DA 17-0428

IN THE SUPREME COURT OF THE STATE OF MONTANA

2018 MT 135N

ROB BROWN and DESIREE BROWN,

Plaintiffs and Appellants,

v.

WENDY GEHRING,

Defendant and Appellee.

APPEAL FROM: District Court of the Eighth Judicial District,
In and For the County of Cascade, Cause No. DDV 16-0751
Honorable John W. Parker, Presiding Judge

COUNSEL OF RECORD:

For Appellants:

Steven T. Potts, Steven T. Potts, PLLC, Great Falls, Montana

For Appellee:

KD Feeback, Toole & Feeback, PLLC, Lincoln, Montana

Submitted on Briefs: March 14, 2018

Decided: June 5, 2018

Filed:

Clerk

Justice James Jeremiah Shea delivered the Opinion of the Court

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Rob Brown and Desiree Frankos appeal the Eighth Judicial District, Cascade County District Court's Order granting Wendy Gehring's Motion to Set Aside Default Judgment. We affirm.

¶3 The dispute arises from a real estate contract Brown and Frankos entered into to buy a parcel of land from Gehring and her husband. Brown and Frankos paid for the property, but, at the time the final payment was made, Gehring was unable to convey the warranty deed.[1] On September 16, 2016, Brown and Frankos filed the Complaint commencing the present action against Gehring. In the Complaint, Brown and Frankos sought rescission of the Contract with Gehring and a return of all payments made to Gehring, plus prejudgment interest. In the alternative, Brown and Frankos sought damages under § 27-1-314, MCA, or specific performance of the Contract. On September 21, 2016, the District Court issued

[1] As a condition of the contract, the parcel was to be subdivided. In 2012, Gehring's husband passed away. Gehring alleges she was under the impression the property subdivision was complete, and she could convey title once the property was fully paid off. It was not until 2015, when Brown and Frankos notified Gehring they wished to pay off the property with a final balloon payment, that Gehring allegedly learned of the subdivision issues. Gehring contacted the surveyor, who had worked with her late husband. It was then, Gehring alleges, she learned the surveyor had retired and had not completed the property subdivision as she originally assumed.

a summons in Cascade County for Gehring to respond to Brown and Frankos' Complaint. On October 2, 2016, Gehring was served with the Summons and Complaint. Gehring did not file an answer or other responsive pleading. On November 2, 2016, the Clerk of Court entered a default against Gehring. The same day, the District Court entered a Findings of Fact and Conclusions of Law. The District Court determined that Gehring failed to subdivide and transfer the property as agreed upon following payment, and the District Court granted Brown and Frankos' request for rescission. The District Court awarded Brown and Frankos the money paid to Gehring for the property, plus prejudgment interest, for a total judgment award of $176,711.53.

¶4 On November 30, 2016, Gehring served Brown and Frankos with a Motion to Set Aside Default Judgment ("Motion"). On December 5, 2016, Gehring filed the Motion on the grounds of mistake and excusable neglect as a pro se litigant who misunderstood the issue or was inadvertently mislead. In the affidavit attached to her Motion, Gehring alleged that after being served, she contacted counsel representing Brown and Frankos, but that counsel did not return her calls. Gehring argued she was mistaken about her procedural obligations and incorrectly believed contacting opposing counsel and explaining the situation sufficed. Gehring alleged she was waiting to hear back from opposing counsel. Brown and Frankos opposed Gehring's Motion. Gehring also filed a Motion for Change of Venue to Lewis and Clark County, the location of the real property that is the subject of the action, and the county in which Gehring resides. On February 3, 2017, Gehring filed a Notice of Issue that the Motion was "fully briefed and ready for disposition." On April 7,

2017, Gehring submitted a Status Notice with the District Court advising that she completed the subdivision process and could convey the warranty deed for the property to Brown and Frankos. On April 13, 2017, Brown and Frankos responded to Gehring's Status Notice. The parties dispute whether Brown and Frankos currently "have" the property. On June 20, 2017, the District Court issued an Order setting aside the November 2, 2016 default judgment pursuant to Mont. R. Civ. P. 60(b)(5) and (6). The District Court ordered Gehring's case reopened for a proceeding on the merits. Brown and Frankos appeal the District Court's Order setting aside the default judgment.

¶5 "Our standard of review of a district court's ruling on a motion pursuant to M. R. Civ. P. 60(b) depends on the nature of the final judgment, order, or proceeding from which relief is sought and the specific basis of the [M. R. Civ. P] 60(b) motion." *Essex Ins. Co. v. Moose's Saloon, Inc.*, 2007 MT 202, ¶ 16, 338 Mont. 423, 166 P.3d 451. Whether a district court untimely granted a M. R. Civ. P. 60(b) motion is a question of law we review de novo. *See Green v. Gerber*, 2013 MT 35, ¶¶ 12, 24–29, 369 Mont. 20, 303 P.3d 729 (non-compliance with deadline objectionable error but not jurisdictional). Where a district court grants a motion to set aside a default judgment and opens the action for a decision on the merits, this Court will only reverse on a showing of manifest abuse of discretion. *Ditton v. Dep't of J. Motor Vehicle Div.*, 2014 MT 54, ¶ 15, 374 Mont. 122, 319 P.3d 1268; *Essex Ins. Co.*, ¶ 17; *Lords v. Newman*, 212 Mont. 359, 364, 366, 688 P.2d 290, 293, 294 (1984). We review the deemed denial of a motion to set aside a default judgment for a slight abuse of discretion. *Green*, ¶ 13.

¶6 It is within this Court's power to consider any trial court proceedings that affect the parties' substantial rights, and we may, for good cause, remand a case for further proceedings. Section 3-2-204, MCA; *United Farm Agency v. Blome*, 198 Mont. 435, 438, 646 P.2d 1205, 1207 (1982).

¶7 Every litigated case should be tried on the merits, and judgments by default are not favored. *Essex Ins. Co.*, ¶ 17 (internal citations omitted); *Brilz v. Metro. Gen. Ins. Co.*, 2012 MT 184, ¶ 15, 366 Mont. 78, 285 P.3d 494; *Keller v. Hanson*, 157 Mont. 307, 309, 485 P.2d 705, 707 (1971) ("this Court will not interfere except upon a showing of manifest abuse; and the trial court should exercise liberality since judgment by default is not favored. . . .").

¶8 A district court may set aside a default judgment in accordance with M. R. Civ. P. 60(b) if, for example, applying a default judgment prospectively is no longer equitable. *See Green*, ¶ 15. M. R. Civ. P. 60 provides:

> (b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> . . .
>
> (5) the judgement has been satisfied, released or discharged, it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
>
> (6) any other reason that justifies relief.

The timing for setting aside a default judgment is found in M. R. Civ. P. 60(c):

> (1) Motions provided by Rule 60(b) must be determined within the times provided by Rule 59 in the case of motions for . . . amendment of judgment and if the court shall fail to rule on the motion within the 60-day period, the motion must be deemed denied.

¶9 M. R. Civ. P. 59(f) provides:

> If the court does not rule on a motion . . . to alter or amend a judgment properly filed according to Rule 59(e), within 60 days from its filing date, the motion must be deemed denied.

¶10 A court may afford a party relief under M. R. Civ. P. 60(b)(6) in extraordinary situations when circumstances go beyond those covered in M. R. Civ. P. 60(b)(1)–(5). *Karlen v. Evans*, 276 Mont. 181, 188, 915 P.2d 232, 237 (1996) (internal citations omitted). "[U]nless a statute, rule, or constitutional provision expressly imposes jurisdictional limitations, the expiration of a time bar does not deprive a district court of the jurisdiction to further act in the matter before it." *Green*, ¶ 24. Thus, a deemed denial does not relieve a district court of jurisdiction of a matter "upon expiration of the 60-day time period." *Green*, ¶ 24.

¶11 In its June 20, 2017 Order, setting aside the default judgment pursuant to M. R. Civ. P. 60(b)(5), (6), the District Court cited Montana's long-standing policy favoring trials on the merits over default judgments against pro se litigants. The District Court noted the likely improper venue and Gehring's notice that the subdivision was complete and a deed could be transferred: "[Gehring], allegedly unaware of the specific facts surrounding the nonperformance of the claim[,] has made recent efforts to cure her defective performance." The District Court did not address the deemed denial of Gehring's Motion to Set Aside Default Judgment.

¶12 Brown and Frankos advance several reasons why the District Court erred in setting aside the default judgment after Gehring's M. R. Civ. P. 60 Motion was deemed denied. First, they contend that the District Court's ruling was untimely and categorically ignored the deemed denial of Gehring's motion under a M. R. Civ. P 60(c). Second, they contend that Gehring did not appeal the deemed denial, rendering its denial final. Third, they contend that the District Court's application of M. R. Civ. P. 60(b)(5) and (6) as support for its ruling was erroneous; M. R. Civ. P. 60(b)(5) does not authorize setting aside a money judgment for equitable reasons, and Gehring did not show how M. R. Civ. P. 60(b)(6) applied in this case.

¶13 Gehring counters that the 60-day "deemed denied" provision of M. R. Civ. P. 60(c)(1) should not be interpreted literally where the District Court is without a sitting judge, where she was operating as a pro se litigant under a period of significant personal turmoil,[2] and where the object of the litigation was resolved.

¶14 Gehring's Motion was deemed denied 60 days after it was filed. M. R. Civ. P. 60(c)(1), 59(f). The deemed denial did not deprive the District Court of jurisdiction, and the District Court was authorized to rule on Gehring's Motion. *See Green*, ¶ 24. Nevertheless, the District Court erred in granting Gehring's Motion after the 60-day provisions of M. R. Civ. P. 59(f) and 60(c)(1) expired. The District Court's June 20, 2017 Order was beyond the 60-day window following the December 5, 2016 Entry of Default

[2] In addition to the death of her husband, in 2007, Gehring states that her daughter contracted a brain tumor. This illness, Gehring alleges, was the basis for the contract with Brown and Frankos to sell the property. Gehring's daughter succumbed to her illness in May 2017.

Judgment, as well as 60 days beyond Gehring's filing of her February 3, 2017 Notice of Issue.[3] The District Court's error in entering the Order notwithstanding, it did issue an Order setting aside the default judgment, it had jurisdiction to enter the Order, *see Green*, ¶ 24, and that Order is now before us on appeal.

¶15 Following entry of the default judgment, Gehring made diligent efforts to remedy the situation to Brown and Frankos' satisfaction. Gehring provided notice to the District Court that the matter had been resolved and that she was able to convey title to the subject property. Although the District Court granted Gehring's motion pursuant to both M. R. Civ. P. 60(b)(5) and (6), M. R. Civ. P. 60(b)(5) does not apply because Gehring did not seek relief from a prior judgment that was reversed or otherwise vacated. *See Fiscus v. Beartooth Elec. Coop.*, 180 Mont. 434, 441–42, 591 P.2d 196, 200 (1979); *see also Koch v. Billings Sch. Dist. No. 2*, 253 Mont. 261, 266–67, 833 P.2d 181, 184–85 (1992). Nor do subsections (1)–(4) of Rule 60(b) apply in this case. However, in light of Brown and Frankos' requested alternative remedy of specific performance and the obvious prejudice to Gehring from the entry of default, Gehring's extraordinary circumstances justify relief from judgment under M. R. Civ. P. 60(b)(6). *See Karlen*, 276 Mont. at 188, 915 P.2d at 237. Thus, we agree with the District Court's ultimate conclusion that the default judgment should not stand. *See* § 3-2-204, MCA; M. R. Civ. P. 60(b)(6); *see also Maulding v.*

[3] Cascade County Local Rule 7(B): Notice of Issue

> When all briefs have been filed, or the time for filing of briefs has expired, at least one party shall file "Notice of Issue" with the Court indicating that the matter is ready for ruling by the Court.

Hardman, 257 Mont. 18, 25–26, 847 P.2d 292, 297 (1993), *overruled on other grounds by Green*, ¶ 41. The District Court did not abuse its discretion in setting aside the default judgment. The present case should be tried on its merits. *See Essex Ins. Co.*, ¶ 17. We affirm.

¶16 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review. We affirm the District Court's Order setting aside the default judgment.

/S/ JAMES JEREMIAH SHEA

We concur:

/S/ MIKE McGRATH
/S/ BETH BAKER
/S/ INGRID GUSTAFSON
/S/ JIM RICE