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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1523**

Larry Lake, et al.,
Respondents,

vs.

Hibbing Community College, et al.,
Defendants,

Brian Johnson,
Appellant.

**Filed May 21, 2018
Affirmed
Connolly, Judge**

Ramsey County District Court
File No. 62-CV-14-935

Matthew J. Gilbert, Charlie R. Alden, Gilbert Alden PLLC, Burnsville, Minnesota (for respondents)

Robert H. Tennant, III, Meghan A. Cooper, Stringer & Rohleder, Ltd., St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Worke, Judge; and
Connolly, Judge.

UNPUBLISHED OPINION

CONNOLLY, Judge

Appellant challenges the default judgment awarded to respondents, formerly students in a degree program that appellant's company provided, in their action for damages resulting from the termination of the program. Appellant argues that the district court abused its discretion in denying his motion to vacate the default judgment and in awarding damages; he also contends that his right to due process was violated by the district court's restriction of appellant's attorney's role in a trial on damages. Because we see no abuse of discretion and no violation of appellant's due-process rights, we affirm.

FACTS

Respondents Larry Lake, Bo Connor, and Tony Hautula were students in a helicopter-pilot degree and certification program operated through a community college (the college). The program was terminated before they completed it.

In 2014, they brought this action against the college, the Minnesota State Colleges and Universities (collectively, the state defendants), and appellant Brian Johnson as an individual and as an officer of Northern Wings and Rotors, d/b/a Northern Helicopters (NH), which operated the program.¹ They alleged one count of fraud against appellant individually and joint and several liability with the other defendants on other counts. In September 2014, appellant filed an answer on behalf of himself individually, denying

¹ Although listed on the complaint, NH was not a party to the action because it was not served with a summons and complaint. *Lake v. Brian Johnson*, No. A17-1523 (Minn. App. Oct. 11, 2017) (order) (concluding that the judgment, although it did not resolve respondents' claims against NH, was final and appealable because NH was not a party).

liability for fraud. From then until December 2015, appellant took no part in the case; he did not respond to discovery requests, appear for his deposition, or attend mediation. Respondents settled with the state defendants in August 2015.

In September 2015, respondents filed a motion, seeking either summary judgment, default judgment under Minn. R. Civ. P. 55.01, or default judgment for failure to comply with the scheduling order. Respondents supported their motion with unrefuted evidence that appellant made false representations as to the federal certification of the helicopter program and as to the cost of obtaining flight certification and a degree and that appellant required respondents to sign over their student loans. Appellant did not oppose the motion.

In October 2015, the district court entered default judgment for respondents against appellant on the fraud count and ordered a trial on respondents' damages. In December 2015, appellant retained counsel and moved to vacate the default judgment.

The motion to vacate was denied and a trial was held on respondents' claims for damages. At this trial, appellant's counsel was not permitted to cross-examine respondents or to present any of his own evidence. The district court awarded respondents the damages they had claimed at the trial. After the trial, appellant's second counsel moved for a new trial at which he would be permitted to cross-examine respondents and to make a closing argument. The motion was granted, but, as a sanction for failing to comply with court-ordered discovery, appellant's counsel was not permitted to present evidence. Following this trial, at which appellant's counsel cross-examined respondents and made a closing argument but did not present any of appellant's evidence, the district court awarded

respondents a total of \$508,704.29 in damages against appellant: \$226,858 to Lake, \$205,239 to Conner, and \$76,607.29 to Hautula.

Appellant now argues that the district court abused its discretion in denying his motion to vacate the default judgment, that his right to due process was violated by the district court's decision that appellant's attorney could only cross-examine and make a closing argument at the second damages trial, and that the district court further abused its discretion in awarding damages to respondents.

D E C I S I O N

1. Denial of Motion to Vacate

Minnesota appellate courts “will not overturn a ruling on a motion to vacate a default judgment unless the district court abused its discretion.” *Roehrdanz v. Brill*, 682 N.W.2d 626, 631 (Minn. 2004).

The district court granted respondents' motion for default judgment, finding in relevant part that appellant: (1) represented that the program would provide the instruction and training required for certification to qualify for a helicopter-pilot license; (2) falsely represented the costs of the program and the level of certification NH had obtained; (3) knew the representations were false; (4) accepted tuition and program payments and held those funds with no intention of offering the requisite flight instruction or repaying the tuition; (5) raised the hourly rate for flight hours and the number of flight hours required; (6) had respondents deposit their flight-hour money with NH, which gave appellant control of those funds; (7) failed to return phone calls and did not return the deposited funds after NH closed, (8) misappropriated the funds, (9) still controls deposits

on students' flight accounts, and (10) refused to return the deposits. The district court also found that, because the program terminated, respondents did not receive the helicopter-avionics degrees that they had been promised and had paid for.

When appellant moved to vacate the default judgment, the district court applied the four factors set out in *Hinz v. Northland Milk & Ice Cream Co.*, for granting a motion to vacate:

the party against whom judgment was entered (a) has a reasonable defense on the merits, (b) has a reasonable excuse for failure or neglect to answer, (c) acted with due diligence after notice of the entry of the judgment, and (d) no substantial prejudice will result to the other party.

237 Minn. 28, 30, 53 N.W.2d 454, 455-56 (Minn. 1952), *quoted in Peterson v. Skutt Ceramic Prods. Inc.*, 417 N.W.2d 648, 651 (Minn. App. 1987), *review denied* (Minn. Mar. 18, 1988).

As to the first factor, a defense on the merits, the district court found at the hearing that there was “no evidence that . . . would suggest that there’s a meritorious defense to the claims made in this case. The only thing that’s been submitted is a memorandum, and that’s not evidence.” Appellant’s attorney objected because he had received respondents’ exhibits only the day before the hearing. After noting that “[it’s] well over a year since [appellant] decided to participate in this litigation and now [he] claims . . . he doesn’t have enough time to present evidence to defend against his claims[,]” the district court rejected the argument that appellant lacked sufficient time to defend himself.

Appellant argues now that the evidence was insufficient to prove fraud because he did not make oral statements to all of the respondents, but he ignores the fact that the

misrepresentations at issue were made in the online information he posted. The district court accurately concluded that “[t]here’s no record to support a valid defense or a reasonable defense on the merits before this Court.”

Appellant also argues that he had a reasonable defense on the merits because his acts did not cause respondents’ damages. For this argument, he relies on evidence respondents presented at the April 2017 second trial on damages, which occurred over a year after the March 2016 denial of appellant’s motion to vacate. Because this evidence was not before the court at the time it denied the motion to vacate, it is not relevant to an appeal of that denial. “The scope of review for an appellate court is necessarily limited to issues which the record establishes were actually raised in, and decided by, the trial court.” *In re Estate of McCue*, 449 N.W.2d 509, 512 (Minn. App. 1990) (quotation omitted).² This court’s review of the district court’s decision to deny the motion to vacate is restricted to what the district court knew when it made that decision, not to what it learned later.

As to the second factor, a reasonable excuse for the failure to attend to the case, appellant’s attorney said, “[Appellant] was in a terrible depression. He lost everything. He lost his business. He lost his wife. . . . [O]nce he got himself back together . . . he did react” The district court disagreed.

² Appellant in his reply brief argues that “any and all evidence before the trial court at the time of the July 31, 2017 order denying the motion to vacate” may be considered on appeal because that was the decision he challenges on appeal. But the motion to vacate was actually denied in March 2016, not in April 2017; the July 2017 judgment incorporates the March 2016 judgment. Appellant offers no support for the view that, if a district court reiterates an earlier decision, it must consider evidence not presented when the earlier decision was made.

There's nothing in the record . . . to suggest that [appellant] did anything to rectify that state of affairs. . . . The doctor's statement is very broad. It doesn't give an opinion that [appellant] was in any way incapacitated from participating in this litigation. . . . There's no indication that [the doctor] . . . actually examined [appellant] for the purpose of making a determination as to whether or not he was incapacitated during any or all of the period of time since September of 2014.

. . . .

At no time did [appellant] inform this court that he was under any kind of impairment or inability to properly defend himself during that period of time.

The record supports the district court's findings. Appellant argues that the district court "fail[ed] to consider the ample evidence that [appellant] was suffering from debilitating major depression [that] constituted a reasonable excuse for his failure to participate." But the "ample evidence" was one letter from a doctor who said that: (1) he had both a personal and a professional relationship with appellant; (2) he and appellant had "many conversations outside the office about the stresses in [appellant's] life"; (3) he recommended that appellant "be seen in the office and placed on medication" because he showed symptoms of depression; (4) [appellant] "wanted to work his way through these issues without medication"; (5) the doctor "stated that [he] was willing to see [appellant] in the office should he decide differently"; and (6) the doctor sincerely believed that appellant's personal and professional issues "may have clouded his judgment in decision making regarding the issues related to the loss of his business."

The doctor expressed no opinion as to why appellant was able to file an answer to the complaint in September 2014 but unable to attend events or even acknowledge communication in this litigation until December 2015. The letter is not "ample evidence"

that appellant had a “reasonable excuse” to neglect this litigation for 16 months. “Neglect of the party . . . which leads to entry of a default judgment is inexcusable, and such neglect is a proper ground for refusing to reopen a judgment.” *Howard v. Frondell*, 387 N.W.2d 205, 208 (Minn. App. 1986), *review denied* (Minn. July 31, 1986).

Appellant relies on *Deaver v. Nelson*, 180 Minn. 36, 230 N.W. 122 (1930) to argue that the district court should have found “excusable neglect” in appellant’s situation. But *Deaver* is distinguishable. In that case, an attorney had moved “for a continuance on the ground of the illness of the plaintiff,” the motion was denied, the defendant proceeded to trial, and judgment on his counterclaims against the plaintiff was entered. *Id.* at 37, 230 N.W. at 123. The supreme court concluded that “it was an abuse of discretion to deny the motion” because a doctor’s affidavit indicated that the plaintiff “had suffered a paralytic stroke” and was “in a state of physical collapse and exhaustion, half conscious and unable to stand, suffering from hardening of the arteries, high blood pressure and gangrene of his right foot” and “the stress and nervous excitement of the lawsuit would be apt to bring on a cerebral hemorrhage at any time.” *Id.* at 37-38, 230 N.W. at 123. In appellant’s case, no motion for a continuance was filed, and appellant’s doctor’s affidavit does not indicate any comparable physical condition.

As to the third factor, moving to vacate with due diligence, the district court found that appellant had brought his motion “in a relatively timely fashion.”³

³ Respondents disagree with and argue against this finding in their brief, but they did not file a notice of related appeal, and we do not address it. See Minn. R. Civ. App. P. 103.02 (requiring a party other than appellant to file a notice of related appeal to obtain review).

As to the fourth factor, prejudice to the opposing party, respondents' attorney told the district court, "I'm sure [appellant] has gone through tough times . . . [But] so have [respondents], and they've been waiting for two years . . . to get to this point, where they can talk about what they invested in this program [i.e., their damages]." Vacating the default judgment and reopening the litigation on appellant's liability would involve events that occurred at least five years ago, parties with whom respondents settled three years ago, and witnesses who are no longer available. The district court appropriately concluded that vacating the judgment of appellant's liability to respondents "would be clearly prejudicial to [respondents]."

Thus, only one of the four factors supported granting the motion to vacate: appellant did not have a reasonable defense on the merits or a reasonable excuse for his failure to participate in the case, and respondents would have been significantly damaged by vacating the judgment that appellant had committed fraud against them. The district court did not abuse its discretion in denying appellant's motion to vacate the judgment on his liability.

2. Due-Process Rights

"[A] judgment will be held void for want of due process only where the circumstances surrounding the trial are such as to make it a sham and a pretense rather than a real judicial proceeding." *In re Welfare of Children of Coats*, 633 N.W.2d 505, 512 (Minn. 2001).

The district court initially denied appellant's request "to participate in the damages phase of these proceedings, including the right to present evidence and examine witnesses" because "in light of [appellant's] failure to respond to [respondents'] discovery, to allow

[appellant] to possibly benefit from information he possessed and failed to disclose to [respondents] during discovery would have been fundamentally unfair.” But the district court granted appellant’s motion for a new trial at which appellant’s attorney could cross-examine respondents but could not present evidence. *See Kemerer v. State Farm Mut. Auto Ins. Co.*, 206 Minn. 325, 288 N.W. 719 (1939) (holding that a defaulting party who later appears in an action has limited rights but is entitled to cross-examine the other party’s witnesses).⁴

Appellant argues that his due-process rights were violated because he was not allowed to offer evidence at the second trial on damages. But the only issue at that trial was the amounts of respondents’ damages. The evidence appellant wanted to present would have been relevant to his own liability, an issue already resolved by the judgment on which his motion to vacate had been denied. Moreover, appellant did not respond to discovery requests or identify the witnesses he planned to call when he had the opportunity to do so, in violation of the district court’s scheduling order. We see no due-process violation in limiting a party’s ability to participate at trial as a sanction for failing to comply with discovery or scheduling orders. Indeed we believe the district court struck the right balance in its decision.

3. Damages

The district court’s determination on whether an award of damages is excessive will be disturbed only for a clear abuse of discretion. *Dallum v. Farmers Union Cent. Exch.*,

⁴ Appellant made no objection to this procedure before or during the hearing.

Inc., 462 N.W.2d 608, 614 (Minn. App. 1990). Appellant challenges the damages awards on two grounds: first, he argues that there is no evidence that respondents' damages were caused by his alleged misrepresentations, and second, he argues that the awards were excessive.

A. Evidence of Causation

Appellant argues that, because there is no evidence that his personal interactions with any of the respondents caused their damages, the damage awards were erroneous. But this argument goes to the issue of appellant's liability rather than to the issue of damages, and appellant's liability was established by the default judgment, on which his motion to vacate was denied. In any event, this argument was rejected by the determination that appellant did not have a reasonable defense on the merits.

B. Amounts of Awards

"Generally, damages need not be proved with absolute certainty nor with mathematical precision." *Bethesda Lutheran Church v. Twin City Constr. Co.*, 356 N.W.2d 344, 348 (Minn. App. 1984), *review denied* (Minn. Feb. 5, 1985). Appellant does not argue that the damages were too high; he rather contends that none of the respondents was entitled to any damages whatsoever.

Respondent Hautula was awarded \$76,607.29, the amount of tuition he paid to obtain a degree in helicopter avionics, plus interest, less \$15,000. The district court determined that, because he used some of his training to obtain a private helicopter license worth about \$15,000, this deduction was appropriate.

As to respondent Conner, the district court found that: (1) he was informed by appellant in a written promotion of the program that he would be employed by appellant after completing the program and earn \$80,000 annually; (2) he had completed all the course work and needed only flight time to earn his commercial, instrument, and flight-instructor certificates when the program closed; (3) appellant never returned the \$17,645.23 in Conner's flight account; and (4) Conner's lost income in the three years after the program closed, i.e. the difference between the \$240,000 the promotion materials indicated he would earn and the \$165,000 he did earn, was \$75,000. The district court awarded him that amount as well as his student loans plus interest, \$127,739, and his moving expenses to Hibbing to attend the program, \$2,500, a total of \$205,239.

As to respondent Lake, the district court found that: (1) prior to enrolling in the program, Lake had been a police officer with a gross annual income of about \$42,500; (2) appellant told Lake that he could take out student loans to pay for his training and would be hired as an instructor by appellant at \$80,000 per year; (3) Lake left his job as a police officer and moved to Hibbing at a cost of \$4,000; (4) when the program folded, Lake moved to Brainerd at a cost of \$10,000; and (5) Lake earned about \$12,000 annually after the program terminated. Lake had out-of-pocket expenses for the flight program of \$32,000, student loans of \$33,431, and fees and interest of \$13,927; his lost income for the three years in the program was \$91,500. Lake testified that he expected to start out earning between \$40,000 and \$60,000 after completing the program; his lost future income was therefore computed as \$74,000 (expected income of at least \$40,000 minus actual income of about \$12,000, i.e., \$28,000, for three years), a total of \$226,858.

The record supports these awards.

The district court did not abuse its discretion in denying appellant's motion to vacate the default judgment or in setting the amounts of respondents' awards, and appellant's due-process rights were not violated when he was not permitted to present evidence at the second trial on damages.

Affirmed.