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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2068**

Northtown Business Supper Club Limited Partnership,
Respondent,

vs.

T. Jacobs, Inc. d/b/a Tanners Woodfire Grill, et al.,
Defendants,

Mark Motz,
Appellant.

**Filed September 23, 2008
Affirmed
Kalitowski, Judge**

Anoka County District Court
File No. 02-C7-06-005855

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Considered and decided by Kalitowski, Presiding Judge; Hudson, Judge; and
Collins, Judge.*

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

UNPUBLISHED OPINION

KALITOWSKI, Judge

On appeal in this lease-guaranty dispute, appellant guarantor Mark Motz argues that (1) summary judgment was improper because appellant raised fact questions regarding the extent to which the tenant's improvements of the leased property should be offset against the unpaid rent that was the subject of the guaranty and (2) the district court abused its discretion by denying appellant's motion to vacate default judgment against the tenant co-defendant. We affirm.

DECISION

I.

Appellant argues that the district court erred in granting respondent summary judgment on its breach-of-personal-guaranty claims. Because appellant did not submit evidence that raised a genuine issue of material fact regarding any defense to respondent's claim for unpaid rent, we disagree.

On appeal from summary judgment, we make two determinations: "(1) whether there are any genuine issues of material fact and (2) whether the [district court] erred in [its] application of the law." *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). We "view the evidence in the light most favorable to the party against whom judgment was granted." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). But "the party resisting summary judgment must do more than rest on mere averments"; it must produce evidence of specific facts sufficient to raise a jury issue. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997); *Lundgren v. Eustermann*, 370 N.W.2d 877, 881 (Minn. 1985).

Summary judgment is appropriate if the nonmoving party fails to present “*sufficient evidence* to permit reasonable persons to draw different conclusions.” *Schroeder v. St. Louis County*, 708 N.W.2d 497, 507 (Minn. 2006). If there are no genuine issues of material fact, we will review the district court’s application of the law de novo. *Hubred v. Control Data Corp.*, 442 N.W.2d 308, 310 (Minn. 1989).

Here, appellant does not dispute the district court’s finding that the personal guaranty is valid and enforceable. But appellant claims that the amount owed under the lease is undetermined because he has a valid offset defense.

As an initial matter, respondent raises a number of threshold objections to appellant’s offset defense, asserting that appellant lacks standing to bring the defense on another party’s behalf, that the defense has been waived, and that appellant is precluded from bringing the defense as a matter of law because of the unconditional nature of the personal guaranty. But because appellant has not shown that a genuine issue of material fact exists for trial on any defense he has raised in response to respondent’s claim for unpaid rent, we need not address these arguments.

Appellant argues that T. Jacobs, the tenant, made improvements to the subject property totaling approximately \$1,000,000 that respondent-landlord was responsible for under the lease and that appellant should now be allowed to deduct from the total amount owed. In support of his motion opposing summary judgment, appellant produced several affidavits and his deposition testimony. Appellant’s affidavit and testimony establish that he had no personal knowledge of the improvements and that they were another company officer’s responsibility. Appellant submitted another affidavit from that company officer

detailing some of the improvements. But with regard to respondent's liability for the cost, the affidavit merely states that the company officer informed respondent's agent that he "believed that under the lease [respondent] was responsible to pay those costs." Appellant's attorney also provided an affidavit, which states: "[The company officer] stated that there are documents which would exonerate [appellant]; that there are documents which would evidence the million dollars of repairs and improvements made" But appellant never provided the court with any of these documents. We conclude that the "mere averments" made in the affidavits and testimony provided by appellant are insufficient to raise a genuine issue of material fact regarding the alleged offset defense. *See DLH*, 566 N.W.2d at 71.

II.

Appellant argues that the district court abused its discretion by refusing to vacate its order for default judgment against T. Jacobs. Because appellant failed to meet the requirements of the four-part test for vacating a default judgment, we disagree.

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). "In the exercise of sound judicial discretion . . . it is the duty of the [district] court . . . to grant a motion to open a default judgment and permit a party to answer," if the moving party shows that it has met each of four requirements. *Hinz v. Northland Milk & Ice Cream Co.*, 237 Minn. 28, 30, 53 N.W.2d 454, 455-56 (1952); *see also Finden v. Klaas*, 268 Minn. 268, 271, 128 N.W.2d 748, 750 (1964) (reaffirming four-part test). The movant must show that (1) he has a reasonable defense on the merits; (2) he has a reasonable excuse for the failure

or neglect to answer; (3) he was diligent after notice of entry of the judgment; and (4) no prejudice to the other party will result from reopening the judgment. *Hinz*, 237 Minn. at 30, 53 N.W.2d at 456. On review, we determine whether the district court clearly abused its discretion, viewing the record in the light most favorable to the district court's decision. *Bentonize, Inc. v. Green*, 431 N.W.2d 579, 582 (Minn. App. 1988).

Reasonable Defense on the Merits

The most important factor in examining a motion for relief under rule 60.02 is whether the movant has “establish[ed] to the satisfaction of the court that [he] possesses a meritorious claim.” *Charson v. Temple Israel*, 419 N.W.2d 488, 491 (Minn. 1988). Specific information that demonstrates the existence of a debatably meritorious claim or defense satisfies this factor. *Id.* at 492. A meritorious defense “must ordinarily be demonstrated by more than conclusory allegations in moving papers.” *Id.* at 491.

Here, the record contains no evidence of a meritorious defense. As discussed in Section I, appellant (1) does not dispute that the personal guaranty is valid and enforceable; and (2) has produced insufficient evidence to defeat summary judgment on his offset defense.

Excusable Neglect

Appellant has not offered a reasonable excuse for either T. Jacobs' or his own failure to act. “Neglect of the party itself which leads to entry of a default judgment is inexcusable, and such neglect is a proper ground for refusing to reopen a judgment.” *Howard v. Frondell*, 387 N.W.2d 205, 208 (Minn. App. 1986), *review denied* (Minn. July 31, 1986). Appellant offered no excuse for T. Jacobs' failure to respond to

discovery requests and to attend court appearances. Moreover, although appellant was put on notice as early as September 2006 that T. Jacobs would not defend itself in the lawsuit, appellant did not attempt to gather information relating to his offset defense until January 2007, after summary judgment was entered against him.

Diligence after Notice of Entry of Default Judgment

Appellant has not established that he acted diligently after judgment was entered against T. Jacobs. Although appellant stated in an affidavit supporting his January 16, 2007 motion to vacate default judgment that he was “in the process of gathering . . . information and documents” that he would provide to respondent, he did not provide the information or documents until March 20, 2007, the day after the hearing on his motion to vacate. Because appellant’s discovery responses were untimely, it was within the district court’s discretion not to receive them.

Prejudice

Appellant cannot show that respondent would not be prejudiced if default judgment were vacated. Prejudice inherently incidental to the reopening of a case is not sufficient prejudice to require denial of a motion to vacate. *Finden*, 268 Minn. at 272, 128 N.W.2d at 751. When the only prejudicial effect of vacating a judgment is expense and delay, “substantial prejudice of the kind necessary to keep a judgment from being reopened does not exist.” *Peterson v. Skutt Ceramic Prods., Inc.*, 417 N.W.2d 648, 651 (Minn. App. 1987), *review denied* (Minn. Mar. 18, 1988).

Appellant argues that respondent would only be prejudiced by the expense and delay of reopening the judgment. But respondent never received discovery responses

from T. Jacobs, and appellant did not produce any responses or documents supporting his offset defense until after the hearing on his motion to vacate. And as the district court observed, since respondent bargained for appellant's personal guaranty when he signed the lease "to ensure the timely and full payment of any amounts becoming due under the lease . . . [respondent] would be substantially prejudiced by reopening this case because doing so would alter the terms of their original contract."

Because appellant did not satisfy the four requirements for vacating a default judgment, we conclude that the district court's refusal to reopen the judgment entered against T. Jacobs was within its discretion.

Affirmed.