STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1202

Jarod A. Kruse,
Respondent,

vs.

Apollo Manufacturing Company,
Defendant,

Jay Lippert,
Appellant.

Filed May 18, 2010
Affirmed
Ross, Judge

Dakota County District Court
File No. 19HA-CV-08-3207

Scott D. Lake, Lake Law Firm, LLC, Prior Lake, Minnesota (for respondent)

Bradford S. Delapena, Bradford Delapena, Ltd., St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Shumaker, Judge; and Randall, Judge.*

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

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

ROSS, Judge

Jay Lippert appeals from the district court's denial of his motion to vacate a default judgment entered against him after he failed to defend a shareholder lawsuit against a company of which he is president. The shareholder alleged, among other things, that Lippert had denied him access to corporate documents. Lippert failed to answer either the complaint or an amended complaint, and the district court entered a default judgment. Lippert argues that the judgment must be reopened under Minnesota Rule of Civil Procedure 60.02(a) because it was the result of "mistake, inadvertence, surprise, or excusable neglect." Because we conclude that Lippert did not establish a reasonable excuse for failing to answer the complaints or that he acted with due diligence after receiving notice of the adverse judgment, we affirm.

FACTS

In February 2004, Jarod Kruse paid $25,000 for a twenty percent ownership interest in Apollo Manufacturing Company, a closely held Minnesota corporation. Jay Lippert, Apollo's president and a shareholder, executed an agreement confirming Kruse's ownership stake. In June 2004, Kruse loaned Apollo $5,000 for operating expenses; but the loan was not repaid. Kruse also worked for the corporation for about six months from 2004 to 2005, earning more than $9,200, also unpaid. Kruse repeatedly requested access to Apollo corporate documents as a shareholder, but Lippert denied his requests. In January 2007, Kruse hired an attorney to help him access corporate documents. Neither Lippert nor Apollo responded to a letter sent by Kruse's attorney.

On June 13, 2008, Kruse sued Lippert and Apollo by serving a summons and complaint on the Minnesota Secretary of State after he attempted personal service. The complaint alleged breach of common law and statutory fiduciary duties, breach of contract, unjust enrichment, and misrepresentation. Kruse later served an amended complaint on the defendants. Neither Lippert nor Apollo responded to the complaints by serving or filing an answer, and they did not contact Kruse.

Lippert received the first complaint on August 24. And he was served the amended complaint and a notice of motion for default judgment by mail on September 24. The notice of motion for default judgment indicated that the default judgment hearing would be held on October 29. Lippert contacted an attorney and told him that he would be out of town on the date of the hearing. The attorney promised to "make a call" to Kruse's attorney, but he never did. Lippert later learned that the attorney did not believe that Lippert had formally retained him.

After the hearing on October 29, the district court granted a default judgment and awarded Kruse damages of $39,643, presumably the total of his $25,000 investment in Apollo, his $5,000 loan to the corporation, and more than $9,200 in back pay. The court also awarded Kruse his attorney's fees and prejudgment interest for a total money judgment of $48,352.84. Lippert did not respond formally or informally until March 9, 2009, after his bank account was levied to satisfy the judgment. Lippert then moved to vacate the default judgment. In his supporting affidavit, Lippert explained that he met with a new attorney on December 1, but that the attorney had refused to act on his behalf until he provided a retainer fee. Lippert retained the new attorney in mid February.

In his motion to vacate the default judgment, Lippert contended that the judgment must be reopened pursuant to Minnesota Rule of Civil Procedure 60.02(a) because it was the result of "mistake, inadvertence, surprise, or excusable neglect." Lippert argued that he had a reasonable defense to Kruse's claims because as a shareholder he was not responsible for Apollo's debts. He also argued that he had a reasonable excuse for failing to answer the complaint because his attorney had promised to call Kruse's attorney. Finally, Lippert argued that he had acted with due diligence after receiving notice of the default judgment and that Kruse would suffer no prejudice if the judgment were reopened.

The district court rejected Lippert's claim that he had a reasonable defense to the legal claims on the merits, observing that under the circumstances specified in Minnesota Statues section 302A.751 (2008), the court could grant equitable relief against a corporate shareholder. The court also rejected Lippert's excuse for failing to answer the complaint and his contention that he had acted diligently after learning of the default judgment. The court agreed with Lippert on only one point—that Kruse would not suffer prejudice—and it denied his motion to vacate the judgment.

Lippert appeals.

D E C I S I O N

Lippert challenges the district court's denial of his motion to vacate the default judgment. A party may move the district court for relief from a final judgment on the ground of "mistake, inadvertence, surprise, or excusable neglect." Minn. R. Civ. P. 60.02(a). The decision whether to grant such a motion is within the discretion of the

district court, and its decision will not be reversed unless the court has clearly abused its discretion. *Riemer v. Zahn*, 420 N.W.2d 659, 661 (Minn. App. 1988).

Lippert argues that the district court's discretion was limited by caselaw. This caselaw holds that the court must vacate a judgment if a defaulting defendant shows (1) that he has a reasonable defense on the merits, (2) that he has a reasonable excuse for his failing to answer, (3) that he acted with due diligence after receiving notice of the judgment, and (4) that no substantial prejudice will result to the plaintiff if the judgment is reopened. *Hinz v. Northland Milk & Ice Cream Co.*, 237 Minn. 28, 30, 53 N.W.2d 454, 455−56 (1952). Generally, relief is warranted only if the defendant satisfies all four factors. *In re Welfare of Children of Coats*, 633 N.W.2d 505, 510 (Minn. 2001).

Lippert argues that he satisfied all four *Hinz* factors and that the district court therefore erred by denying his motion to vacate. We conclude otherwise. Lippert failed to satisfy the reasonable-excuse and due-diligence factors, and we hold that the district court did not abuse its discretion by denying his motion.

Reasonable Excuse for Failing to Answer

In his affidavit supporting his motion to vacate, Lippert explains that he contacted an attorney after receiving Kruse's amended complaint and notice of application for default judgment. The attorney "advised" Lippert merely that he would "make a call" to Kruse's attorney. Lippert later learned that the attorney, who did not believe he had been formally retained, had failed to take action and that a default judgment had been entered. The district court rejected Lippert's excuse as unreasonable because he "failed to show that he did anything to assure that the matter was being handled by an attorney." The

court was unfavorably impressed with Lippert's failure to pay the attorney's retainer fee. The court concluded that under these circumstances Lippert's reliance on the attorney's promise to make a call was unreasonable.

Minnesota caselaw favors granting relief from final judgments that are entered because of an attorney's neglect rather than the client's neglect. *Nguyen v. State Farm Mut. Auto. Ins. Co.*, 558 N.W.2d 487, 489, 491 (Minn. 1997). But a party who has been personally neglectful will not escape the consequences even if his attorney was also neglectful. *Wiethoff v. Williams*, 413 N.W.2d 533, 536 (Minn. App. 1987). "It is for the trial court to determine whether the excuse offered by a defaulting party is reasonable." *Howard v. Frondell*, 387 N.W.2d 205, 208 (Minn. App. 1986), *review denied* (Minn. July 31, 1986.)

Howard is instructive. In *Howard*, the defendants failed to answer, and default judgment was entered against them. 387 N.W.2d at 207. On appeal from the judgment, the defendants claimed that they had a reasonable excuse for failing to answer because their attorney had been forced to withdraw due to a conflict of interest and had made a good faith attempt to secure a time extension for their new attorney to file an answer. *Id.* at 208. But this court observed that there was "a definite paucity of evidence supporting these contentions" because the defendants made no attempt to explain their attorney's failure to answer before withdrawing, the attorney's failure to actually move the court for more time, or what efforts they took to secure a new attorney. *Id.* Nor did the defendants expressly allege neglect by their attorney or supply an affidavit from him explaining his

failure to act. *Id.* We concluded that the record "simply fails to reflect any sensible excuse for [defendants'] failure to answer." *Id.*

Similar to *Howard*, in this case Lippert has failed to establish a persuasive excuse for failing to answer, and the district court's conclusion to that effect is sound. The court was entitled to conclude that Lippert's reliance on an attorney before paying his retainer fee was unreasonable. We add that the unretained attorney's promise simply to "make a call" also would not alone create a reasonable expectation that the attorney would take the necessary steps to defend the lawsuit or to secure an extension of time to avoid a plaintiff's judgment with prejudice. The court's decision is also supported, as in *Howard*, by the fact that no documentary evidence or testimony from the attorney corroborates Lippert's explanation. And further supporting the court's conclusion that relying on an unpaid attorney was unreasonable, the attorney whom Lippert later hired to contest the default judgment refused to file a motion to vacate until he was paid a retainer fee.

Due Diligence After Notice of Judgment

The district court concluded that Lippert had not acted with due diligence because, after learning of the default judgment in December 2008, Lippert did not respond with a motion to vacate until March 2009. Lippert claims in his affidavit that he contacted an attorney in December but that the attorney would not file the motion before receiving a retainer. It took Lippert until mid-February to raise the money for a retainer, and Lippert complains that the district court did not acknowledge this fact. But the district court did acknowledge the fact; it observed that Lippert made no attempt even to contact Kruse informally regarding the matter while he was saving the money to retain an attorney.

Determining whether a party acted with due diligence requires the court to ask whether the party was diligent "after notice of entry of judgment." *Valley View, Inc. v. Schutte*, 399 N.W.2d 182, 184 (Minn. App. 1987), *review denied* (Minn. Mar. 18, 1987). What constitutes a reasonable time for seeking rule 60.02 relief will vary from case to case depending on the district court's discretionary review of the facts. *Sommers v. Thomas*, 251 Minn. 461, 467, 88 N.W.2d 191, 195−96 (1958). The district court was within its discretion to conclude that Lippert's failure to contact Kruse while he was allegedly saving for the retainer fee highlighted that his efforts to resolve the matter were less than diligent. Lippert's failure to respond to Kruse even informally at this or any other stage of the litigation is especially significant in a case in which the allegations arose from a closely held corporation's alleged unresponsiveness to a shareholder's requests to access corporate records.

Affirmed.