**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A07-1377**

Joseph J. Palumbo,
Respondent,

vs.

Nicholas Gary Anderson,
Appellant,

Joshua Foster,
Defendant.

**Filed June 3, 2008**
**Affirmed**
**Worke, Judge**

Anoka County District Court
File No. 02-C1-05-009289

Donald G. Clapp, Clapp & Erickson, 386 North Wabasha Street, Suite 1450, St. Paul, MN 55102 (for respondent)

Deborah A. Macaulay, 649 Grand Avenue, Suite 2, St. Paul, MN 55105; and

Deborah K. Ellis, 700 St. Paul Building, 6 West fifth Street, Suite, St. Paul, MN 55102 (for appellant)

Considered and decided by Lansing, Presiding Judge; Stoneburner, Judge; and Worke, Judge.

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

**WORKE,** Judge

Appellant challenges the district court's denial of his motion to vacate a default judgment based on excusable neglect, arguing that the district court erred by finding that (1) his difficult circumstances and depression did not constitute a reasonable excuse for his failure to respond to the complaint, and (2) his defense on the merits was not sufficiently compelling to support vacation of the judgment. We affirm.

## D E C I S I O N

A district court may vacate a final judgment for reasons of "[m]istake, inadvertence, surprise, or excusable neglect[.]" Minn. R. Civ. P. 60.02(a). "In the exercise of [] sound judicial discretion . . . it is the duty of the [district] court . . . to grant a motion to open a default judgment" if the moving party shows that he has met each of the requirements of a four-part test. *Hinz v. Northland Milk & Ice Cream Co.*, 237 Minn. 28, 30, 53 N.W.2d 454, 455-56 (1952); *see also Finden v. Klaas*, 268 Minn. 268, 271, 128 N.W.2d 748, 750 (1964) (reaffirming four-part test). The four-part test requires a moving party to show that (1) he has a reasonable defense on the merits; (2) he has a reasonable excuse for the failure or neglect to answer; (3) he acted with due diligence after notice of the entry of judgment; and (4) no substantial prejudice will result to the judgment creditor. *Hinz*, 237 Minn. at 30, 53 N.W.2d at 456. On review, this court determines whether the district court abused its discretion, viewing the record in the light most favorable to the district court's decision. *Bentonize, Inc. v. Green*, 431 N.W.2d 579, 582 (Minn. App. 1988).

On July 9, 2005, appellant Nicholas Gary Anderson was personally served with a summons and complaint. Over the course of 15 months, appellant failed to respond to the complaint. On October 9, 2006, the district court held a hearing; appellant did not appear. On November 2, judgment was entered against appellant and defendant Joshua Foster, jointly and severally. On November 30, appellant moved to vacate the default judgment, arguing that his failure to respond or appear was the result of excusable neglect. Following a hearing, the district court denied appellant's motion, finding that although the timing of appellant's motion was not an issue and respondent Joseph J. Palumbo would not be substantially prejudiced, his excuse for inaction was not excusable neglect because he received "approximately 12 communications over a 15 month period," and his reasonable defense on the merits was not compelling, given "that the default hearing included the presentation of evidence and witness testimony contradicting his defense." Appellant argues that the district court should have reopened the judgment because he has a reasonable excuse for his inaction and a reasonable defense.

***Excusable Neglect***

"Neglect of the party itself which leads to entry of a default judgment is inexcusable, and such neglect is a proper ground for refusing to reopen a judgment." *Howard v. Frondell*, 387 N.W.2d 205, 208 (Minn. App. 1986), *review denied* (Minn. July 31, 1986). Appellant argues that his neglect to answer was excusable because when the complaint was filed he was searching for a new home, he was in the midst of a custody battle, his brother had died from a gunshot wound, his child was diagnosed with Autism, and he was suffering from depression.

The court determined that although, initially, appellant's delay was excusable, after 12 pieces of correspondence over a 15-month period, appellant should have been alerted to the urgency of the matter. After appellant was personally served, on September 13, 2005, the court administrator sent appellant notice that a case number had been assigned. On December 12, 2005, appellant was sent notice that a scheduling order had been filed and that a trial date was set for October 9, 2006. On March 7, 2006, appellant was served with respondent's notice of motion and motion to enlarge the time to serve defendant. On April 6, 2006, appellant was served with an affidavit in support of service on defendant by publication. On July 13, 2006, appellant was sent a copy of an affidavit of personal service of defendant. On September 8, 2006, appellant was served with respondent's statement of the case. On September 21, 2006, appellant was served with notice of taking a physician's deposition. On October 2, 2006, appellant was served with respondent's witness list and exhibit list. The record shows each piece of correspondence was directed to appellant. Appellant contends that none of the correspondence calls for action on his behalf. However, appellant moved to vacate the judgment less than 30 days after receiving notice that the judgment was entered, in stark contrast to his failure to respond to the case when it was pending. Further, appellant was involved in a custody battle; thus, he was aware of how the court system functions and the importance of appearances. Appellant failed to provide a reasonable excuse for his neglect over the course of 15 months.

***Reasonable Defense on the Merits***

In order to obtain relief under rule 60.02, appellant must "establish to the satisfaction of the court that [he] possesses a meritorious claim." *Charson v. Temple Israel*, 419 N.W.2d 488, 491 (Minn. 1988). Specific information that clearly demonstrates the existence of a debatably meritorious defense satisfies this requirement. *Id.* at 492. "[A] meritorious claim must ordinarily be demonstrated by more than conclusory allegations in moving papers." *Id.* at 491.

Appellant argues that he has a reasonable defense on the merits. The underlying complaint involved an assault on respondent by defendant. Respondent had been at his home when appellant arrived, looking for his girlfriend. Appellant got into an argument with his girlfriend and left, only to return with defendant. Respondent was falling asleep on his couch when appellant returned. Appellant and his girlfriend began to argue again. Before respondent could interject, defendant jumped on him and began punching him in the head. Respondent suffered significant facial injuries and required surgery. Defendant pleaded guilty to the assault. Appellant was never charged criminally. At defendant's sentencing, his attorney stated that appellant brought defendant to respondent's residence because appellant is a "little guy" and he thought respondent was having some contact with his girlfriend. Defendant explained to the sentencing court that he did not know respondent and that appellant thought that he was going to be beaten up by a houseful of guys.

The district court considered that appellant was not charged criminally, but still found that there was enough evidence from the default hearing to show that his defense

was not compelling. Although appellant did not attack respondent, the evidence shows that defendant would not have been at respondent's residence had it not been for appellant. Appellant made merely conclusory allegations that he has a defense because he did not assault respondent. Appellant also asserts that the district court erred in determining that he was required to make a showing of a *compelling* defense when all he is required to show is a *reasonable* defense. But as caselaw indicates, the showing of a defense on the merits must be established to the "satisfaction of the court." *Charson*, 419 N.W.2d at 491. The district court here was not satisfied with the strength of appellant's defense. The district court did not abuse its discretion in refusing to reopen the judgment.

**Affirmed.**