
STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF CASS

EAST CENTRAL JUDICIAL DISTRICT

Sierra Corporate Design, Inc.,

Plaintiff,

vs.

Civil No. 09-05-C-01660

David Ritz and Ed Falk,

Hon. John C. Irby

Defendants.

BRIEF IN SUPPORT OF MOTION TO VACATE DEFAULT JUDGMENT

FACTUAL BACKGROUND

Defendant Ed Falk recently retained legal counsel to defend in this litigation, as well as a similar litigation entitled John Doe v. Ed Falk, Civil No. 09-05-C-543, before Judge Racek. In the John Doe v. Ed Falk matter, the Court held a Motion for Default Judgment before Judge Racek on November 9, 2005. At that time, Judge Racek denied the Motion for Default Judgment and gave Defendant Ed Falk until November 23, 2005 to file a Motion to Dismiss for Lack of Personal Jurisdiction. Defendant Ed Falk also requested that the Court consolidate the John Doe v. Ed Falk case with the Sierra Corporate Design, Inc. v. David Ritz and Ed Falk case for purposes of the Motion to Dismiss for Lack of Personal Jurisdiction. Judge Racek requested that the motion be made to him. Defendant Ed Falk subsequently filed a Motion to Consolidate with Judge Racek on November 11, 2005. Judge Racek has not yet decided this motion. Defendant Ed Falk's motion also requested that the evidentiary hearing on Plaintiff Sierra Corporation's default judgment against Ed Falk be continued, so the issue of whether the Court has personal

jurisdiction can be addressed. Unfortunately, due to the timing of events, the Motion to Consolidate has not been ruled upon and Plaintiff refuses to continue the evidentiary hearing in this matter. Accordingly, Defendant Ed Falk bring this Motion to Vacate Judgment for Lack of Personal Jurisdiction. Defendant Falk's Notice of Motion and Motion and supporting brief on the Motion to Dismiss for Lack of Personal Jurisdiction will be filed with this Court on or before November 23, 2005.

The Motion to Dismiss for Lack of Personal Jurisdiction is supported by the recent United States District Court for the District of North Dakota case, Atkinson v. McLaughlin, 343 F.Supp.2d 868 (D.ND. 2004). In that case, the Court answered the question of whether it could exercise personal jurisdiction over the Defendant based on their Internet communications. That case was a case of first impression pertaining to personal jurisdiction involving the Internet. The McLaughlins in that case, characterized their website as passive whereby they were not conducting business by way of their website. The Court held McLaughlin's website was passive, and explained that the e-mail, hyperlink on the website did not, in and of itself, render the website interactive for personal jurisdiction purposes. Id. at 874. The Court further explained that maintaining a passive website does not support the exercise of personal jurisdiction.

The Court in the Atkinson v. McLaughlin case, however did find personal jurisdiction since the website targeting North Dakota residents and the McLaughlins contacted board members in the State of North Dakota. Id. at 876-878.

Defendant Ed Falk is born and raised in California. He is a computer programmer for Google. In our case at hand, Defendant Ed Falk has never visited North Dakota, has never conducted business in North Dakota, does not have any offices, employees or agents in the State of North Dakota, does not own any personal or real property in North Dakota, does not maintain

any bank accounts in North Dakota, does not conduct business over the Internet, and his website does not target the Plaintiff or North Dakota residents. This factual basis will be supported in the Motion to Dismiss by Affidavit of Defendant Ed Falk.

LAW AND ARGUMENT

Rule 60(b) of the North Dakota Rules of Civil Procedure allows the Court to relieve a party from final judgment or order for the reason of the judgment is void. N.D.R.Civ.P. 60(b)(iv). A Judgment entered without personal or subject matter jurisdiction is void. McComb v. Aboelessad, 535 N.W.2d 744, 747 (N.D. 1995). In our case at hand, Defendant Ed Falk asserts that this Court lacks personal jurisdiction, and accordingly the default judgment is void. N.D.R.Civ.P. Rule 60(b)(iv). If the judgment is void, the Court has no discretion to protect it and it must be vacated. Aggl v. Fleetguard, Inc., 583 N.W.2d 812 (N.D. 1998).

A motion to vacate a judgment “must be made within a reasonable time.” “Cases construing the corresponding federal rule, however, clarify that there is no time limit for attacking a void judgment under Rule 60(b)(iv).” Aggl v. Fleetguard, Inc., 583 N.W.2d at 814. In Aggl, the Defendant’s Motion to Vacate Default Judgment was made more than seven years after Judgment was entered. Id. The Supreme Court concluded that Fleetguard was not transacting business in North Dakota, and accordingly the Court lacked personal jurisdiction and the Judgment was void. Id. at 817. The Court stated, “There is and can be no time limit on judicial relief from a judgment that is, in fact, already a nullity and always subject to direct and collateral attack, and therefore any time is reasonable time to set aside a void judgment. Id. at 814 (citations omitted).

Defendant Ed Falk brings this Motion to Vacate on the same grounds, that the Court lacks personal jurisdiction over Defendant Ed Falk.

CONCLUSION

For the foregoing reasons, Defendant Ed Falk respectfully requests that the Court vacate Plaintiff's default judgment. The motion will be supported by Defendant Ed Falk's Motion to Dismiss for Lack of Personal Jurisdiction which will be filed with the Court on or before November 23, 2005.

Dated this 15 day of November, 2005.

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