STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1928, A11-1932

Langford Tool & Drill Co.,
Plaintiff,

vs.

The 401 Group, LLC, et al.,
Defendants,

and

ADB Construction Company, Inc., et al.,
Intervenors and Third Party Plaintiffs (A11-1928),

ADB Construction Company, Inc.,
intervenor and third party plaintiff,
Respondent (A11-1932),

C. H. Carpenter Lumber Co., Inc.,
Intervenor and Third Party Plaintiff (A11-1932),

vs.

Positive Companies, Inc.,
Third Party Defendant,

and

SR Mechanical, Inc.
Intervenor and Third Party Plaintiff,

vs.

Vikram Uppal, et al.,
third party defendants,
Appellants (A11-1928),

Vikram Uppal and UN Hospitality, LLC,
Third Party Defendants (A11-1932),

Sohan Uppal,
third party defendant,
Appellant (A11-1932),

and

UN Hospitality, LLC,
Third Party Defendant (A11-1928),

Central Bank, as successor in
interest to Mainstreet Bank,
Third Party Plaintiff,

vs.

Vijay Uppal, et al.,
Third Party Defendants,

Budget Plumbing Corp.,
third party defendant,
Respondent (A11-1932),

Century Construction Co.,
third party defendant,
Respondent (A11-1932),

and

Egan Companies, Inc.,
Intervening Mechanic's Lien Claimant,

Century Construction Company, Inc.,
Third Party Plaintiff (A11-1928),

Century Construction Company, Inc.,
third party plaintiff,
Respondent, (A11-1932),

vs.

The 401 Group, LLC,
Third Party Defendant (A11-1928),

The 401 Group, LLC, et al.,
Third Party Defendants (A11-1932),

Sohan Uppal,
third party defendant,
Appellant,

Positive Companies, Inc.,
third party defendant,
Respondent (A11-1928),

and

J. H. Larson Electrical Company,
Third Party Plaintiff,

vs.

Vikram Uppal, et al.,
third party defendants,
Appellants (A11-1928),

Sohan Uppal,
third party defendant,
Appellant (A11-1932),

Vikram Uppal, et al.,
Third Party Defendants (A11-1932),

UN Hospitality, et al.,
Third Party Defendants.

Filed August 27, 2012
Reversed and remanded
Hudson, Judge

Hennepin County District Court
File No. 27-CV-09-20489

Kay Nord Hunt, Lee A. Hutton III, Nick A. Dolejsi, Lommen, Abdo, Cole, King & Stageberg, P.A., Minneapolis, Minnesota; and

John G. Westrick, Westrick & McDowell-Nix, P.L.L.P., St. Paul, Minnesota (for appellants)

Gary G. Fuchs, Elizabeth E. Rein, Hellmuth & Johnson, PLLC, Edina, Minnesota (for respondent Positive Companies, Inc.)

Andrew R. Brown, Matthew Stewart, Reding & Pilney, PLLP, Lake Elmo, Minnesota (for respondent ADB Construction Company, Inc.)

Robert A. Gust, Kretsch & Gust, P.L.L.C., Minneapolis, Minnesota (for respondent Budget Plumbing Corporation)

Richard J. Gabriel, Kyle R. Gabriel, Gabriel Law Office, PLLC, Mendota Heights, Minnesota (for respondent Century Construction Company, Inc.)

Considered and decided by Peterson, Presiding Judge; Halbrooks, Judge; and Hudson, Judge.

U N P U B L I S H E D O P I N I O N

HUDSON, Judge

In consolidated appeals from a mechanic's-lien action, appellants challenge the district court's grant of default judgments against them as a sanction for their failure to attend a pretrial conference and the district court's denial of their motions to vacate those judgments. Because respondents did not demonstrate prejudice in allowing this action to proceed and the district court did not consider a less severe sanction before entering default judgment against pro se appellants, we conclude that the district court abused its discretion by granting the default judgments. We therefore reverse and remand.

FACTS

Plaintiff Langford Tool & Drill Co. (Langford) brought a mechanic's-lien foreclosure against The 401 Group LLC and general contractor Positive Companies (Positive). Positive then filed a cross-claim against the Uppals.[1] Sohan Uppal and his son, Vikram Uppal, are officers of The 401 Group. In May 2008, The 401 Group borrowed $6,130,000 from defendant Mainstreet Bank to finance the renovation of a building in downtown Minneapolis. Positive, as the general contractor, entered into a construction contract with The 401 Group. In addition, Positive entered into contracts with respondents ADB Construction Company (ADB), Budget Plumbing Corporation (Budget), Century Construction Company (Century), and other subcontractors to complete the work.

The loan from Mainstreet Bank was to provide funds for project costs through periodic draws by The 401 Group. Because of the mechanic's-lien action, Mainstreet Bank required The 401 Group to deposit 150% of the amount claimed by Langford in an escrow account until the issue was resolved. Once the funds were escrowed, Mainstreet Bank would fund The 401 Group's pending draw requests. On August 13, 2009, Langford commenced its mechanic's-lien action against The 401 Group, Uppal Enterprises LLC, and Mainstreet Bank.

On August 27, Mainstreet informed appellants that a draw request would not be funded because the Federal Deposit Insurance Corporation was taking over the bank and had frozen the bank's funds. The next day, Mainstreet Bank's assets were purchased by

[1]Langford is not a respondent and did not file a brief in this appeal.

defendant Central Bank. Central Bank refused to fund the pending draw, and The 401 Group was unable to pay Positive and Positive's subcontractors.[2] Additional mechanics' liens were filed by multiple parties.

Appellants were represented by counsel in the mechanic's-lien actions until January 2011. But on January 22, 2011, appellants' then-attorney, John Westrick, filed a notice of withdrawal stating that henceforth appellants could be served and notified by phone and mail at the Morris Law Group P.A. in Edina. On January 31, 2011, the day that appellants' response to respondent's and third-party plaintiffs' proposed stipulations of fact were due, Sohan Uppal delivered a letter to the district court requesting a continuance. The district court denied the continuance and set four trial dates for various third-party defendants, in addition to a pretrial conference for May 6, 2011, to address the remaining claims.[3] On February 9, 2011, the district court issued a scheduling order that stated that the pretrial conference would occur on May 6, 2011, at 8:30 a.m. The district court stated in its denial of appellants' motions to vacate that the scheduling order was mailed to the Morris Law Group. Appellants state that, when Vikram Uppal contacted the district court on May 11, he was told that the order was sent to appellants' former attorney John Westrick. Appellants state that Westrick never received the February 9 scheduling order. On February 22, 2011, The 401 Group filed for bankruptcy. Due to

[2] Central Bank's refusal to fund the draw was the subject of a lawsuit filed by The 401 Group in which the district court granted summary judgment in favor of Central Bank. Appellant appealed, and summary judgment was affirmed. *Langford Tool & Drill Co. v. 401 Grp., LLC*, A11-1166, 2012 WL 896418 (Minn. App. Mar. 19, 2012), *review denied* (Minn. May 30, 2012).

[3] Of the four trial dates set for March, the only respondent to receive a trial date was ADB.

The 401 Group's bankruptcy filing, respondent ADB requested a new trial date; the district court granted the request. Additionally, ADB informed the district court that, in February 2011, it had been unable to contact appellants through the Morris Law Group. On February 28, 2011, defendant J.H. Larson Electrical Company (Larson) also informed the district court by letter that appellants were not represented by counsel and that the only contact information available to Larson was "their mailing address." Larson further stated that it had not received a response sent to this address from appellants regarding various documents and a request by Larson to converse. The district court stated in its denial of motions to vacate that, on March 3, 2011, it mailed to Sohan Uppal's home address a trial order stating that all parties were to appear at the pretrial conference on May 6, 2011, at 8:30 a.m. But the service list in the record indicates the order was sent to the Uppals at the Morris Law Group address.

The first of the scheduled trials involved defendant Larson and took place on March 9, 2011. Appellants appeared pro se.[4] On April 8, 2011, the district court acknowledged the difficulties that Larson had experienced in mailing post-trial submissions to appellants and stated, "The Court has experienced the same problem and has received returned mail[] from the address the Court has for Mr. Vikram Uppal." The district court instructed Larson to continue mailing correspondence to Vikram Uppal's last known address, which the court would consider "proper service even if the mail is returned." The district court also issued an order instructing Vikram Uppal to comply

[4] Appellants state that they became aware of the March 9 trial only because Larson's counsel sent a letter dated February 23, 2011, to Sohan Uppal at his home address in Bloomington, Minnesota.

with Minn. Gen. R. Pract. 1.04 and 13.01, which require parties, including pro se parties, to provide notice of their current address to other parties and the district court administrator.

Neither Sohan nor Vikram Uppal appeared at the May 6, 2011 pretrial conference. ADB moved for default judgment; the district court granted default judgment in favor of all parties[5] at the hearing. The district court stated that its grant of default judgment was based on the Uppals, who were third-party defendants, not appearing at the pretrial hearing and noted the difficulties in reaching the Uppals via mail. That day, the district court issued a written order stating, "All oral motions for Default Judgment are granted with leave to support claims for damages pursuant to Minn. R. Civ. P. 55." Each respondent filed a motion for entry of default judgment. Budget requested entry of judgment for $30,000; Century requested entry of judgment for $78,189.50; ADB requested entry of judgment for $229,403.88; and Positive sought entry of default judgment for $2,014,421.69.

The Uppals claim that they learned on May 10, 2011 that the district court had held a pretrial conference on May 6 during which it granted default judgment. That day, Vikram Uppal called the district court's chambers and was told that notice of the hearing had been sent to the office of John Westrick, appellants' former counsel who withdrew from the case in January 2011.

The Uppals, represented once again by Westrick, promptly moved to vacate the default judgments. The district court denied the motions to vacate the judgments, citing

[5] The parties in attendance were: Budget, Century, ADB, and Positive.

Minn. R. Civ. P. 16.06 and Minn. R. Civ. P. 37.02 as support for the default-judgment sanction. The district court also concluded that the Uppals had not satisfied their burden to vacate the default judgments.

This appeal follows.

D E C I S I O N

Appellants Sohan Uppal and Vikram Uppal challenge both the district court's grant of default judgments and denial of appellants' motions to vacate those judgments. Sohan Uppal appeals the default judgment and denial of his motion to vacate default judgment arising out of personal-guaranty claims brought by respondents ADB, Century, and Budget. Sohan Uppal and Vikram Uppal appeal the default judgments and denial of their motion to vacate default judgments granted in favor of Positive.

Generally, an order denying a motion to vacate a judgment entered as a sanction against a party who has participated in the action is not independently appealable. *Carlson v. Panuska*, 555 N.W.2d 745, 746 (Minn. 1996). But, in this case, appellants' motions to vacate tolled the time to appeal the underlying judgments. Minn. R. App. P. 104.01, subd. 2. And our scope of review on appeal from the judgments extends to the order denying the motions to vacate. Minn. R. App. P. 103.04 (stating scope of appellate review includes review of any order "affecting the judgment"). And because we conclude that the district court's sanction of appellants was an abuse of discretion, we need not reach appellants' argument related to denial of their motions to vacate.

Minn. R. Civ. P. 16.06 permits district courts to issue default judgment against a party who fails to attend a pretrial hearing.[6] Rule 16.06 states that if a party fails to appear at a pretrial conference, "the court, upon motion or upon its own initiative, may make such orders with regard thereto as are just, including any of the orders provided in Rule 37.02(b)(2), (3), (4)." Minn. R. Civ. P. 37.02(b)(3) allows for "a judgment by default against the disobedient party."

As an initial matter, we note that, at oral argument before this court, appellant's counsel argued that, like Minn. R. Civ. P. 55.01, rule 16.06 requires three days' written notice to the defaulting party prior to a default-judgment hearing. On its face, rule 16 contains no such requirement. Moreover, appellant's counsel cited no authority for that proposition, and our subsequent research has found none. We therefore consider only whether the district court's sanction of default judgment pursuant to rule 16.06 was an abuse of its discretion. To determine whether the sanction of dismissal is warranted, courts consider the extent of noncompliance, reasons for delay, whether a pattern of

[6] In its initial oral ruling at the May 6 prehearing conference, the district court issued default judgment under rule 55.01. But in its subsequent written orders refusing to vacate default judgment, the district court justified its ruling under rule 16.06 with no mention of rule 55.01. It appears from the record that appellants waived their notice argument under rule 55.01 for failing to raise the issue below as to all parties except Budget. *See Thiele v. Stitch*, 425 N.W.2d 580, 582 (Minn. 1988) (concluding that reviewing courts consider only issues presented and considered by district court). But if we were to review the district court's rulings under rule 55.01, we observe that it is undisputed that appellants did not receive the three-day notice that the rule requires, and Minnesota caselaw supports vacation of default judgment if a party is not provided the requisite notice under rule 55.01. *See* Minn. R. Civ. P. 55.01(b) (requiring three-day written notice to defaulting party prior to default-judgment hearing); *Genz-Ryan Plumbing & Heating Co. v. McCarthy*, 350 N.W.2d 485, 487 (Minn. 1984) (concluding vacation of judgment justified under rule 55.01 when appellant not notified of motion for default judgment).

misconduct existed, and resulting prejudice to the parties. *Firoved v. Gen. Motors Corp.*, 277 Minn. 278, 283–84, 152 N.W.2d 364, 368–69 (1967).

In this case, the parties dispute the reason for the delay: specifically, whether appellants received notice of the May 6 hearing. Appellants claim they did not and point to their appearance at the March 9 Larson trial as evidence of their willingness to appear when notified of hearing/trial dates. But the district court found that "[i]t strains all credibility" to conclude that appellants did not know of the May 6 hearing, given the multiple notices mailed to appellants. The district court's order provides a detailed accounting of court notices mailed to appellants at the Morris Law Group and Sohan Uppal's Bloomington home address, as well as numerous attempts by the district court to ascertain appellants' accurate addresses. And the district court stated that it had not received any returned mail from correspondence or orders mailed to appellants at the Morris Law Group or the Bloomington address. In addition, the district court noted that counsel for ADB sent a letter concerning the ADB May trial date to appellants at the Morris Law Group; that letter also referenced the May 6 pretrial conference. The district court concluded that appellants demonstrated a conscious intent not to appear.

The district court's findings are supported by the record, and its frustration with appellants' conduct is understandable. Nevertheless, for several reasons, we are compelled to conclude that, on this record, the district court abused its discretion by imposing default judgment. First, it is undisputed that appellants were acting pro se at the time of the May 6 hearing. A sanction of default judgment may be inappropriate against a pro se party. *Cf. Liedtke v. Fillenworth*, 372 N.W.2d 50, 52 (Minn. App. 1985),

review denied (Minn. Sept. 13, 1985) (stating reluctance to grant sanction of attorney fees against pro se party, though recognizing sanctions as appropriate where conduct extreme).

Second, the primary factor to be considered when granting a dismissal is the prejudicial effect on the parties. *Firoved*, 277 Minn. at 283, 152 N.W.2d at 368. "Such prejudice should not be presumed nor inferred from the mere fact of delay." *Id.* The burden rests on the party benefitting from dismissal to show "some substantial right or advantage will be lost" if the opposing party is allowed to reinstitute the action. *Id.* at 283–84, 152 N.W.2d at 368. In examining the prejudice to the parties here, the resulting prejudice to appellants is dismissal and entry of default judgments totaling more than $2 million. The severity of this sanction runs counter to our caselaw, which uniformly holds that cases should be decided on their merits. *See Guillaume & Assocs., Inc. v. Don-John Co.*, 336 N.W.2d 262, 264 (Minn. 1983) (policy behind rules of civil procedure is to seek a just determination of every action); *Firoved*, 277 Minn. at 283, 152 N.W.2d at 368 (stating that dismissal on procedural grounds is severe sanction contrary to general objective of the law to dispose of cases on their merits); *Chi. Greatwestern Office Condo. Ass'n v. Brooks*, 427 N.W.2d 728, 731 (Minn. App. 1988) (stating that courts should "act cautiously when the sanction imposed is that of default judgment, which is the most severe in the spectrum of sanctions provided by statute or rule") (quotation omitted).

In addition, defendants failed to demonstrate that any substantial right or advantage would be lost by allowing the case to proceed. In denying appellants' motions to vacate, the district court found that defendants—up until the pretrial hearing—had

been substantially prejudiced by appellants' failure to comply with deadlines, lack of truthfulness to the court and opposing parties, and failure to file trial materials and appear at the May 6 hearing. But the district court made no finding that the parties would be prejudiced going forward by granting appellants an extension of time. *See Henke v. Dunham*, 450 N.W.2d 595, 598 (Minn. App. 1990) (concluding dismissal of complaint unwarranted when no showing that opposing parties would be substantially prejudiced by granting an extension of time to remedy delay in filing expert-witness affidavit), *review denied* (Minn. Mar. 22, 1990).

Moreover—although the district court was not required to do so—it is concerning that the district court did not notify appellants that failure to appear at the pretrial conference would result in any sanction, let alone the ultimate sanction of a default judgment. *See Sudheimer v. Sudheimer*, 372 N.W.2d 792, 795 (Minn. App. 1985) (stating that existence of clear warning by district court that sanction, including dismissal, would result from failure to comply with discovery deadline can be significant factor in determining whether sanction was appropriate). Additionally, the delay here is not as severe as those in cases where defendants were determined to have been prejudiced. *See, e.g.*, *Frontier Ins. Co. v. Frontline Processing Corp.*, 788 N.W.2d 917, 925 (Minn. App. 2010) (concluding willful failure to provide meaningful discovery after four years of litigation prejudiced party's ability to prepare defense supporting dismissal), *review denied* (Minn. Dec. 14, 2010); *Copeland v. Bragge*, 378 N.W.2d 35, 38 (Minn. App. 1985) (affirming dismissal, concluding defendant prejudiced in personal-injury action where plaintiff waited nine years to conduct discovery). As appellants note, the May 6

hearing was a status conference, thus the parties came to the conference simply seeking to have the district court schedule for trial their claims against appellants. Accordingly, respondents suffered minimal prejudice when appellants did not appear at the pretrial conference.

Finally, the district court did not consider a less severe sanction at the May 6 hearing or in its subsequent order, although rule 37.02(b) allows for a less severe sanction of awarding reasonable expenses, including attorney fees. Minn. R. Civ. P. 37.02(b) (stating that district court shall require party failing to obey order to pay reasonable expenses, including attorney fees, unless the failure was substantially justified); *see also Firoved*, 277 Minn. at 283, 152 N.W.2d at 368 (stating that prejudice must be such that it cannot be adequately "compensated by the allowance of costs, attorney's fees, or the imposition of other reasonable conditions").

Although appellants were responsible for much of the delay in this matter, on this record, we conclude that the district court abused its discretion by imposing default judgment.

Reversed and remanded.