STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1016

Eischen Cabinet Company,
Respondent,

vs.

Daniel Happe,
Individually,
Dan Happe Construction Inc.,
Respondent,
Copar Finance, Inc.,
Appellant,
North Anoka Plumbing, Inc.,
Respondent,
Christopher Daniel Groe,
Respondent,
Maverick Electric, Inc.,
Respondent,
84 Lumber Co.,
Respondent,
Excel Drywall Incorporated,
Excel Custom Painting Inc.,
Respondent,
Ahern Painting, Inc.,
Respondent.

Filed May 19, 2009
Affirmed
Stauber, Judge

Isanti County District Court
File No. 30CV07593

George L. May, May & O'Brien, L.L.P., Suite 202, 204 Sibley Street, Hastings, MN 55033 (for respondent Eischen Cabinet Company)

Aaron A. Dean, Jesse R. Orman, Fabyanske, Westra, Hart & Thomson, P.A., Suite 1900, 800 LaSalle Avenue, Minneapolis, MN 55402 (for respondent 84 Lumber Company)

Charles E. Keenan, Christoffel & Elliott, P.A., 1111 UBS Plaza, 444 Cedar Street, St. Paul, MN 55101-2129 (for appellant)

Considered and decided by Stauber, Presiding Judge; Minge, Judge; and Larkin, Judge.

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

STAUBER, Judge

On appeal in this lien-priority dispute, appellant CoPar Finance, Inc. (CoPar) argues that the district court abused its discretion in denying CoPar's motions to vacate two default judgments in favor of two separate mechanic's lienholders. We affirm.

FACTS

In April 2006, Dan Happe Construction (DHC), a real estate development and construction company, obtained financing through CoPar for four separate residential construction projects in or around Isanti County. One of the projects was the construction of a single-family residence on a parcel of real property legally described as Lot 12, Block 3, The Preserve at Parkwood, Cambridge, MN. The loans provided by CoPar for the purchase of the real property and construction of the residence were secured by two mortgages on the parcel, both of which were recorded on April 5, 2006. DHC contracted with various subcontractors, including respondents 84 Lumber Company (84 Lumber) and Eischen Cabinet Company (Eischen), to supply the necessary labor and

materials to complete portions of the project. After completing their work, both 84 Lumber and Eischen timely filed mechanic's liens for their improvements to the parcel. According to their respective mechanic's lien statements, 84 Lumber's first contribution to the premises occurred on May 26, 2006, while Eischen began its work on July 16, 2006.

Several months after completion of the project, DHC continued to own the residence, but had failed to compensate 84 Lumber and Eischen in full for their services. Accordingly, Eischen commenced a mechanic's lien foreclosure action naming several potential lien claimants, including CoPar and 84 Lumber, as defendants.[1] The complaint requested that Eischen's lien be declared prior and superior to all other liens. On July 24, 2007, Eischen effectuated personal service of the summons and complaint upon Thomas Hansen, the president of CoPar, via process server. CoPar did not answer the complaint or otherwise respond. Consequently, on September 14, 2007, Eischen moved for default judgment against CoPar and served CoPar with notice of the motion. CoPar failed to respond to the motion, and on October 2, 2007, default judgment was ordered. As part of the judgment, the district court found that Eischen's mechanic's lien was prior and superior to CoPar's mortgage liens. Notice of entry of judgment was served on CoPar on October 5, 2007.

While Eischen's default judgment motion was pending, 84 Lumber brought a cross-claim seeking to foreclose its mechanic's lien on the property. Like Eischen, 84

[1] Pursuant to Minn. Stat. § 514.02, subd. 3 (2008), a proceeding to foreclose a mechanic's lien must be brought within one year of completion of the lien claimant's work on the property or the claimant's priority will be lost.

Lumber claimed that its mechanic's lien was prior and superior to all other liens. On September 21, 2007, 84 Lumber served CoPar with the cross-claim via first-class mail, but CoPar did not answer. 84 Lumber then brought a motion for default judgment against CoPar and several other nonresponsive defendants. CoPar did not file a written response, but an attorney who represents CoPar in several other mechanic's lien foreclosure actions involving DHC projects, happened to be in court on the day of the motion hearing and noticed the hearing on the docket. The attorney appeared on behalf of CoPar at the hearing, but was unprepared and could not provide an excuse for CoPar's failure to respond to the cross-claim. The district court subsequently granted 84 Lumber's motion for default judgment on January 22, 2008, and declared 84 Lumber's mechanic's lien prior and superior to CoPar's mortgage liens.

On January 28, 2008, CoPar moved to vacate both default judgments pursuant to Minn. R. Civ. P. 60.02. In support of its motion, CoPar submitted an affidavit from Hansen. Hansen claimed that CoPar's failure to defend against Eischen's foreclosure action and 84 Lumber's cross-claim arose out of his mistaken belief that all of the pleadings served on CoPar were related to another DHC mechanic's lien foreclosure action that CoPar's attorney was handling. During the fall and summer of 2007, CoPar was served with four separate mechanic's lien foreclosure actions initiated against each of the four properties purchased and improved by DHC with loans provided by CoPar. Hansen claimed that, although he had been served with "miscellaneous court documents" relating to DHC during that time period, he assumed that all of the pleadings related to a single lawsuit because he was unaware that mechanic's lien foreclosure actions had been

commenced against each of the other properties. As a result, he turned over only one summons and complaint to CoPar's attorney, and from that point forward, he assumed that the attorney would handle the litigation. Hansen's assumption proved incorrect, as the summons and complaint that he submitted to the attorney actually related to a mechanic's lien foreclosure action filed by 84 Lumber against a different DHC-developed property.

Based on Hansen's allegedly honest but mistaken belief that CoPar was being represented in the litigation, CoPar claimed that it had a reasonable excuse for its failure to answer the pleadings it received. CoPar also claimed that vacation of the default judgments was appropriate because: (1) it had a reasonable defense on the merits in that its mortgages were superior to any mechanic's liens on the property; (2) it acted with due diligence after becoming aware of the proceedings; and (3) no prejudice would result to 84 Lumber and Eischen's interests in the property. The district court denied the motion, finding that none of the *Hinz* factors supported vacation of the judgments. The district court also denied CoPar's request for reconsideration, and this appeal followed.

D E C I S I O N

I.

The district court may relieve a party from a final judgment or order for "[m]istake, inadvertence, surprise, or excusable neglect" or "[a]ny other reason justifying relief from the operation of the judgment." Minn. R. Civ. P. 60.02(a), (f). 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. *Hinz v. Northland Milk & Ice Cream Co.*, 237 Minn. 28, 30, 53 N.W.2d 454, 455–56 (1952). Generally, courts favor a liberal application of the four-part test to further the policy of resolving cases on their merits. *See Taylor v. Steinke*, 295 Minn. 244, 246, 203 N.W.2d 859, 860 (1973) (stating that courts should be liberal in opening default judgments). "All four elements 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). "The 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). Whether a judgment should be reopened is a matter largely within the discretion of the district court and will not be reversed on appeal absent a clear abuse of discretion. *Id.*

1. Reasonable defense on the merits

The first part of the *Hinz* test is a reasonable defense on the merits. "A reasonable defense on the merits is one that, if established, provides a defense to the plaintiff's claim." *Northland Temporaries, Inc. v. Turpin*, 744 N.W.2d 398, 403 (Minn. App. 2008), *review denied* (Minn. Apr. 29, 2008). Specific information that clearly demonstrates the existence of a debatably meritorious defense satisfies this factor. *Charson v. Temple Israel*, 419 N.W.2d 488, 492 (Minn. 1988).

CoPar claims that it has established a reasonable defense on the merits by offering an ownership and encumbrance (O & E) report prepared by a title company. The report indicates that CoPar was the first to file its mortgage against the property and contains copies of 84 Lumber's and Eischen's mechanic's lien statements, which provide that

CoPar's mortgages were recorded prior to the first date of work performed by 84 Lumber and Eischen.

We disagree that this evidence establishes a reasonable defense on the merits. In determining priority as against a mortgagee with notice, all timely-filed mechanic's liens relate back to the date that the first item of material or labor was furnished upon the property. *See* Minn. Stat. § 514.05, subd. 1 (2008); *Superior Const. Servs., Inc. v. Belton*, 749 N.W.2d 388, 391 (Minn. App. 2008) (stating that a mechanic's lien "preserves the priority of that lien—or relates back—to the date that the [construction] project began."). Thus, in order to have a reasonable defense on the merits, CoPar had the burden of presenting specific evidence that tends to show that the mortgages were recorded before the first item of material or labor was furnished upon the property, not that its mortgage was simply recorded prior to the recordation of the mechanic's liens. *See Hinz*, 237 Minn. at 30, 53 N.W.2d at 456 (stating that a party must show that a reasonable defense on the merits exists).

CoPar has failed to meet its burden. Although dated priority affidavits or site photographs might help to establish when the first item of material or labor was furnished, the only evidence presented was the sterile O & E report. This report is not probative of when the first item of material or labor was furnished. Similarly, Eischen's and 84 Lumber's mechanic's lien statements are not helpful in determining lien priority because numerous subcontractors contributed to the project, and CoPar does not suggest that either Eischen or 84 Lumber provided the first item of material or labor. Without any specific information that clearly demonstrates the existence of a debatably

meritorious defense, the district court did not abuse its discretion in concluding that CoPar failed to meet its burden under this factor. *Charson*, 419 N.W.2d at 492.

2. Reasonable excuse for the failure to act

CoPar claims that Hansen's mistaken belief that CoPar was being represented in the litigation after turning over an unrelated summons and complaint to CoPar's attorney constitutes a reasonable excuse for its failure to act. The district court did not find this to be a justifiable excuse because Hansen and CoPar were aware of "other pending, closely related" litigation, and Hansen, as president of the company, "would have the knowledge and understanding . . . to know that he needs to read and respond to documents that are served upon him."

The district court's conclusion is reasonable and supported by the record. Sophisticated parties such as CoPar who are engaged in the business of real estate development financing and are familiar with the lien foreclosure process should be able to distinguish between foreclosure suits involving distinct parcels of property. In fact, CoPar was the owner of the lots in this development which it sold to DHC and financed DHC's construction through the two mortgages. Each complaint clearly identifies the legal description of the parcel of property at issue and the case caption provides the names of each of the parties involved. Even a cursory review of the pleadings would have put CoPar on notice that four separate lawsuits had been filed.

Moreover, CoPar's claim that it mistakenly believed that the numerous pleadings it received were related to another mechanic's lien foreclosure action brought by 84 Lumber seems implausible in light of the chronology of the four mechanic's lien

foreclosure lawsuits involving four distinct DHC properties. This lawsuit was actually the first of the four actions commenced, and the only one brought by Eischen. The three subsequent suits were commenced by 84 Lumber, which claimed a mechanic's lien on all four of the DHC projects. Thus, CoPar's claim that it assumed that the pleadings in this case related to one of the 84 Lumber suits lacks merit because the summons and complaint that Hansen allegedly turned over to CoPar's attorney had been served on CoPar over two months after CoPar was served with the summons and complaint by Eischen. In fact, the summons and complaint submitted to CoPar's attorney was served on CoPar *after* CoPar had already been served with notice of Eischen's motion for default judgment and 84 Lumber's cross-claim in this case. Because we defer to the district court's determinations as to the reasonableness of the excuse provided, and because the record appears to indicate that CoPar's own neglect led to entry of default judgment, the district court's conclusion that this factor was not satisfied does not constitute an abuse of discretion. *See Howard v. Frondell*, 387 N.W.2d 205, 208 (Minn. App. 1986), *review denied* (Minn. July 31, 1986) (providing that this court defers to the district court's determination as to the reasonableness of the excuse provided and will not allow vacation of default judgment in the event that a party's own neglect led to the judgment).

3. Due diligence after notice of entry of the default judgment

The third *Hinz* factor is whether the moving party exercised due diligence in pursuing vacation of the default judgments. A motion to vacate must be made within a reasonable time, but no more than one year after the judgment was entered. Minn. R. Civ. P. 60.02. What constitutes a reasonable time varies with the circumstances of each

case and is determined by the district court in the exercise of its discretionary power. *Hovelson v. U.S. Swim & Fitness, Inc.*, 450 N.W.2d 137, 142 (Minn. App. 1990), *review denied* (Minn. Mar. 16, 1990). In similar circumstances, this court has held that acting within three months of receiving notice of default judgment constitutes due diligence. *Kemmerer v. State Farm Ins. Cos.*, 513 N.W.2d 838, 841 (Minn. App. 1994), *review denied* (Minn. June 2, 1994).

CoPar claims that it acted with due diligence because it promptly brought a motion to vacate shortly after its attorney became aware of the defaults while reviewing the court docket on January 22, 2008. However, this argument improperly focuses on when CoPar allegedly learned of the default judgments, rather than when it received notice. *See, e.g.*, *Hinz*, 237 Minn. at 30, 53 N.W.2d at 456 (stating that a party seeking to vacate a default judgment must demonstrate that it acted with "due diligence *after notice of the entry of judgment*" (emphasis added)). CoPar was served with notice of the default judgment in favor of Eischen on October 5, 2007, two and a half months after service of the complaint and three and a half months before it moved to vacate the judgments. Due to these delays, we conclude that the district court did not abuse its discretion in concluding that CoPar failed to act with due diligence in the Eischen case. But because CoPar acted diligently by moving to vacate the default judgment in favor of 84 Lumber within eight days of the court order, we conclude that this factor should have been weighed in favor of CoPar in the 84 Lumber suit. *See Valley View, Inc. v. Schutte*, 399 N.W.2d 182, 185 (Minn. App. 1987) (finding that the district court abused its discretion in denying a

motion to vacate a default judgment where the movant made its motion six days after receiving notice of judgment), *review denied* (Minn. Mar. 18, 1987).

4. Absence of substantial prejudice to opposing party

The final *Hinz* factor is prejudice. It is an appellant's burden to show that the opposing party will not be substantially prejudiced by a new trial. *Bentonize, Inc. v. Green*, 431 N.W.2d 579, 584 (Minn. App. 1988). The district court found that substantial prejudice would result if the default judgment were vacated because Eischen and 84 Lumber would incur "considerable additional expense and delay" and could potentially lose the lien priority they currently enjoy.

CoPar claims that additional expense and delay are an insufficient basis to deny a motion to vacate. As CoPar suggests, where the only prejudice is added expense and delay, substantial prejudice of the kind necessary to keep a judgment from being reopened generally does not exist. *Hovelson*, 450 N.W.2d at 142. However, additional expense or delay does constitute substantial prejudice if the district court finds inexcusable neglect or intentional disregard of process by the moving party. *Id.*

Here, implicit in the district court's decision is the conclusion that CoPar acted with inexcusable neglect toward the pending litigation. The only excuse CoPar offered for its failure to respond to the action was its mistaken belief that the pleadings from this lawsuit were actually related to another lawsuit. As discussed above, this purported excuse is belied by (1) the chronology of the four lawsuits, (2) the information contained in the pleadings; and (3) CoPar's experience and sophistication as a mortgage lender. On

these facts, the district court did not abuse its discretion in concluding that substantial prejudice would result from vacation of the default judgments.[2]

Because CoPar has not made a strong showing for any of the *Hinz* factors in the the Eischen suit, and has satisfied only one of the factors in the 84 Lumber suit, we conclude that the district court did not abuse its discretion in refusing to vacate the default judgments.[3]

Affirmed.

[2] Because the finding of added expense and delay satisfies the substantial prejudice factor, we do not reach CoPar's further arguments addressing the loss-of-lien priority.

[3] CoPar also argues that it is entitled to relief under Minn. R. Civ. P. 60.02(f). We decline to address this argument because, although it was raised before the district court, the court did not explicitly rule on it. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that an appellate court generally will not consider issues raised but not decided by the district court).