STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1353

Charles Maxwell, et al.,
Respondents,

vs.

Winge Construction Services, Inc., et al.,
Appellants.

Filed June 23, 2009
Affirmed
Ross, Judge

Hennepin County District Court
File No. 27-CV-07-18508

Barton C. Gernander, Erik F. Hansen, Hellmuth & Johnson, PLLC, 10400 Viking Drive, Suite 500, Eden Prairie, MN 55344 (for respondents)

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Considered and decided by Johnson, Presiding Judge; Ross, Judge; and Crippen, Judge.*

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

ROSS, Judge

This appeal requires us to decide whether the district court abused its discretion when it refused to vacate a default judgment entered against three defendants who relied

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

on a responsive letter sent from one of the defendants as their answer to a civil complaint. Winge Construction Services and its shareholders, Gerald and Daniel Winge, appeal from an order denying their motion to vacate a default judgment against them. Because the Winges did not appeal the judgment and waited more than six months to seek its vacation, because Daniel Winge has no legal capacity to represent the interests of Gerald Winge or Winge Construction, and because the district court appropriately considered the traditional *Hinz* factors before making its decision, we conclude that the district court did not abuse its discretion by choosing not to vacate the default judgment. We therefore affirm.

FACTS

Charles and Tara Maxwell contested the quality and completeness of work they had contracted to be performed on their home by Winge Construction Services. The Maxwells sued Winge Construction along with Gerald and Daniel Winge, serving their civil complaint on both the company and the Winges individually to recover for breach of contract and for alleged overpayments related to the construction project.

Rather than serving or filing an answer or other pleading in response to the Maxwells' complaint, Daniel Winge sent a letter to the Maxwells' attorney within 20 days of service of the complaint. The letter was expressly written "[i]n response to the Maxwells' claims of breach of contract" and other claims that were specified in the complaint, and it affirmatively asserted that Winge Construction did not breach its contract with the Maxwells and received no overpayment. The letter did not mention

Gerald Winge, and its signature line listed "Winge Construction Services, Inc." and "Dan Winge."

After receiving Daniel Winge's letter, the Maxwells moved for default judgment without serving notice of the motion on the Winges or Winge Construction and without notifying the district court of the letter. The district court granted default judgment for $53,658, reasoning that the defendants did not answer the Maxwells' complaint.

The Winges soon learned of the default judgment and hired counsel. But they did not appeal the judgment, and the Maxwells took steps to collect on it. Eventually, more than six months after entry of the final judgment, the Winges and Winge Construction moved the district court to vacate the judgment. They based their motion on grounds of excusable neglect, and they asserted that the letter should have been sufficient to avoid the ex parte grant of the default judgment. The district court denied the motion to vacate its judgment. Gerald and Daniel Winge and Winge Construction appeal that denial.

D E C I S I O N

The Winges claim that this appeal presents four legal issues. The Maxwells counter that there are only two issues. Because the Winges appeal from the district court's refusal to vacate a default judgment against them, we identify only one overarching issue presented by this appeal: whether the district court abused its discretion when it declined to vacate the judgment against the defendants. A district court's refusal to vacate a default judgment will be upheld unless it was a "clear abuse of discretion." *Riemer v. Zahn*, 420 N.W.2d 659, 661 (Minn. App. 1988).

Daniel Winge asserts that the district court should have treated his responsive letter to the Maxwells' attorney as an answer to the complaint. The argument has some merit, but its strength is not sufficient to require reversal.

We observe that the letter has the substance but lacks the form of a responsive pleading. *See* Minn. R. Civ. P. 8.02 ("A party shall state in short and plain terms any defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies."); Minn. R. Civ. P 8.05(a) ("Each averment of a pleading shall be simple, concise, and direct."); Minn. R. Civ. P 10.01 (requiring each pleading to include a caption stating the county name, title of the action, case type, and other particulars). The letter specifically refers to breach of contract, unjust enrichment, fraud, and negligence—claims stated in the complaint—and declares that the allegations have no merit. It makes factual assertions contradicting those made in the complaint and rejects the allegations outright. It states that Winge Construction did not breach its contract with the Maxwells and that the Maxwells did not overpay Winge Construction. The letter was sent within the time for serving an answer. *See* Minn. R. Civ. P. 5.02 ("Service upon the attorney or upon a party shall be made by . . . transmitting a copy by facsimile machine to the attorney or party's office."); Minn. R. Civ. P. 12.01 ("Defendant shall serve an answer within 20 days . . . ."). And Daniel Winge's signature appears at the bottom.

On these details, we agree with Daniel Winge that the Maxwells should have either presented the letter to the district court when it sought the default judgment or given notice of the default-judgment motion to the letter's author. This would have allowed the district court to consider whether the letter constituted an answer despite its

lack of compliance with the formal pleading obligations imposed by the civil rules. Even if the Maxwells intended to argue that the letter fails to constitute an answer, they deprived the court of the opportunity to address that argument at the time it first considered whether to enter judgment in the Maxwells' favor. It seems clear to us that the Maxwells' attorney would recognize that the Winge letter, written by a pro se defendant in third person "To Whom It May Concern" and denying the factual and legal claims stated in the complaint, was intended to constitute the response to the Maxwells' complaint.

But the defendants had a chance almost immediately to cure their lack of notice of the motion, but they did not. Winge Construction, Gerald Winge, and Daniel Winge received notice of the default judgment soon after its entry. They also obtained legal counsel and engaged with the Maxwells through counsel attempting to resolve the suit. Still, they never filed a formal answer or filed the letter seeking treatment of it as an answer, and they did not appeal the entry of the default judgment. They chose not to ask the district court to vacate the judgment for six months. The district court was reasonably concerned about the long delay, and it included that concern in its discretionary decision whether to vacate the judgment.

A district court must vacate a default judgment if a party shows: "that he (a) is possessed of a reasonable defense on the merits, (b) has a reasonable excuse for his failure or neglect to answer, (c) has acted with due diligence after notice of the entry of judgment, and (d) that no substantial prejudice will result to the other party." *Hinz v. Northland Milk & Ice Cream Co.*, 237 Minn. 28, 30, 53 N.W.2d 454, 455–56 (1952).

Relief is warranted only if a party satisfies all four factors. *In re Welfare of Children of Coats*, 633 N.W.2d 505, 510 (Minn. 2001). But because Minnesota courts favor adjudication on the merits, a weak showing on one factor might be outweighed by a strong showing on another. *Riemer*, 420 N.W.2d at 662.

Without expressly balancing the four *Hinz* factors, but having found two factors weighing against vacating the judgment, the district court denied the motion to vacate. The district court concluded that the Winges did not have a reasonable excuse for failing to serve a proper answer, and it determined that they did not act with due diligence after entry of judgment against them.

Reasonable Excuse

The Winges assert that their belief that they had responded sufficiently to the complaint by Daniel Winge's letter constitutes a reasonable excuse and should weigh in favor of their motion. We note that Daniel Winge's letter could not actually constitute an answer by anyone but Daniel Winge. Although he is the president of Winge Construction, a corporation must be represented by an attorney. *Nicollet Restoration, Inc. v. Turnham*, 486 N.W.2d 753, 754 (Minn. 1992). Daniel Winge is not an attorney and can represent neither Gerald Winge nor Winge Construction. The district court recognized this in its analysis. And it implicitly concluded that the Winges' previous litigation experience renders their excuse unreasonable under the circumstances.

The Winges argue that having been parties to previous litigation should not justify holding them to knowledge of civil pleading requirements. They cite an unpublished opinion of this court, *Midland Credit Mgmt., Inc. v. Resler*, A03-1482 2004 WL

1152843, at (Minn. App. May 25, 2004), to support their position. That case does not provide much support. The case is unpublished and carries no precedential weight. *In re Collier*, 726 N.W.2d 799, 806 (Minn. 2007). And in *Midland*, this court considered a different question than the one presented here. We upheld a district court's decision to vacate a default judgment and stated that "[i]t was within the district court's discretion to find" that a pro se letter to counsel "answered 'or otherwise defended' against [a] complaint." *Midland*, 2004 WL 1152843 at *3. This case does not call into question whether the district court abused its discretion by treating a noncomplying response as an answer, but whether the district court abused its discretion when it concluded that the letter was *not* an answer and that relying on the letter *did not* otherwise constitute a reasonable excuse for failing to file an answer. In light of the district court's finding that the Winges have at least some knowledge of the requirements of the legal system, its conclusion that the excuse does not weigh in favor of vacating the judgment appears to be reasonable. Pro se litigants are expected to comply with court rules, *Fitzgerald v. Fitzgerald*, 629 N.W.2d 115, 119 (Minn. App. 2001), and the Winges' mistaken belief is not a compelling excuse.

The Winges also argue that their inability to afford an attorney constitutes a reasonable excuse. But the record provides no meaningful support for their assertion that they were unable to afford counsel, and the district court had discretion to consider whether the Winges' explanation was adequate. The record establishes that the Winges had counsel soon after the default judgment, and the district court was neither compelled

to believe the explanation or to be persuaded that it weighs heavily toward vacating the judgment.

Due Diligence

The Winges assert that they "hired counsel as soon as they could" after they were notified of judgment against them, and they maintain that their inability to afford the services of an attorney justified both the failure to answer the complaint and the delay in moving to vacate the judgment. The argument faces two significant problems. The first regards the lapse between their securing counsel and their motion. The record reflects that the Winges secured representation within ten days of the entry of judgment on November 20, 2007, that the Winges and their counsel were aware of the judgment in that same ten-day period, and that they still delayed moving to vacate the judgment until May 27, 2008, more than six months after judgment.

The second problem is that the record renders no meaningful support for their assertion regarding affordability of counsel. The Winges offer no explanation for their failure to obtain representation and bring the motion to vacate immediately after the district court entered judgment against them, besides their assertion of financial difficulty. The district court was not compelled to believe the assertion or to be persuaded by it.

The district court concluded that the Winges did not act with due diligence, and the Winges provide no basis to support their contention that their six-month delay *must* be considered reasonable and diligent under the circumstances. According to rule 60.02, the motion "shall" be filed "within a reasonable time," but no more than one year after

judgment is entered. Minn. R. Civ. P. 60.02. The rule does not suggest that motions filed within one year are necessarily filed within a reasonable time. Rather, whether a delay was reasonable under the circumstances is a discretionary factual question. *Bode v. Minn. Dep't of Natural Res.*, 612 N.W.2d 862, 870 (Minn. 2000).

Reasonable Defense & Prejudice to the Maxwells

The remaining *Hinz* factors of reasonable defense on the merits and prejudice to the Maxwells were not expressly addressed by the district court. But because the district court reasonably weighed two factors against granting the motion, it was within the district court's discretion to deny the motion without analyzing the other two factors. *See Children of Coats*, 633 N.W.2d at 510 (stating that a party must satisfy all four *Hinz* factors to justify relief from judgment).

Affirmed.