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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2077**

Clements Lumber, Inc.,
Respondent,

vs.

Rick DeMartini, a/k/a Rick D. Martini, Jr.,
d/b/a Entirely Seamless Gutters,
Appellant,

Rachel Fonss, et al.,
Defendants.

**Filed August 4, 2009
Affirmed in part, reversed in part, and remanded.
Stauber, Judge**

Redwood County District Court
File No. 64CV06155

John D. Moritz, O'Leary & Moritz Chtd., 102 North Marshall, Box 76, Springfield, MN
56087-0076 (for respondent)

Rick DeMartini, Federal Prison Camp, Box 1000, Duluth, MN 55814-1000 (pro se
appellant)

Considered and decided by Stoneburner, Presiding Judge; Stauber, Judge; and
Willis, Judge.*

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

UNPUBLISHED OPINION

STAUBER, Judge

Appellant appeals the denial of his motion to vacate a stipulated judgment for fraud, claiming that the stipulation was entered into without his consent. Appellant also challenges the district court's order directing the sale of his property for failure to comply with the terms of the stipulated judgment. We affirm the denial of appellant's motion to vacate the judgment, but reverse the order directing sale of the property and remand for further findings.

FACTS

In 2004 and 2005, respondent Clements Lumber Company (CLC) provided building materials and supplies to appellant Rick DeMartini and Rachel Fonss for the renovation of a homestead and construction of a commercial building on two separate parcels of property they own in Lamberton, Minnesota. CLC timely recorded mechanic's liens against the parcels for the value of the materials and supplies provided and interest that had accrued since CLC had completed its contributions to the projects. DeMartini and Fonss subsequently failed to fully compensate CLC for its contributions, and CLC brought a mechanic's-lien-foreclosure action.

DeMartini and Fonss, who were married at the time, hired attorney Kevin Stroup to represent them in the litigation. On the day that the trial was scheduled to begin, Stroup and John Moritz, the attorney for CLC, informed the district court that a settlement had been reached. Under the terms of the settlement, DeMartini and Fonss were required to pay CLC \$115,000 to discharge the mechanic's lien on the commercial

property. The \$115,000 was payable in installments of \$1,500 per month with an 8% interest rate and a balloon payment after approximately two years. Failure to timely pay would result in a default and foreclosure. Fonss was present at the hearing and indicated on the record that she agreed to the settlement terms. DeMartini did not attend the hearing because he was incarcerated. Moritz drafted a proposed order that memorialized the terms of the settlement and sent it to Stroup. Stroup sent a letter to Moritz indicating that the proposed order was acceptable, and mailed a courtesy copy of the letter to Fonss and DeMartini. The proposed settlement order was signed by both attorneys and submitted to the court. On February 2, 2007, the district court signed the order.

Fonss and DeMartini allegedly failed to make their scheduled July 2008 installment payment, and on July 22, 2008, Moritz mailed separate notices of default to Fonss and DeMartini. On July 29, 2008, DeMartini moved to vacate the February 2, 2007 order, claiming that the settlement agreement had been negotiated and entered into by Fonss, Stroup, and Moritz without his knowledge or consent. The district court did not hold a hearing on the motion because the rules for setting a hearing had not been followed. On September 22, 2008, CLC moved to sell the commercial property at a sheriff's sale based on Fonss's and DeMartini's failure to make their July 2008 installment payment. On September 25, 2008, DeMartini renewed his motion to vacate on the basis that he did not consent to the settlement. A hearing was held on the motions. DeMartini remained incarcerated and did not appear. Fonss was present at the hearing and admitted that the July 2008 installment payment had not been made. Fonss informed

the court that she was no longer able to make the payments and agreed that the property should be sold at a foreclosure sale pursuant to the February 2, 2007 order.

The district court denied DeMartini's motion to vacate and granted CLC's motion to sell the commercial property. With respect to DeMartini's motion, the court agreed that "some of the documents [he] submitted . . . could suggest that he was not being kept fully informed and may have been deliberately excluded [from settlement negotiations] by Attorney Stroup." But the court concluded that, even if such conduct occurred, DeMartini was not entitled to vacation of the order under Minn. R. Civ. P. 60.02 "because the rule is designed to protect against fraud from the [opposing] party and not from one's own counsel." The court opined that DeMartini would need to bring a separate lawsuit against Stroup and/or Fonss in order to obtain relief. The court further held that there was no evidence of fraud on the part of Moritz. The motion to sell the property was granted based on Fonss's admission that the July 2008 installment payment had not been made. DeMartini later moved for reconsideration and requested a stay of the sale of the property. The district court denied the motion as frivolous. This appeal followed.

DECISION

I.

DeMartini contends that the district court abused its discretion in denying his motion to vacate the February 2, 2007 order adopting the proposed settlement agreement. DeMartini essentially argues that Fonss, Stroup, and Moritz committed fraud by

conspiring to prevent him from participating in the settlement negotiations and settling the matter without his consent.

The district court treated DeMartini's motion as a request for relief based on fraud by an adverse party.¹ *See* Minn. R. Civ. P. 60.02(c) (allowing a court to grant relief from an order that was obtained through fraud by an adverse party). Motions for relief based on fraud by an adverse party must be brought within one year after the order. This court reviews a district court's denial of a motion to vacate an order under an abuse-of-discretion standard. *Johnson v. Hunter*, 447 N.W.2d 871, 873 (Minn. 1989).

The district court found that DeMartini was not entitled to relief on that basis because Fonss and Stroup are not adverse parties, and although Moritz, as the attorney for CLC, represented an adverse party, the court found that there was no evidence that he committed fraud in obtaining the settlement. The court further held that DeMartini's motion for relief was untimely, as it was brought more than 18 months after the February 2, 2007 order was entered. Because these conclusions are supported by the record, we affirm the denial of DeMartini's motion to vacate.

II.

DeMartini also contends that the district court erred in granting CLC's motion for an order directing the sale of the commercial property, claiming that CLC had failed to establish the requirements for sale under the terms of the settlement agreement. The

¹ Rule 60.02 contemplates two distinct types of fraud: fraud by an adverse party and fraud on the court. Minn. R. Civ. P. 60.02. DeMartini's pro se brief does not distinguish between the two types of fraud, and DeMartini did not allege fraud on the court at the district court level. Therefore, we defer to the district court's interpretation of appellant's argument as one based on fraud by an adverse party.

interpretation of a settlement agreement is an issue of law reviewed de novo. *In re Welfare of M.R.H.*, 716 N.W.2d 349, 352 (Minn. App. 2006), *review denied* (Minn. Aug. 15, 2006). But we will not reverse a district court's findings of fact unless they are clearly erroneous. Minn. R. Civ. P. 52.01. A finding is clearly erroneous if a reviewing court is left "with the definite and firm conviction that a mistake has been made." *Gjovik v. Strobe*, 401 N.W.2d 664, 667 (Minn. 1987).

Here, the settlement agreement required DeMartini and Fonss to make installment payments on the 15th of each month. In the event that payment was not timely made, CLC was required to give DeMartini and Fonss notice of default and allow them two weeks to cure.

In granting CLC's motion, the district court relied upon Fonss's testimony at the motion hearing that the July 2008 installment payment had not been made. But in doing so, the court overlooked an affidavit from Moritz, CLC's lawyer, acknowledging that CLC had received the July payment at some point. CLC also concedes in its brief that it received and accepted payment. Thus, the finding that the July 2008 payment had not been received is clearly erroneous.

DeMartini seems to acknowledge that the July 2008 installment payment was untimely, but claims that CLC received and accepted the payment within the time allowed for cure. In order to be entitled to sell the commercial property under the settlement agreement, CLC had the burden of proving both that DeMartini and Fonss did not timely pay *and* that they failed to cure. The letter providing notice of default is dated July 22, 2008. But there is no evidence in the record that payment was not received

within the allowed cure period. CLC argues that the error is harmless because DeMartini and Fonss failed to make any further payments after the July 2008 installment. But there is no support in the record for CLC's assertion, and the district court's decision was based only on the alleged default on the July 2008 installment. Because the determination that the July 2008 installment payment was not made is clearly erroneous, and because the district court failed to consider whether the payment was made within the time allowed for cure, we reverse the order directing sale of the commercial property, and remand for further proceedings consistent with our decision.

Affirmed in part, reversed in part, and remanded.