STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1040

Michael O'Hern, et al.,
Respondents,

vs.

Todd S. Wheeler, and Elaine Johnson a/k/a Elaine Wheeler,
d/b/a Timber Mountain Construction a/k/a Construction Associates
and Construction Associates, LLC,
Appellants.

Filed May 26, 2009
Affirmed
Halbrooks, Judge

Crow Wing County District Court
File No. 18-C3-07-000926

Christopher D. Robinson, Askegaard & Robinson, P.A., 206 North 7th Street, P.O. Box 826, Brainerd, MN 56401 (for respondents)

Thomas C. Pearson, Gammello, Qualley & Pearson, PLLC, 14275 Golf Course Drive, Suite 200, Baxter, MN 56425 (for appellants)

Considered and decided by Lansing, Presiding Judge; Toussaint, Chief Judge; and Halbrooks, Judge.

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

HALBROOKS, Judge

Appellants challenge the district court's denial of their motion to vacate a default judgment on the grounds that the district court erred in analyzing the reasonable-defense-

on-the-merits and reasonable-excuse *Finden* factors and failed to address the possibility of relief under Minn. R. Civ. P. 60.02(f). We affirm.

FACTS

In January 2004, respondents Michael O'Hern and Bambi Z. Cardias-O'Hern entered into a written contract with appellant Todd S. Wheeler whereby the latter agreed to construct a residence for respondents. After a dispute involving costs that exceeded the contract price, respondents terminated Wheeler's contract and filed a complaint with the Department of Labor and Industry (department). In April 2006, the department issued a cease-and-desist order against Wheeler.

A hearing was held before an administrative law judge (ALJ) in August 2006. In October 2006, the ALJ recommended that disciplinary action be taken against Wheeler. On February 5, 2007, the department commissioner imposed a $15,000 civil penalty against Wheeler, to be paid to the state.

Respondents then brought a civil suit against appellants Wheeler and Elaine Johnson, doing business as Timber Mountain Construction. The complaint set forth three counts: breach of contract, breach of statutory warranty, and breach of general warranty. Appellants were served personally with the summons and complaint on March 13, 2007.

On April 23, 2007, after the time to file an answer had expired, appellants' attorney Thomas C. Pearson faxed a letter to respondents' counsel. Pearson, who had represented Wheeler during the administrative proceedings, requested and received a one-week extension to file an answer and counterclaim on appellants' behalf. When no answer was filed, respondents moved the district court for a default judgment. A default

hearing was scheduled for August 27, 2007. That morning, Pearson met with respondents' counsel at the courthouse and told respondents' counsel that he would file an answer within a week. The record indicates that appellants attended this meeting and that respondents' counsel agreed to postpone the default hearing.

No answer was filed within the week following this second extension. On September 20, 2007, respondents filed an amended motion for default judgment. Neither appellants nor Pearson attended the October 1, 2007 default hearing. On October 15, 2007, judgment was entered for respondents in the amount of $147,033.52.

On January 22, 2008, appellants moved to vacate the default judgment. Wheeler filed an affidavit of merit, and Pearson filed an affidavit explaining why an answer had not been filed. On February 1, 2008, appellants filed an answer and counterclaim. The hearing on appellants' motion to vacate took place on February 4, 2008. The district court denied the motion, finding that appellants had failed to establish the reasonable-defense and reasonable-excuse *Finden* factors.

This appeal follows.

D E C I S I O N

I.

A district court may relieve a party from a final judgment or order for "[m]istake, inadvertence, surprise, or excusable neglect," Minn. R. Civ. P. 60.02(a), but "[t]he right to be relieved of a default judgment is not absolute." *Kosloski v. Jones*, 295 Minn. 177, 180, 203 N.W.2d 401, 403 (1973). To qualify for such relief, the moving party has the burden of demonstrating: (1) a reasonable defense on the merits; (2) a reasonable excuse

for its failure or neglect to act; (3) due diligence after notice of entry of judgment; and (4) absence of substantial prejudice to the opponent. *Finden v. Klaas*, 268 Minn. 268, 271, 128 N.W.2d 748, 750 (1964). All four *Finden* factors "must be proven, but a weak showing on one factor may be offset by a strong showing on the others." *Reid v. Strodtman*, 631 N.W.2d 414, 419 (Minn. App. 2001). We will uphold a district court's refusal to vacate a default judgment absent a clear abuse of discretion. *Riemer v. Zahn*, 420 N.W.2d 659, 661 (Minn. App. 1988).

We address each of the *Finden* factors in turn.

A. Reasonable defense on the merits

In its analysis of the reasonable-defense *Finden* factor, the district court stated:

> Of the three counts in the Complaint, Wheeler only addresses the allegations of breach of contract. With respect to this charge, Wheeler states in his Affidavit of Merit that he has evidence and testimony that will show that he was wrongly fired by [respondents] as well as denied access to the property to complete the work.
>
> Regarding the alleged breaches of statutory warranty and general warranty, Wheeler merely states a general denial and claims that he "cannot specify facts [he] would offer to address this claim" because he is unaware what [respondents] specifically claim. With respect to the claim of breach of general warranty, this is countered by the Complaint which specifically claims that Wheeler implicitly or expressly warranted to complete the work in a workmanlike manner within a reasonable amount of time.

(Citations omitted.)

Appellants concede that their answer contains general denials to some of respondents' allegations, but they assert that these general denials cannot be deemed a lack of reasonable defense on the merits. We disagree.

"A reasonable defense on the merits is one that, if established, provides a defense to the plaintiff's claim." *Northland Temps., Inc. v. Turpin*, 744 N.W.2d 398, 403 (Minn. App. 2008), *review denied* (Minn. Apr. 29, 2008). The party seeking to vacate the default judgment must "in good faith, make a showing of facts, which if established will constitute a good defense." *Frontier Lumber & Hardware, Inc. v. Dickey*, 289 Minn. 162, 164, 183 N.W.2d 788, 790 (1971) (quotation omitted); *see also Wiethoff v. Williams*, 413 N.W.2d 533, 536 (Minn. App. 1987) (concluding that appellant failed to show a reasonable defense on the merits when his answer "allege[d] no facts and simply require[d] respondent to prove his case"). Appellants' general denials regarding the two warranty claims are not sufficient to establish a reasonable defense on the merits. Furthermore, Wheeler's conclusory affidavit of merit falls short of the required showing of specific facts that would establish a reasonable defense to the breach-of-contract claim. *See Charson v. Temple Israel*, 419 N.W.2d 488, 492 (Minn. 1988) (stating that reasonable-defense factor is satisfied by specific information that clearly demonstrates the existence of a debatably meritorious defense). We therefore conclude that appellants have not demonstrated a reasonable defense on the merits.

Because the district court's decision is adequately supported by the insufficiency of appellants' answer and Wheeler's affidavit of merit, we do not address the district court's alternative rationale involving res judicata and collateral estoppel.

B. Reasonable excuse

Appellants argue that the district court erroneously analyzed the reasonable-excuse *Finden* factor by attributing the failure to submit an answer to appellants themselves rather than their attorney. The district court found that Pearson filed a notice of representation after the time to answer had expired, requested an additional week to file an answer and counterclaim, and did not file an answer and counterclaim before the first motion for default judgment. The district court also found that Pearson requested and received a second extension from respondents' counsel, and that Pearson again failed to file before the renewed motion for default judgment. The district court stated that forgetfulness does not amount to excusable neglect and cited *Cline v. Hoogland*, 518 F.2d 776, 778 (8th Cir. 1975), for the proposition that "[u]nder the analogous Federal rule for reopening default judgment, ignorance or carelessness of an attorney is generally not cognizable for granting relief from a judgment."

The district court's reliance on *Cline* ignores the long-established Minnesota tradition of declining to penalize litigants for the mistakes of their attorneys, including carelessness and inexcusable neglect. *See, e.g.*, *Nguyen v. State Farm Mut. Auto. Ins. Co.*, 558 N.W.2d 487, 489, 491 (Minn. 1997) (stating that Minnesota caselaw "reflects a strong policy favoring the granting of relief when judgment is entered through no fault of the client" but for "the excusable neglect or mistakes of [the] attorney[]"). But a party that has been personally neglectful will be punished even if the attorney was also neglectful. *See Wiethoff*, 413 N.W.2d at 536.

Although the district court acknowledged that appellants sought to vacate the default judgment based in part on Pearson's neglect, the district court made no finding that appellants were personally inexcusably neglectful, independent of whatever mistakes Pearson made. *See Charson*, 419 N.W.2d at 491 (noting that a client's action is to be "specifically scrutinized . . . apart from his attorney's omissions"); *Nelson v. Siebert*, 411 N.W.2d 229, 231 (Minn. App. 1987), *aff'd*, 428 N.W.2d 394 (Minn. 1988); *Kurak v. Control Data Corp.*, 410 N.W.2d 34, 36 (Minn. App. 1987). And Pearson has stated by affidavit that he alone is to blame for the failure to file a timely answer. We therefore conclude that appellants have made a weak showing of a reasonable excuse. *See Thomas v. Ross*, 412 N.W.2d 358, 360 (Minn. App. 1987) (stating that appellants' argument that they entrusted the case's procedural matters to their attorney is supported by the attorney's affidavit, and accepting the attorney's statements as true in the absence of contrary evidence).

C. Due diligence

The district court found that the due-diligence *Finden* factor weighed in favor of appellants, and respondents do not dispute that appellants have satisfied this factor.

D. Substantial prejudice

Appellants mistakenly assert that the district court found that they had satisfied this factor; while the district court set forth the controlling law regarding this factor, it never came to a conclusion. Because appellants have made no argument to this court regarding the substantial-prejudice factor, they have failed to demonstrate that vacating the default judgment would not substantially prejudice respondents. *See Melina v.*

Chaplin, 327 N.W.2d 19, 20 (Minn. 1982) (stating that issues not briefed on appeal are waived).

Because appellants have failed to prove the reasonable-defense and substantial-prejudice factors and have made only a weak showing as to the reasonable-excuse factor, we conclude that the district court did not abuse its discretion by denying appellants' motion to vacate the default judgment.

II.

Minn. R. Civ. P. 60.02(f) provides that a final judgment may be reopened for "[a]ny other reason justifying relief." Appellants assert that the $147,033.52 judgment against them is not adequately supported by the record and that a remand for a determination of respondents' damages is warranted. But appellants ignore respondents' affidavit of costs and disbursements, wherein respondents' attorney set forth an itemized account of the $147,033.52 respondents sought to recover.[1] The district court awarded damages based on the information it had; this is not an abuse of discretion.

Because we affirm the district court's denial of appellants' motion to vacate the default judgment, we do not reach the issue of respondents' request for a bond in case of remand.

Affirmed.

[1] $132,120.86 in principal, $14,388.50 in interest, and $524.16 in costs and disbursements.