20190239
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
NOVEMBER 8, 2019
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court Case No. 20190239
Cass County District Court No. 09-2017-CV-00915

Hustle Proof Corporation and Chinedu Ilogu a/k/a BIG REENO

Plaintiff/Appellees

v.

Ryan Matthews d/b/a The R Music Group & WTF Touring and Zachary Beck a/k/a FUTURISTIC,

Defendant/Appellants.

BRIEF OF APPELLEES

APPEAL FROM ORDER DENYING MOTION TO VACATE ENTERED JULY 29, 2019 (DOCKET NO. 149)

THE DISTRICT COURT FOR THE EAST CENTRAL JUDICIAL DISTRICT THE HONORABLE STEVEN E. MCCULLOUGH

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STATEMENT OF THE ISSUES

1. Whether the District Court abused its discretion in denying Appellant's Rule 60(b) motion to vacate.

STATEMENT OF THE CASE

[¶1] This is an appeal from the district court's denial of Appellant's Rule 60(b) motion to vacate a judgment entered after a jury trial on the merits. The Appellant was personally served with the Summons and Complaint and then never took any steps to check on the litigation, hire a lawyer, or ask about documents confirming that the litigation had been concluded. Instead, his first challenge to the lawsuit was in the form of a Rule 60(b) Motion to Vacate. After careful consideration by the trial court (the same Court that was involved in determining jury instructions and presiding over the jury trial), it denied the motion. Through this appeal, the only relevant issue is whether the trial Court abused its discretion in denying the Appellant's motion under Rule 60(b).

[¶2] This case arises out of a contract between Appellees Hustle Proof Corporation ("Hustle Proof") and Chinedu Ilogu a/k/a BIG REENO ("Ilogu"), Ryan Matthews d/b/a The R Music Group & WTF Touring ("Matthews"), and Appellant Zachary Beck a/k/a FUTURISTIC ("Beck"), whereby Matthews, as Beck's managing agent in the entertainment industry, agreed that Ilogu could provide a twenty minute set at each show during the FUTURISTIC Winter Tour 2014 (the "Tour"), which was supposed to be comprised of approximately 30-34 concert dates in the United States between January 2014 through February 2015.

[¶3] During a period of approximately six months of planning and waiting to be advised of the details of the start of the Tour, Ilogu and Hustle Proof passed on important and lucrative international touring opportunities for Ilogu, as BIG

REENO, through which they would have made a significant amount of money through appearance fees, the sale of music, and the sale of merchandise. Matthews and Beck ultimately breached their contract with Ilogu and Hustle Proof by lying to them about the Tour, having the Tour without him, failing to give him the opportunity to perform in the Tour and gain valuable exposure in America, and reasonably causing Ilogu and Hustle Proof to forego very profitable international opportunities for the opportunity to get exposure in America.

[¶4] Through a process server, Hustle Proof and Ilogu personally served Matthews and Beck with a Summons and Complaint while they were present in North Dakota. Despite being personally served with a lawsuit, Beck never responded or even appeared in the litigation. Ultimately, a Jury awarded Ilogu and Hustle Proof $192,500 following a trial on the merits.

[¶5] More than one year later, Beck filed an Answer and made a Rule 60(b) motion to vacate. Therein, Beck averred that he mistakenly believed that Matthews, his non-lawyer managing agent for the entertainment industry was "handling" the litigation on his behalf, and allegedly told him that this had all "been taken care of", apparently without Beck asking for any details or confirmation/proof of the same. Basically, Beck asked the District Court and now asks this Court to make Appellees "retry" their jury trial because Beck now claims that his manager, Matthews, allegedly told him a lie about the litigation being "handled". We do not even know that Beck and Matthews ever <u>really</u> discussed the litigation after personal service was made on each of them individually. We just know that now,

after-the-fact, Beck says that Matthews told him this, which is entirely self-serving hearsay. Please note that Beck also asserted various arguments regarding purported deficient service under Rule 5. The District Court denied Beck's Rule 60(b) motion after considering Beck's pre- and post-hearing briefings, and after oral arguments.

[¶6] Despite Beck's attempt to claim deficiencies in the legal process, possibly none of which would have occurred had Beck hired a lawyer or responded to the Complaint personally served on him, and had he or Matthews provided contact information to the parties and the Court, the sole legal question subject to this appeal is whether the District Court abused its discretion in denying Beck's Rule 60(b) motion. As set forth below—it did not.

STATEMENT OF THE FACTS

A. The underlying contract and the Tour.

[¶7] Ilogu is a rap artist performing under the stage name "BIG REENO". See Trans. at p. 15. Ilogu is managed by Hustle Proof. See Trans. at p. 14. Ilogu established himself as a successful rap artist throughout Africa and has sold out shows with thousands of spectators. See Trans. at pp. 15, 17.

[¶8] In an attempt to establish his career in the United States, Hustle Proof and Ilogu sought to perform before "headliner" events with rap artists established in the United States. Beck is an artist and performs under the stage name "FUTURISTIC". Matthews was Beck's non-lawyer managing agent at all times pertinent to this case. See Trans. at p. 36; Appellant App. at p. 54. Matthew

conducted business under the names “The R Music Group” and “WTF Touring”. Indeed, Beck acknowledged that Matthews “handled many matters related to my music career”. Appellant App. at p. 54. It is specifically noted in paragraph 5 of that affidavit that Matthews took responsibility for organizing the Tour, for which they agreed Beck and Matthews would split the profit with Beck getting 80% and Matthews getting 20% of those profits. Beck further acknowledged in his affidavit that Matthews had been his entertainment business “manager” from October 2013 through June 2018.

[¶9] Hustle Proof and Ilogu contacted Matthews to perform in the Tour with Beck. On or about October 11, 2013, the parties entered into a contract whereby Ilogu paid Matthews and Beck $3,000 to secure an opening spot on the Tour. See Appellant’s App. at p. 24. A spot on the Tour was extremely important as a result of the exposure Ilogu would receive throughout the United States, coupled with the opportunity to sell significant amounts of merchandise, such as t-shirts and CDs. Matthews represented that the Tour was continually being postponed for various reasons. See Trans. at pp. 32-34. From contract execution through March 2014, Matthews continued to promise updates and scheduling for the Tour, but instead simply just ”strung” Ilogu and Hustle Proof along, waiting for the information and start of the Tour. See Appellant App. at pp. 30-41. It reached such a point that by November 2014 Matthews promised Ilogu a free feature with Beck to make up for the “long and unacceptable delay” in going on the Tour, which also was never provided by Beck. See Appellant App. at p. 40.

[¶10] During this period of planning and waiting for the Tour, the Appellees passed on important and substantial international touring opportunities, through which Ilogu and Hustle Proof would have made a significant amount of money through appearance fees, the sale of music and the sale of merchandise. See Trans. at pp. 26, 85; Doc. ID #64 [flash drive of videotaped deposition at beginning at 4:03]; Doc. ID #20.

[¶11] The Tour ultimately went on without giving Ilogu the promised opportunity to perform in it in accordance with the parties' contract. Hustle Proof and Ilogu only even found out about the Tour actually occurring without them via secondhand information. See Trans. at p. 49.

[¶12] On or about March 19, 2014, while acknowledging their failure to act in conformity with the contract, Matthews promised to provide a full refund to Hustle Proof and Ilogu. However, out of the $3,000 in consideration previously paid, only $500 was returned to them on or about September 3, 2014. As noted, Matthews promises of Beck making a great appearance/collaboration on one of Ilogu's songs also never occurred. See Trans. at pp 49-50.

B. Personal service of the underlying lawsuit, service of subsequent filings, and the jury trial.

[¶13] Matthews and Beck were both personally served with the underlying lawsuit on September 9, 2016. See Doc. ID Nos. 4-5. The Affidavit of Service indicates personal service of the Summons and Complaint was effectuated by a private process server at Newman Outdoor Field in Fargo, North Dakota. See Doc. ID #5. The process server, specifically noted in his Affidavit of Service that "I was able to

explain to defendant Beck [a/k/a FUTURISTIC] that he was being sued by the named Plaintiffs".

[¶14] Beck has since acknowledged receiving and even discussing the Summons and Complaint with Matthews the same night. See Appellant's App. at p. 54. Beck avers that Matthews allegedly told him that Matthews would simply "take care of all matters relating to this lawsuit". Appellant's App. at p. 54. There is no proof of the same beyond that assertion by Beck. There is no statement or affidavit from Matthews confirming that hearsay statement.

[¶15] Beck also claims (through self-serving hearsay) that he again inquired with Matthews several days later as to what was happening in the case and allegedly Matthews told him that it was "handled" and/or "wasn't a big deal". Appellant's App. at pp. 54-55. With that, Beck, apparently, put the lawsuit out of his mind and took no action to defend himself, to hire a lawyer, or inquire with the Court and/or the opposing parties about whether he had any further legal rights or obligations vis-à-vis the underlying litigation. Rather, apparently relying on Matthews' non-lawyer response that he would "handle it" and that the Summons and Complaint " wasn't a big deal", Beck elected to disregard the pleadings and did not inquire about it until after Ilogu and Hustle Proof attempted to execute upon their judgment, as discussed below.

[¶16] Shortly after Matthews and Beck were served with the Summons and Complaint in this matter, Matthews contacted Appellee's Counsel via e-mail. Then, Matthews simply disappeared. It is important to further note that Beck has

acknowledged that he was not aware of Matthews contact with Counsel until after Beck moved to vacate the judgment, also discussed below.

[¶17] After personal service of the underlying lawsuit was effectuated, and the very brief contact with Matthews ceased, all subsequent filings were mailed to what Counsel for Appellees thought was Matthews' last known address. Having not received an Answer from Matthews or Beck, and no address or other contact information from either of them or attorneys for them, Appellees attempted to serve them with a notice of default judgment motion and supporting documents on or about April 4, 2017. Appellant's App. at p. 20. Appellees' Counsel located Matthews through the Florida Secretary of State's website, as the managing member for the "R Music Group, LLC", with an address of "1775 James Ave. #111, Miami Beach, Florida 33139." Appellant's App. at pp. 60-61. That contact information was never taken down, updated, or changed with the Florida Secretary of State, if Matthews or The R Music Group had actually ever changed their address. One of the single most important things on a Secretary of State website is to provide information about the principal location of a business and information about how to effectuate service of process. Counsel corroborated this Florida address by cross-referencing that address with one found on the active website for The R Music Group, which was the same. Appellant's App. at pp. 62-63. As such, Appellees' Counsel concluded that address was the best "last known address" for Matthews, who was the only party who made any attempt at all to try

to talk his way out of the litigation, without providing any contact information for subsequent proceedings in the lawsuit.

[¶18] Following the hearing on the motion for default held on June 7, 2017, the Court indicated that it would not issue damages in the amount requested and/or to hold Beck personally liable under the subject contract without proof of the same through a trial. On August 7, 2017, a Scheduling Conference was held, and a resulting Order for Pretrial Conference and Notice of Trial was served by the Court to all of the parties indicating that a jury trial would be held on January 30, 2018. See Appellant's App. at p. 5. In advance of a Pretrial Conference set by the Court for January 8, 2018, Appellees submitted their Pretrial Statement, Witness List, Exhibit List and Jury Instructions See Doc ID #38.

[¶19] Prior to the January 30, 2018 jury trial, Appellees provided proposed Jury Instructions and a "Special Verdict Form", located in the Court Docket as Docket Index Nos. 38 and 43. The Court modified the Special Verdict Form and Jury Instructions as deemed by the Court to be sufficient to fully respond to the Court's issues of liability of Beck and Matthews, and damages – that the Court had previously been unwilling to enter via default judgment without factual findings through a jury.

[¶20] A jury trial was held on January 30, 2018, and the jury responded to the Court's Special Verdict Form. See Doc. ID #67. Based upon evidence that came out and discussed with the jury during the jury trial, the relationship between the manager and the artist he is representing has clear legal implications and

understandings in the entertainment business, very much parroting a joint venture and/or partnership. This was best explained through the testimony of expert witness Aaron Young ("Young"). See Doc. ID #64 [flash drive video deposition on file with the Court]. Young's testimony was based upon all of his experience, expertise and legal education in the field of the entertainment industry, as well as his review of the subject contract involved. While much of that testimony is helpful, most importantly, Young explained that Matthews had the actual or apparent authority to stand in the place of Beck himself in entering the contract, and was acting specifically on behalf of Beck to bind and obligate him under the contract with Ilogu and Hustle Proof.

[¶21] In accordance with the Jury Instructions and Special Verdict Form, as modified and approved by the Court, the jury found in favor of Ilogu and Hustle Proof and awarded $192,500 in damages seemingly stemming from their lost international opportunities that were foregone in order to do Beck's Tour, which included appearance fees of $10,000 per show for fifteen shows, and, conservatively, between $45,000 and $135,000 in lost merchandise sales. The jury never explained exactly how it came up with that number for damages but it clearly was within the scope of the potential damages as presented. See Trans. at pp. 26, 85; Doc. ID #64 [flash drive of videotaped deposition at beginning at 4:03]; Doc. ID #20. An Order for Judgment for that amount, plus costs and disbursements, was provided by the Court and dated February 16, 2018 (Docket No. 73). Notice

of Entry of Order for Judgment and Judgment was filed/served on February 22, 2018 (Docket Nos. 74 and 76).

C. Beck's Rule 60(b) Motion to Vacate and the District Court's denial thereof.

[¶22] On April 18, 2019, more than one year after Notice of Entry of Judgment was filed and served, Beck moved to vacate the Court's Judgment entered against him under Rule 60(b). Beck concedes on appeal the only timely ground remaining under that Rule is under the "catch-all" provision of N.D.R.Civ.P. 60(b)(6). See Appellant's App. at p. 52. Beck's offered basis for the motion was and is unsupported hearsay of misrepresentations allegedly made by Matthews, who presumably failed to answer the Complaint on Beck's behalf as well. See Doc. ID #80 at ¶ 2. ("Mr. Beck contends that his failure to Answer and appear was due to misrepresentations by his manager at the time, Ryan Matthews, who failed to answer the complaint and address all issues related to the lawsuit after asserting he would do so.").

[¶23] After substantial briefing and oral argument by both parties, the District Court denied Beck's Rule 60(b) motion. See Doc. ID #149.

LAW AND ARGUMENT

A. Legal standards.

[¶24] This Court's standard for reviewing a District Court's denial of a Rule 60(b) motion is well-established:

> ***A motion to vacate lies with the sound discretion of the trial court, and its decision whether to vacate the judgment will not be disturbed on appeal unless the court has abused its***

> ***discretion*.** A district court abuses its discretion when it acts in an arbitrary, capricious, or unreasonable manner. A trial court acts in an arbitrary, unreasonable, or unconscionable manner when its decision is not the product of a rational mental process by which the facts and law relied upon are stated and considered together for the purpose of achieving a reasoned and reasonable determination. An abuse of discretion also occurs when a district court misinterprets or misapplies the law. ***A self-represented party should not be treated differently nor allowed any more or any less consideration than parties represented by counsel.***

Hildebrand v. Stolz, 2016 ND 225, ¶ 7, 888 N.W.2d 197 (citation and quotation omitted) (emphasis added).

[¶25] Rule 60, N.D.R.Civ.P., provides, in pertinent part relative to this appeal, that:

> **(b) Grounds for Relief From a Final Judgment or Order.** 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;
>
> . . .
>
> (6) any other reason that justifies relief.
>
> **(c) Timing and Effect of the Motion.**
>
> (1) *Timing*. A motion under Rule 60 (b) must be made within a reasonable time, and for reasons (1), (2), and (3) ***no more than a year after notice of entry of the judgment or order in the action or proceeding*** if the opposing party appeared, ***but not more than one year*** after a default judgment has been entered.

(Emphasis added.)

[¶26] As set forth below, Beck's calculated decision to allegedly permit Matthews—a non-lawyer—to "handle it" after having been personally served with a lawsuit was a "free, calculated, and deliberate" choice and does not amount to

excusable neglect under Rule 60 (b) (1), let alone rise to the level of extraordinary circumstances justifying Rule 60(b)(6) relief.

B. The District Court properly denied Beck's Rule 60(b) motion.

[¶27] Beck continually refers to the underlying Judgment as entered upon "default" to imply the District Court should have viewed his Rule 60 (b) motion with more leniency. However, Beck ignores that the District Court refused to enter a default judgment against Beck without Ilogu and Hustle Proof satisfying their burden of production and persuasion to a jury that: (1) Matthews had authority to bind Beck to the contract; and (2) the amount of Ilogu and Hustle Proof's damages stemming from Matthews and Beck's breaches. Ilogu and Hustle Proof offered sufficient evidence at the jury to satisfy the District Court's two concerns. However, regardless of whether this Court characterizes the Judgment as entered on the merits, or on Beck's default, Beck failed to meet his burden of establishing entitlement to Rule 60(b) relief in either instance.

1. Beck's free, calculated, and deliberate decision to do nothing does not give rise to extraordinary circumstances.

[¶28] Initially, Beck's motion is untimely. While Beck's motion purports to be one made pursuant to Rule 60 (b)(6), it is really one properly framed under Rule 60(b)(1) for "inadvertence mistake or excusable neglect". Beck concedes the same. See Appellant's Brief at ¶ 20 ("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.'") Notice of Entry of Judgment was filed and served on February 22, 2018. Beck moved to vacate on April 18, 2019, nearly two months after his deadline to file a Rule 60(b)(1) motion. See N.D.R.Civ.P. 60(c)(1). Beck's motion to vacate was untimely.

[¶29] Beck attempts to circumvent this procedural bar by filing an untimely Rule 60 (b) (1) motion mascaraing as one made under the "catch all" of Rule 60)(b)(6) allowing a Court to vacate for "any other reason that justifies relief". But, this Court has thoroughly explained the limitations of invoking the "catch all" provisions of Rule 60(b)(6):

> Rule 60 (b) (6), N.D.R.Civ.P., is a 'catch-all' provision that allows a district court to grant relief from a judgment for any other reason that justifies relief. ***Rule 60 (b) (6), N.D.R.Civ.P., should be invoked only when extraordinary circumstances are present***. This Court previously described the limitations of N.D.R.Civ.P. 60(b)(6):
>
> The use of the rule is limited by many considerations. It is not to be used as a substitute for appeal. ***It is not to be used to relieve a party from free, calculated, and deliberate choices he has made***. ***It is not to be used in cases where subdivisions (1) to (5) of Rule 60 (b) might be employed—it and they are mutually exclusive***. Yet 60(b)(6) can be used where the grounds for vacating a judgment or order are within any of subdivisions (1) to (5), but ***something more or extraordinary which justifies relief from the operation of the judgment must be present*.**

Matter of Estate of Bartelson, 2019 ND 107, ¶ 13, 925 N.W.2d 416; City of Duluth v. Fond du Lac Band of Lake Superior Chippewa, 702 F.3d 1147, 1155 (8th Cir. 2013) (citing 11 Wright & Miller, *Federal Practice and Procedure* § 2864 (2d ed. 2011) ("The purpose of Rule 60 (b) (6) is to broaden the grounds for relief to

encompass scenarios ***not covered by the preceding five subsections*** . . . .")

(emphasis added). This Court has explained:

> Although N.D.R.Civ.P. 60(b)(6) should not be used when another subsection may apply, Rule 60 (b) (6) may be used when "the grounds for vacating a judgment or order are" within another subsection, ***but "something more" or "extraordinary" is present to justify relief from the judgment***. Suburban Sales & Serv., Inc. v. District Court of Ramsey County, 290 N.W.2d 247, 252 (N.D.1980) (citations omitted); see also Brigham Oil & Gas, L.P. v. Lario Oil & Gas Co., 2011 ND 154, ¶ 47, 801 N.W.2d 677 (***no abuse of discretion in denying motion when no "extraordinary circumstances" were present*** and motion was not made within a reasonable time); 11 Charles Alan Wright, et al., Federal Practice and Procedure § 2864 (3d ed. 2012) ("If the reasons for seeking relief could have been considered in an earlier motion under another subsection of the rule, then the motion will be granted only when extraordinary circumstances are present.").
>
> . . .
>
> "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." Brakke, at 689. Nonetheless, ***a Rule 60 (b) motion "is not to be used to relieve a party from free, calculated, and deliberate choices," and "[a] party remains under a duty to take legal steps to protect his own interests***." Follman, 2000 ND 72, ¶ 11, 609 N.W.2d 90 (quotations omitted). "Rule 60(b) 'attempts to strike a proper balance between the conflicting principles that litigation must be brought to an end and that justice should be done, and accordingly . . . should be invoked only when extraordinary circumstances are present.

Kukla v. Kukla, 2013 ND 192, ¶¶ 23, 25, 838 N.W.2d 434 (emphasis added).

[¶30] Beck's calculated decision to permit Matthews—a non-lawyer—to "handle it" after having been personally served with a lawsuit was a "free, calculated, and deliberate" choice to neglect his duty to respond or otherwise make an appearance or defend in the underlying litigation. Like in the District Court in this present action had decided, even this Court has determined that disregard of one's own legal

rights does not amount to "excusable neglect" let alone "extraordinary circumstances":

> ***A simple disregard of legal process is, of course, not excusable neglect under the rule***." *Bender v. Liebelt*, 303 N.W.2d 316, 318 (N.D. 1981).
>
> In *Greenwood v. American Family Insurance Co.,* 398 N.W.2d 108 (N.D. 1986), we upheld a trial court's denial of a Rule 60 (b) motion under very similar circumstances. In *Greenwood*, the individual plaintiffs were officers of Dakminn, which was in bankruptcy. They claimed that they were informed by counsel that all proceedings in state court would be stayed by the bankruptcy proceeding, and that they therefore did not appear at a summary judgment hearing. After summary judgment was granted against them, they sought to reopen the judgment by a 60(b) motion. The trial court denied the motion, and we affirmed on appeal.

Royal Industries, Inc. v. Haugen, 409 N.W.2d 636, 638 (N.D. 1987) (emphasis added). Likewise, in State v. $33,000.00 U.S. Currency, the defendant sought to vacate a judgment entered against him. This Court discussed the district court's justifiable refusal to vacate the judgment:

> Tran argues that because he is only semi-literate and he had retained and was relying upon his counsel for the underlying criminal matter, his failure to read and respond to the complaint constitutes excusable neglect, inadvertence, or mistake. Tran argues he is therefore entitled to vacate the default forfeiture judgment. In his brief, ***Tran concedes the summons and complaint were properly served upon him*** because these documents were served on Tran's brother at Tran's residence. However, ***Tran argues he "assumed if any papers were served involving [Tran] then his attorney would receive them and take care of all matters."*** Tran does not argue that his attorney had been retained for the civil forfeiture action ***and*** that attorney error was the sole cause of the entry of default judgment, which may have provided Tran relief from the judgment under Rule 60 (b) .
>
> ***The fact that Tran ignored the summons and complaint, properly served upon him, does not constitute excusable***

> ***neglect, inadvertence, mistake, or surprise under Rule 60 (b) (i), N.D.R.Civ.P. "'A 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)). ***In Royal Industries, Inc. v. Haugen, this Court explained a district court did not abuse its discretion in denying a Rule 60(b)(i) motion to vacate when the party moving to vacate default judgment completely disregarded service of process, without seeking legal advice, based upon a mere assumption that the matter would be handled in bankruptcy court and that the court would not allow entry of judgment against him personally.*** We conclude that the trial court did not abuse its discretion in denying the motion.

2008 ND 420, ¶¶ 13-14, 748 N.W.2d 420 (citations omitted) (emphasis added); see also Hildebrand v. Stolz, 2016 ND 225, ¶¶ 17-18, 888 N.W.2d 197 (affirming district court's denial of Rule 60 (b) (6) motion because "even if [defendant] was not made aware [of the trial date] by [his attorney], ***he had an obligation as a self-represented party to apprise himself of the status of this litigation*** . . . .") (emphasis added).

[¶31] Beck's free, calculated, and deliberate decision to trust a non-lawyer to "handle" the lawsuit and relying on his representation that being sued was not a "big deal" certainly does not present the "extraordinary grounds" necessary to consider an untimely Rule 60 (b) (1) motion in the context of Rule 60(b)(6). See Klapprott v. United States, 335 U.S. 601, 613 (1949) ("And of course, the one year limitation would control if no more than 'neglect' was disclosed by the petition. In that event the petitioner could not avail himself of the broad 'any other reason' clause of 60(b).").

[¶32] Despite Beck acknowledging receiving ***personal service*** of a lawsuit claiming $252,500.00 in damages against him, Beck

seemingly dropped all responsibility for defending himself. Beck failed to hire a lawyer. Beck failed to contact Plaintiff's Counsel. Beck failed to monitor the progress of the underlying litigation. Beck attributes these failures upon Matthews' vague and unsupported assertion that he, a non-lawyer, would "handle" the Complaint that had been served on them and that the lawsuit "wasn't a big deal", despite that the Complaint sought damages in the amount of $252,500. Beck's alleged trusted the "word" of Matthews, his chosen non-lawyer entertainment manager, is not Ilogu and Hustle Proof's fault, and they should not be penalized for that by having to go through another trial. They properly commenced the underlying lawsuit via personal service upon Beck and Matthews—specifically referencing the appropriate Court and carefully describing the allegations made in the case.

[¶33] Certainly, Beck now appreciates the gravity of legal process, as he immediately retained local counsel in North Dakota and in Arizona (where assets of his were found), after Appellees' levied on his bank accounts in Arizona. Beck also apparently has full-time legal counsel in Arizona. So one must ask—why would Beck not exercise his legal prowess and defend his rights sooner? Because he made a calculated decision not to, regardless of what information from his non-lawyer manager he may or may not have chose to rely on without question.

[¶34] This Court should affirm the District Court's denial of Beck's motion to vacate.

2. Beck failed to present a meritorious defense to justify Rule 60 (b) relief.

i. **Beck did not "appear" in the underlying litigation and, therefore, was not entitled to service.**

[¶35] Beck's primary argument really begins and ends with the erroneous premise that he "appeared" in this litigation through non-attorney Matthews. Of course, Matthews cannot "appear" on behalf of Beck for legal proceedings, as doing so would amount to unauthorized practice of law. Not just anyone can "appear" on behalf of a party in the legal sense:

> The words "appear," "appearing," or "appearance" are words of art in the legal sense. *Black's Law Dictionary* 94 (7th ed. 1999) defines "appearance" as ***"[a] coming into court as a party or an interested person, or as a lawyer on behalf of a party or interested person***." There are a number of cases in which this Court has written on whether or not a party has made an "appearance" for the purposes of requiring notice before default judgment may be entered. Generally we have broadly construed the term "appearance" for that purpose.

Lawrence v. Delkamp, 2008 ND 111, ¶ 21, 750 N.W.2d 452 (VandeWalle, C.J., concurring specially) (citation omitted) (emphasis added).

[¶36] While a mere conversation or telephone call between the parties can amount to an "appearance" entitling the party to service of subsequent filings, it is undisputed that Beck, nor an attorney acting on Beck's behalf, contacted the Appellees or their Counsel following service of the Summons and Complaint. See Perdue v. Sherman, 246 N.W.2d 491, 493 (N.D.1976) ("[W]e interpret the telephone conversation of December 29, 1975, ***between the attorneys*** for Perdue and Sherman as establishing an appearance by Sherman."). Any contact between Matthews and Plaintiffs' Counsel on Beck's behalf cannot amount to Beck's

"appearance" in these proceedings. See Wetzel v. Schlenvogt, 2005 ND 190, ¶ 11, 705 N.W.2d 836 ("Just as one unlicensed natural person may not act as an attorney for another natural person in his or her cause, an unlicensed natural person cannot attorn for an artificial person, such as a corporation."). In Wetzel, this Court discussed the legal effect of a non-attorney agent purportedly representing a defending party:

> This Court, however, has not decided what must happen to an underlying case or documents when a corporation is represented by a non-attorney agent. As a result of a corporation's appearance through a non-attorney agent in United Accounts, we rejected the appellant's brief and dismissed the appeal as frivolous. 524 N.W.2d at 607. Applying this logic to a trial court, ***the proper remedy would be to dismiss the action and strike all legal documents signed and filed by the non-attorney as void***. Many other courts have refused to allow a corporation to appear before it without counsel and have disposed of the action. See, e.g., Carr Enter., Inc. v. United States, 698 F.2d 952, 953 (8th Cir.1983) (the plaintiff corporation's appearance through a non-attorney agent would be sufficient alone to affirm the district court's judgment against the plaintiff); Merco Constr. Eng'rs, Inc. v. Mun. Court, 21 Cal.3d 724, 147 Cal.Rptr. 631, 581 P.2d 636, 637 (1978) (refusing a writ of mandamus allowing a corporation to appear through a non-attorney agent in municipal court); Estate of Nagel, 950 P.2d 693, 694 (Colo.Ct.App.1997) (a petition or pleading that was not signed by an attorney on behalf of a corporation was void); Oahu Plumbing & Sheet Metal, Ltd. v. Kona Constr., Inc., 60 Haw. 372, 590 P.2d 570, 576 (1979) (***default judgment was proper because the defendant corporation could not continue before the court without counsel***); Berg v. Mid–Am. Indus., Inc., 293 Ill.App.3d 731, 228 Ill.Dec. 1, 688 N.E.2d 699, 704 (1997) ("a corporation can file a complaint only through a licensed attorney; ***any action filed without an attorney is null and void ab initio*** "); Nicollet Restoration, Inc. v. Turnham, 486 N.W.2d 753, 753, 754, 756 (Minn.1992) (trial court's dismissal was appropriate because the petitioner appeared without an attorney); Lloyd Enters., Inc. v. Longview Plumbing & Heating Co., Inc., 91 Wash.App. 697, 958 P.2d 1035, 1038 (1998) (the district court properly struck documents signed by a non-attorney on behalf of a corporation)

(citing United Accounts, 524 N.W.2d at 607); see generally Jay M. Zitter, *Propriety and Effect of Corporation's Appearance Pro Se Through Agent Who is Not Attorney,* 8 A.L.R.5th 653 (1992).

[¶37] Because Beck did not "appear" in the underlying action personally, or through an attorney, he was not entitled to service of any subsequent filings under Rule 5 (a)(2). The District Court did not abuse its discretion in denying Beck's motion to vacate because he did not receive notice of the trial or other pleadings after being personally served with the Summons and Complaint.

[¶38] Beck also argues this case is analogous to Suburban Sales & Serv., Inc. v. District Court of Ramsey, when in fact it is inapposite for several reasons—primarily based on Beck's failure to retain counsel, or otherwise personally appear, to defend his legal rights. In Suburban Sales & Serv., Inc., the defendant retained counsel who effectively engaged in ineffective assistance of counsel. This Court found that the inaction of the defendant's attorney in that case amounted to inexcusable neglect. In such a case, this Court has held that the inactions of an attorney are ordinarily not imputable to the client where the client is otherwise an innocent victim. The same cannot be said here of Beck.

[¶39] Instead of retaining counsel, Beck inexcusably relied on Matthews' representation that he would handle the lawsuit. Beck attested (through self serving and unsupported testimony that has not been proven or verified) that he only followed up one more time several days later when he inquired with Matthews as to what was happening in the case. Beck, again, at best, inexcusably relied on Matthews' representation that the lawsuit was "handled" and that it "wasn't a big

deal". Beck took no other typical action to defend/assert his legal rights in the underlying action such as hiring—or even discussing the matter with—an attorney, or inquire with the District Court or opposing parties regarding the status of the lawsuit.

[¶40] Beck's inaction and cavalier attitude towards a quarter million dollar lawsuit is certainly inexcusable—let alone constitute extraordinary circumstances justifying Rule 60 (b) (6) relief.

ii. Even if Beck made an appearance through Matthews, all documents were forwarded to Matthews' last known address.

[¶41] Matthews does not appeal from the District Court's judgment, nor challenges the sufficiency of Appellees' service throughout the underlying litigation. Instead, Beck attempts to "bootstrap" what perhaps could otherwise potentially be Matthews' legal arguments against this judgment into his own.

[¶42] Rule 55(a), N.D.R.Civ.P., provides:

> (3) If the party against whom a default judgment is sought has appeared personally ***or by a representative***, that party ***or its representative*** must be served with a motion for judgment. Notice must be served with the motion and must comply with N.D.R.Ct. 3.2(a).

(Emphasis added.)

[¶43] Even if by some machination of imagination Rule 55(a) can be interpreted to include a non-attorney representative (based on the above cases it cannot), Beck was not entitled to service of any filings at his Arizona address. Also, Matthews never provided contact information to Appellees' counsel or to the District Court itself. What's more, Beck's suggestion that he "appeared" through

Matthews undercuts his overarching defense he is trying to assert in order to vacate the judgment that Matthews was not authorized to act on Beck's behalf in entering into the underlying contract. Last but not least, this wasn't a case decided on default judgment so Rule 55 is not applicable.

[¶44] As set forth above, Appellants' Counsel attempted to conduct a search of where Matthews, or more importantly "The R Music Group" might be located. While the contract listed an address for The R Music Group, the contract did not indicate that notices should be sent to that address. The contract also referenced "The R Music Group, LLC" at the very bottom of the contract. Based on this information, Counsel conducted a Secretary of State search for that entity which revealed a different address for the entity. Counsel also corroborated that new address with the address The R Music Group was representing as its own on its website. Plainly, through legal counsel, Appellees did the best they could to locate someone who, clearly, was disinterested in this lawsuit or maybe even attempting to "dodge" this lawsuit or for other reasons. That Matthews listed an address on his contract that was different than the "The R Music Group's" official address listed on its website and Secretary of State page is suspect, if not telling. Also, if Beck and/or Matthews had provided contact information for them to either Appellees' legal counsel or the Court, then things would have been served to that address. Beck is trying to place blame on Ilogu and Hustle Proof for his own legal failures.

[¶45] Rule 5 does not require one to engage in a scavenger hunt to locate the most current address for a defending party. It does not even require one to make

a "diligent inquiry". See N.D.R.Civ.P. 5(b)(3)(C) ("A document . . . that will be served on a person exempt form electronic service, is served . . . by . . . mailing it to the person's last known address, in which event service is complete upon mailing."). Yet, Plaintiff's Counsel diligently searched for a likely address and found one of official record. In other contexts affecting important interests, an address of record is sufficient even though the record address may not be the correct one, or was returned as undeliverable:

> The 2004 version of N.D.C.C. § 38–18.1–06(2) applicable to this case provides, "if the address of the mineral interest owner is shown of record or can be determined upon reasonable inquiry, notice must also be made by mailing a copy of the notice to the owner of the mineral interest within ten days after the last publication is made." This Court has had occasion to interpret N.D.C.C. § 38–18.1–06(2) (2004). Our prior cases dealt with interpretation of the "reasonable inquiry" language of the statute. We determined a surface owner is required to conduct a "reasonable inquiry" only if the mineral owner's address does not appear of record. See, e.g., Taliaferro, 2011 ND 34, ¶ 11, 793 N.W.2d 804; Felton, 2011 ND 33, ¶ 14, 793 N.W.2d 799; Sorenson v. Alinder, 2011 ND 36, ¶ 6, 793 N.W.2d 797. ***This Court has also stated, "the address of record need not be the mineral interest owner's correct address for the mailing of the notice of lapse to satisfy the statutory requirement***." Capps v. Weflen, 2014 ND 201, ¶ 10, 855 N.W.2d 637.

Nelson v. McAlester Fuel Co., 2017 ND 49, ¶ 13, 891 N.W.2d 126 (emphasis added). Further, in In re Disciplinary Action Against Roybal, this Court touched on the undeliverable service by mail at the last known address of a respondent to a disciplinary complaint:

> On November 12, 1999, ***the Hearing Body Report was served on Mr. Roybal by mail at his last known address. Mr. Roybal's mail was returned, unopened, and marked "ATTEMPTED NOT KNOWN***."

> The Disciplinary Board considered the matter at its regularly scheduled meeting on March 20, 2000, and filed its Report on March 27, 2000, adopting the Report of the Hearing Body. ***The Report of the Disciplinary Board was served on Mr. Roybal by mail at his last known address. Again, Mr. Roybal's mail was returned, unopened, and marked "ATTEMPTED NOT KNOWN***."
>
> The Report of the Disciplinary Board is submitted to the Court under Rule 4.4(D), N.D.R. Lawyer Discipl. No briefs have been filed in this matter. The Court considered the matter, and
>
> ***ORDERED, the Report of the Disciplinary Board is ADOPTED.***

2000 ND 125, ¶¶ 2-5, 612 N.W.2d 277 (emphasis added).

[¶46] Appellees did the best they could with the information they had in order to serve documents to Matthews' last known address. That Matthews did not set up a forwarding address with the Florida Secretary of State is also telling of his general neglectful behavior and further evidences/suggests his desire not to be found. Beck has acknowledged he has many legal claims that he wants to assert against Matthews. While Beck was not entitled to notice of any subsequent filings after he failed to appear, this Court should, nevertheless, understand that notice of trial was properly served upon Matthews at his last known address, and Beck never "appeared" after being personally served.

iii. Beck does not present any other meritorious defenses in support of Rule 60 (b) relief.

[¶47] Beck asserts various other grounds in support of his request to vacate the Judgment, all of which are without merit. For example, Beck disingenuously asserts that he was misled to believe a "$3,000 situation" was resolved. See

Appellant's Brief at ¶ 44. Yet, Beck acknowledges personal service of the Complaint and reviewing the same with Matthews the same night. See Appellant's App. at p. 54. That Beck may have chosen to simply allow a non-lawyer agent handle this litigation on his behalf was never disclosed to Appellees or their legal counsel. Beck now relies on hearsay about conversations he allegedly had with Matthews – without any real proof that even this fundamental concept is even true.

[¶48] Beck argues that he was not party to the contract, however concedes that Matthews was his agent and "***acted as my manager and handled many matters related to my music career, including all agreements related to the [Tour]***." Appellant's App. at p. 54 (emphasis added). Beck concedes Matthews was responsible for organizing the Tour, including "hiring openers." See Appellant's App. at p. 54.

[¶49] Sufficient evidence supports the jury's finding that Matthews bound Beck to the contract with respect to Ilogu's involvement with the Tour. See Doc. ID #64 (Young's videotaped deposition on file with the Court testifying with respect to managers binding their artists to contracts in the music industry).

[¶50] What's more, Beck's affidavit provided in support of the motion to vacate (Beck and Matthews agreeing to jointly put the Tour together and split) is indicative of a "joint venture" and/or partnership between them, whether called (1) an artist and his manager, (2) a partnership, or (3) a joint venture. This Court has explained:

> North Dakota has historically recognized the joint venture relationship. *Voltz v. Dudgeon,* 334 N.W.2d 204, 206 (N.D.1983); *see Kelly v. Lang,* 62 N.W.2d 770 (N.D.1953); *Brudvik v. Frosaker*

> *Blaisdell Co.,* 56 N.D. 215, 216 N.W. 891 (1927); *Gehlhar v. Konoske,* 50 N.D. 256, 195 N.W. 558 (1923). A joint venture is generally considered akin to a partnership, although more limited in scope and duration, and principles of partnership law apply to the joint venture relationship. *See Thompson v. Danner,* 507 N.W.2d 550, 556 (N.D.1993); *Edwards v. Thompson,* 336 N.W.2d 612, 616 n. 7 (N.D.1983); 1 Alan R. Bromberg & Larry E. Ribstein, *Partnership* § 2.06(a) (2006).
>
> Section 45–15–01(1), N.D.C.C., provides that a partner is an agent of, and may bind, the partnership:
>
> > Each partner is an agent of the partnership for the purpose of its business. An act of a partner, including the execution of an instrument in the partnership name, for apparently carrying on in the ordinary course the partnership business or business of the kind carried on by the partnership binds the partnership, unless the partner had no authority to act for the partnership in the particular matter and the person with whom the partner was dealing knew or had received a notification that the partner lacked authority

SPW Associates, LLP v. Anderson, 718 N.W.2d 580, 582-83 (2006). Beck's arguments that he was not party to the contract, or that Matthews was not authorized to bind Beck with respect to the Tour are entirely without merit.

[¶51] Beck's argument that Ilogu's damages are overstated because the Tour actually lost money misses the mark. It appears the jury awarded Hustle Proof and Ilogu's damages based upon lost foregone international opportunities, as set forth below, in reliance on performing in the Tour are recoverable. See N.D.C.C. § 32-03-09 ("[T]he measure of damages . . . is the amount which will compensate

the party aggrieved for all the detriment proximately caused thereby or which in the ordinary course of things would be likely to result therefrom.").

[¶52] The jury returned a verdict of $192,500.00. This verdict was well within the range of damages presented in the evidence. See KLE Const., LLC v. Twalker Dev., LLC, 2016 ND 229, ¶ 13, 887 N.W.2d 536 ("An award of damages will be sustained if it is within the range of evidence presented to the trier of fact.").

[¶53] Ilogu testified that he sells merchandise at his shows: hoodies, $40 net profit; t-shirts, $26 net profit; and CD's $19 net profit. Trans. at pp. 32-34. Ilogu further testified that he averages between $3,000 to $3,500 per show, but has done up to $5,000 when he performs in the United States. See Trans. at pp. 55, 59. Ilogu also testified that he can make "three times" or up to "four times" performing internationally than what he would make in America. See Trans. at pp. 15-16. Ilogu testified that he forewent an opportunity to perform shows in Togo and Nigeria when he was supposed to be performing in the Tour. See Trans. at p. 60.

[¶54] Chikezie Ukejelam is an international promoter who offered to pay Ilogu $150,000.00 to perform in fifteen international shows—five shows in three counties for $10,000 an appearance. See Trans. pp. 26, 85; Doc. ID #64 [flash drive of videotaped deposition at beginning at 4:03]; Doc. ID #20. Based on the testimony presented at trial, Ilogu and Hustle Proof lost out on ***$150,000*** in international appearance fees. In addition, they lost out on substantial merchandise sales: conservatively, between ***$45,000*** ($3,000 per show average based on American sales) and ***$135,000*** (using the lower multiple of "three times"—or $9,000 per

show—for international shows). The jury's verdict of $192,500 is well-within the amount alleged in the Complaint and range of evidence offered at trial.

[¶55] Beck has failed to present any meritorious defense in support of his motion. The District Court did not abuse its discretion in denying Beck's motion to vacate.

CONCLUSION

[¶56] This Court should affirm the District Court's order denying Appellant's Rule 60 (b) (6) motion to vacate the Judgment.

Dated this 8th day of November, 2019.

/s/ Ronald J. Knoll

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CERTIFICATION OF COMPLIANCE

The undersigned hereby certifies that Appellants' Brief complies with the page limit of North Dakota Rules of Appellate Procedure 32(e) because it contains no more than 35 pages, as indicated by the page-count utility of the word processing software.

Dated this 8th day of November, 2019.

/s/ Ronald J. Knoll

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

The undersigned, being first sworn, says upon her oath that on the 8th day of November, 2019, she delivered via e-mail a true and correct copy of each of the following:

Brief of Appellee
Appellee's Appendix

A copy of the foregoing was securely e-mailed to the addresses as follows:

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I declare, under penalty of perjury under the law of North Dakota, that the foregoing is true and correct.

Dated this 8th day of November, 2019.

/s/ Jennifer A. Ernst
Jennifer A. Ernst