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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1758**

The Riverbank,
Respondent,

vs.

SAS Rental Properties, LLC, et al.,
Defendants,

Strand Closing Services, Inc.,
Appellant.

**Filed April 19, 2011
Affirmed
Klaphake, Judge**

Washington County District Court
File No. 82-CV-09-7534

Peter Bellanti Tiede, Kelly S. Hadac, Anna C. Mickelson, Murnane Brandt, St. Paul,
Minnesota (for respondent)

John P. Brendel, Julia A. Lines, Brendel and Zinn, Ltd., Lake Elmo, Minnesota (for
appellant)

Considered and decided by Schellhas, Presiding Judge; Klaphake, Judge; and
Shumaker, Judge.

UNPUBLISHED OPINION

KLAPHAKE, Judge

Appellant Strand Closing Services, Inc. challenges the district court's grant of
summary judgment in favor of respondent The Riverbank, and the court's subsequent

denial of appellant's motion to reopen the judgment under Minn. R. Civ. P. 60.02. Respondent, a bank, sued appellant, a mortgage closing company, after appellant received \$600,000 under the terms of a mortgage loan agreement but failed to remit \$507,494.29 to Patriot Bank to satisfy a first mortgage on certain Forest Lake property, and failed to record the second mortgage on the property, although required to do so. Respondent initially sought recovery in tort and contract from S.A.S. Rental Properties, LLC (SAS), the owner of the subject property, and Cynthia and Steven Strand, who held interests in both SAS and appellant, and who had personally guaranteed the loan. As to appellant, respondent moved for summary judgment only on its negligence claim. We affirm the grant of summary judgment to respondent and the district court's denial of appellant's motion to reopen the judgment because respondent satisfied its initial burden to establish a negligence claim against appellant, and appellant offered no contrary evidence that would create a material fact issue for trial or that would support reopening the judgment.

D E C I S I O N

Summary Judgment

The district court shall grant summary judgment if, based on the entire record, there are no genuine issues of material fact and either party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. This court conducts de novo review of the district court's summary judgment to determine whether there are any genuine issues of material fact and whether the district court erred in applying the law. *Riverview Muir Doran, LLC v. JADC Dev. Group, LLC*, 790 N.W.2d 167, 171 (Minn. 2010). "The district court's

function on a motion for summary judgment is not to decide issues of fact, but solely to determine whether genuine factual issues exist.” *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997). But a nonmoving party “must do more than rest on mere averments,” and

there is no genuine issue of material fact for trial when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party’s case to permit reasonable persons to draw different conclusions.

Id. at 71.

“The basic elements necessary to maintain a claim for negligence are (1) duty; (2) breach of that duty; (3) that the breach of duty be the proximate cause of plaintiff’s injury; and (4) that plaintiff did in fact suffer injury.” *Schmanski v. Church of St. Casimir of Wells*, 243 Minn. 289, 292, 67 N.W.2d 644, 646 (1954). The existence of a legal duty is a question of law for the district court to decide. *Larson v. Larson*, 373 N.W.2d 287, 289 (Minn. 1985). It is undisputed that appellant owed respondent a duty to disburse \$507,494.29 to Patriot Bank, and to obtain and record a signed second mortgage from SAS. Respondent offered facts establishing that although appellant received \$600,000, it failed to make the required disbursement to Patriot Bank and did not obtain or record a signed second mortgage. These actions were the proximate cause of respondent’s injury for this amount.

Appellant claims that the facts are insufficiently developed to prove whether it breached its duty to respondent and that the district court weighed the evidence in considering Cynthia Strand’s conduct with regard to the \$600,000 in funds received from

respondent. Appellant claims that a jury must determine whether Cynthia Strand acted as an agent for appellant in retaining the funds designated for Patriot Bank, and that without her testimony, this factual “determination” should not have been made by the court.

Appellant appears to confuse any duty owed by Cynthia Strand to respondent with the legal duty of appellant as an entity. Aware of the fact that Cynthia Strand’s role in the failure to disburse the loan funds to Patriot Bank could be undiscoverable at this time due to her pending criminal investigation and personal bankruptcy proceedings, respondent moved for summary judgment only as to appellant and as to Steven Strand. Cynthia Strand’s conduct in this matter does not obviate appellant’s duty to respondent, although it may be an independent basis for Cynthia Strand’s liability. Thus, appellant’s claim that respondent could not assert a negligence claim against appellant “without the input of Ms. Strand” is incorrect. We conclude that the district court properly granted summary judgment to respondent on its negligence claim against appellant.

Appellant also argues that it had no opportunity to defend against this action because its attorney, John Brendel, began to represent appellant only the day before the summary judgment hearing. The district court was not persuaded by this argument because appellant’s two prior attorneys had at least four months during which to prepare a defense and approximately two months to respond to respondent’s summary judgment motion. By failing to respond to the summary judgment motion on the merits, appellant did not offer any facts that would demonstrate a material fact for trial. Under these circumstances, we cannot conclude that the district court erred by granting summary judgment to respondent.

Motion to Reopen Judgment

Appellant also claims that the district court erred by denying its motion for relief from the judgment under Minn. R. Civ. P. 60.02. The rule states that among other reasons for granting a party relief from a judgment, the court may do so for:

(a) Mistake, inadvertence, surprise, or excusable neglect;

. . . . or

(f) Any other reason justifying relief from the operation of the judgment.

The moving party bears the burden of proving (1) a reasonable likelihood of success on the merits, (2) a reasonable excuse for failing to act, (3) the exercise of due diligence after notice of entry of judgment, and (4) lack of substantial prejudice to the opposing party. *Finden v. Klaas*, 268 Minn. 268, 271, 128 N.W.2d 748, 750 (1964). Although all four *Finden* factors must be established, a strong showing on one factor may offset a weaker showing on another factor. *Reid v. Strodtman*, 631 N.W.2d 414, 419 (Minn. App. 2001). A district court's decision to deny a rule 60.02 motion is subject to an abuse of discretion standard of review. *Carter v. Anderson*, 554 N.W.2d 110, 115 (Minn. App. 1996), *review denied* (Minn. Dec. 23, 1996); *see also Nguyen v. State Farm Mut. Auto. Ins. Co.*, 558 N.W.2d 487, 490-91 (Minn. 1997) (stating that rule 60.02 movant must demonstrate reasonable excuse for failure to act).

Although the rule 60 motion was made within a month of the summary judgment decision, thus satisfying the due diligence *Finden* factor, appellant has failed to offer any facts supporting the other three *Finden* factors. Appellant has not shown a reasonable

likelihood of success on the merits because it has offered no facts in defense of respondent's claim that appellant was negligent in carrying out its closing duties by failing to remit \$507,494.29 to Patriot Bank and by failing to record the second mortgage. As noted by respondent, the district court specifically stated at the time of granting summary judgment that it would allow appellant to reopen the judgment if appellant came forward with a legal basis to do so, which it has not. Despite enduring two changes of attorney, appellant should have been able to offer some evidence to defend against respondent's claim of negligence since the case was initiated in November 2009.¹ Thus, appellant has also failed to show a reasonable excuse for failing to act.

Finally, appellant has not shown that respondent would not be prejudiced by granting appellant relief from the judgment. As noted by the district court, time was of the essence in this case because of priority issues involving others seeking funds from appellant via its insurance, and respondent has no recourse on the mortgage because it was not recorded. Because the *Finden* factors do not support a grant of relief under rule 60.02, the district court did not abuse its discretion by denying the motion.

Affirmed.

¹ The district court rejected appellant's argument that it could not give a meaningful response to respondent's claims until a criminal matter involving Cynthia Strand was resolved. The district court stated that "[t]he Fifth Amendment protects only a natural individual and not a corporation, even when the corporation is merely the alter ego of the owner." *Kohn v. State*, 336 N.W.2d 292, 298 (Minn. 1983); see also *Bellis v. United States*, 417 U.S. 85, 88, 94 S. Ct. 2179, 2183 (1974).