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Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-36**

Wesley Young, Jr.,
Plaintiff,

Michael J. Keogh,
Appellant,

vs.

New Century Mortgage Corp.,
Respondent,

Mortgage Electronic Registration Systems, Inc.,
Respondent,

The Bank of New York Mellon Trust Company,
National Association, intervening defendant,
Respondent.

**Filed November 7, 2011
Affirmed as modified
Connolly, Judge**

Hennepin County District Court
File No. 27-CV-09-18529

Michael J. Keogh, Keogh Law Office, St. Paul, Minnesota (attorney pro se)

New Century Mortgage Corporation, Irvine, California (respondent)

Mortgage Electronic Registration Systems, Inc., Reston, VA (respondent)

Gerald W. Von Korff, David J. Meyers, Keri A. Phillips, Rinke Noonan, St. Cloud,
Minnesota; and

Caitlin Duncanson Dowling, Wilford Geske & Cook, P.A., Woodbury, Minnesota (for respondent The Bank of New York Mellon Trust Company)

Considered and decided by Connolly, Presiding Judge; Halbrooks, Judge; and Harten, Judge.*

UNPUBLISHED OPINION

CONNOLLY, Judge

Appellant challenges the district court's order awarding attorney fees under Minn. R. Civ. P. 37.04. Respondent seeks modification of the order, which erroneously awarded the fees to the original defendants in the underlying action, rather than to respondent, the intervening defendant. Because we see no abuse of discretion in the award of attorney fees, we affirm. However, because the award of the fees to defendants instead of to respondent was merely a clerical error, we modify the order under Minn. R. Civ. P. 60.01.

FACTS

Appellant Michael Keogh, an attorney, brought an action on behalf of his client, a mortgagor, against the mortgagee in July 2009. In September 2009, the mortgage was transferred to The Bank of New York Mellon Trust Company, National Association (respondent). In December 2009, respondent moved to intervene in the action. Appellant opposed the motion, arguing that respondent lacked standing to intervene. The district court rejected appellant's argument and granted respondent's motion.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

On January 21, 2010, respondent served appellant with a subpoena and notice of a deposition of his client on February 3, 2010. On February 2, 2010, appellant served a motion, with no hearing date, to stay the deposition and to quash the subpoena.

Neither appellant nor his client appeared for the February 3 deposition, and respondent sent appellant a letter and called, asking why his client could not attend. Appellant did not reply to either the letter or the call. On February 12, respondent again wrote to appellant, asking for responses to discovery requests. Appellant did not reply. On February 17, 2010, respondent moved for attorney fees under Minn. R. Civ. P. 37.01(d).

Appellant's client was deposed on March 9, 2010. On March 12, 2010, the district court issued an order stating that a receiver had been appointed on February 2, 2010, for respondent, that "[respondent's] counsel . . . told the Court that they have notified [appellant] by telephone and by letter that the home needs to be vacated so that the Receiver could take possession pursuant to the Court's Order" and that, during his deposition three days earlier, appellant's client had said "the property is occupied by [him] and two of [his guests] and "that he would not move out of the property for at least two months." The district court ordered that a writ of recovery be issued to the receiver and said it would "reserve . . . the question of attorneys' fees and costs incurred in connection with this order."

On April 10, 2010, respondent filed with the district court a notice of motion, motion, affidavit, and memorandum seeking attorney fees under Minn. Stat. § 549.211 and Minn. R. Civ. P. 11. The affidavit, filed by respondent's counsel, said that "[t]o date,

I have not received a formal response to the Request for Production of Documents or any answers to Interrogatories” and that “[appellant] neglected or refused to answer my telephone call requests to set up a deposition of his client.”

On April 12, 2010, a notice of appellant’s withdrawal from the representation of his client was filed with the district court. Substitute counsel appeared on April 13, 2010, at a hearing on respondent’s motion for summary judgment. The parties later settled the matter through mediation, and the district court’s judgment entered on June 30, 2010, “reserve[d respondent’s] Motion for Sanctions for future proceedings.”

After a hearing on the sanctions motions, the district court denied the motions under Minn. Stat. § 549.211 and Minn. R. Civ. P. 11, granted the motion under Minn. R. Civ. P. 37.04, and asked respondent’s counsel to submit an affidavit detailing fees related to the discovery and sanctions motions. Two counsel submitted affidavits: one for \$9,316 and one for \$2,775. The district court awarded judgment of \$11,446 in attorney fees.¹ Through a clerical error, that judgment was awarded to the original defendants in the underlying action, not to respondent, the intervening defendant.

Appellant challenges the award of attorney fees against him; respondent seeks modification to correct the clerical error.

¹ The total amount requested in respondent’s counsels’ affidavits was \$12,091. The district court’s disallowance of some of the fees requested is neither explained nor challenged. The affidavits reflect that, after appellant withdrew from the representation, only fees pertaining to the sanctions motions, not to the underlying action, were included.

DECISION

1. Attorney Fee Award

If a party . . . fails . . . to appear before the officer who is to take the deposition, after being served with proper notice, . . . the court in which the action is pending on motion may make such orders in regard to the failure as are just, including any action authorized in Rule 37.02(b)(1),(2), and (3). In lieu of any order or in addition thereto, the court *shall* require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Minn. R. Civ. P. 37.04 (emphasis added). In construing statutes, “[s]hall’ is mandatory.”

Minn. Stat. § 645.44, subd. 16 (2010). This court reviews the imposition of sanctions for discovery violations for an abuse of discretion. *Hornberger v. Wendel*, 764 N.W.2d 371, 377 (Minn. App. 2009).

The district court concluded that, while appellant’s conduct was not “egregious enough” to warrant sanctions under Minn. Stat. § 549.21 or Minn. R. Civ. P. 11, “[s]anctions are justified as against [appellant] for failure to comply with discovery, especially after being told to comply in conference with the Court.” Appellant does not refute the district court findings that, after respondent had been allowed to intervene, (1) “[appellant] argued in motions and in oral argument to the Court that [respondent] did not have standing to be a party to the action or to make basic discovery requests of his client”; (2) neither he nor his client appeared at the scheduled deposition; (3) when the motion for sanctions was brought, appellant had neither answered interrogatories nor provided a formal response to the document request; and (4) “during a telephone

conference, the Court reiterated to [appellant] that [respondent] had standing to request discovery and that he and his client were to treat [respondent] as a party and to get discovery answered.”

Appellant does not explain why he waited until the day before the scheduled deposition to object to the date or why he and his client did not attend. Instead, he argues that the sanctions were unjustified because notice of the deposition was provided in a subpoena duces tecum before opposing counsel had consulted with him as to available dates. But appellant provides no support for the view that a deposition may not be noticed in a subpoena duces tecum or that counsel is obligated to arrange a date before noticing a deposition, and he does not refute the statement in respondent’s counsel’s affidavit that “[appellant] neglected or refused to answer . . . telephone call requests to set up a deposition of his client.”

Appellant also argues that the motion for sanctions was heard after the case was settled and he had withdrawn as counsel. But he offers no support for the position that either settlement of a case or withdrawal of an attorney makes discovery violations irrelevant; certainly they are not irrelevant to the opposing party who incurred them. Moreover, the stipulation for dismissal that accompanied the settlement agreement specifically reserved the right of the district court to award sanctions against appellant and a post-judgment motion was scheduled precisely for that purpose.

The district court did not abuse its discretion in imposing a sanction on appellant for discovery violations.

2. Rule 60 Motion

“Clerical mistakes in judgments . . . may be corrected by the court at any time upon its own initiative or on the motion of any party. . . . During the pendency of an appeal, such mistakes may be so corrected with leave of the appellate court.” Minn. R. Civ. P. 60.01. The district court stated that awarding attorney fees to defendants in the underlying action, which had not sought them, rather than to respondent, which did seek them, was a clerical mistake. Appellant does not challenge this position. We modify the judgment to award the attorney fees to respondent, The Bank of New York Mellon Trust Company, National Association, the intervening defendant.

Affirmed as modified.