

CASE NO. A09-0489

State of Minnesota
In Court of Appeals

PALLADIUM HOLDINGS, LLC,

Appellant,

vs.

ZUNI MORTGAGE LOAN TRUST 2006-OA1,

Respondent.

RESPONDENT'S BRIEF

WESTRICK & McDOWALL-
NIX, P.L.L.P.
John G. Westrick (#0206581)
450 Degree of Honor Building
325 Cedar Street
St. Paul, Minnesota 55101
(651) 292-9603

Attorneys for Appellant

WILFORD & GESKE, P.A.
Lawrence A. Wilford (#177109)
Christina M. Weber (#034963X)
Robert Q. Williams (#0388794)
8425 Seasons Parkway, Suite 105
Woodbury, Minnesota 55125
(651) 209-3300

Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

CERTIFICATION AS TO BRIEF LENGTH.....iv

STATEMENT OF THE CASE.....1

STATEMENT OF THE FACTS.....2

ARGUMENT

 I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT ZUNI SATISFIED THE *HINZ* TEST AND VACATING THE DEFAULT JUDGMENT. THE FACTS AND ALLEGATIONS CONTAINED IN THE RECORD SUPPORT THIS FINDING, AND THE DISTRICT COURT’S ORDER SHOULD BE AFFIRMED.
 7

 II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING INTO EVIDENCE THE AFFIDAVITS OF KEVIN DUNLEVY AND KIRSTEN BRAITHWAITE. DESPITE APPELLANT’S PROTESTS, THE DOCUMENTS WERE SERVED TIMELY AND CONTAINED ADMISSIBLE MATERIAL. HOWEVER, THE ISSUE IS LIKELY MOOT.
 15

CONCLUSION.....19

TABLE OF AUTHORITIES

| | |
|--|---------------|
| Minn. R. Civ. P. 6.05..... | 17 |
| Minn. R. Civ. P. 60.02..... | 9, 11, 12 |
| Minn. R. Gen. P. 115.04..... | 17 |
| Minn. R. Gen. Prac..... | 17 |
| Minn. Stat. § 515B.3-116..... | 4 |
| Minn. Stat. § 582.032..... | passim |
| Minn. Stat. § 645.16..... | 18 |
| Minn. Stat. § 645.17(1)..... | 12 |
| Minn. Stat. § 649.16..... | 12 |
| <i>Drewitz v. Motorwerks, Inc</i> , 728 N.W.2d 231, 233 n. 2 (Minn. 2007)..... | 19 |
| <i>Fletcher v. St. Paul Pioneer Press</i> , 589 N.W.2d 96, 101 (Minn. 1999)..... | 9 |
| <i>Hinz v. Northland Milk & Ice Cream Co.</i> , 237 Minn. 28, 30, 53 N.W.2d 454,456 (1952)..... | 9, 12, 14, 15 |
| <i>Imperial Premium Finance</i> , 603 N.W.2d 853, 857 (Minn.App. 2000) (<i>citation omitted</i>)..... | 9 |
| <i>In re State Farm Mut Auto Ins. Co.</i> , 392 N.W.2d 558, 569 (Minn. App. 1986)..... | 18 |
| <i>Kroning v. State Farm Auto Ins Co</i> , 567 N.W.2d 42, 46 (Minn. 1997)..... | 17 |
| <i>Northland Temporaries, Inc. v. Turpin</i> , 744 N.W.2d 398, 402 (Minn App. 2008)..... | 9 |
| <i>Plunkett v Lampert</i> , 231 Minn. 484, 492, 43 N.W.2d 489, 494 (1950)..... | 17 |
| <i>Riley on behalf of Swanson v Herbes</i> , 524 N.W.2d 523, 526 (Minn.App. 1994) (<i>citation omitted</i>)..... | 15 |
| <i>Roehrdanz v. Brill</i> , 682 N.W.2d 626, 631-32 (Minn. 2004)..... | 9 |
| <i>Safeco Ins Co. of Am. v. Dain Bosworth, Inc</i> , 531 N.W.2d 867, 873 (Minn.App.1995), <i>review denied</i> (Minn. July 20, 1995)..... | 9 |
| <i>State v. Amos</i> , 658 N.W.2d 201, 203 (Minn. 2003) (<i>citation omitted</i>)..... | 16 |
| <i>Sward v Nash</i> , 230 Minn. 100, 109, 40 N.W.2d 828, 833 (1950)..... | 17 |

Turek v. A.S.P. of Moorhead, Inc., 618 N.W.2d 609, 611 (Minn.App. 2001) (*citation omitted*)..... 12

CERTIFICATION AS TO BRIEF LENGTH

I, Robert Q. Williams, hereby certify that this Brief, served on May 29, 2009, conforms to the requirements of Minn. R. Civ. App. P. 132.01, subd. 3(a)(1). This brief was typeset with Times New Roman font at 13 point type. Including footnotes, this Brief contains 4,856 words and 423 lines of text. This Brief was drafted using Microsoft Word 2007.

Dated: May 29, 2009.

WILFORD & GESKE, P.A.



Robert Q. Williams, #0388794

STATEMENT OF THE CASE

This action was commenced by Appellant Palladium Holdings, LLC (“Appellant”) pursuant to Minn. Stat. § 582.032 on or about August 25, 2008 seeking to reduce the six-month statutory redemption period from a foreclosure by advertisement to five weeks for property legally described to wit:

Unit No. 304, CIC No. 0826, Lowry Ridge Townhomes,
Hennepin County, Minnesota.

(“Property”).¹ A Summons, Amended Summons and Complaint in the matter filed as Hennepin County District Court no. 27-CV-08-20949 were allegedly served by certified mail upon Respondent Zuni Mortgage Loan Trust 2006-OA1 (“Zuni”) at a corporate address in Plano, Texas on September 1 and September 9, 2008, respectively. The Property was allegedly posted with the same respective pleadings on September 1 and September 9, 2008 by agents of Appellant. Zuni did not receive any of these documents, and was unaware that a hearing on the matter was scheduled for September 25, 2008. Accordingly, Zuni did not appear at the September 25th hearing and a default judgment was entered in favor of Appellant.

Subsequently, Appellant brought an action to quiet title to the Property, filed as Hennepin County District Court no. 27-CV-08-27795, assumedly to ascertain ownership as between Appellant and Zuni.

¹ Appellant’s brief contains a typographical error in the legal description of the Property, designating the townhome association as “Lowry Ridge Townhomes” rather than Lowry Ridge Townhomes. (*Underlining added*) The Panel should take care to cite the correct legal description, to the extent that it is included in the court’s Opinion

It was not until early December, 2008 that Zuni learned of these proceedings. Zuni's legal counsel, Wilford & Geske, P.A., was notified by a third party that a five week action had taken place and that an action to quiet title to the Property was pending. (Transcript, page 11). Wilford & Geske immediately contacted Zuni and the parties investigated the matter to find out why Zuni had no knowledge of the prior proceedings and interposed responsive pleadings and drafted motions to protect and restore Zuni's rights in the Property. (*Id*).

On February 17, 2009, Zuni brought their motions to reopen and vacate the September 25, 2009 Order reducing redemption, and to companion the reopened five-week action with the quiet title action for more speedy and consistent adjudication.

On March 3, 2009, the Honorable Tony N. Leung, Judge of the Hennepin County District Court, granted Zuni's two motions. Zuni then redeemed the Property under the restored six month redemption period and remains fee owner of the Property subject to the instant appeal.

STATEMENT OF THE FACTS

In September, 2007, Mortgage Electronic Registration Systems, Inc. ("MERS") initiated foreclosure by advertisement proceedings on the Property, culminating in a Sheriff's sale held October 25, 2007. MERS was the high bidder at the Sheriff's Sale, and purchased the Property for \$485,369.53, receiving a Sheriff's Certificate subject to a six month redemption period. The Sheriff's Certificate was recorded in the Office of the Hennepin County Recorder as document no. 9058393. The redemption period expired on

April 25, 2008 with no redemption being made by the previous mortgagor or any third party. As a result, MERS became the fee owner of the Property on that date.

Two months later, on June 23, 2008, MERS filed for record with the Office of the Hennepin County Recorder a Limited Warranty Deed dated November 2, 2007, granting the Property to Zuni (“**Deed**”). The Deed was recorded in the Office of the Hennepin County Recorder as document no. 9150515. The Deed contained the address to which Tax Statements should be sent, reading as follows:

Zuni Mortgage Loan Trust 2006-OA1
c/o Countrywide Home Loans, Inc
7105 Corporate Drive
PTX-C-35
Plano, TX 75024
Document ID#: 00056614060MN35

Attempts to contact or otherwise correspond with Zuni were to be made to this precise address.

As the legal description suggests, the Property is part of the Lowry Ridge Townhomes Association (“**Association**”), an entity formed to manage and maintain the common interest community on behalf of the collective property owners. To this end, the Association is entitled to collect association dues and assessment fees from the owners in an amount billed monthly. A fee owner’s failure to timely pay association fees and dues gives rise to a lien against the property under Minn. Stat. § 515B.3-116. The Association may foreclose the lien to collect its debts.

On July 11, 2008, the Association assigned its lien rights in the Property to Appellant. Four days later, Appellant commenced a foreclosure by advertisement based

on the newly-acquired lien rights. Despite being the fee owner of the Property for less than a month, Zuni was already in foreclosure.

The Sheriff's sale was conducted on September 4, 2008. Appellant was the sole bidder at the sale and purchased the Property for \$9,767.43. On its face, Appellant's Sheriff's Certificate was subject to Zuni's six-month right of redemption, however Appellant had already taken steps to have that period reduced to five weeks. Apparently under the misapprehension – however unreasonable – that Zuni had abandoned the Property, Appellant had initiated the afore-mentioned action to reduce redemption on August 25, 2008.

While Appellant was busy trying to acquire the Property, Zuni did what anyone wanting to sell property would do: it hired a Realtor. On June 6, 2008, Jim Angle, a real estate broker with the Minnesota-based Realty House, was retained by Listing Agreement to inspect, monitor, and market the Property on behalf of Zuni. (Affidavit of Jim Angle, attached to Appellant's Brief as Appendix A-15 at ¶ 2). Mr. Angle immediately posted an online MLS Listing of the Property and secured the Property with a lockbox that allowed only Mr. Angle and his agents to access the Property. (A-16 at ¶¶ 5, 7). From the period of June 6, 2008 to October 10, 2008 ("**Marketing Period**"), Mr. Angle and his agents had exclusive control of the Property, and were actively marketing the Property on the MLS and with a large "For Sale" sign posted in the front yard. (A-15-16 at ¶¶ 4, 6). During the Marketing Period, Mr. Angle and his agents kept the Property in clean and marketable condition. (A-16 at ¶ 8). During the Marketing Period, Mr. Angle paid all

electric bills for the Property on behalf of Zuni. (A-16 at ¶ 9). During the Marketing Period, the Property was visited twenty-one (21) times by brokers, agents, and prospective purchasers, all with the consent of listing agent Jim Angle. (A-16-17 at ¶ 10).

The Marketing Period, it's important to reiterate, started weeks before the Appellant foreclosed its association lien, and ended weeks after the September 25th Order was signed reducing Zuni's period of redemption. As discussed in further detail below, all of Appellant's allegations were made and all of Appellant's Affidavits were signed while there was a "For Sale" sign in the front yard, while the Property was actively listed online on the MLS, while electrical bills were being paid, and while prospective buyers were touring the Property with their Realtors and brokers. (A-16-17 at ¶¶ 6,9,10).

The September 25, 2008 hearing to reduce redemption took place before a Deputy Examiner of the Hennepin County of Examiner Titles. Here, Appellant presented two Affidavits alleging the Property was abandoned. Unaware of the proceedings, Zuni did not attend the hearing. Zuni was found to be in Default and the Order was signed by the Deputy Examiner, then taken to the courtroom of the signing judge, the Honorable Patricia Belois, who countersigned the Order. Zuni's redemption period would now end on October 31, 2008.

By the time Zuni learned of the association lien foreclosure and the five-week redemption proceeding, the redemption period had already expired. Zuni worked quickly to file an Answer in Appellant's action to quiet title, and diligently began the process to vacate the Default judgment entered on September 25, 2008. Zuni brought a Rule 60.02

Motion before the Hennepin County District Court arguing that the default judgment should be vacated because 1) Property was not abandoned as a matter of law, 2) Appellant had failed to properly serve Zuni with process, 3) Zuni acted diligently once it learned of what had happened, and 4) Appellant would not be prejudiced if the court vacated its September 25, 2008 Order. Zuni also alleged it was unable to fully and fairly present its case due to fraud by Appellant, that Appellant had purposely misrepresented the Property was abandoned. The matter was set for hearing on March 2, 2009.

Appellant submitted a Memorandum in Opposition to Zuni's Motion to Vacate relying principally upon the same statutory language now cited at length in the Appellant's Brief, to paraphrase: a defendant's failure to appear at the hearing, after proper service, is conclusive evidence of abandonment by the defendant. Minn. Stat. § 582.032, Subd. 7. Appellant argued that service was proper (although Zuni never received it) and that the Property was abandoned (although it was being actively marketed and none of the affirmative allegations provided in § 582.032, Subd. 7 were ever made by Affiants).

In response, Zuni served and filed a Reply Memorandum on February 26, 2009, along with the accompanying Affidavits of Kevin Dunlevy and Kirsten Braithwaite that followed on February 27, 2009. Due to a mis-programmed clock on Zuni's fax machine, these Affidavits appeared to be sent at too late an hour to conform with Minn. R. Civ. P.

6.05 (documents must be sent before 5:00pm or an additional day will be added). Appellant now objects to these Affidavits being received into evidence.²

At the March 2, 2009 hearing, the Honorable Tony N. Leung found for Zuni, stating in his Findings of Fact, Conclusions of Law, and Order:

The persuasiveness of [Appellant's] affidavits alleging abandonment is questionable in light of their failure to specifically allege the conditions outlined in Minn. Stat. § 582.032 subd. 7 and Zuni's evidence of Angle's continued marketing of the Property during the pendency of the five week action before the Examiner of Titles.

(A-104, ¶ 2). Zuni redeemed from the foreclosure sale. The facts remain unchanged from the March 2 hearing, with the exception that Appellant posted a supersedeas bond to allow a personal friend of Appellant's counsel to live rent-free in the Property during the pendency of this appeal.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT ZUNI SATISFIED THE HINZ TEST AND VACATING THE DEFAULT JUDGMENT. THE FACTS AND ALLEGATIONS CONTAINED IN THE RECORD SUPPORT THIS FINDING, AND THE DISTRICT COURT'S ORDER SHOULD BE AFFIRMED.

A) Standard of Review

“The decision to vacate a judgment is within the district court's discretion and that decision will not be reversed on appeal absent a clear abuse of discretion.” *Safeco Ins Co of Am v. Dain Bosworth, Inc* , 531 N.W.2d 867, 873 (Minn.App.1995), *review*

² The trial court did not incorporate any facts or opinions from these documents into its Findings of Fact,

denied (Minn. July 20, 1995). The Court of Appeals defers to the factual findings of the district court unless they are clearly erroneous. *Fletcher v. St Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999). Of significant importance in this matter: the district court's discretion when opening a default judgment is particularly broad when the court's decision, as here, is based upon an evaluation of conflicting affidavits. *Roehrdanz v. Brill*, 682 N.W.2d 626, 631-32 (Minn. 2004).

B) The *Hinz* Test

Default judgments are to be liberally reopened to promote resolution of cases on the merits. *Imperial Premium Finance*, 603 N.W.2d 853, 857 (Minn.App. 2000) (*citation omitted*). A party seeking to vacate a default judgment under Rule 60.02 must demonstrate the following: 1) a reasonable defense on the merits; 2) a reasonable excuse for the failure to act; 3) that it acted with due diligence after notice of the entry of judgment, and 4) that there would be no substantial prejudice to the opposing party if the motion to vacate is granted. *Hinz v. Northland Milk & Ice Cream Co*, 237 Minn. 28, 30, 53 N.W.2d 454,456 (1952); *Northland Temporaries, Inc. v. Turpin*, 744 N.W.2d 398, 402 (Minn.App. 2008).

The following analysis of the *Hinz* factors is supported by the record and therefore not clearly erroneous. The district court did not abuse its discretion by relying upon these facts to find for Zuni and vacate the default judgment.

Conclusions of Law and Order, nor did it rely upon either document in finding for Zuni

i) Zuni's reasonable defense on the merits.

Based on Zuni's continuous and exclusive control and possession of the Property during the Marketing Period (a period that encompassed the pendency of the five-week action), the Property was clearly not abandoned and was not eligible for a reduced redemption period under Minn. Stat. §582.032. The Affidavit of Jim Angle set forth a detailed chronology of the period from Mr. Angle's acceptance of a Listing Agreement on June 6, 2008 through the subsequent marketing of the Property, to Zuni's eventual decision on October 10, 2008 to send the Property to auction.

In its Findings of Fact, Conclusions of Law, and Order, the district court made specific findings that Jim Angle was actively marketing the Property at the time the five week action took place. The court found that during the Marketing Period, Angle maintained an active MLS listing for the Property, secured the Property by installation of a lockbox, posted a large for sale sign in the yard that read: "The Realty House: 952-831-3201," inspected the property on a semi-weekly basis, paid the electric bills on behalf of Zuni, and made the Property accessible to twenty-one prospective buyers and their agents. (Findings of Fact, Conclusions of Law, and Order at page 2 (A-102)). Taken together, these Findings contradict Appellant's assertions that the Property was abandoned.³

Additionally, the district court found that "Neither Plaintiff nor Plaintiff's agents contacted Zuni or Angle regarding the status of the Property or requesting access to the

³ In its Brief, Appellant frequently conflates "vacancy" with "abandonment" and uses the two terms interchangeably. Under the statute, the vacancy of the Property is of absolutely no legal significance; Minn. Stat. 582.032 only contemplates abandonment.

Property.” (Findings of Fact, Conclusions of Law, and Order at page 3 (A-103)) This Finding calls into question the veracity of the Affidavits of Joe Yurecko and Troy Van Beek, which alleged in varying terms that “no party has requested entrance to the premises from me.”⁴ In light of the court’s Finding that Angle had secured the Property with a lockbox and had clearly listed his contact information in the front yard, neither Yurecko nor Van Beek were entitled to go upon the Property without Angle’s permission (nor was either Affiant entitled to grant entrance to others). The allegations were merely smoke screens to create the illusion that Appellant controlled the Property, when it neither had access to the lockbox nor any other legal means for entrance.

Appellant’s arguments frequently return to the language in the statute that provides, “A defendant’s failure to appear at the hearing after service of process in compliance with subdivision 6 is conclusive evidence of abandonment by the defendant ” Minn. Stat. §582.032 subd. 7. Appellant fails to add, however, that the statute is silent on whether such “conclusive evidence” can be contested by a defendant, such as Zuni, in a Rule 60.02 Motion or other post-judgment proceedings. The goal of statutory construction is to ascertain and effectuate the intention of the legislature. Minn. Stat. §

⁴ In its Brief, Appellant cites the controlling statute at length, apparently reasoning that because Minn. Stat. §582 032, subd. 7 provides that a defendant’s failure to appear at the hearing is conclusive evidence of abandonment, Appellant was entitled to bring its action to reduce redemption on threadbare facts and conclusory allegations, and then just hope that Zuni would not appear at the hearing

This position is simply untenable. The purpose of Subdivision 7 is for the affiant to allege facts that lead to the *conclusion* that property is abandoned, not to simply state as such. To that end, the statute provides a litany of possible indications of abandonment for parties to allege such as broken windows, accumulated rubbish, reports of vandalism or illegal acts, etc. Minn. Stat. 582 032 subd. 7. On the contrary, the statute clearly does *not* provide an affiant the opportunity to simply allege that the premises are abandoned. Again, mere vacancy is not enough. Abandonment is a legal conclusion, not a fact that proves itself by its mere utterance.

649.16. However, the legislature does not intend a result that is absurd or unreasonable. Minn. Stat. § 645.17(1). Where, as here, the Appellant failed to provide prima facie evidence of abandonment and where the Appellant was unable to establish as a matter of law that Zuni was properly served with process, it would be absurd to presume the legislature intended to deny Zuni and other similarly situated defendants any avenue of legal redress. Appellant's assertions as to legislative intent are unreasonable and wholly without merit.

The district court's Findings are supported by the record, and are therefore not clearly erroneous. It was not an abuse of the court's discretion to rely upon these Findings in establishing that Zuni had a reasonable defense on the merits in arguing the Property was not abandoned.

ii) Zuni's reasonable excuse for failure to answer.

Under *Hinz*, the party seeking to vacate the default judgment must have a reasonable excuse for its failure to act. 237 Minn. at 30, 53 N.W.2d at 456. A judgment entered without due service of process must be vacated under Minn. R.Civ.P. 60.02. *Turek v. A.S.P. of Moorhead, Inc.*, 618 N.W.2d 609, 611 (Minn.App. 2001) (*citation omitted*). Zuni's failure to appear at the hearing on September 25, 2008 is reasonable in that it was not provided with proper notice of Appellant's intention to reduce the redemption period.

The district court found that it was unclear whether Zuni was provided with sufficient notice of the September 25th hearing because although the pleadings were

allegedly sent via certified mail, the address was incomplete. (Findings of Fact, Conclusions of Law, and Order at 5 (A-105)). This finding is clearly supported by the record.

Minn. Stat. §582.032(6) requires service on the Defendant and posting of the Summons and Complaint on the subject real property. If the Defendant cannot be found in the county, certified mail service at its last known address is proper. *Id* The last known address for Zuni can be found on the Limited Warranty Deed filed with the Hennepin County Recorder on June 23, 2008 as Document No. 9150515. As noted above, this document states that tax statements should be forwarded to:

Zuni Mortgage Loan Trust 2006 OA1
c/o Countrywide Home Loans, Inc
7105 Corporate Drive
PTX-C-35
Plano, TX 75024
Document ID#: 00056614060MN35

Whether through inadvertence or mistake, Appellant never served its pleadings (Summons, Amended Summons and Complaint) to the above address, instead transposing or redacting portions prior to sending. Appellant asserts proper service was made to this address:

Countrywide Home Loans, Inc. ptxc35
7105 Corporate Drive
Plano, TX 75024

(A-51). Whether the transposed and redacted addresses were careless mistakes or shrewd calculations to forestall or prevent proper notice, Zuni did not become timely aware of the proceedings. Additionally, although Appellant allegedly sent its pleadings by certified

mail, no return receipts or certified tracking numbers were supplied to definitively prove that the documents ever entered the Postal System.

The record establishes inconsistencies and inaccuracies in the addresses to which Appellant allegedly mailed its pleadings. These Findings were not clearly erroneous and the district court did not abuse its discretion in relying upon them to conclude that Zuni had a reasonable excuse in failing to respond to Appellant's original action.

iii) Zuni acted diligently after notice of entry of judgment.

The third *Hinz* factor that the party seeking to vacate the default judgment must prove is that it acted with due diligence after notice of the entry of judgment. 237 Minn. at 30, 53 N.W.2d at 456. Here, Zuni did not become aware of entry of the September 25, 2008 Order until December 3, 2008 when its counsel, Wilford & Geske, P.A., received word from a third party. By this time, Zuni's shortened redemption period had expired and Appellant had filed an action to quiet title to the Property. Zuni acted quickly to interpose an Answer in the quiet title matter and to draft and serve pleadings to protect and restore its rights in the Property. (Transcript at 11-12). Accordingly, the district court found that Zuni "acted diligently to address both issues." (Findings of Fact, Conclusions of Law, and Order at 5 (A-105)). This finding is supported by the record so is not clearly erroneous; the district court did not abuse its discretion in relying on it to find Zuni established the third factor in the *Hinz* test.

iv) The Appellant was not prejudiced by the Court vacating the Order.

For the fourth and final *Hinz* factor, Zuni had to prove that there would be no substantial prejudice to the Appellant if the motion to vacate was granted. 237 Minn. at 30. Although the party moving for relief from judgment must show that no substantial prejudice will result to its opponent, some prejudice is inherent any time a judgment is opened. *See Riley on behalf of Swanson v. Herbes*, 524 N.W.2d 523, 526 (Minn.App. 1994) (*citation omitted*). In this situation however, this inherent prejudice was greatly limited for two reasons. First, Appellant had filed the action to quiet title to the Property in Hennepin County District Court. Pursuant to that action, Appellant was presumably prepared to argue the very same facts and defenses that came up at the March 2nd hearing on Zuni's Rule 60.02 motion. Zuni timely interposed an Answer to the quiet title action, and asserted in that pleading the same facts and defenses it brought in the Rule 60.02 Motion. As a practical matter, where the Appellant was set to argue these same points in furtherance of its own action to quiet title, Appellant was not substantially prejudiced by making the same arguments in a Rule 60.02 context.

Additionally, the district court found that Appellant would not suffer prejudice if the five week Order was vacated. The court reasoned that if Zuni was allowed to redeem the Property from Appellant's foreclosure sale, Appellant would receive all amounts to which it was entitled under Minnesota law. (Findings of Fact, Conclusions of Law, and Order at 5 (A-105)). In fact, Zuni did redeem from Appellant's sale the next day by paying the amount of \$13,998.66 to the Hennepin County Sheriff, as recorded in

document no. 9328471 at the Office of the Hennepin County Recorder. This amount was then paid by the Sheriff to Appellant. Because Appellant received the relief it was entitled to under the law, Appellant was not prejudiced. The court's Findings are supported by evidence in the record, so are therefore not clearly erroneous. The court did not abuse its discretion in holding that the Appellant would not be prejudiced if the order was vacated.

Plainly, Zuni satisfied the *Hinz* test by proving it had a reasonable defense on the merits, had a reasonable excuse for its failure to answer, acted with diligence upon learning of the Order, and that Appellant was not substantially prejudiced in defending Zuni's motion. The court's Findings on each of these points was clearly supported by the record, so were not clearly erroneous. It was not an abuse of discretion for the district court to find in favor of Zuni and vacate the five-week Order. This court should affirm.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING INTO EVIDENCE THE AFFIDAVITS OF KEVIN DUNLEVY AND KIRSTEN BRAITHWAITE. DESPITE APPELLANT'S PROTESTS, THE DOCUMENTS WERE SERVED TIMELY AND CONTAINED ADMISSIBLE MATERIAL. HOWEVER, THE ISSUE IS LIKELY MOOT.

A. Standard of Review

Evidentiary rulings rest "within the sound discretion of trial court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the trial court abused its discretion and that appellant was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (*citation omitted*). In the absence of some indication that the trial court exercised its discretion arbitrarily,

capriciously, or contrary to legal usage, the appellate court is bound by the result. *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 46 (Minn. 1997) citing *Plunkett v. Lampert*, 231 Minn. 484, 492, 43 N.W.2d 489, 494 (1950).

B. Timing of Service

Minn. R. Civ. P. 6.05 provides that any document served by facsimile after 5:00pm will be considered to be received on the following day. Appellant argues that Zuni served the Affidavit of Kevin Dunlevy and the Affidavit of Kirsten Braithwaite after 6:00pm on Friday, February 27, 2009, the last possible day to serve such pleadings prior to the hearing. See Minn. R. Gen. Prac. 115.03, 115.04. Appellant contends this amounts to trial by ambush. (Appellant's Brief at 25). However, surprise is not grounds for a new trial unless "there is a strong probability that a new trial would result differently." *Sward v. Nash*, 230 Minn. 100, 109, 40 N.W.2d 828, 833 (1950). On this record, there is no such probability.

In truth, the documents were transmitted more than an hour earlier than Appellant alleges, but due to a mis-programmed clock on Zuni's counsel's fax machine, the headings of the faxed pages all read at least an hour late. (T-23). Because Zuni's counsel was aware that the Affidavit of Kirsten Braithwaite was en route from California, it sent Appellant's counsel an email at about 1:00pm that afternoon, informing Appellant that the two affidavits would be timely submitted yet that day, and laying out the source and contents of each affidavit. (*Id.*).

The undersigned will not speculate as to when Appellant's counsel left the office, but the record clearly establishes that Appellant was on notice that the Affidavits were inbound, was aware of the contents of those affidavits well before 5:00 pm, and that the Affidavits were timely sent by fax notwithstanding the erroneous time stamp at the top of the pages. (*Id.*)

The district court did not abuse its discretion by admitting the Affidavits of Kevin Dunlevy and Kirsten Braithwaite over Appellant's objections as to timeliness.

C. The Affidavit of Kevin Dunlevy

Kevin Dunlevy wrote the 2008 amendment of Minn. Stat. § 582.032 and testified before the House Civil Law Committee and the Senate Judiciary Committee regarding the amendments to that statute. While Appellant correctly points out that the testimony of an individual legislator or author of a bill is inadmissible regarding legislative intent, such testimony is relevant and admissible to establish the occasion and necessity for the law, the circumstances under which the law was enacted, the mischief to be remedied by the law, the object to be attained by the law, the contemporaneous legislative history, and other such factors that will help the court to ascertain the legislative intent. Minn. Stat. § 645.16; *In re State Farm Mut. Auto. Ins. Co.*, 392 N.W.2d 558, 569 (Minn. App. 1986).

Zuni sought to admit the Affidavit of Kevin Dunlevy merely to inform the court of the factors at play when the 2008 amendment to § 582.032 was considered, not to tell the court what the legislature intended. Appellant's objection confuses this distinction, as the Affidavit of Kevin Dunlevy offered competent and admissible testimony for the purposes

which it was offered, not the purpose Appellant foists upon it in an effort to be argumentative.

D. Mootness

Appellant argues at length that the Affidavit of Kevin Dunlevy is inadmissible and should have been stricken. Regardless of the admissibility of either the Affidavit of Kirsten Braithwaite or the Affidavit of Kevin Dunlevy, one thing remains plain: the district court did not rely on either document in ultimately finding for Zuni.

Motions to strike will be denied as moot when the court came to its conclusion without relying upon that material. *Drewitz v. Motorwerks, Inc* , 728 N.W.2d 231, 233 n. 2 (Minn. 2007). Nowhere in the Findings of Fact, Conclusions of Law, and Order is either Affidavit referenced by name. Nowhere are the allegations in either affidavit incorporated into the court's Findings. Nowhere in the hearing transcript does Zuni advance legal arguments or defenses based on either of those Affidavits, except as to their admissibility.

This court need not consider Appellant's arguments as to the admissibility of these documents, as the district court clearly did not rely on either Affidavit in making its ultimate decision.

CONCLUSION

In the instant matter, the district court's findings of fact are supported by the record and are therefore not clearly erroneous. It was not an abuse of discretion for the court to rely on these facts when holding that Zuni satisfied the four factors of the *Hinz*

test and was entitled to vacation of the Order reducing its six-month redemption period to five weeks. Based on the foregoing, Zuni respectfully requests this court **AFFIRM** the Order of the district court.

Respectfully submitted,

WILFORD & GESKE, P A.

Dated: May 28, 2009

By: 

Lawrence A. Wilford, # 117109
Christina M. Weber, # 034963X
Robert Q. Williams, # 0388794
8425 Seasons Parkway, Suite 105
Woodbury, MN 55125
(651) 209-3300