STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0301

Associates Plus, Inc.,
d/b/a RE/MAX associates plus, et al.,
Respondents,

vs.

Steven Levesseur, individually and
d/b/a Steven Levesseur Construction,
Appellant,

Marvick, Inc. d/b/a Chisago County Abstract Company,
Defendant.

Filed April 7, 2009
Affirmed
Johnson, Judge

Anoka County District Court
File No. 02-C5-06-004879

Steven J. Lodge, Nash & Lodge, PLLP, 2705 Bunker Lake Boulevard Northwest, Suite 107, Andover, MN 55304 (for respondents)

Jamie R. Pierce, Hinshaw & Culbertson, LLP, 333 South Seventh Street, Suite 2000, Minneapolis, MN 55402 (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Ross, Judge; and Johnson, Judge.

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

JOHNSON, Judge

The district court entered default judgment against Steven Levesseur because he failed to answer the complaint of Associates Plus, Inc., which sought relief for Levesseur's non-payment of a $16,000 commission on the sale of a home. Levesseur moved to vacate the default judgment, but the district court denied the motion. We affirm.

FACTS

In July 2004, Steven Levesseur, a homebuilder, and Associates Plus, Inc., a real estate brokerage, entered into a listing agreement concerning a home in the city of Cambridge. Levesseur agreed to pay a commission of $16,000. After Associates Plus sold the home, Levesseur paid $8,000 into an escrow account controlled by Chisago County Abstract Company and withheld payment of the remaining $8,000.

In April 2006, Associates Plus commenced this action against Levesseur and Chisago County Abstract Company to recover the $16,000 commission. At some point thereafter, Levesseur filed for bankruptcy, which automatically stayed the action until February 2007, when the bankruptcy court lifted the stay.

In July and August 2007, the district court entered a series of orders for default judgment against Levesseur because he had not served and filed an answer to Associates Plus's complaint. The amount of the judgment was approximately $18,200, which includes approximately $2,200 in costs and disbursements.

In September 2007, Levesseur moved to vacate the default judgment. Before the hearing on the motion, the title company released the $8,000 from its escrow account to Associates Plus. During the hearing, Levesseur's counsel informed the district court that Levesseur was waiving any claim to the $8,000 that had been distributed to Associates Plus, which meant that $10,200 remained at issue. The district court expressed concern that attorney fees likely would exceed the amount in controversy. The district court stated that

> there might be some warrant to open [the case], but you don't get it for free. He can't sit there and ignore his responsibilities as a litigant. . . . He knew personally; he got served with a complaint. . . . [H]e thought he could dodge it and avoid it because of his bankruptcy, and that got screwed up. Okay, fine. Maybe he has a right to open it up. But he can't allow . . . people to take all kinds of action; to pay money to secure results that they believe they're legitimately due, and then ask me to open it up without any cost to him.

The district court then indicated that if it were to vacate the default judgment, it would do so only after Levesseur reimbursed Associates Plus for the attorney fees it incurred in pursuing the default judgment. The district court then suggested that the parties resolve the matter voluntarily. The district court concluded the hearing by instructing counsel to submit a proposed order or orders that would reflect a voluntary resolution of the case or their respective views of the motion to vacate.

The parties did not reach an agreement. In December 2007, each party's attorney sent a letter to the district court with a proposed order. Counsel for Levesseur proposed an order that would vacate the judgment but allow Associates Plus to keep the $8,000 it had received from the title company. Counsel for Associates Plus proposed an order

denying the motion to vacate. Associates Plus's counsel noted in his letter to the district court that Levesseur had reimbursed Associates Plus for the attorney fees and expenses related to the default judgment. On December 17, 2007, the district court issued an order denying Levesseur's motion to vacate. Levesseur appeals.

D E C I S I O N

Levesseur argues that the district court erred by concluding that he had not satisfied the four requirements of a motion to vacate a default judgment. Levesseur also argues that the district court erred by denying his motion to vacate the default judgment after he had relied on the district court's statements at the motion hearing by reimbursing Associates Plus for its attorney fees.

I. Motion to Vacate Default Judgment

A court may grant relief from a final judgment for certain enumerated reasons, including "[m]istake, inadvertence, surprise, or excusable neglect" or "[a]ny other reason justifying relief." Minn. R. Civ. P. 60.02(a), (f). To obtain relief from a default judgment under rule 60.02, a party must demonstrate: (1) a reasonable defense on the merits of the case; (2) a reasonable excuse for failure to act; (3) that the moving party acted with due diligence after the notice of entry of the default judgment; and (4) that the opposing party will not be substantially prejudiced if the motion to vacate the default judgment is granted. *Roehrdanz v. Brill*, 682 N.W.2d 626, 632 (Minn. 2004); *In re Welfare of Children of Coats*, 633 N.W.2d 505, 510 (Minn. 2001). On appeal from a district court's decision to deny relief under rule 60.02, we review to determine whether the district court abused its discretion. *Roehrdanz*, 682 N.W.2d at 631.

A. Reasonable Defense on the Merits

Levesseur first argues that he has a reasonable defense on the merits. A reasonable defense on the merits "'must ordinarily be demonstrated by more than conclusory allegations in moving papers.'" *Coats*, 633 N.W.2d at 511 (quoting *Charson v. Temple Israel*, 419 N.W.2d 488, 491 (Minn. 1988)). The party seeking vacatur must "'in good faith, make a showing of facts, which if established will constitute a good defense.'" *In re Estate of McCue*, 449 N.W.2d 509, 514 (Minn. App. 1990) (quoting *Frontier Lumber & Hardware, Inc. v. Dickey*, 289 Minn. 162, 164, 183 N.W.2d 788, 790 (1971)). The requisite showing must be more than an "unverified statement." *Id.* (quotation omitted).

Levesseur contends that he has a reasonable defense on the merits because Michael Chopp, an agent of Associates Plus, engaged in conduct that Levesseur describes as fraudulent. Levesseur alleges in an affidavit that Chopp "exaggerated costs for the project," which exceeded the expectations of the parties. He also alleges that Chopp asked Levesseur to provide more financing for the project than was initially anticipated and that Chopp double-counted a payment to the buyer in closing documents. Levesseur contends that these actions constitute a breach of Chopp's fiduciary duty to "communicate to the seller all facts of which he has knowledge which might affect the principal's rights or interests." *White v. Boucher*, 322 N.W.2d 560, 564 (Minn. 1982) (quotation omitted). As a consequence, Levesseur contends, a court may conclude that Associates Plus has forfeited its commission. *See id.* at 565.

Levesseur did not submit a copy of the listing agreement to the district court, nor did he submit any evidence concerning the terms of the listing agreement, other than Associates Plus's obligation to sell the property and Levesseur's obligation to pay a commission. It appears that Levesseur and Associates Plus had a business relationship that went beyond the typical residential listing agreement. Levesseur failed to offer evidence of sufficient quantum or detail to allow the district court or this court to understand the factual bases of his defense. As a result, it is unclear why Chopp's alleged conduct was wrongful or how it affected Levesseur. Based on the district court record, we cannot conclude that Chopp's alleged actions, if proven, would constitute a breach of his fiduciary duty and would result in the forfeiture of his commission. Thus, Levesseur has not made "a showing of facts, which if established will constitute a good defense." *McCue*, 449 N.W.2d at 514 (quotation omitted).

B. Reasonable Excuse

Levesseur also argues that he has a reasonable excuse for failing to respond to the complaint. Specifically, he states that he believed that the claim was for only $8,000 (rather than $16,000) and that he believed that his attorney had served and filed an answer.

Levesseur's first excuse is not a reasonable one. Levesseur does not deny knowing that the unpaid commission was $16,000. The prayer for relief in the complaint clearly states that Associates Plus was seeking $8,000 from Levesseur in addition to an order requiring the title company to release $8,000 from its escrow account. In any

event, a belief that a claim is for only a small amount does not constitute a reasonable excuse for failing to respond to a summons and complaint.

As for Levesseur's second asserted excuse, the general rule is that courts may reopen a judgment if there has been neglect that was "purely that of counsel." *Charson*, 419 N.W.2d at 491. To demonstrate this type of reasonable excuse, a party must "expressly allege neglect on [an attorney's] part" and, in addition, submit independent evidence supporting that contention, such as an affidavit from an attorney explaining his or her failure to act. *Howard v. Frondell*, 387 N.W.2d 205, 208 (Minn. App. 1986), *review denied* (Minn. July 31, 1986); *see also Betts v. M.I.L. Realty Corp.*, 269 N.W.2d 42, 45 (Minn. 1978). Unsupported allegations of attorney neglect, however, are insufficient to demonstrate a reasonable excuse for failing to respond to a complaint. *Howard*, 387 N.W.2d at 208.

Levesseur stated in his affidavit that he had been represented by another attorney when the lawsuit was commenced and that he was "unaware that [his] prior attorney did not serve and file an Answer." But Levesseur has provided no independent evidence to support his assertion. Thus, Levesseur's unsupported allegations are insufficient to constitute a reasonable excuse for failing to respond to the complaint. *See Howard*, 387 N.W.2d at 208.

Levesseur has failed to demonstrate either the first or the second requirement for relief under rule 60.02(f). Because a party seeking vacatur of a default judgment must prove "all four factors," *Coats*, 633 N.W.2d at 510, we need not analyze the third or

fourth factor. Thus, we conclude that the district court did not abuse its discretion by denying Levesseur's motion to vacate the default judgment.

II. Payment of Attorney Fees

Levesseur also seeks reversal on the ground that he reimbursed Associates Plus for its attorney fees in reliance on the district court's statements at the motion hearing that reimbursement would be a condition of vacatur. Levesseur argues, "It is an abuse of discretion to tell a party that an Order will be entered on certain terms and then no[t] to enter such an Order after such terms have been met."

It is well-established that a district court may condition vacatur of a default judgment on payment of attorney fees. *Finden v. Klaas*, 268 Minn. 268, 272, 128 N.W.2d 748, 751 (1964); *Roinestad v. McCarthy*, 249 Minn. 396, 406, 82 N.W.2d 697, 703 (1957); *Valley View, Inc. v. Schutte*, 399 N.W.2d 182, 186 (Minn. App. 1987), *review denied* (Minn. Mar. 18, 1987). In this case, however, the district court did not vacate the judgment. During the motion hearing, the district court did not orally grant the motion and did not give any oral assurances that it would issue a written order vacating the default judgment. In response to Levesseur's argument, the district court essentially stated that reimbursement of Associates Plus's attorney fees would be a necessary condition for vacatur of the default judgment, but the district court did not state that reimbursement would be a sufficient condition. At the conclusion of the hearing, the district court reserved ruling on the motion and encouraged the parties to settle the case.

Levesseur has not cited any caselaw supporting his argument that, in these circumstances, the district court erred or that reversal is warranted. We do not interpret

the district court's comments to have clearly required the reimbursement that was paid. In the absence of a district court order requiring reimbursement, Levesseur's payment was voluntary. Nonetheless, the money paid by Levesseur to Associates Plus may, of course, be offset against the judgment.

In sum, the district court did not abuse its discretion by denying Levesseur's motion to vacate the default judgment.

Affirmed.