DA 19-0219

IN THE SUPREME COURT OF THE STATE OF MONTANA

2020 MT 2N

PAUL OVERBY,

Plaintiff and Appellee,

v.

MILES KINGMAN,

Defendant and Appellant,

and

RYAN SEAN DIBERT, HARD TIMES, INC.,
d/b/a/ THE SCOOP BAR,

Defendants.

APPEAL FROM: District Court of the Eighteenth Judicial District,
In and For the County of Gallatin, Cause No. DV-10-887C
Honorable John C. Brown, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Miles Kingman, Self-Represented, Great Falls, Montana

For Appellee:

Geoffrey C. Angel, Angel Law Firm, Bozeman, Montana

Submitted on Briefs: November 20, 2019
Decided: January 7, 2020

Filed:

Clerk

Chief Justice Mike McGrath 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 Pro se Appellant Miles Kingman ("Kingman") appeals from an order of the Eighteenth Judicial District Court, Gallatin County, granting summary judgment to the Appellee Paul Overby ("Overby") on the basis that Kingman was in default for failing to respond to Overby's complaint. Kingman contends that the District Court abused its discretion by entering a default, granting summary judgment to Overby, failing to order his transport from prison to be present at the summary judgment hearing, and by awarding a clearly erroneous damage amount. We affirm.

¶3 On August 24, 2010, Overby sued Kingman, Ryan Sean Dibert ("Dibert"), and Hard Times, Inc., d/b/a The Scoop Bar for an assault stemming from an altercation that occurred on September 17, 2008, outside The Scoop Bar.[1] Kingman and Dibert had viciously attacked Overby and, even after Overby was knocked unconscious they continued their assault, causing Overby irreversible brain damage. Kingman was convicted of aggravated assault; this Court upheld the conviction in *State v. Kingman*, 2011 MT 269, 362 Mont. 330, 264 P.3d 1104. Overby has since had to relearn how to

[1] Hard Times, Inc./The Scoop Bar were subsequently dismissed on October 14, 2014.

speak, as well as other daily functions. He has had extensive facial reconstruction and a host of other medical treatments for the associated traumatic injuries caused by the attack.

¶4 On June 6, 2013, Kingman, at the time an inmate at Crossroads Correctional Center in Shelby, Montana, was served with a summons and complaint and signed the Acknowledgment of Receipt of Service. In returning the Acknowledgment, Kingman included an obscene drawing of a penis accompanied by two offensive statements directed at Overby. Proof of Service was filed on June 21, 2013. Kingman never filed an answer. On June 22, 2017, Overby submitted a Request for Entry of Default for Failure to Appear or Defend. Default was entered on July 11, 2017.

¶5 Where an appellant seeks relief from a judgment on the ground that the judgment is void, our review is de novo since the determination of whether or not a judgment is void is a conclusion of law. *Essex Ins. Co. v. Moose's Saloon, Inc*., 2007 MT 202, ¶ 16, 338 Mont. 423, 166 P.3d 451.

¶6 Kingman argues the District Court abused its discretion by entering the default on the basis that he did not know how to answer a civil complaint, and that, regardless, his obscene drawing and inflammatory statements in his acknowledgment were a "solid denial in any language." Kingman's issues raised on appeal are futile since he failed to set aside the default in District Court. We will not find a district court committed error where it was not given an opportunity to correct itself. *State v. Benson*, 1999 MT 324, ¶ 19, 297 Mont. 321, 992 P.2d 831.

¶7 Kingman acknowledged receipt of the summons and complaint, providing him notice of his obligation to respond or otherwise defend. Contrary to Kingman's

argument, an obscene drawing coupled with two inflammatory statements on an acknowledgment of receipt and summons of complaint are not sufficient to meet the pleading requirements for defendants set forth in M. R. Civ. P. 8(b). Kingman's actions indicate his willingness to neglect his rights and ignore the judicial machinery established by law. *Dudley v. Stiles*, 142 Mont. 566, 568, 386 P.2d 342, 343 (1963) (holding excusable neglect to set aside a judgment under M. R. Civ. P. 60(b)(1) will not be found "where a defendant has willingly slumbered on his rights and ignored the judiciary machinery established by law"). The District Court correctly concluded that default was proper.

¶8 In August 2016, Overby filed a motion for summary judgment; Kingman did not respond to this motion. On May 22, 2017, Kingman was mailed notice of the District Court's order setting the summary judgment hearing. On June 5, 2017, Kingman filed a motion for declaratory judgment and on June 22, 2017, Overby filed a response. On July 13, 2017, two days following the entry of default, Kingman filed his response to Overby's request for default and requested transportation to any hearings or other proceedings. Following a hearing on July 20, 2017, the District Court granted summary judgment in the amount of $1,728,960 in damages to Overby (ten times his medical expenses of $172,896 during the first twelve months following the assault) plus $1,728,960 in punitive damages, with interest at the rate of 10% as allowed by law from July 20, 2017, until paid.

¶9 The District Court correctly entered summary judgment against Kingman. Where a party has "failed to show any material issues of fact concerning his default" or the

underlying claims, we will not find that the district court erred in entering summary judgment. *Club Buffet Bar v. Lilienthal*, 268 Mont. 164, 167, 885 P.2d 526, 528 (1994). M. R. Civ. P. 56 provides that summary judgment is proper when a party does not respond to the motion or set out specific facts showing a genuine issue for trial. M. R. Civ. P. 56(e)(2).

¶10 Kingman failed to set out any material issues of fact concerning his default or Overby's claims. In addition to M. R. Civ. P. 56, the District Court cited Rule 2 of the Montana Uniform District Court Rules, which states that "failure to file an answer brief by an opposing party within the time allowed shall be deemed an admission that the motion is well taken." Mont. Unif. Dist. Ct. R. 2(b). The record shows that Kingman chose to ignore Overby's complaint and was effectively in default at the time of Overby's August 2016 motion for summary judgment. Kingman was aware of the claims against him, and on May 22, 2017, received notice of the summary judgment hearing set for July 20, 2017. Kingman never provided a response to Overby's complaint or motion for summary judgment that set out specific facts showing a genuine issue for trial. A party that "ignores the judicial system and slumbers on his rights," does so "at his own peril." *Bedford v. Jorden*, 215 Mont. 508, 511, 698 P.2d 854, 856 (1985) (affirming summary judgment where the appellant had failed to timely respond to the merits of appellee's motion for summary judgment). The District Court correctly granted summary judgment in favor of Overby, as Kingman was in default and failed to respond to Overby's motion or set out material issues of fact showing a genuine issue for trial.

¶11 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. This appeal presents no constitutional issues, no issues of first impression, and does not establish new precedent or modify existing precedent.

¶12 Affirmed.

/S/ MIKE McGRATH

We Concur:

/S/ LAURIE McKINNON
/S/ JAMES JEREMIAH SHEA
/S/ BETH BAKER
/S/ JIM RICE