STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1787
A10-1788

Peggy Ingber,
Respondent,

vs.

Helen Ann Dovolis,
Appellant,

and

Melitta Mayer,
Respondent,

vs.

Helen Ann Dovolis,
Appellant.

Filed June 27, 2011
Affirmed
Kalitowski, Judge

Hennepin County District Court
File Nos. 27-CV-09-22366, 27-CV-09-21834

Joseph P. Staehr, Jr., Minneapolis, Minnesota (for appellant)

Peggy Ingber, Eden Prairie, Minnesota (pro se respondent)

Melitta Mayer, Eden Prairie, Minnesota (pro se respondent)

Considered and decided by Kalitowski, Presiding Judge; Wright, Judge; and Larkin, Judge.

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

KALITOWSKI, Judge

In this consolidated appeal, appellant Helen Ann Dovolis challenges the district court's denial of her motions to vacate judgments granting respondents Peggy Ingber and Melitta Mayer the balance of the restitution owed by appellant. We affirm.

D E C I S I O N

More than ten years ago, appellant was convicted of theft by swindle for forging checks. Appellant was a lawyer. Her victims were former clients, including respondents. At a 1999 hearing on restitution, appellant agreed to pay Mayer $15,000 and Ingber $12,000 in addition to restitution for the amounts of the forged checks. Appellant stated at the hearing that she understood that respondents would not pursue their civil suits against her in exchange for the additional restitution amounts.

On March 13, 2009, the district court ordered judgment in the amount of $3,275.33 for Mayer and $2,638.42 for Ingber. These amounts corresponded to the balance of the restitution appellant owed respondents at that time. The record indicates that the judgments were requested by the probation department shortly before appellant was discharged and none of the parties appeared before the district court before it issued the orders for judgment. Appellant moved to vacate the judgments. After a hearing and additional briefing and documentation, the district court denied appellant's motions to vacate.

An appellate court will not reverse an order denying a motion to vacate a judgment under Minn. R. Civ. P. 60.02 unless the district court abused its discretion. *Carter v.*

Anderson, 554 N.W.2d 110, 115 (Minn. App. 1996), *review denied* (Minn. Dec. 23, 1996). Rule 60.02 allows a district court to vacate a final judgment "or grant such other relief as may be just" for the following reasons:

> (a) Mistake, inadvertence, surprise, or excusable neglect;
>
> (b) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial pursuant to Rule 59.03;
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> (c) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> (d) The judgment is void;
>
> (e) The judgment has been satisfied, released, or discharged or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
>
> (f) Any other reason justifying relief from the operation of the judgment.

Minn. R. Civ. P. 60.02.

Appellant appears to invoke clauses (e) and (f) as bases for vacating the judgments. Rule 60.02(e) is focused on "whether changed circumstances exist and, if so, whether they render it inequitable for the judgment to have prospective application." *City of Barnum v. Sabri*, 657 N.W.2d 201, 207 (Minn. App. 2003). Whether it is equitable for a judgment to continue to have prospective application "requires courts to strike a delicate balance between the sanctity of final judgments and the incessant command of a court's conscience that justice be done in light of all the facts." *Id.* (emphasis omitted) (quotation omitted).

Relief under clause (f) requires a showing of "extraordinary circumstances." *Regents v. Med. Inc.*, 405 N.W.2d 474, 481 (Minn. App. 1987) (quotation omitted), *review denied* (Minn. July 15, 1987). "Relief under this residual clause is appropriate when the equities weigh heavily in favor of the party seeking relief and relief is required to avoid an unconscionable result." *Hovelson v. U.S. Swim & Fitness, Inc.*, 450 N.W.2d 137, 142-43 (Minn. App. 1990), *review denied* (Minn. Mar. 16, 1990). The burden of proof in a proceeding under rule 60.02 is on the moving party. *Sabri*, 657 N.W.2d at 205.

Respondents' Subrogation Agreements

Appellant first argues that respondents are barred from obtaining civil judgments against her because they signed subrogation agreements with the Client Security Board, which paid respondents the value of the forged checks. But appellant misunderstands the effect of these agreements. First, the judgments represent the outstanding balances of the restitution amounts appellant agreed to pay respondents so they would not pursue their civil actions. The Client Security Board is not implicated in this settlement agreement. Consequently, respondents did not subrogate their rights against appellant for the settlement amounts.

Second, appellant cannot sue to enforce the subrogation agreements as a third-party beneficiary. Appellant argues that she is an intended third-party beneficiary. A third party can enforce a contract if the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance. *Hickman v. SAFECO Ins. Co. of Am.*, 695 N.W.2d 365, 369 (Minn. 2005) (citing

Restatement (Second) of Contracts § 302 (1979)). The intent to benefit a third party must be expressed in the terms of the contract. *Cretex Cos. v. Constr. Leaders, Inc.*, 342 N.W.2d 135, 138 (Minn. 1984).

Here, in the subrogation agreements the Client Security Board promised to pay clients who had been defrauded by appellant. In exchange, the board received the ability to take action to recover from appellant the amount of the board's payments to the clients. For appellant to be an intended third-party beneficiary, these agreements must have been made to benefit the lawyer committing the fraud or to discharge a duty owed by the Client Security Board or the defrauded clients to the lawyer. Neither condition is met. The terms of the subrogation agreements do not benefit appellant: the agreements simply allow the clients to be compensated quickly for the lawyer's misdeeds and allow the Client Security Board to sue in the shoes of the clients for reimbursement. And neither the Client Security Board nor the defrauded clients owe a duty to appellant. Thus, we conclude that the subrogation agreements do not bar the judgments.

Accuracy of the Judgments

Appellant argues that her outstanding balance to Mayer is $2,387.94. Later in her brief, she calculates the balance as $1,676.94. At the motions hearing, appellant stated that she had not kept independent records of her payments and was relying on the records of the restitution unit. These records show that at the time the judgments were ordered, appellant had paid Mayer $11,724.67 and had paid Ingber $9,361.58. The records also show that after the date the judgments were ordered, appellant paid Mayer $887.39 and Ingber $18.85. The values of the post-judgment payments match the amounts appellant

identifies as error in the judgment amounts. But as the district court concluded, the judgments were accurate at the time they were ordered and the discrepancies identified by appellant simply reflect payments in partial satisfaction of the judgments. Rule 60.02(e) allows for vacation of a judgment that is fully satisfied but not one that is partially satisfied. Vacating a judgment and updating the amount every time there is a payment against it is not required under the rule and would be unduly burdensome.

Appellant's alternate calculation of $1,676.94, based on Mayer's records, is in conflict with her accounting using the restitution unit's records and Mayer's calculations based on her own records. The district court relied on the restitution unit's records to evaluate the accuracy of the judgments. Relying on these records over the check stubs supplied by Mayer is akin to a credibility determination, to which this court defers. *See Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) (requiring deference to district court credibility determinations); *Grant v. Malkerson Sales, Inc.*, 259 Minn. 419, 424-25, 108 N.W.2d 347, 351 (1961) (holding that appellate courts defer to district court's findings of fact based on conflicting evidence "unless manifestly and palpably contrary to the evidence as a whole").

Unaccounted-for Payments

Appellant asserts that the judgments must be vacated until $4,064.51 that appellant paid in restitution and for which there is no disbursement record is accounted for. This argument misapprehends the implication of the unaccounted-for funds. The disbursement records show that the funds were not used to pay Mayer or Ingber. Mayer and Ingber testified that the restitution unit's records accurately reflect the payments they

have received, and appellant did not maintain her own records of restitution payments. The missing amount may be disbursed, once accounted for, to satisfy appellant's outstanding judgments. But the fact that the restitution unit received more in payments from appellant than it disbursed to restitution creditors does not show that the judgments for the outstanding balances were inaccurate when they were entered.

Lack of Notice and Hearing

Appellant next argues that the judgments should be vacated because she was not given notice or an opportunity to be heard before they were ordered. This argument is premised on her assertion that the judgments are inaccurate and that she was deprived of an opportunity to correct the amounts. But the judgments are accurate. If they were not and appellant was not able to contest the amounts at the time they were ordered, rule 60.02(f) would provide a basis for relief. But here the judgments are not "unconscionable" nor the circumstances "extraordinary." *See Hovelson*, 450 N.W.2d at 142-43; *Regents*, 405 N.W.2d at 481.

Client Security Board's Opportunity to Intervene

Finally, appellant argues for the first time on appeal that the judgments should be vacated because the Client Security Board was deprived of its right to intervene under Minn. R. Civ. P. 24.01 when the judgments were ordered without notice or an opportunity to be heard. This issue was not raised in the district court and therefore was not preserved for appellate review. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

Moreover, even if the Client Security Board's opportunity to intervene were reviewable, appellant lacks standing to assert this claim. The question of standing

focuses on whether the plaintiff is the proper party to make a claim. *Olson v. State*, 742 N.W.2d 681, 684 (Minn. App. 2007). To have standing, a plaintiff must have a sufficient personal stake in a justiciable controversy. *State by Humphrey v. Philip Morris Inc.*, 551 N.W.2d 490, 493 (Minn. 1996). A sufficient stake may exist if the party has suffered an "injury-in-fact." *Id.* To show an "injury-in-fact," a party must demonstrate that it has suffered actual, concrete injuries caused by the challenged conduct. *Alliance for Metro. Stability v. Metro. Council*, 671 N.W.2d 905, 913 (Minn. App. 2003). Appellant challenges the orders for judgment without providing an opportunity for the Client Security Board to intervene, but this alleged injury was sustained by the Client Security Board, not appellant. Appellant, therefore, is not the proper party to assert this claim.

We conclude that appellant did not establish a basis for vacating the judgments under rule 60.02. The district court, therefore, did not abuse its discretion by denying the motions.

Affirmed.