estate of Jensen*, 162 N.W.2d 861 (N.D. 1968); *In re Baun*, 145 N.W.2d 482 (N.D. 1966): *Sioux Falls Construction Co. v. Dakota Flooring*, 109 N.W.2d 244 (N.D. 1961).

Suburban Sales & Serv., Inc. v. District Court of Ramsey, 290 N.W.2d at 252 (N.D. 1980)

[24] In this case in particular, the district court abused its discretion in refusing to vacate the default judgment entered against Beck. Beck can demonstrate that he has timely sought relief from default judgment and that he has a meritorious defense to Plaintiffs' claims.

1. Beck timely sought relief from the default judgment.

[25] Although Beck's motion for relief from judgment was brought over a year after default judgment was entered, that is not reason enough to find that his response was untimely. "What constitutes a reasonable time varies from case to case and must be determined in each instance from the facts before the court." *United Accounts, Inc. v. Lantz*, 145 N.W.2d 488, 493 (N.D. 1966). This Court has found delays as long as six and a half and even seven years to have been timely. *See e.g. United Accounts, Inc. v. Lantz*,

145 N.W.2d 488 (N.D. 1966) and *Suburban Sales & Serv., Inc. v. District Court of Ramsey*, 290 N.W.2d 247 (N.D. 1980). Beck filed the motion to vacate the judgment within less than 30 days of his first notice of entry of the judgment.

2. Beck has demonstrated a meritorious defense to Plaintiffs' Complaint

[26] Finding that a movant has a "meritorious defense" does not require what amounts to a trial on the movant's defenses.

> [A] " 'meritorious' claim or defense ... does not mean that the moving party must show that he or she is likely to prevail," 12 James Wm. Moore, *Moore's Federal Practice* § 60.24[2] (3d ed. 2018) (footnote omitted), and "if there is any doubt that the defenses may prevail, the judgment should be vacated." *State v. $33,000.00 U.S. Currency*, 2008 ND 96, ¶ 19, 748 N.W.2d 420. But the "moving party must state enough facts to give a court an opportunity to measure whether the claim or defense has any potential." 12 James Wm. Moore, *Moore's Federal Practice* § 60.24[2]; see *also $33,000.00 U.S. Currency*, at ¶ 18, 748 N.W.2d 420.

Dockter v. Dockter, 2018 ND 219, ¶ 23, 918 N.W.2d 35, reh'g denied (Nov. 13, 2018).

[27] Contemporaneously with filing his Motion for Relief, Beck filed an answer to Plaintiffs' Complaint. (App. 49-51) and an Affidavit asserting numerous facts as to his defense, the underlying dispute and Plaintiffs' lack of service. Beck denies that he had any privity of contract with Ilogu. Beck did not sign any agreements with Ilogu. Beck, like Ilogu, was under contract to perform various shows as part of the Futuristic Winter Tour 2014. Beck also has a defense to most of the alleged damages. (See Argument below, ¶¶ 49-59).

C. The District Court Abused its Discretion in Denying Beck's Motion for Relief from Judgment.

[28] Beck's primary arguments in support of his motion to vacate the judgment are 1) the lack of service on him of the pleadings, and 2) the overall facts (lack of notice,

timeliness of Beck's actions, justifiable nature of Beck's "non-response", and the damages in issue.

1. Beck was not Properly Served with the Notice before Default Judgment.

[29] This Court should reverse the district court's order on the grounds that Beck was not given proper notice of the motion for default judgment, or any other filings. Ilogu has alleged that Beck has not appeared in this action. (App. 18). His counsel alleges that any correspondences or documents sent to Beck were sent as a "courtesy". (App. 63). Ilogu's attorney does admit that Matthews did make an appearance in this matter by contacting attorney Knoll by email. (App. 59). However, this email does not appear to be a part of the record, so it is impossible to determine the substance or effect of this email. What is clear, however, is the fact that in every subsequent filing, Plaintiffs' counsel filed Affidavits of Service that reflect the fact that they attempted to serve:

> Zachary Beck a/k/a FUTURISTIC
> c/o The R Music Group, LLC
> 1775 James Avenue #111
> Miami Beach, FL 33139

(App. 20, 22-23, 27-29, 46-48).

[30] An action of this nature would be consistent with Plaintiffs' belief that Beck had made an appearance through Matthews' emails. Plaintiffs also allege in their subsequent briefing that there exists some form of agency relationship between Beck and Matthews. While that question is not immediately before the Court, it further creates an impression that Plaintiffs were operating under the belief that Beck had made an appearance in this matter.

[31] Because Beck made an appearance in this matter, Plaintiffs were required to serve any additional documents on Beck. Rule 5 of the North Dakota Rules of Civil Procedure directs that:

> Other than a service of a summons and complaint under Rule 4, each of the following documents must be served under this rule on every party, unless the rules proved otherwise:
>
> (A) an order, unless the court orders otherwise;
>
> (B) a pleading served after the original summons and complaint, unless the court orders otherwise under Rule 5(c) because there are numerous defendants;
>
> . . .
>
> (D) a written motion, except one that may be heard ex parte; and
>
> (E) a written notice, appearance, demand, or offer of judgment, or any similar document. . .

N.D. R. Civ. P. 5(a)(1).

[32] Rule 5(b) governs how service of one of the above-described documents is to be accomplished. The applicable rule for service on Beck is Rule 5(b)(3) which reads, in relevant part:

> A document that is not required to be filed, or that will be served on the person exempt from electronic service, is served under this rule by:
>
> (A) handing it to the person;
>
> (B) leaving it:
>
> > (i) at the person's office with a clerk or other person in charge or, if no one is in charge, leaving it in a conspicuous place in the office; or
> >
> > (ii) if the person has no office or the office is closed, at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there;
>
> (C) *mailing it to the person's last known address*, in which event service is complete upon mailing;
>
> …

N.D. R. Civ. P. 5(b)(3) (emphasis added).

[33] Plaintiffs have failed to properly serve notice on Beck under any of these methods. Rule 5 makes no provisions for service on an agent other than an attorney. As such, any attempt to serve Beck through Matthews is improper and insufficient. Unlike Rule 5, Rule 4 specifically provides for service of process on an individual's agent. *See e.g.*, N.D. R. Civ. P. 4(d)(2)(A)(iv) ("Personal service of process within the state must be made as follows: . . . Service must be made on an individual 14 or more years of age by: . . . **delivering** a copy of the summons to the individual's agent authorized by appointment or by law to receive service of process.") (emphasis added).

[33] Assuming for the moment that service under Rule 4 was appropriate for service of a notice of motion for default judgment, Plaintiffs still failed to effectuate service under Rule 4 for several reasons. First, Plaintiffs' Affidavits of Service show that they mailed the documents that they intended to serve. This Court has previously made it clear that under Rule 4, service by mail does not constitute "delivery". *Sanderson v. Walsh County*, 2006 ND 83, ¶¶ 17-19, 712 N.W.2d 842. Second, under Rule 4(i), service by mail must be supported by an affidavit. N.D.R. Civ. P. 4(i)(4). The affidavit of mailing must "state a copy of the process, pleading, order of court, or other paper to be served was deposited by the affiant, with postage or shipping prepaid, in the mail or with a third-party commercial carrier and directed to the party shown in the affidavit to be served **at the party's last reasonably ascertainable address.**" N.D. R. Civ. P. 4(k)(1) (emphasis added). To the extent Plaintiffs have attempted service on Beck under Rule 4, instead of Rule 5, their affidavits are deficient. Further, the contract between Matthews and Ilogu is the most recent address that Ilogu had for Matthews and is, therefore, the "last reasonably ascertainable address."

[34] The completeness of these service rules reflect the important policy concerns of ensuring that parties to an action are properly aware of what is happening in a case at all times. This creates an implied, if not explicit, duty on a moving party to exercise some due diligence to determine a party's last known address.

[35] If we were to stretch the assumption further and assume that under Rule 5, Beck could be served through either Matthews or The R Music Group, LLC, Plaintiffs have failed to even demonstrate that their attempts at doing so were sufficient. Rule 5(b)(3)(C) requires mailing to the person's last known address. Note, though, that Rule 5 states that service must be made on the "person" not on an agent.

[36] The question then becomes, what is a "person's last known address"? Plaintiffs' counsel submitted an affidavit stating:

> Ryan Matthews and Zachary Beck never provided an address to serve legal papers. Upon searching for an address, I found an address for The R Music Group LLC with the Florida Secretary of State, listing Ryan Matthews as the Registered Agent, at the address of 1775 James Avenue, #111, Miami Beach, Florida 33139[1].

(App. 59-60).

[37] Jennifer Ernst, a paralegal with Anderson, Bottrell, Sanden & Thompson Law Firm submitted an affidavit consistent with that of attorney Knoll's. (App. 62-63). Her affidavit goes into slightly further detail in that she testifies as to additional steps she had taken in locating an address:

> I Googled 'Ryan Matthews The R Music Group' and my recollection is that there was a website for bookings for artists signed with The R Music Group that brought me to The R Music Group website. Within The R Music Group website is where I located the same address that was listed on the Florida Secretary of State website.

---

[1] This is factually incorrect. The Florida Secretary of State's listing for The R Music Group, LLC identifies United States Corporation Agents, Inc., 5575 S. Semoran Boulevard, Suite 36, Orlando, FL 32822 as the registered agent, not Matthews.

> . . .
>
> The R Music Group website is now shut down and I am unable to download this same information.

(App. 63).

[38] The affidavit by Ilogu's counsel and Ms. Ernst glosses over the most relevant detail: that Plaintiffs had a more recent address for Matthews. The contract between Matthews and Ilogu is dated October 11, 2013. It contains a different address for Matthews: 1990 Marseille Drive, Suite # 303, Miami Beach, FL 33141. It is unclear why Plaintiffs' counsel would believe that the Florida Secretary of State's address for Matthews would be a better source for determining Beck's "last known address" than the actual contract itself, which was dated over three years after The R Music Group LLC was formed and over two years after it was dissolved.

[39] Nor does the affidavit of Ms. Ernst provide enough information to explain why she would select a clearly outdated address over a more current address. Her affidavit does indicate that she performed some amount of independent investigation, but the extent of that investigation is incomplete. For example, her affidavit does not state that the website she located was current or otherwise up-to-date. Further, Ms. Ernst couches her testimony with language indicating that the affidavit is based on her "recollection". In reality, the affidavit was dated July 18, 2019. It is unclear exactly which "default judgment documents" she assisted attorney Knoll in preparing, or when she did so, but the district court's docket shows that default judgment documents were filed as early as April 4, 2017, over two years prior to her affidavit.

[40] Plaintiffs had, or should have had, other clues that the 1775 James Avenue, #111, Miami Beach, Florida 33139 address was wrong. The district court's docket had many

instances of returned mail sent to Matthews and Beck at that address. Where Plaintiffs had at least two possible addresses, including one on a more recent document, this should have alerted Plaintiffs that there was an issue with the address they were using as the "last known address" and further inquiry should have been made to determine whether the newer address was more appropriate.

[41] Had Ilogu performed some level of due diligence, it is believed they could have located a current address for Beck. A simple search for Beck on a standard internet search engine will reveal a Wikipedia article on Beck. This article reveals that he resides in Tempe, Arizona. Using that knowledge, a search of the Maricopa County Assessor's Office will reveal the current address for Beck. Further, due to Beck's fame, tracking him down should not have been an issue. Plaintiffs, for example, were able to determine when Beck was going to be in Fargo for a concert on September 9, 2016. Finally, Plaintiffs had no difficulty locating Beck, or his attorney, in Arizona when it came time to enforce their judgment.

[42] Plaintiffs knew, or should have known, that the 1775 James Avenue, #111, Miami Beach, Florida 33139 address was not the last known address for Beck. As such, they cannot in good faith argue that Beck was properly served with these documents.

2. *The facts of this case justify vacating the default judgment.*

[43] Beck did not have a fair opportunity to defend himself. Had Beck received any type of notice of the ongoing dispute, he could have dealt with the problem long before this. It was over six months between service of Beck and Matthews' assurance that he would "handle" it, and the filing of the action with the district court. It was another year before the judgment was entered, with many service requirements, none of which were

sent to any of Beck's personal addresses (The R Music Group, LLC is not Beck's agent and not authorized to accept service for him; Ilogu demonstrates no efforts to serve Beck individually after Matthews' attempt to settle the dispute with Ilogu's attorney.). As soon as Beck knew of ongoing litigation, he reacted to it. (See Timeliness argument above.)

[44] This is not to blame Ilogu, but Matthews mislead Beck to believe that what was a $3,000 situation, was resolved. Frankly, with several opening acts signed, it was to be expected that only a few would actually tour, and the rest would be released from their contracts, as Beck would expect Ilogu was. Matthews was "handling" the situation.

[45] Beck has meritorious defenses, he is not a party to the contract and Ilogu's damages are grossly overstated. This situation is, in many circumstances, similar to *Suburban Sales & Serv., Inc. v. District Court of Ramsey*, infra.

[46] In *Suburban Sales*, a default judgment was entered against White, one of the parties, on a cross-claim on October 13, 1972. *Id.*, at 248. The sheriff levied on the judgment on March 14, 1977. *Id.* at 249. It wasn't until August 18, 1978 that White brought a motion under 60(b)(6) seeking to vacate the judgment that was entered on October 13, 1972. *Id.* On July 21, 1979, the district court granted White's motion to vacate the judgment. *Id.* On review, the *Suburban Sales* Court looked at the history of the case. It found that White was ousted as a director of Suburban Sales and the transfer of shares to White was cancelled. *Id.* at 253. White believed that due to the ouster and cancellation of his shares that he was relieved of his obligations on an underlying note which he had signed for the company. *Id.* When the bank later moved to enforce the note, White gave the summons and complaint to his attorney. *Id.* White's attorney never filed an answer or any other legal instrument, though he was named as the attorney of

record. *Id.* White's co-defendants filed a separate cross-claim against White and received a default judgment against White without providing notice. *Id.* Although White had an attorney of record, the cross-claimants did not serve notice of the default judgment on White or his attorney. *Id.*

[47] The district court found "that White was in essence deprived of counsel in that the inaction of [his attorney] constitutes inexcusable neglect. *Id.* at 254. He continued to rely on [his attorney]'s advice in the matter as late as 1977." *Id.* Other factors considered by the district court in vacating the judgment were White's level of education, the size of the judgment entered against him, and the fact that the judgment was based in part on speculative damages. *Id.* The *Suburban Sales* Court took no issue with those findings and affirmed the district court's order vacating the default judgment. *Id.*

[48] The similarity between *Suburban Sales* and this case is notable. Beck relied upon Matthews' assurances that the matter was being handled. Although Matthews was not Beck's attorney, Beck had no reason to believe that Matthews had not resolved the issue. Nor did Beck hear anything further from Ilogu that would cause him to believe otherwise.

[49] There is also a substantial judgment against Beck in issue ($227,790), which should be considered. The nature of Ilogu's claimed damages is not clear. Plaintiffs' Complaint raises several causes of action, including breach of contract, fraudulent inducement to enter in to contract, and "failure to repay monies owed." (App. 13-14). The jury instructions focused heavily on contracts, breaches of contract, and damages for the same. (App. 26). The jury was instructed as to the nature of damages for breach of contract, consistent with the law.

> **<u>MEASURE OF DAMAGES (CONTRACTS IN GENERAL)</u>**
> The measure of damages for breach of contract is the amount which will compensate for all the damage proximately caused by the breach or which, in the ordinary course of things, would be likely to result from the breach.
>
> Damages must be limited to those damages the parties entering into the contact [sic] actually anticipated or which were so probable and natural the damages would reasonably have been anticipated. No damages can be recovered for a breach of contract if the damages are not clearly ascertainable in both their nature and origin.
>
> Damages must be reasonable and may not be more than the amount that would have been gained by the full performance of the contract.

(*Id.*).

This Court described the measure of damages for breach of contract as follows:

> The general rule in the case of a breach of contract is that the measure of damages is the amount which will compensate the injured person for the loss which a fulfillment of the contract would have prevented or the breach of the contract now requires. *Vallejo v. Jamestown Coll.*, 244 N.W.2d 753, 758 (N.D. 1976). "The person injured is, as far as it is possible to do so by monetary award, to be placed in the position he would have been in had the contract been performed." *Id.*

Bakke v. Magi-Touch Carpet One Floor & Home, Inc., 2018 ND 726, ¶ 23, 920 N.W.2d 726. (*See also*, N.D. CENT. CODE § 32-03-09).

[50] The trial transcript reveals that the jury heard about damages that were speculative and others that are contrary to those damages permitted for breach of contract.

> But so we go to this No. 5: What amount of damage, if any, do you award to the Plaintiffs or the defendants', or either of them, breach of contract? I would suggest to you as a jury to choose it would either be if he could have gone on tour with Futuristic as promised that he would have made approximately $100,000 in merchandise sales, as well as all those other perks that I can't quantify in monetary terms. Or if he hadn't put aside the offers to go to Africa, he could have made $150,000. And there, again, is another quantifiable thing. And as the witness said, he has accommodations, his travel. That would all be taken care of. So it would be fair to go this is a -- either a $100,000 case or a $150,000 case. Now, you guys aren't bound to either of those two numbers. You guys get to decide in your judgment of what are reasonable damages in this scenario. But those are the numbers that I've seen, and those are the numbers that make sense in this case.

(App. 98-99).

[51] Ilogu testified that he had lost estimated merchandise profits of around $100,000. (App. 94). If that is the source of Plaintiff's damages, those damages are, at best, speculative. Beck has indicated that the FUTURISTIC – Winter Tour 2014 actually lost money due to poor attendance. (App. 54). Ilogu's testimony at trial reveals that he sells hoodie sweatshirts for $50 which nets a profit of $40; t-shirts are sold for $30, which nets $26, and CDs are sold for $20 which nets $19. (App. 88-90). His estimated damages were based upon the average merchandise revenue for his concerts. (App. 94). Although Ilogu gave a wide range of estimates as to average merchandise revenues, he ultimately testified that he lost approximately $100,000 in profit which was calculated based on $3,000 to $3,300 average merchandise sales over thirty to thirty-four shows. (*Id.*). Given that the average attendance at a FUTURISTIC – Winter Tour 2014 concert was in the range of twenty to forty people, Ilogu would have had difficulty reaching those averages even if every attendee purchased a sweatshirt, CD and t-shirt sold by an opening act.

[52] There is also testimony regarding intangible damages such as opportunities and fame that Ilogu believes would have resulted had he performed with Beck.

> Q. Do you have any knowledge or information as to why Big Reeno would forgo an overseas trip where he could potentially make $150,000 in order to be in a United States tour with Futuristic where he has to pay $3,000?
>
> A. Yeah. For an artist trying to become bigger than he is already in America, it's makes more sense to do a show here in America and win that fan base than overseas. That's just typical for artists in his position. You would forgo that money because you're looking at it as long term. And the bigger you are in the U.S. it translates -- the money you might be receiving overseas, the bigger you are in the U.S., that money quickly triples overseas. So it's a long-term game plan.

(App. 95-96).

[53] These damages are too speculative and are not clearly ascertainable. *See* N.D. CENT. CODE § 32-03-09 ("No damages can be recovered for a breach of contract if they are not clearly ascertainable in both their nature and origin."). The Plaintiffs acknowledge that these damages, to the extent they exist, cannot be reduced to a monetary value.

> "I would suggest to you as a jury to choose it would either be if he could have gone on tour with Futuristic as promised that he would have made approximately $100,000 in merchandise sales, <u>as well as all those other perks that I can't quantify in monetary terms</u>.

(App. 98-99) (emphasis added).

[54] Nor was there any testimony provided to allow the jury to make this determination. For example, no evidence was provided as to any increased fame or earning capabilities of other openers that toured with Beck on the FUTURISTIC – Winter Tour 2014. Even if there had been, Ilogu would have needed to prove that his situation was sufficiently similar to the situation of the hypothetical tour opener. This was not done. As such, these damages are simply too speculative to be ascertainable and cannot be awarded.

[55] Ilogu also asserted damages for lost profits from a potential Africa tour. Again, in walking the jury through the jury instructions, attorney Knoll said as follows:

> Or if he hadn't put aside the offers to go to Africa, he could have made $150,000. And there, again, is another quantifiable thing. And as the witness said, he has accommodations, his travel. That would all be taken care of.

(App. 98-99).

[56] The jury's verdict makes it impossible to determine how it calculated damages. That it considered the testimony regarding the African tour is clear, though. The jury submitted a question to the court asking: "Would there have been monies from sales of merch. [sic] overseas?" (App. 42).

[57] Testimony was given to the jury that Ilogu was in a situation where he could either tour with Beck or participate in the African tour. While Ilogu had the choice between the two opportunities, he ultimately chose to forego the African tour in order to participate in the FUTURISTIC – Winter Tour 2014. Therefore, lost profits from the African tour are not an appropriate measure of damages for Ilogu under case law[2] or the jury instructions[3].

[58] While the jury did not describe how it calculated the damages, the size of the verdict leads to the conclusion that it awarded Ilogu damages that he was not entitled to receive. Lost merchandise profits were over-estimated at $100,000. The jury awarded Ilogu $192,500 in damages for the breach of contract, plus interest. (App. 44). While Beck contests the accuracy of the damages arising from lost merchandise sales, the fact that the jury awarded nearly double those damages creates the inference that the jury awarded damages which Ilogu was not entitled to receive.

[59] In light of the fact that Rule 60(b) is remedial in nature and the strong preference for having a case heard on the merits, both of which this Court identified in *CUNA Mtg. v. Aafedt*, 459 N.W.2d 801, 803 (N.D. 1990), any doubt regarding this case should be resolved by vacating the default judgment and allowing Beck to have his case heard on its merits.

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[2] "The general rule in the case of a breach of contract is that the measure of damages is the amount which will compensate the injured person for the loss which a fulfillment of the contract would have prevented or the breach of the contract now requires." *Bakke*, 2018 ND 726, ¶ 23, 920 N.W.2d 726 (citing *Vallejo v. Jamestown Coll.*, 244 N.W.2d 753, 758 (N.D. 1976)).

[3] "The measure of damages for breach of contract is the amount which will compensate for all the damage proximately caused by the breach or which, in the ordinary course of things, would be likely to result from the breach." (65, p.27).

CONCLUSION

[60] Beck respectfully requests that the Court reverse the District Court's order denying Beck's Rule 60(b) motion for relief from judgment and remand the case to the District Court for a trial on the merits.

Dated this 9th day of October, 2019.

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CERTIFICATE OF COMPLIANCE

I hereby certify this document complies with the applicable page limitations contained in N.D.R.App.P. 32(a)(8)(A) as it is only 30 pages.

Dated: October 9, 2019

/s/ Asa K. Burck

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CERTIFICATE OF SERVICE

I hereby certify that on October 9, 2019, the following document:

Appellant's Brief

Appellant's Appendix

was filed electronically with the Clerk of Court through North Dakota Supreme Court E-Filing Portal and a copy of the above listed document was sent electronically to the following:

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