STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1475
A10-1551

American International Specialty Lines Insurance Company,
as subrogee for Rescue Mortgage, Inc.,
Respondent,

vs.

Brookfield Home Loans, Inc., et al.,
Defendants,

Gary B. Bodelson,
Appellant (A10-1475),

Northwest Title and Escrow Corporation,
Appellant (A10-1551)

Filed April 26, 2011
Reversed
Connolly, Judge

Hennepin County District Court
File No. 27-CV-07-20863

Joel T. Wiegert, Melissa Dosick Riethof, Meagher & Geer, P.L.L.P., Minneapolis, Minnesota (for respondent)

Gary B. Bodelson, Minneapolis, Minnesota (pro se appellant)

Frederic W. Knaak, Knaak & Associates, Vadnais Heights, Minnesota (for appellant Northwest Title and Escrow Corp.)

Considered and decided by Ross, Presiding Judge; Lansing, Judge; and Connolly, Judge.

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

CONNOLLY, Judge

A corporation and the attorney who represented it at trial and on a prior appeal challenge sanctions imposed against them under Minn. R. Civ. P. 37.04 for the failure to appear at a deposition in connection with postjudgment collection proceedings. Because we conclude that the corporation did not have reasonable notice of the deposition, we reverse the sanctions imposed against it. And because we conclude that the attorney was not representing the corporation in the postjudgment collection proceedings, we reverse the sanctions imposed against him.

FACTS

These consolidated appeals arise from postjudgment collection actions taken by respondent American International Specialty Lines Insurance Company (American), as subrogee for Rescue Mortgage, Inc., following a suit in which appellant Northwest Title and Escrow Corporation (Northwest) was found to have acted negligently and in breach of its fiduciary duties during a home-mortgage transaction. *See Am. Int'l Specialty Lines Ins. Co. v. Brookfield Home Loans, Inc.*, No. A09-506, 2010 WL 934248, at *1 (Minn. App. Mar. 16, 2010) (*AISLIC*), *review denied* (Minn. May 18, 2010). At trial and on appeal of the damages award, appellant Gary B. Bodelson represented Northwest. We affirmed the district court's denial of Northwest's motion for a new trial. *Id.* at *3.

Northwest did not move to stay enforcement of the underlying judgment while the appeal was pending. *See* Minn. R. Civ. App. P. 108.01, subd. 1 ("Except as otherwise provided by rule or statute, an appeal from a judgment . . . does not stay enforcement of

the judgment . . . ."); Minn. R. Civ. App. P. 108.02 (stating process for filing motion and providing security to stay enforcement of a judgment pending appeal); *see also* Minn. R. Civ. App. P. 108.01, subd. 2 (providing that the district court "retains jurisdiction as to matters independent of, supplemental to, or collateral to the . . . judgment appealed from"). American thus moved forward with collection efforts, requesting that the district court order Northwest to complete a financial disclosure form. An order for disclosure was mailed to Wayne Holstad, the owner of Northwest. *See* Minn. Stat. § 550.011 (2010) ("[T]he district court . . . shall, upon request of the judgment creditor, order the judgment debtor to mail . . . to the judgment creditor information as to the nature, amount, identity, and locations of all the debtor's assets, liabilities, and personal earnings."). When Northwest did not respond, an order to show cause was issued. The disclosure form was subsequently completed by Northwest's general counsel John Lindell,[1] who had second-chaired the trial. Northwest indicated that it did not have any bank accounts or assets.

On June 15, American notified Bodelson of its intent to depose Northwest on June 25 regarding Northwest's assets and corporate structure. In letters dated June 16 and 23, Bodelson told American that his representation was limited to the trial and appeal and that he did not represent Northwest regarding any postjudgment collection issues. On June 24, counsel for American wrote to Bodelson:

> You are counsel of record, in both the district and appellate courts. Despite your indications to the contrary, you have not filed any withdrawal of counsel, nor has any substitution of counsel been filed. Quite simply, I cannot communicate with anyone else. If I am authorized to speak directly with your

[1] It appears that Lindell served as both secretary and general counsel of Northwest.

> client, please advise. Nonetheless, notice and content of tomorrow's deposition is proper, and we look forward to speaking with Northwest's designated corporate representative(s).

Bodelson responded on June 25, reiterating that he was not representing Northwest as to any collection issues and stating that he "had no authority to respond to [American's] inquiries concerning who [American] could or could not communicate with relating to such issues."[2] Neither Bodelson nor Northwest appeared at the deposition.

American then moved for discovery sanctions against both Northwest and Bodelson under Minn. R. Civ. P. 37.04 (allowing sanctions for failure of party to attend at own deposition or serve answers). American requested both monetary sanctions (attorney fees in preparing for and appearing at the deposition and for bringing the instant motion) and non-monetary sanctions in the form of certain facts being deemed established.

At the hearing on American's motion for sanctions, Bodelson appeared on his own behalf and Frederic Knaak appeared on behalf of Northwest. The district court observed that (1) only Bodelson had filed a certificate of representation for Northwest; (2) Bodelson had not filed a notice of withdrawal; and (3) Knaak had not submitted a certificate of representation. Knaak acknowledged that no certificate had been filed, but asked the district court "if [he] could just have a moment" and would "appreciate the courtesy of just a brief statement." Knaak then made a brief argument on Northwest's behalf:

[2] While the June 16 and 23 letters are included in Bodelson's appendix, the June 25 letter is not. American contends that Bodelson did not respond to its June 24 letter.

> And, it is just simply a matter of my client not having knowledge, in fact, of the fact that these proceedings were supposedly going on. It's not a matter of just, you know, simply duck and weave here. It's tough getting into a dog fight like this kind of late in the game, but the truth is, Your Honor, as I've discussed this with [Lindell], he was genuinely unaware of the fact that some of these things were going on.

The district court responded:

> Let me just mention what the Court's been unaware of. My pretrial order requires that counsel who are trying the case appear at pretrial. That was Mr. Lindell. The first day of trial Mr. Bodelson appeared and said, "I'm trying the case." I'd never heard of Mr. Bodelson, he wasn't here at pretrial; and in fact, my recollection is that we had quite some discussion before the trial began, I can't exactly recall, but it did require Mr. Bodelson to file a [certificate of representation] since he hadn't filed one. . . .
>
> I have read the rules since this case came in, and it's very clear to me that [American's] argument is correct, that [American] is entitled to know who it is that's representing who[m]. There's never been a withdrawal by Mr. Bodelson. Mr. Bodelson is representing his client on appeal. I don't know how it is that he wants to limit his representation. That's not one of the things I have to consider. I have to consider who is the attorney of record.

The district court directed Knaak to file a certificate of representation, which Knaak stated he would do, and took the matter under advisement.

The district court ultimately granted American's motion in all respects and ordered sanctions against both Northwest and Bodelson. The amount of attorney fees was reserved pending submission of a Rule 119 affidavit. *See* Minn. R. Gen. Pract. 119 (governing applications for attorney fees). Counsel for American subsequently submitted an affidavit of costs and fees totaling $7,901. Bodelson objected to the amount on four grounds: (1) American had no reasonable basis to believe that the deposition was going to

occur given that it had not served Northwest; (2) the hours spent and fees charged in preparing for the deposition were in excess of those customarily charged; (3) the hours spent in preparing the discovery sanctions motion were in excess of those customarily charged; and (4) the claimed fees "for hours expended in reviewing billing and drafting the fees and costs affidavit . . . is essentially making a claim for fees for making a claim for fees." Northwest did not object to the fees.

Northwest and Bodelson subsequently filed petitions of prohibition in this court, which were denied. *In re Northwest Title & Escrow Corp.*, No. A09-1985, *In re Gary Bodelson*, No. A09-1991 (Minn. App. Nov. 17, 2009) (order). Upon conclusion of the appellate proceedings in *AISLIC*, American was awarded the requested $7,901 in costs and fees.

Notices of appeal were filed by both Northwest (A10-1551) and Bodelson (A10-1475). *Am. Int'l Specialty Lines Ins. Co. v. Brookfield Home Loans, Inc.*, Nos. A10-1475, A10-1551, at 1 (Minn. App. Dec. 20, 2010) (order). American then moved to consolidate these appeals, which we granted. *Id.* at 2.

D E C I S I O N

"Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise," and conducted in accordance with Minn. Stat. §§ 550.01-550.42 (2010). Minn. R. Civ. P. 69. A judgment creditor may "obtain discovery from any person, including the judgment debtor," to aid in execution pursuant to the rules of civil procedure. *Id.* The rules permit a party to depose another party after giving reasonable notice in writing. Minn. R. Civ. P. 30.02(a).

If a party fails to attend a deposition after 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)." Minn. R. Civ. P. 37.04; *see* Minn. R. Civ. P. 37.02(b)(1) (considering certain facts established), (2) (prohibiting party from supporting or opposing certain claims or defenses or introducing certain evidence), (3) ("striking pleadings or parts thereof, staying further proceedings . . . , dismissing the action or proceeding or any part thereof, or rendering a judgment by default").

> In lieu of . . . 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. We review the imposition of discovery sanctions for an abuse of discretion. *Hornberger v. Wendel*, 764 N.W.2d 371, 377 (Minn. App. 2009).

The district court concluded that Bodelson was the attorney of record for Northwest and therefore service of the deposition notice on Bodelson was proper. Bodelson and Northwest both argue that service was improper because Bodelson was not Northwest's attorney for the purposes of any collection activities and assert that Bodelson's representation was limited to the damages trial and appeal. We agree.

In granting American's request for sanctions, the district court reasoned that "to allow [Bodelson] to limit his representation in this manner would leave [American] in a precarious situation," noting that the rules of professional responsibility prohibit an

opposing party's attorney from contacting a party directly when the attorney knows the party is represented. *See* Minn. R. Prof. Cond. 4.2 ("In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order."). But American was not in such a "precarious situation." Although American claims it could not communicate with anyone other than Bodelson under Rule 4.2, once American had been informed that Northwest was no longer a represented party, nothing prohibited American from contacting Northwest directly. *See id.* cmt. 8 ("The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented *in the matter to be discussed*. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances." (Emphasis added.)); *accord State v. Miller*, 600 N.W.2d 457, 464 (Minn. 1999) ("In contrast to protecting the client's right *to* counsel, MRPC 4.2 protects the right *of* counsel to be present during any communication between the counsel's client and opposing counsel.").

We are most troubled by American's failure to directly serve notice of the deposition on Northwest following Bodelson's correspondence as the record reflects that such direct communication occurred a month earlier. Lindell was general counsel for Northwest. Like Bodelson, Lindell participated in the damages trial. Later, Lindell completed the financial disclosure form, which prompted American to cancel the hearing on the order to show cause. American specifically informed the district court that "[b]y

copy of this letter, *counsel for [Northwest] has been notified of the cancellation*." (Emphasis added.) Lindell was the *only* attorney copied on American's correspondence.[3] *This letter was sent a mere month before the deposition notice.*

We agree with Bodelson and Northwest that the entry of final judgment against a party generally terminates the authority of the losing party's attorney. *Berthold v. Fox*, 21 Minn. 51, 1874 WL 3755, at *2 (1874) ("But neither the common law nor any statute continues after judgment the authority of the attorney for the defeated party . . . ."); *see* 7 Am. Jur. 2d *Attorneys at Law* § 172 (2007) ("[T]he authority of an attorney to act for a client terminates on final judgment . . . with respect to the attorney for the losing party."). However, "where the defendant's former attorney, or any other, takes any proceeding in his behalf, the attorney's authority is presumed, as well after judgment as before." *Berthold*, 21 Minn. 51, 1874 WL 3755, at *2. Notwithstanding any initial confusion as to whether Bodelson was representing Northwest in the collection proceedings given his representation of Northwest on the trial appeal, Bodelson's subsequent communication clarified that he was not representing Northwest in the collection proceedings. And Northwest is correct that "[t]here is nothing in the record to indicate that either attorneys Holstad or Lindell received notification of anything after [American] received the initial post-judgment Answers to Interrogatories from [Lindell]." Because Northwest was no longer a represented party, nothing precluded American from serving notice of the deposition on Northwest directly.

[3] To the extent that Northwest claims that Bodelson informed American that it could contact either Lindell or Holstad, this is disputed by both Bodelson and American.

Based on the record and the statements of counsel at oral argument, Northwest did not receive reasonable notice of the deposition. Therefore, we conclude that the district court abused its discretion and reverse the sanctions imposed against Northwest and Bodelson under Minn. R. Civ. P. 37.04. As a result, we do not consider Bodelson's argument that the amount of monetary sanctions was unreasonable; Northwest's challenges to the establishment of certain facts; or Northwest's due-process claims.

We do, however, feel it necessary to clarify that the general rules of practice do not prohibit an attorney from speaking on behalf of his client prior to filing a certificate of representation after an action has commenced. Rule 104 states that "a party *filing a civil case*, shall, *at the time of filing*, notify the court administrator in writing of the name, address and telephone number of all counsel and unrepresented parties, if known . . . ." Minn. R. Gen. Pract. 104 (emphasis added). The comments to the rule further reinforce that it applies at the time of filing: "This rule formalizes the requirement to provide information about all parties when an action is filed." *Id.* 1995 comm. cmt. When new counsel appears on behalf of a party, the district court should permit the substitution and allow counsel to participate with the understanding that the certificate of representation will be subsequently filed. *See* 7 Am. Jur. 2d *Attorneys at Law* § 184 (2007) ("Although, generally, the attorney of record has the exclusive right to appear for his or her client, when the actual authority of the new or different attorney appears, the absence of record of a formal substitution may be excused."). Counsel should then proceed to file a certificate of representation as soon as practicable.

Reversed.