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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 REPLY TO APPELLEE'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

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ARGUMENT

A. Beck was entitled to Notice

i. Beck "appeared" in this action such that he was entitled to notice.

[1] Courts "broadly construe[] the term 'appearance'" for the purpose of requiring notice. (Appellee's Br. p. 23) (quoting *Lawrence v. Delkamp*, 2008 ND 111, ¶ 21, 750 N.W.2d 452 (VandeWalle, C.J., concurring specially)). Ilogu would have the Court narrow this definition to require a personal appearance by the party or an appearance made by a licensed attorney. In doing so, he conflates the meaning of an "appearance" for notice purposes with an "appearance" before a court. In support of his position, Ilogu cites *Wetzel v. Schlenvogt*, 2005 ND 190, 705 N.W.2d 836. *Wetzel* is inapposite in that it involves an action commenced by a non-attorney agent on behalf of a corporation. This type of an "appearance" (i.e., appearing before a court) has stricter requirements than an "appearance" for notice purposes.

[2] The relevant language of Rules 5 of the North Dakota Rules of Civil Procedure and the Federal Rules of Civil Procedure are identical. *See* N.D.R.Civ.P. 5(a)(2); F.R.Civ.P. 5(a)(2). Rule 55 of the North Dakota Rules of Civil Procedure is also derived from Rule 55 of the Federal Rules of Civil Procedure. N.D.R.Civ.P. 55, advisory committee notes. This Court has acknowledged that:

> [W]hen we adopted the Federal Rules of Civil Procedure we did so with knowledge of the interpretations placed upon them by the Federal courts, and although we are not compelled to follow those interpretations, they are highly persuasive and, in the interest of uniform interpretation, we should be guided by them.

Unemployment Comp. Div. v. Bjornsrud, 261 N.W.2d 396, 398 (N.D. 1977) (citing *In re Estate of Elmer*, 210 N.W.2d 815 (N.D. 1973)). In looking to other courts that have

considered the question of what constitutes an "appearance" for notice purposes, it becomes clear that a broad interpretation is favored.

[3] Under Ilogu's proposed interpretation, an attorney that is not authorized to practice law in the relevant jurisdiction could not make an appearance for their client. (*See* Appellee's Br., p. 24) (citing *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.")). The United States Court of Appeals for the Fifth Circuit rejected this idea. *See Charlton L. Davis & Co., P.C. v. Fedder Data Center, Inc.*, 556 F.2d 308 (5th Cir. 1977) (finding that a Maryland attorney's communications constituted an "appearance" by his client for a case in Georgia). The United States District Court for the District of Delaware also found an appearance where an out-of-state attorney contacted the plaintiff's attorney and informed them that the defendants were seeking local counsel and requested an extension. *Heleasco Seventeen, Inc. v. Drake*, 102 F.R.D. 909 (D.Del. 1984).

[4] In a case that is further on point, the United States District Court for the South District of Texas found that a corporation made an "appearance" when its non-attorney president wrote a letter to the plaintiff's attorney. *Dalminter, Inc. v. Jessie Edwards, Inc.*, 27 F.R.D. 491, 492-93 (S.D.Tex. 1963). *See also, Kinnear Corp. v. Crawford Door Sales Co.*, 49 F.R.D. 3, 5 (D.S.C. 1970).

ii. Ilogu failed to serve Beck at his "last known address."

[5] All notices in this case were improperly served on Beck at an address at which he has never resided or claimed as his own. The R Music Group, LLC was organized on

January 8, 2010. (App. 61). At that time, Matthews and The R Music Group, LLC listed their address as 1775 James Avenue, #111, Miami Beach, FL 33139 (hereinafter the "1775 address"). (*Id.*). The R Music Group, LLC was administratively dissolved on September 23, 2011 due to failure to file an annual renewal. (*Id.*). There is no evidence that either Matthews or The R Music Group, LLC have been at the 1775 address since January 8, 2010.

[6] Ilogu's counsel submitted an affidavit to support its reasoning in serving Beck at the 1775 address. (App. 62-63). However, this Affidavit does not support Ilogu's contention that the 1775 address is more recent than the address contained on the contract (which was signed and dated two years after The R Music Group, LLC was dissolved). The Affidavit relies upon the affiant's recollection of routine work that was performed two years prior. (App. 63). It also asserts that the affiant found a website for The R Music Group which confirmed the 1775 address. (*Id.*). However, the website referenced by the Affidavit is no longer active or accessible nor does the affidavit explain why the affiant believed that the website was current at the time it was viewed.

[7] Ilogu demonstrated that he was capable of finding Beck for service of the summons and complaint. Ilogu was also able to determine Beck's location to execute on his judgment. Ilogu's ability to find a well-known figure for some purposes, but not others, is evidence of Ilogu's bad faith in attempting to serve Beck at the 1775 address. This is especially true in this instance because Ilogu had a more recent address as well as knowledge that the documents he was serving were being returned undelivered.

iii. <u>It is irrelevant whether Ilogu acquired judgment by default or otherwise.</u>

[8] Beck has generally averred that Ilogu acquired judgment by default. Ilogu asserts that he did not get default judgment but instead had to prove his case in front of a jury. This is a distinction without a difference. While much of the case law regarding "appearances" was developed under Rule 55, Rule 5 separately requires service of motions, orders, and legal filings on a party that has appeared in the action. N.D.R.Civ.P. 5(a)(1)-(2). It is Rule 5 (not Rule 55) that requires service at the party's "last known address." N.D.R.Civ.P. 5(b)(3)(C).

[9] The North Dakota Supreme Court has said much regarding the preference of having a matter decided on its 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). A party's right to present a defense is a crucial element of having a case heard on its merits. The factors informing the *CUNA* Court's decision (i.e., that "Rule 60(b) is remedial in nature and should be liberally construed and applied", that "decisions on the merits are preferable to those by default", and "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") are all present regardless of whether a judgment is a true "default judgment" or merely a judgment where one party had no knowledge of the trial and no opportunity to present a defense. *See CUNA Mtg. v. Aafedt*, 459 N.W.2d 801, 803 (N.D. 1990).

B. Ilogu received damages he was not entitled by law to receive

[10] The jury awarded Ilogu a money judgment in the principal amount of $192,500 plus pre-judgment interest for a total judgment of $227,790. Ilogu testified that he

anticipated profits of up to $100,000 from the sale of merchandise during the Tour. (App. 94). The only way the jury could have arrived at an award of $192,500 is if they considered inappropriate sources of damages.

[11] Ilogu testified that he would have earned $150,000 on the international tour plus expenses. (App. 98-99). However, Ilogu chose to tour with Beck with the hope of becoming more famous in the United States. (App. 95-96).

> For a breach of contract, the injured party is entitled to compensation for the loss suffered, but can recover no more than would have been gained by full performance. NDCC §§ 32–03–09, 32–03–36. Our law thus incorporates the notion that contract damages should give the nonbreaching party the benefit of the bargain by awarding a sum of money that will put that person in as good a position as if the contract had been performed. See generally 22 Am.Jur.2d Damages § 45 (1988).

Leingang v. City of Mandan Weed Bd., 468 N.W.2d 397, 398 (N.D. 1991).

> 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.C.C. § 32-03-09).

[12] Although this is consistent with the jury instructions, it is clear that the jury improperly considered alternative damages. The best evidence Ilogu presented regarding "the position he would have been in had the contract been performed" is the loss of an estimated $100,000 in profit from merchandise sales. (App. 94). This is based on his average merchandise sales rather than on any testimony related to the actual attendance at concerts during the Tour. Other damages, such as missing out on the increased fame that

would have come with a Beck tour, are too speculative and are not clearly ascertainable enough to be compensable. N.D.C.C. § 32-03-09.

[13] Ilogu presented no evidence that would support $192,500 plus interest in damages unless the jury considered the international tour damages. That the jury did so is supported by the written questions submitted to the Court. (App. 42).

C. Extraordinary circumstances exist in this case

[14] Beck seeks relief under Rule 60(b)(6). Ilogu's delay has deprived Beck of other relief that he could otherwise seek under Rules 60(b)(1) or (3). A motion for relief under those rules must be brought within one year from the date of judgment. N.D. Civ. P. 60(c)(1). By waiting over one year to enforce his judgment, Ilogu has limited Beck's options for relief.

[15] Rule 60(b)(6) read: "On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for . . . any other reason that justifies relief." N.D.R.Civ.P. 60(b)(6). This Court has noted that Rule 60(b)(6) relief requires "extraordinary circumstances." *Kautzman v. Doll*, 2018 ND 23, ¶ 14, 905 N.W.2d 744.

> "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):
>
> [T]he 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.

Id. (quoting *Hildebrand v. Stolz*, 2016 ND 225, ¶ 16, 888 N.W.2d 197. This Court has softened this harsh result by noting a number of factors to consider.

> 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).

[16] Beck did not make a "free, calculated [or] deliberate choice" in this matter. *See Kautzman*, 2018 ND 23, ¶ 14, 905 N.W.2d 744. After receiving the summons and complaint, he discussed the issue with his agent and was informed that Matthews would "handle" it. Beck heard nothing further until March 22, 2019, over two years after the lawsuit was commenced and over one year after judgment had been entered.

[17] Beck's lack of knowledge of the lawsuit is the direct result of Ilogu's decision to serve all documents at an address that cannot be said to have been Beck's last known address. Beck's failure to seek relief under the other provisions of Rule 60(b) is likewise the direct result of Ilogu's one year delay in executing on his judgment. Upon learning of the judgment, Beck immediately sought relief.

[18] While Rule 60(b)(6) does require "extraordinary circumstances", it ultimately exists to further the interests of justice. "In simple English, the language of the 'other reason' clause . . . vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." *Klapprott v. U.S.*, 335 U.S. 601, 614–15, 69 S.Ct. 384 (1949). In light of these factors, Beck should be given the opportunity to have his day in court.

CONCLUSION

[19] 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 22nd day of November, 2019.

/s/ Asa K. Burck

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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 12 pages.

Dated: November 22, 2019

/s/ Asa K. Burck

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CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2019, the following document:

Appellant Zachary Beck a/k/a FUTURISTIC'S Reply to Appellee's Brief

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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