STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1998

Soubin Thao,
Respondent,

vs.

Karma Entertainment, LLC, d/b/a Karma Nightclub,
Appellant,

John Doe I, et al.,
Defendants.

Filed July 18, 2011
Affirmed
Bjorkman, Judge

Hennepin County District Court
File No. 27-CV-09-24420

Ma Manee Moua, Moua Law Office, Roseville, Minnesota (for respondent)

Peter Lind, Theodore J. Waldeck, Waldeck & Lind, P.A., Minneapolis, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Wright, Judge; and Bjorkman, Judge.

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

BJORKMAN, Judge

Appellant Karma Entertainment, LLC, d/b/a Karma Nightclub, challenges the denial of its motion to vacate the default judgment entered against it in this personal-

injury action. Karma argues that the district court (1) erred as a matter of law by applying an incorrect legal standard, (2) abused its discretion by denying the motion after Karma established the requisite grounds to vacate, and (3) erred by declining to dismiss respondent Soubin Thao's suit for lack of personal jurisdiction due to improper service. We affirm.

FACTS

On the evening of December 12, 2008, Thao was injured in an altercation with security guards on Karma's premises. On December 18, Thao's counsel notified Karma by letter that she was representing Thao and asked Karma to preserve any security records relevant to the incident and to have Karma's insurance carrier contact her. Ned Abdul, one of Karma's owners, received the letter and forwarded it to Illinois Casualty Company (ICC). ICC investigated the claim and advised Thao's counsel on August 3, 2009, that Karma "was in no way negligent" and that ICC would not pay Thao's medical bills because Karma's insurance policy only covers medical expenses caused by accidents.

In September, Karma changed its registered office address without notifying the Minnesota Secretary of State; Karma did, however, notify the post office such that mail addressed to the old address was forwarded. The same month, Thao commenced this action against Karma and two unnamed employees. Thao's process server twice attempted to personally serve a summons, complaint, and discovery requests on Karma at its registered business address—which was not current—and found the door locked and the lights out. Thao subsequently served Karma through the Minnesota Secretary of

State, which effected service via certified mail and provided Thao an acknowledgement of receipt signed by Karma's receptionist.[1]

Karma neither answered the complaint nor communicated with Thao or his counsel in any manner. In April 2010, over six months after serving the summons and complaint, Thao moved for a default judgment, serving the motion on Karma by mail. Abdul forwarded the motion papers to ICC, which, according to ICC's subsequent statements, disposed of them without taking any responsive action. After Karma failed to appear at the motion hearing, the district court granted Thao's motion and entered judgment in favor of Thao in the amount of $100,752.50.

Approximately one month later, Karma moved the district court to vacate the default judgment on the grounds that its failure to answer the complaint was due to mistake and excusable neglect and that the district court lacked personal jurisdiction over Karma because Thao's substituted service was improper. The district court denied Karma's motion, concluding that Karma had no reasonable excuse for failing to answer and did not demonstrate that Thao had not been prejudiced by Karma's failure to answer. The court did not address the issue of service. This appeal follows.

D E C I S I O N

A district court may vacate a final judgment for reasons of "[m]istake, inadvertence, surprise, or excusable neglect." Minn. R. Civ. P. 60.02(a). Minnesota

[1] By affidavit testimony, Abdul initially denied that the secretary of state ever served Karma. When confronted with proof of service, Abdul stated that the receptionist had "no recollection of signing her name or receiving any materials" and "maintain[ed] that [he] personally never received a copy of [Thao's] summons and complaint served by the Secretary of State."

courts analyze rule-60.02 motions by considering whether the movant has (1) a reasonable defense on the merits; (2) a reasonable excuse for the failure or neglect to answer; (3) acted diligently after notice of entry of the judgment; and (4) demonstrated that no prejudice will occur to the nonmoving party. *See Hinz v. Northland Milk & Ice Cream Co.*, 237 Minn. 28, 30, 53 N.W.2d 454, 456 (1952); *see also Northland Temps., Inc. v. Turpin*, 744 N.W.2d 398, 402 (Minn. App. 2008) (reaffirming *Hinz* test), *review denied* (Minn. Apr. 29, 2008).

Whether a judgment should be reopened is a matter largely within the district court's discretion and will not be reversed on appeal, absent a clear abuse of discretion. *Kosloski v. Jones*, 295 Minn. 177, 180, 203 N.W.2d 401, 403 (1973). But the district court's discretion is not unlimited. *Spicer v. Carefree Vacations, Inc.*, 370 N.W.2d 424, 426 (Minn. 1985). When a party in default proves all four *Hinz* factors, the district court must vacate the default judgment. *Hinz*, 237 Minn. at 30, 53 N.W.2d at 455-56; *see also Finden v. Klaas*, 268 Minn. 268, 271-73, 128 N.W.2d 748, 750-51 (1964) (reversing denial of motion to vacate because defendant met three factors and, on fourth—absence of reasonable excuse—attorney's neglect was not attributable to defendant). And a district court cannot vacate a default judgment when the moving party does not establish that it has a meritorious claim or defense. *Charson v. Temple Israel*, 419 N.W.2d 488, 491 (Minn. 1988). Between these two circumstances, the district court has broad discretion. *Northland Temps.*, 744 N.W.2d at 406 (stating that the district court, in its discretion, may deem satisfaction of fewer than four *Hinz* factors sufficient to grant relief from judgment based on the court's analysis of the strength of each factor: there is "no

solid authority for saying that the district court may only grant relief under rule 60.02 when *all* four factors have been fully met").

A district court abuses its discretion with respect to vacation of a default judgment "if the trial court has acted under a misapprehension of the law," *Sommers v. Thomas*, 251 Minn. 461, 469, 88 N.W.2d 191, 196-97 (1958), or the district court's reasons are based on facts not supported by the record, *Roehrdanz v. Brill*, 682 N.W.2d 626, 631-32 (Minn. 2004) (evaluating district court's discretionary ruling on motion to vacate default judgment); *see also Duenow v. Lindeman*, 223 Minn. 505, 518, 27 N.W.2d 421, 429 (1947) (reversing order denying motion to vacate because "plain and decisive facts were entirely overlooked by the trial judge").

Karma argues that the district court abused its discretion by misapplying *Hinz* and by determining that Karma did not establish that the *Hinz* factors support vacation. We address each argument in turn.

I. The district court did not act under a misapprehension of the law.

Karma argues that the district court applied the wrong legal standard because the court required Karma to meet all four *Hinz* factors to support vacation. Application of the correct legal standard presents a question of law, which we review de novo. *Thompson v. Thompson*, 739 N.W.2d 424, 430 (Minn. App. 2007).

In setting forth the applicable legal standard, the district court cited *Howard v. Frondell*, 387 N.W.2d 205, 207 (Minn. App. 1986), *review denied* (Minn. July 31, 1986), for the proposition that the *Hinz* factors are mandatory and exclusive such that a motion to vacate must be denied unless the movant fully demonstrates each factor. This is an

incomplete expression of the correct standard, which mandates relief when all four factors are fully present and permits relief when they are not, subject to the "exercise of [the district court's] affirmative discretionary power." *Northland Temps.*,744 N.W.2d at 406.

Although the district court's articulation of the *Hinz* standard is misleading to the extent it does not acknowledge that a court may grant relief when fewer than four factors are met, we disagree with Karma that this misarticulation warrants reversal. We considered an identical situation in *Northland Temps.* There, the district court cited *Black v. Rimmer*, 700 N.W.2d 521, 528 (Minn. App. 2005), *review dismissed* (Minn. Sept. 28, 2005), for the proposition that to obtain relief under rule 60.02, all four of the *Hinz* factors must be present. *Northland Temps.*, 744 N.W.2d at 406. Because the district court found only two of the *Hinz* factors were met, the court denied vacation. We reversed, observing that while the district court did not misstate the review standard articulated in *Black*, "an element of caution is necessary in its application." *Id*. We concluded that there is "no solid authority for saying that the district court may only grant relief under rule 60.02 when *all* four factors have been fully met." *Id*. That is, there are instances when the district court may, in its discretion, grant relief even when a party fully demonstrates fewer than four *Hinz* factors. *See Hill v. Tischer*, 385 N.W.2d 329, 332 (Minn. App. 1986) (granting relief despite a weak showing on one factor, and noting that "[t]he relative weakness of one [*Hinz*] factor should be balanced against the strong showing on the other three factors" (quotation omitted)).

Although we concluded in *Northland Temps.* that the district court erred in applying *Black* to require that all four *Hinz* factors be established to grant relief under rule 60.02, we did not reverse on that basis. Rather, we reversed, in part, because the district court committed legal error when it determined that the movants did not have a reasonable defense on the merits. *Northland Temps.*, 744 N.W.2d at 405. Concerning the *Black* standard of review, we simply noted that while it is true that relief must be granted when all four factors are fully met, it is also true that relief may (or may not) be granted when fewer than four factors are present. *Id*. at 406. As such, rather than lending themselves to mechanical application, the *Hinz* "factors provide a relevant framework for the district court in the exercise of its affirmative discretionary power." *Id*.

Here, as in *Northland Temps.*, the district court's erroneous articulation of the *Hinz* standard does not warrant reversal. Reversal is only required when the district court's analysis and conclusions are based on an erroneous legal standard. Here, the court's analysis and conclusion did not ultimately rely on, or reflect such a standard; nor did the court deny relief after determining that Karma had demonstrated each factor, which would plainly have constituted a misapprehension of law. Rather, the district court recognized, consistent with *Northland Temps.*, that when a movant fails to demonstrate all four factors, the district court must independently analyze the factors and exercise its affirmative discretionary power to determine whether relief is warranted.

Therefore, while the district court erred in stating that Karma's motion "must be denied" because it failed to demonstrate a reasonable excuse for failing to answer and to overcome the prejudice to plaintiff, the district court acted well within its discretion by

denying Karma's motion on those grounds. The result reached by the district court was justified under the correct standard, and its analysis was in no way corrupted or compromised by its incomplete statement of the legal standard. *Katz v. Katz*, 408 N.W.2d 835, 839 (Minn. 1987) (stating that a district court will not be reversed if it reached correct result for wrong reason).

Finally, we cannot agree with Karma's categorical proposition that "[u]nder Minnesota law it is an abuse of discretion for the district court to deny a motion to vacate where the movant has established three of the four *Hinz* factors but has made a weak showing on the failure to answer factor." It is well-settled that the district court may not deny relief when all four factors are met and that the relative strengths and weaknesses of each factor must be considered in determining whether to grant relief. *See Hill*, 385 N.W.2d at 332. But to mandate vacation on a showing of three factors (and an undefined "weak" showing on the fourth) would invade the discretionary province of the district court and compromise the principle that the *Hinz* factors function as a case-specific analytic framework rather than a set of criteria susceptible to mechanical application. *See Howard*, 387 N.W.2d at 208 (affirming denial of a motion to vacate default judgment where only three of the four factors are present).

II. The district court did not abuse its discretion by determining that Karma did not establish that the *Hinz* factors support vacation.

The district court denied Karma's motion to vacate on the grounds that Karma did not demonstrate a reasonable excuse for failing to answer the complaint and that Karma did not demonstrate that no prejudice will occur if the judgment is reopened. The court

further found that Karma "may" have a reasonable defense on the merits and that Karma acted with due diligence.

A. Reasonable excuse

It is generally for the district court to determine whether the excuse offered by a defaulting party is reasonable. *Northland Temps.*, 744 N.W.2d at 406. Neglect of the party itself that leads to entry of a default judgment is inexcusable, and such neglect is a proper ground for refusing to reopen a judgment. *Thayer v. Am. Fin. Advisers, Inc.*, 322 N.W.2d 599, 602 (Minn. 1982); *see also Whipple v. Mahler*, 215 Minn. 578, 583-84, 10 N.W.2d 771, 775 (1943) (denying a motion to vacate where defendants were served personally and knew of their obligation to answer but simply forgot, noting that neglect of the parties themselves led to the default judgment).

On October 8, 2009, Karma's receptionist received and signed for the summons and complaint. After initially denying—in a sworn affidavit—that process had ever been served, Abdul later acknowledged receipt but stated that the documents were lost and that he had never seen them. Karma's failure to answer the complaint is solely attributable to Karma's own neglect, and, as such, is inexcusable under *Thayer* and *Whipple*. *See Osman v. Wisted*, 78 Minn. 295, 297, 80 N.W. 1127, 1127 (1899) (denying husband's motion to reopen judgment where wife accepted service and misplaced the complaint). Concerning Karma's failure to appear at the hearing on the motion for default judgment, Abdul admitted receiving the motion papers but claimed that ICC lost them. But once Abdul received the papers, Karma was on notice of the suit and the default hearing such that the insurer's error does not excuse Karma's failure to respond or appear.

Karma argues that the misplacement of the summons and complaint was "isolated human error and not willful disregard." But there is no isolated-incident or lack-of-intent exception to the reasonable-excuse analysis, and the disappearance of the documents is solely attributable to Karma; losing papers is not excusable neglect. *See Hovelson v. U.S. Swim & Fitness, Inc.*, 450 N.W.2d 137, 142 (Minn. App. 1990) (rejecting as "without merit" a party's argument that its "neglect was excusable because it lost the summons and complaint"), *review denied* (Minn. Mar. 16, 1990). On this record, we discern no abuse of discretion in the district court's determination that Karma did not have a reasonable excuse for failing to respond to the summons and complaint.

B. Substantial prejudice

A party seeking relief under Minn. R. Civ. P. 60.02(1) "must show . . . that no substantial prejudice will result to the opponent." *Sand v. Sch. Serv. Employees Union, Local 284*, 402 N.W.2d 183, 186 (Minn. App. 1987), *review denied* (Minn. Apr. 29, 1987). Karma argues that it met this burden and that the district court abused its discretion in concluding otherwise for essentially three reasons. First, Karma asserts that Thao's argument regarding delay and expense occasioned by Karma's failure to answer or appear is misplaced because the "added expense and delay alone are not sufficient to show prejudice." *See Hovelson*, 450 N.W.2d at 142. But *Hovelson*, in fact, says: "*Ordinarily*, added expense and delay alone are not sufficient to show prejudice." *Id.* (emphasis added). The opinion continues:

> If it is perceived by the trial court that there is intentional ignoring of process, the additional expense must be viewed in a different light. To force a claimant to go to the expense of a

> hearing in court, to gather evidence and expert testimony and the concomitant preparation, all either by inexcusable neglect or by intent, colors the prejudice with a deeper hue.

Id. Here, the inexcusable nature of Karma's neglect must be considered in weighing the prejudicial effect of the added expense and delay occasioned by Karma's unexcused failure to answer or appear at the default hearing.

Second, Karma argues that Thao did not raise the issue of prejudice in the district court. Not only does Karma's argument erroneously suggest that it is Thao's burden to show prejudice by specifically identifying evidence or witnesses rendered unavailable by Karma's conduct, but the record reflects the contrary. At the hearing on Karma's motion, Thao's counsel argued that Karma had failed to show that Thao would not be prejudiced by Karma's failure to respond to either the discovery requests served with the complaint or to a pre-complaint letter requesting that Karma preserve all video surveillance tapes, recordings, and any other security records in its possession concerning the events giving rise to Thao's suit. Karma's bold assertion that "all relevant, discoverable, and known evidence has been preserved," is insufficient to meet its burden on the prejudice factor. Karma's failure (without explanation or excuse) to comply with Thao's discovery requests—served with the initial complaint—or to acknowledge Thao's request to preserve videotapes and other evidence, prevented Thao from even learning what relevant or discoverable evidence was in Karma's possession. Having withheld information in violation of the rules of civil procedure, Karma cannot now be heard to argue that Thao's failure to specifically identify lost evidence compels a conclusion that no prejudice has occurred.

Third, Karma argues that the district court abused its discretion by finding that "evidence needed for trial may be lost" and that Thao is prejudiced as a consequence. We disagree. In concluding that Karma had failed to meet its burden, the district court found that

> [b]y [Karma's] own admission, files regarding this case have been deleted and lost. [Thao] attempted to serve discovery demands upon [Karma] when the lawsuit was initially filed and these demands were not answered. Much of the evidence needed for trial may be lost because of the significant time lapse thereby prejudicing [Thao] against presenting and asserting a complete claim at trial.

Karma points out that the record contains incident reports, Thao's medical records, and witness statements collected by ICC. But this evidence does not include surveillance tapes or other security records created and maintained by Karma itself that Thao's counsel requested within a week of the incident. Nor does ICC's disclosure excuse Karma's prolonged failure to answer the complaint or respond to discovery. The record provides ample support for the district court's inference that evidence needed for trial may be lost. *See Foerster v. Holland*, 498 N.W.2d 459, 460 (Minn. 1993) (deferring to district court's discretion when record amply supported inferences drawn by district court). Accordingly, we conclude that the district court did not abuse its discretion in determining that Karma failed to satisfy its burden of showing lack of prejudice.

C. Due diligence

The district court found, and the parties do not dispute, that Karma acted with due diligence in seeking vacation of the default judgment.

D. Meritorious defense

The district court found that Karma "may also have a meritorious defense in this case." The court went no further than to observe that there are significant differences in the parties' accounts of the altercation and to conclude that it did "not rule out the fact that [Karma] may have a meritorious defense on the incomplete body of evidence that is before it presently." The memorandum and affidavits submitted with Karma's motion to vacate support this determination.

A reasonable defense is presented if the moving party "raises a triable issue," *Lysholm v. Karlos*, 414 N.W.2d 773, 775 (Minn. App. 1987), and presents "more than conclusory allegations in [the] moving papers." *Charson*, 419 N.W.2d at 491. "The existence of a meritorious defense may be established in an affidavit or by other proof." *Grunke v. Kloskin*, 355 N.W.2d 207, 209 (Minn. App. 1984), *review denied* (Minn. Jan. 2, 1985). Affidavits supporting the opening of a default judgment must be executed by an affiant with personal knowledge of the facts stated therein. *See Hinz*, 237 Minn. at 30, 53 N.W.2d at 456 (requiring an affidavit executed by the defendant or some other person possessing personal knowledge of the facts).

Karma submitted affidavits from four of its security guards who were working on the night Thao was injured. Thao correctly observes that none of the affidavits contains specific information about Thao or states that Thao provoked Karma's employees, thereby causing them to injure Thao in self-defense. Each affiant described a chaotic sequence of events, but none of them identified Thao or denied that he was injured by a Karma employee. The employee-affiants do state that they were set upon by several

Asian customers while escorting a drunk customer (who is not identified as Thao) outside, while Thao's affidavit states that the employees attacked him without provocation. As the district court found, these differing versions of the incident may establish a meritorious defense, but, on this record, not a strong one.

To summarize, Karma has (1) made a reasonable, but not strong, showing of a defense on the merits; (2) not shown any reasonable excuse for its failure to answer; (3) made, at best, a weak showing on the prejudice factor; and (4) shown due diligence. The moderate strength of the defense and due diligence factors is attenuated somewhat by Karma's overall course of conduct, which, the record demonstrates, has been characterized by a negligent and irresponsible disregard for its legal obligations as a registered limited liability company and a party to litigation. *See Hovelson*, 450 N.W.2d at 142 (observing that "some showing" on two *Hinz* factors may be weakened when the movant's "overall course of conduct" includes inexcusable neglect). Because the district court reasonably weighed two factors against granting the motion, on this record we cannot conclude that the district court abused its discretion by refusing to vacate the default judgment.

III. Thao's substituted service of the summons and complaint through the Minnesota Secretary of State was sufficient.

Karma argues that Thao's substituted service of the summons and complaint was invalid because the affidavit of unserved process the process server submitted to the secretary of state with the request for substituted service did not meet the statutory

criteria. Because service was improper, Karma contends, the district court lacked jurisdiction over Karma and the case must be dismissed. We disagree.

We first consider Thao's argument that Karma waived this issue by failing to properly raise it before the district court. The record demonstrates that Karma raised the issue in its answer, in its reply memorandum in support of its motion to vacate judgment, and at the hearing on the motion. Although the district court did not specifically address the issue in its order, the fact that it found in Thao's favor indicates that it rejected Karma's argument concerning service. *See Roberge v. Cambridge Coop. Creamery Co.*, 248 Minn. 184, 195, 79 N.W.2d 142, 149 (1956) (holding denial of motion for amended findings is equivalent to finding contrary to that sought in motion).

Karma is registered with the Minnesota Secretary of State as "Karma Entertainment, LLC." As a limited liability company, Karma must comply with Minn. Stat. § 5.36, subd. 3 (2010), whenever it changes its registered office or registered agent. Section 5.36 provides that "[a] business entity may change its registered office . . . by filing with the secretary of state a statement containing" the old address and the new address. Minn. Stat. § 5.36, subd. 3 (change of agent or office). It is undisputed here that Karma changed its registered office in September 2009 without notifying the secretary of state, in clear contravention of the statute.

Karma's failure to provide the required notice to the secretary of state directly affected how Thao could effectuate service of process. Minn. Stat. § 322B.876, subd. 1 (2010), provides:

> A process, notice, or demand required or permitted by law to be served upon a limited liability company may be served either upon the registered agent, if any, of the limited liability company named in the articles of organization, or upon a manager of the limited liability company, or upon the secretary of state as provided in section 5.25.

Minn. Stat. § 5.25, subd. 1(3) (2010), provides that "if no agent, officer, manager, or general partner can be found at the address on file with the secretary of state," then service may be accomplished through the "secretary of state as provided in this section." When service is made on the secretary of state,

> the secretary of state shall immediately cause a copy of a service of process to be forwarded by certified mail addressed to the business entity:
>
> (1) in care of the agent of the business entity, at its registered office in this state as it appears in the records of the secretary of state[.]

Minn. Stat. § 5.25, subd. 6 (2010).

The record reflects that Thao effectuated service pursuant to section 5.25. Thao's process server twice went to Karma's registered office at the address on file with the secretary of state. When the process server found the lights out and nobody in the office, he completed an affidavit of unserved process stating that on two occasions he "was not able to personally serve [Karma] because the door was locked and the lights were off." The process server mailed the process to the Minnesota Secretary of State for service on Karma at its registered business address pursuant to Minn. Stat. § 332B.876 and Minn. Stat. § 5.25.

Karma argues that Thao's server was required to comply with Minn. Stat. § 543.08 (2010), which provides:

> If a private domestic corporation has no officer at the registered office of the corporation within the state upon whom service can be made, of which fact the return of the sheriff of the county in which that office is located, or the affidavit of a private person not a party, that none can be found in that county shall be conclusive evidence, service of the summons upon it may be made according to section 5.25.

Karma argues that because the affidavit of unserved process was silent as to whether Karma had an officer at its registered office or in Hennepin County, and because an officer was in fact present in the county on both occasions that service was attempted, the affidavit is legally deficient.

Karma's arguments are unavailing. First, Minn. Stat. § 543.08 applies to corporations and Karma is an LLC, not a corporation. Second, chapter 322B expressly applies to LLCs. And the substituted service provisions of chapter 322B and section 5.25 do not require submission of an affidavit of unserved process. Third, Karma provides no legal basis for its argument that a process server who is unable to locate a company's registered office at the address on file with the secretary of state is obligated to go out into the county searching for the company's officers or investigate the matter with the postal service. And if Karma had notified the secretary of state when it changed its registered address, as it was required to do by statute, the server would have located the office immediately. Because service on Karma is governed by chapter 322B, which does not require an affidavit, Thao properly served Karma through the secretary of state and the district court therefore had jurisdiction over Karma.

Affirmed.