STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2339

In re the Marriage of: Nancy Reeves Sitek, petitioner,
Appellant,

vs.

Michael Joseph Sitek,
Respondent.

Filed July 27, 2010
Reversed and remanded
Stoneburner, Judge

Hennepin County District Court
File No. 27FA225856

John E. Mack, Mack & Daby P.A., New London, Minnesota (for appellant)

Jodi M. Terzich, Kery Minnich, Terzich & Ort, L.L.P., Maple Grove, Minnesota; and

Peter Gray, Nilan Johnson Lewis, P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Stoneburner, Presiding Judge; Wright, Judge; and Connolly, Judge.*

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

STONEBURNER, Judge

Appellant challenges the district court's order denying her motion to vacate a default order suspending respondent's maintenance obligation to her, arguing that the

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

district court erred in determining that appellant had been properly served with notice of respondent's motion to suspend maintenance and erred in granting respondent's motion by default. Because the district court erred by determining that appellant was properly served, we reverse and remand.

FACTS

The marriage of appellant Nancy Reeves Sitek (wife) and respondent Michael Joseph Sitek (husband) was dissolved in December 1998. At the time the dissolution judgment was entered, husband earned $225,000 per year, and wife was not employed. Wife was awarded the parties' homestead, located in Edina, and $4,000 per month in permanent spousal maintenance to meet her monthly living expenses of $3,953. The judgment incorporated the provisions of the attached "Appendix A," which requires, in relevant part, that each party notify the other party and the court of any change in residential and mailing address within ten days of the change. *See* Minn. Stat. § 518.68, subd. 1 (2008) (requiring every judgment of dissolution that provides for spousal maintenance to contain certain notices, including the change-of-address notification requirement). The dissolution judgment reflects that wife was represented by Daniel J. Goldberg and provides that he would no longer be the attorney of record for wife effective 91 days after entry of the judgment.

In 2001, husband properly served a motion for a modification of his maintenance obligation by serving attorney John E. Mack, who was representing wife at that time. Wife did not file any response to the motion and did not respond to discovery served in connection with the motion. *Sitek v. Sitek*, No. C4-01-1263, 2002 WL 338121, at * 1

(Minn. App. Mar. 5, 2002). Wife did not appear at the hearing on the motion, but attorney Mack appeared on her behalf. *Id*. The district court granted husband's motion, reducing his maintenance obligation to $2,500 per month and also ordered wife to respond to discovery. *Id*. at * 2. Wife appealed, arguing only that final relief on husband's motion should not have been granted without further hearing. *Id.* at * 1, 3. This court affirmed. *Id*. at * 3. Mack continued to represent wife in a dissolution-related motion brought by husband in 2003 and in protracted litigation, not involving husband, concerning foreclosure on the homestead, which resulted in a published opinion of this court. *See Sitek v. Striker*, 764 N.W.2d 585 (Minn. App. 2009), *review denied* (Minn. July 22, 2009).

In the summer of 2009, husband mailed a notice of motion and motion to suspend his maintenance obligation to wife at the homestead address. The notice was returned, undelivered. On June 29, 2009, a process server placed the motion documents in the door of the homestead. The district court then notified the parties by letter correspondence that the hearing date was rescheduled from August 11 to August 24, 2009.

Wife failed to appear at the August 24 hearing, and no one appeared on her behalf. The district court proceeded in default. Based on evidence that: (1) husband had monthly living expenses (excluding maintenance payments) in the amount of $8,752; (2) husband's sole source of income was $566 per week from unemployment compensation; and (3) husband was diligently searching for work, the district court found that husband had demonstrated a substantial change in circumstances that made the existing maintenance obligation unreasonable and unfair and necessitated a suspension of his

spousal maintenance obligation. By order dated August 27, 2009, the district court suspended husband's maintenance obligation retroactive to July 1, 2009.

Wife was served with the order on September 14, 2009 and, on November 9, 2009, wife moved to vacate the district court's order suspending husband's maintenance obligation. Wife supported the motion with an affidavit stating that she had not received notice of the hearing.

The district court denied wife's motion to vacate based on its conclusion that that wife failed to keep her current address on file with the court pursuant to Appendix A of the dissolution judgment and that husband followed proper procedures for service delineated in the Minnesota General Rules of Practice and Minnesota Rule of Civil Procedure 5.02, by mailing a copy of the motion to wife's last known address. This appeal followed.

D E C I S I O N

I. Service

The construction of a court rule and the determination of whether service is proper are questions of law, subject to de novo review. *O'Sell v. Peterson*, 595 N.W.2d 870, 871 (Minn. App. 1999) (involving substitute service of process). This case involves the application of Minn. R. Civ. P. 5.02, pertaining to service of papers once an action has been properly commenced and providing, in relevant part, that "[w]henever . . . service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party is ordered by the court." *See Doty v. Doty*, 533 N.W.2d 72, 74 (Minn. App. 1995) (rejecting husband's argument

that personal service of a motion to amend a judgment on wife effectuated timely service of the motion because the argument failed to take into account the language in the rule stating that service directly on a represented party is permitted only by order of the court).

Husband argues that Minn. R. Civ. P. 5.02 provides for service on a party by mailing a copy to the party at the party's last known address and that he has complied with the rule. Husband alternatively relies on several statements from *Atwood v. Atwood*, 253 Minn. 185, 196, 91 N.W.2d 728, 732 (1958), to support his argument that the reasonableness of service efforts is controlling. In *Atwood*, the supreme court stated that where modification of a support order is sought,

> and where the notice is not prescribed by statute, the notice need only be such as is reasonably calculated to give the opposing party knowledge of the proceeding and an opportunity to be heard. It has been declared to be the prevailing rule that courts will not concern themselves so much with the manner of giving notice as with its reasonableness under the circumstances of the particular case.

Id. at 193, 91 N.W.2d at 734. Husband argues that, under the circumstances of this case, including wife's obligation to notify him and the court of any address change, and the passage of time since there had been any action in the dissolution matter, it was reasonable for him to believe that wife was no longer represented by Mack and therefore reasonable to serve wife by mailing the papers to her last-disclosed address (the homestead). Husband further argues that it was reasonable, when the mailing was returned, to leave the papers at a conspicuous place at the homestead. Husband maintains that he thereby fulfilled the notice requirements in the rule or, alternatively, that his efforts to ensure notice to wife were reasonable under the circumstances.

But, as in *Doty*, 553 N.W.2d at 74, husband fails to take into account the provision in Minn. R. Civ. P. 5.02 that mandates service on counsel for a represented party absent an order of the court permitting service on the party. Here, wife was represented; there is no court order permitting service on wife; and husband did not seek such an order before service. Because service on wife was never ordered, husband's argument based on wife's obligation to notify him and the district court of any address change is not relevant to the issue of whether service was proper under Rule 5.02. In the circumstances of this case, the rule requires service on wife's attorney, not wife. We conclude that the district court erred by holding that husband complied with the service requirements of Minn. R. Civ. P. 5.02.

The district court did not state whether husband had complied with general-practice rules. Minn. R. Gen. Pract. 303.03(a)(1) provides, in relevant part, that "[n]o motion shall be heard unless the initial moving party . . . serves a copy of [listed documents including motions and notices of motions] on opposing counsel." It is undisputed that husband did not comply with this rule. But noncompliance with the rule does not mandate vacation of a judgment entered. Minn. R. Gen. Pract. 303.03(b) provides that in the event of noncompliance, "the hearing *may* be cancelled by the court." (Emphasis added.) Therefore, wife has not demonstrated that she is entitled to relief on appeal for any error the district court made with reference to the general practice rules.

II. Actual notice

Husband argues that wife had actual notice of his motion, making the method of service irrelevant, relying on the language in *Atwood* that where a party has actual

sufficient notice, the mode of service will not be closely examined. 253 Minn. at 192, 91 N.W.2d at 734. "When actual notice of the action has been received by the intended recipient, 'the rules governing such service should be liberally construed.'" *Larson v. Hendrickson*, 394 N.W.2d 524, 526 (Minn. App. 1986) (quoting *Minn. Mining & Mfg. v. Kirkevold*, 87 F.R.D. 317, 323 (D. Minn. 1980). But there is no evidence in the record that wife received actual notice of the hearing. Wife's affidavit specifically states that she did not receive service and was not aware of the motion or the hearing until she was served with the order that resulted from the hearing. Husband argues that, based on wife's history of non-participation, non-cooperation, and lack of credibility, the district court could discredit wife's statements that she did not receive actual notice. But the district court did not base denial of the motion to vacate on a determination that wife received actual notice: the district court held the husband had properly served wife. The record does not support a finding that wife received actual notice.

III. Motion to vacate

Neither wife's motion to vacate nor her attached affidavit cited any legal basis for her request: wife merely asserted that she had not been served. Husband argues that wife did not satisfy the factors for relief from the effects of an adverse judgment under Minn. R. Civ. P. 60.02. But rule 60.02 does not apply to dissolution proceedings. *See Lindsey v. Lindsey*, 388 N.W.2d 713, 716 n. 1 (Minn. 1986) (stating that the district courts "lack jurisdiction" under rule 60.02 to modify dissolution judgments); *Maranda v. Maranda*, 449 N.W.2d 158, 164 n.1 (Minn. 1989) (stating that motions to vacate a district court's

ruling in a dissolution case should be made under Minn. Stat. § 518.145, subd. 2, not rule 60.02).

Minn. Stat. 518.145, subd. 2 (2008), like rule 60.02, provides for relief from an adverse order for "mistake, inadvertence, surprise, or excusable neglect." Minn. Stat. § 518.145, subd. 2(1). The rule and the statute are identical for purposes of this case, and cases citing rule 60.02 are used when applying Minn. Stat. § 518.145, subd. 2. *See Peterson v. Eishen*, 512 N.W.2d 338, 341 (Minn. 1994) (applying rule 60.02 cases to analysis of motion to vacate orders and judgment in a paternity matter governed by Minn. Stat. § 518.145, subd. 2). To qualify for relief from a default judgment under rule 60.02, the moving party has the burden of demonstrating: (1) a reasonable defense on the merits; (2) a reasonable excuse for 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).

Because Minn. Stat. § 518.145, subd. 2, was not argued to the district court, the district court did not explicitly address the factors that would permit the order to be vacated under the statute. The district court, by finding that husband had served wife under the rules, implicitly found that wife did not have a reasonable excuse for failure to answer husband's motion. Because the district court did not specifically apply the *Finden* test, we will address the factors. *See Charson v. Temple Israel*, 419 N.W.2d 488,

491–92 (Minn. 1988) (analyzing *Finden* factors de novo when district court failed to apply test).

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 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 Charson*, 419 N.W.2d at 492 (stating that the reasonable-defense factor is satisfied by specific information that clearly demonstrates the existence of a debatably meritorious defense); *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").

Wife's affidavit in support of her motion to vacate states that

> [husband] has not paid me since June 15, 2009. Because I did not receive any payment from [husband], I had several "bounced checks." As is obvious from Exhibit A, I have been unable to make house payments. I am not even able to have housing, because I cannot afford an apartment and have lost my home. I have no source of income and have been supporting myself by selling and pawning my property. I also have had to go into my [401(k)] to get money to support myself.

The district court order suspending maintenance does not address wife's current needs. Minn. Stat. § 518A.39, subd. 2(d) (2008), requires that on a modification of

maintenance "the court shall apply . . . the factors for an award of maintenance under section 518.552 that exist at the time of the motion." Those factors include consideration of the financial resources of the party seeking maintenance. Minn. Stat. § 518.522, subd. 2(a) (2008). The district court found that husband has income from unemployment benefits and that his expenses exceed his income, but wife's affidavit states that she has no source of income. Therefore, we conclude that wife has made at least a weak showing that she had reasonable defense on the merits to elimination of maintenance. *See Erlandson v. Erlandson*, 318 N.W.2d 36, 39–40 (Minn. 1982) (indicating that the basic issue when addressing spousal maintenance is balancing the payor's abilty to pay and the recipient's need for maintenance).

B. Reasonable excuse

Wife's affidavit states that she was "totally unaware of the motion" to modify maintenance until she was served with the default order on September 14, 2009. Wife additionally maintains that she did not receive the correspondence indicating that a hearing set for August 11, 2009 was rescheduled for August 24, 2009. Because husband failed to properly serve wife pursuant to Minn. R. Civ. P. 5.02 and there is no evidence in the record that she had actual notice of the motion and hearing, wife had a reasonable excuse for her failure to respond to husband's motion. Wife has made a very strong showing on this factor that offsets any weakness in the first factor.

C. Due diligence

The record demonstrates that wife acted with due diligence after notice of entry of judgment by filing her motion to vacate within a matter of weeks of the default order and

well before expiration of the one-year time period for filing the motion. *See Lund v. Pan Am. Machs. Sales*, 405 N.W.2d 550, 554 (Minn. App. 1987) (due diligence element satisfied when motion to vacate dismissal was brought within weeks after counsel discovered dismissal); *see also* Minn. R. Civ. P. 60.02 (providing that a motion to vacate "shall be made . . . not more than 1 year after the judgment, order, or proceeding was taken").

D. Substantial prejudice

Husband asserts that a reversal "will only further prolong these parties' involvement in proceedings that [wife] only sporadically chooses to take part in." But "prejudice is always inherent when the trial of a case is delayed," and when the only prejudicial effect of vacating a judgment is delay and added expense of litigation, substantial prejudice of the kind sufficient to prevent reopening a judgment is not established. *Finden*, 268 Minn. at 272, 128 N.W.2d at 751. There would not be substantial prejudice to husband if the order denying wife's motion to vacate is reversed and remanded.

Because we conclude that the *Finden* factors are proven, we reverse the district court's denial of wife's motion to vacate the order suspending husband's maintenance obligation and remand to the district court for reinstatement of husband's maintenance obligation that existed at the time of his motion.

Reversed and remanded.