

No. A 06-2201

**STATE OF MINNESOTA
IN COURT OF APPEALS**

Northland Temporaries, Inc.,
Plaintiff - Respondent,

vs.

Anthony Turpin and Tim Turpin, d/b/a M.O.S.S.,
Defendants - Appellants.

APPELLANT'S REPLY BRIEF

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INTRODUCTION

Despite Respondent's best efforts to cloud the issues with irrelevant arguments, the matter before this Court can be distilled down to just two key questions: 1) does a shareholder have a reasonable defense on the merits to an action seeking recovery of a debt incurred by the corporation where that shareholder did not personally execute a contract with the vendor and the vendor was on notice of the corporate status; and 2) is a party's failure to answer a Complaint or otherwise respond to notice of continued proceedings reasonable where that party provides a verbal answer and believes that they could not legally be held personally liable for debts incurred by the corporation.

The undisclosed principal doctrine does not apply in this case where none of the contracts at issue were signed by either of the Appellants individually. Further, Respondent was on notice of the corporate status of M.O.S.S., Inc. throughout the course of the parties' business relationship and therefore the alleged failure to disclose the full, legal name of the corporation was of no legal effect. And finally, Appellants' failure to answer was reasonable given their understanding that they could not be held personally liable for the corporate debt. Appellants' met the requirements of Rule 60.02 and the district court's refusal to vacate the judgment entered against them personally was an abuse of discretion. Appellants' respectfully request this Court reverse the decision of the District Court and allow them to file an Answer and proceed to trial on the merits of this matter.

I. THIS COURT SHOULD REVERSE THE DISTRICT COURT'S DECISION TO DENY APPELLANTS' MOTION TO VACATE.

A four factor test is applied in determining whether or not to vacate a judgment:

1) whether the party possesses a reasonable defense on the merits, 2) whether there is a reasonable excuse for the failure to answer, 3) whether the party has acted with due diligence after notice of entry of judgment, and 4) that no substantial prejudice will result to the other party. Johnson v. Nelson, 120 N.W.2d 333, 335, (Minn. 1963).

This Court should reverse the decision of the District Court and remand with instruction to vacate the default judgment entered against them individually. Appellants have a strong defense on the merits and a reasonable excuse for failing to serve an Answer. The balancing of the required factors weighs in favor of vacating the judgment and the District Court abused it's discretion in refusing to do so.

A. Appellants' have a reasonable defense on the merits.

Appellants' have met all four required factors for vacation of the default judgment pursuant to Rule 60.02. The "undisclosed agent" doctrine is inapplicable in this case and the disclosure of the "Inc." designation put Respondent on notice it was dealing with a corporation, not the Turpins individually.

i. The "undisclosed principal" doctrine does not apply in this case.

Just as it was at the District Court level, Respondent's primary argument with respect to Appellants' defense on the merits is that Northland was unaware that it was dealing with "Manufacturing Outsourcing Specialists, Inc.", colloquially known as M.O.S.S., Inc. In its Brief, Respondent adopted the district court's analysis and asserts that the alleged

failure to use the full, legal name of the corporation meant that Tim and Paul Turpin's actions could be attributed to M.O.S.S., Inc. under a theory they were acting for an undisclosed principal. (Respondent's Brief pg. 8). Notably, however, Respondent does not dispute the fact that the debt at issue was not incurred by Paul and Tim Turpin in their individual capacities; in fact, it cannot dispute this fact because its own documents conclusively establish that was not the case; the debt was incurred by M.O.S.S., Inc. (AA 32-33; 44-95 & 96-97). Neither Tim Turpin nor Paul Turpin signed any of the timesheets that form the basis for the underlying action. (Id.).

In this case, in order to impose personal liability on Appellants' under the "undisclosed principal" theory, the actions of various M.O.S.S., Inc. employees would have to be somehow attributed to Tim and Paul Turpin individually. Under the facts of this case, the application of the undisclosed principal doctrine is simply stretched too thin; Appellants' are not personally liable for debts incurred by the corporation, M.O.S.S., Inc. They have a meritorious defense to the underlying contract action and the District Court's refusal to vacate the judgment was an abuse of discretion.

ii. Northland was on notice it was dealing with a corporation; disclosure of the corporate status, not the full, legal name of the entity, is all that is required.

Appellants' argument that they have a meritorious defense to the contract action is further supported by the fact that throughout the parties' over five-year relationship, Northland was on notice of M.O.S.S., Inc.'s corporate status. Respondent's argument that the failure to disclose the full, legal name of the corporation is sufficient to impose personal liability on the shareholders and officers under an "undisclosed agent" theory is

contrary to Minnesota law. (See Respondent's Br. pgs. 8-10). The laws regarding registration of corporate names are intended to protect creditors by putting them on notice that they are dealing with a corporation by the use of the "Inc." designation. See Hovelson v. U.S. Swim & Fitness, Inc., 450 N.W.2d 137, 141 (Minn. Ct. App. 1990). Businesses operate under assumed names everyday and those assumed names may, or may not, bear any relationship to the company's full, legal name. The corporate registration statutes require that an incorporated entity identify itself by including the "Inc." designation, even when doing business under the assumed name. Minn. Stat. §302A.115 (2006); Minn. Stat. §333.01 (2006). In fact, a corporation is prohibited from using the "Inc." designation in connection with an assumed name unless the corporation filing the assumed name certificate is authorized to use the "Inc." designation. Minn. Stat. §333.01, Subd. 1 (2006). In other words, a business does not need to know the full, legal name of another entity with which it is doing business in order to know if it is dealing with a corporation.

Respondent has acknowledged that M.O.S.S., Inc. used the required "Inc." designation in its course of dealings with Northland. (Respondent's Br. pg. 9). And, in fact, Northland admits that it included the "Inc." designation when referring to M.O.S.S., Inc. on a number of timesheets. (Id.). M.O.S.S., Inc.'s corporate status was disclosed to, and known by Northland prior to the initiation of litigation; Respondent's inclusion of the "Inc." designation in referring to M.O.S.S., Inc. establishes that it was aware of the corporate status. (See AA 32-33, 44, 45, 50, 56, 61, 66, 69, 76, 80, 83, 88, 90, 92, 94, 96-97 & 140-44).

Respondent also argues that M.O.S.S., Inc.'s use of an alleged "unregistered assumed name" in some way imparted personal liability on its corporate officers for corporate debt. (Respondent's Br. pgs. 7-8). This argument is wrong. Minn. Stat. §333.06 sets forth the penalties for the operation of a corporation with an unregistered assumed name, and provides only that such a corporation may not file suit under the unregistered name. Minn. Stat. §333.06 (2006). This is the only remedy¹. There is no provision in the statute for the imposition of personal liability on a corporation's shareholders or officers as a consequence of doing business under an unregistered assumed name. (Id.).

Throughout the parties' five-year relationship, and during the time the debts at issue were incurred, Respondent was on notice of M.O.S.S., Inc.'s corporate status. Appellants are not personally liable for the corporate debts and the District Court accordingly abused its discretion in refusing to vacate the judgment entered against them individually.

B. Appellants' failure to answer was reasonable; they notified Respondent of the corporate status upon receipt of the Complaint and believed they could not be held personally liable for the corporate debts.

The District Court also abused its discretion in denying Appellants' motion to vacate on the grounds that their failure to answer was intentional and not reasonable. The reopening of default judgments is to be liberally undertaken so that disputes may be resolved on the merits. Petrich v. Dyke, 419 N.W.2d 833, 835 (Minn. Ct. App. 1988). The Petrich Court went so far as to state that "vacation [should be] compelled where there is any issue that should be litigated." Petrich, 419 N.W.2d at 835.

¹ To hold otherwise would be to rewrite the statute. That is a task for the Legislature, not the courts.

Where a defendant makes a strong showing of reasonable defense on the merits, action with due diligence and lack of substantial prejudice to the opposing party, it is an abuse of discretion to deny defendant's motion to vacate on the basis of a weak excuse for failing to answer. Riemer v. Zahn, 420 N.W.2d 659, 662 (Minn. Ct. App. 1988). A relatively weak showing on the failure to answer factor must be balanced against a strong showing on the other three factors. Petrich, 419 N.W.2d at 835; (reversing and remanding denial of vacation of default judgment entered against appellant individually where appellant made a strong showing of no personal liability for underlying debt, that he acted with due diligence after notice of judgment and no substantial prejudice would result).

A lay person's conclusion that he would not be held accountable in a lawsuit, although a weak excuse for failing to answer, is nonetheless reasonable and should not preclude vacation of a default judgment. Guillaume & Assoc., Inc. v. Don-John Co., 371 N.W.2d 15, 19 (Minn. Ct. App. 1985)(emphasis added).

In this case, the District Court concluded that Appellants acted with due diligence and that no substantial prejudice would result to Respondent from the vacation of the judgment against them individually. The District Court based its decision to deny vacation of the judgment on the erroneous conclusions that Appellants' did not possess a reasonable defense on the merits and that their failure to answer was not reasonable. As discussed at length above, Appellants' do have a reasonable defense on the merits, as shareholders and officers they are not personally liable for debt incurred by the

corporation. Likewise, Appellants' failure to answer was reasonable and the District Court's denial of their motion to vacate was an abuse of discretion.

Despite Respondent's characterization, Appellants do not argue that their failure to answer was based solely on their status as pro se litigants. The crux of Appellants' argument is that upon receipt of the Summons and Complaint, they notified Northland by phone of the corporate status and their lack of personal liability. Appellants believed that verbal notification, combined with their belief they could not legally be held personally liable for the corporate debt, was sufficient and no further answer or action was necessary. (AA 34 & 97).

Appellants believed they were shielded by the incorporation and could not be held personally liable for the corporate debts. Although imprudent, Appellants' actions were not unreasonable, despite the fact they may have been on notice that Northland was continuing to pursue the action. See Guillaume & Assoc., Inc., 371 N.W.2d at 19.

Given Appellants' strong showing on the reasonable defense on the merits, due diligence and lack of substantial prejudice factors, the District Court's denial of Appellants' motion to vacate based on its analysis of the reasonableness of the failure to answer was an abuse of discretion. Even if this Court concludes that Appellants' excuse for failing to answer was weak, the strong showing on the other three factors requires the reversal of the District Court and the remand of this action with instructions to vacate the judgment and allow the filing of an Answer.

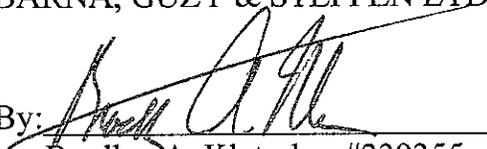
CONCLUSION

Appellants' have a reasonable defense on the merits, their excuse for failing to answer was reasonable, they acted with due diligence upon notice of entry of judgment and no substantial prejudice will result to the Respondent if the judgment entered against Appellants' personally is vacated. Appellants' have met the requirements of Rule 60.02 and the District Court's refusal to vacate the judgment entered against them individually was an abuse of discretion. Appellants' respectfully request this Court reverse the decision of the District Court and remand with instructions to allow them to file an Answer and proceed to a trial on the merits of this matter.

Respectfully submitted,

BARNA, GUZY & STEFFEN LTD.

Dated: 4/5, 2007

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