STATE OF MINNESOTA
IN COURT OF APPEALS
A11-328

First Bank & Trust,
Respondent,

vs.

James M. Larson,
Appellant.

Filed December 12, 2011
Affirmed
Hudson, Judge

Big Stone County District Court
File No. 06-CV-10-194

Jeff C. Braegelmann, Ryan Douglas Christian, Gislason & Hunter, LLP, New Ulm, Minnesota (for respondent)

Douglas D. Kluver, Nelson Oyen Torvik, Montevideo, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Minge, Judge; and Hudson, Judge.

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

HUDSON, Judge

Appellant challenges the denial of his motion to vacate summary judgment, arguing that (1) the district court lacked personal jurisdiction over him, and (2) respondent committed fraud by misrepresentation. Because the district court properly

asserted personal jurisdiction over appellant and because appellant's fraud claim is unfounded, we affirm.

FACTS

In 2008, appellant James Larson purchased property in Ortonville. He borrowed $52,500 from respondent First Bank & Trust as evidenced by a promissory note to finance the purchase. The note was signed in Milbank, South Dakota, where respondent is located, and it stated that all loan payments were to be made to respondent in Milbank.

Appellant moved to Alaska on October 31, 2009. Less than two months later, respondent sent appellant a notice of default, acceleration, and demand for payment on the promissory note. Respondent commenced foreclosure proceedings, which were later postponed because appellant sold the property and applied the $45,000 in proceeds to the loan principal. Appellant claims that the parties agreed to a short sale of the property in lieu of the balance owed. The alleged sale-and-forbearance agreement was not placed in writing.

In June, respondent filed a summons and complaint and personally served appellant in Alaska to recover the note's unpaid balance. Appellant responded by fax in July, after the 20-day deadline to answer had expired, with a four-sentence letter disputing the amount owed and requesting an arbitrator. In addition, appellant hand wrote "Twenty day response" on the fax cover sheet. In August, respondent moved for summary judgment, which the district court granted in September.

Appellant moved the district court to vacate summary judgment pursuant to Minn. R. Civ. P. 60.02(c) and (d). Appellant argued that summary judgment was void because

the district court lacked personal jurisdiction over appellant. In the alternative, appellant argued that summary judgment should have been vacated because respondent committed fraud by misrepresentation by breaching a promise to forbear its deficiency remedy, which gave rise to a promissory estoppel claim. The district court denied appellant's motion. The district court concluded that appellant's faxed response to respondent constituted an answer and that, because appellant did not raise a personal-jurisdiction defense in the answer, appellant waived his personal-jurisdiction defense. Additionally, the district court concluded that appellant's fraud claim was unfounded because an unwritten agreement to forbear respondent's deficiency remedy would be unenforceable under Minnesota law.

This appeal follows.

D E C I S I O N

I

A party may seek to have a judgment vacated if the judgment is void. Minn. R. Civ. P. 60.02(d). One ground for arguing that a judgment is void is lack of personal jurisdiction. *In re Ivey*, 687 N.W.2d 666, 670 (Minn. App. 2004), *review denied* (Minn. Dec. 22, 2004). Generally, we review the grant of a motion to vacate a judgment brought pursuant to Minn. R. Civ. P. 60.02 for abuse of discretion. *Meyer v. Best W. Seville Plaza Hotel*, 562 N.W.2d 690, 694 (Minn. App. 1997), *review denied* (Minn. June 26, 1997). But the decision to grant a 60.02(d) motion because the judgment is void for lack of personal jurisdiction does not involve the exercise of discretion and is reviewed de

novo. *Comm'r of Natural Res. v. Nicollet Cnty. Pub. Water/Wetlands Hearings Unit*, 633 N.W.2d 25, 31 (Minn. App. 2001), *review denied* (Minn. Nov. 13, 2001).

Appellant argues that personal jurisdiction is lacking because Minnesota's long-arm statute does not apply. Alternatively, appellant argues that he did not waive his personal-jurisdiction defense by faxing a response to respondent's complaint. Because the district court determined that appellant waived his personal-jurisdiction defense by answering the complaint, it did not address appellant's argument that the district court lacked personal jurisdiction. In the interests of justice, however, we will address this argument. Minn. R. Civ. App. P. 103.04 (appellate courts may address issues as justice requires).

A. Long-arm statute and minimum contacts

Whether personal jurisdiction over a nonresident exists depends on two criteria: (1) satisfaction of the requirements of the long-arm statute and (2) sufficient minimum contacts to satisfy constitutional due process requirements. *Domtar, Inc. v. Niagara Fire Ins. Co.*, 533 N.W.2d 25, 29 (Minn. 1995). The requirements of the long-arm statute present a question of state law; the issue of minimum contacts is analyzed under federal law. *Id.* The long-arm statute analysis generally goes hand-in-hand with the minimum-contacts test because the statute allows personal jurisdiction to the extent permitted by due process. *Valspar Corp. v. Lukken Color Corp.*, 495 N.W.2d 408, 410–11 (Minn. 1992).

Minnesota's long-arm statute states that courts "may exercise personal jurisdiction over any foreign corporation or any nonresident individual . . . as if . . . the individual

were a resident of this state. This section applies if," among other situations, "nonresident individual: (1) owns, uses, or possesses any real or personal property situated in this state; or (2) transacts any business within the state . . . ." Minn. Stat. § 543.19, subd. 1 (2010). Appellant argues that the long-arm statute does not apply here because (1) he did not own, use, or possess any real property in Minnesota when respondent sued appellant on the promissory note and (2) he did not transact business in Minnesota related to the note.

Ownership of property

Appellant argues that, because the Ortonville property securing the note was sold before respondent brought its motion for summary judgment, the property cannot be used as a basis for long-arm jurisdiction because appellant did not own the property when the motion was filed. The relevant portion of the long-arm statute states that a non-resident must own, use, or possess property in Minnesota for personal jurisdiction to be exercised on that basis. *Id.* Appellant sold the property that secured the note about six weeks before respondent sued to recover the balance of the note. Therefore, we agree that appellant did not own the Ortonville property at the time the district court asserted jurisdiction over appellant. But our analysis does not end there, as we must also consider whether appellant transacted business within the state of Minnesota.

Transacting business

The long-arm statute applies to nonresidents who "transact[] any business within the state." *Id.* Personal jurisdiction is established by general or specific conduct. *JL Schwieters Constr., Inc. v. Goldridge Constr., Inc.*, 788 N.W.2d 529, 534 (Minn. App.

2010), *review denied* (Minn. Dec. 14, 2010). "General personal jurisdiction exists when a party's contacts with the forum state are continuous and systematic." *Id.* at 534–35 (quotation omitted). Specific jurisdiction, on the other hand, "can arise from a single contact with the forum if the cause of action arose out of that contact." *Id.* (quotation omitted). The parties do not distinguish in their briefs between general and specific jurisdiction. But because the arguments center on a single property purchase and accompanying loan, we apply a specific-jurisdiction analysis.

Appellant purchased property in Ortonville, which was financed by the loan that gave rise to the action on appeal. Additionally, the purchase occurred in 2008, more than two years before appellant was served with the action on the promissory note. Therefore, appellant transacted business in Minnesota so as to satisfy that requirement of the long-arm statute. *See* Minn. Stat. § 543.19, subd. 1.

In addition, Minnesota courts use the following five-factor minimum contacts test to determine whether the exercise of personal jurisdiction is proper: (1) the quantity of the contacts with the forum state, (2) the nature and quality of the contacts, (3) the source and connection of the cause of action with those contacts, (4) the state's interest in providing a forum, and (5) the convenience of the parties. *Juelich v. Yamazaki Mazak Optonics Corp.*, 682 N.W.2d 565, 570 (Minn. 2004). The last two factors are secondary factors, which require less consideration. *See id.* We resolve any doubt regarding the sufficiency of contacts to support the exercise of personal jurisdiction in favor of finding jurisdiction. *Valspar Corp.*, 495 N.W.2d at 412. Appellant asserts that, because the long-arm statute does not apply to him, the court need not reach the minimum-contacts

test. But because the long-arm statute extends personal jurisdiction as far as due process allows, we conduct a minimum-contacts analysis. *Id.* at 410–11.

Quantity of contacts

Appellant's contact with Minnesota was a single contact: the purchase of property in Ortonville and the execution of a promissory note in favor of respondent. Multiple contacts, however, are not required to exert specific jurisdiction. *KSTP-FM, LLC v. Specialized Commc'ns, Inc.*, 602 N.W.2d 919, 923 (Minn. App. 1999) (stating that a single, isolated transaction between nonresident and forum state may be sufficient to justify personal jurisdiction).

Nature and quality of contacts

When a party's single transaction supports the exercise of personal jurisdiction and the cause of action arises directly from the transaction, "the nature and quality of the contact[] become dispositive." *TRWL Fin. Establishment v. Select Int'l, Inc.*, 527 N.W.2d 573, 576 (Minn. App. 1995) (quotation omitted). A key consideration in reviewing the nature and quality of contacts is whether a defendant purposefully availed himself of the benefits and protections of Minnesota state law. *Jenson v. R.L.K. & Co.*, 534 N.W.2d 719, 723 (Minn. App. 1995), *review denied* (Minn. Sept. 20, 1995).

Here, appellant's key contact with Minnesota was a single transaction—purchase and financing of the Ortonville property—and the motion for summary judgment arose directly from appellant's purchase of the property. That the property is located in Minnesota is undisputed. Additionally, appellant owned the property for more than two years before respondent sued appellant, procured a loan to finance the purchase from

respondent, and continued to hold the property until six weeks before he was served to recover the unpaid balance. A key question then becomes: Did appellant have "'fair warning' of being sued in Minnesota?" *KSTP-FM, LLC*, 602 N.W.2d at 924 (quoting *Real Props., Inc. v. Mission Ins. Co.*, 427 N.W.2d 665, 668 (Minn. 1988) (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 105 S. Ct. 2174, 2182 (1985))). The purchase of property in Minnesota, in addition to procuring a loan to finance the property, provided appellant fair warning of being sued in the state where the property was purchased.

We conclude that appellant's purchase of Minnesota property and execution of a promissory note in favor of respondent gave rise to the action at issue and that, by purchasing the property, appellant purposefully availed himself of the benefits and protections of Minnesota law. Given the broad reach of the long-arm statute, the district court properly exerted jurisdiction over appellant. *See Hughs on Behalf of Praul v. Cole*, 572 N.W.2d 747, 750 (Minn. App. 1997) ("The legislature designed Minnesota's long-arm statute to extend Minnesota courts' personal jurisdiction as far as due process allows.").

B. Waiver

Even if the long-arm statute did not apply to appellant, we conclude that appellant waived his personal-jurisdiction defense in his faxed answer to respondent. Whether personal jurisdiction exists is a question of law that is reviewed de novo. *Juelich*, 682 at 569. Lack of personal jurisdiction as a defense, unlike subject matter jurisdiction, may be waived. *In re Ivey*, 687 N.W.2d at 670. "The defense of personal jurisdiction is deemed

waived if not raised as a defense, made by motion, or included in a responsive pleading." *Nicollet Cnty.*, 633 N.W.2d at 31 (citing Minn. R. Civ. P. 12.08(a)). But "simple participation in the litigation . . . does not, standing alone, amount to a waiver of a jurisdictional defense." *Shamrock Dev., Inc. v. Smith*, 754 N.W.2d 377, 381 (Minn. 2008) (quotation omitted).

Appellant argues that he did not waive his personal-jurisdiction defense because his faxed response did not constitute an answer. The construction of a rule of court procedure is subject to de novo review. *Patterson v. Wu Family Corp.*, 608 N.W.2d 863, 866 (Minn. 2000). We construe an answer reasonably and not technically. *Rees v. Storms*, 101 Minn. 381, 384, 112 N.W. 419, 420 (1907). Additionally, we have held that "courts should construe pleadings liberally . . . and judge them by their substance and not their form." *Basich v. Bd. of Pensions of Evangelical Lutheran Church in Am.*, 493 N.W.2d 293, 295 (Minn. App. 1992) (stating that pleadings must be construed to promote "substantial justice" (quoting Minn. R. Civ. P. 8.06)).

Appellant argues that the faxed response was deficient as an answer because it did not comport with the requirements of rule 8.02 to admit or deny factual allegations and violated the 20-day response requirement. Appellant's faxed response to respondent stated that he was

> disputing the amount being sought by First Bank & Trust. I believe the amount listed to be inaccurate. In addition I believe the funds of the proceeds of the loan to be inaccurate. I would like to request a third party arbitrator from the court to resolve these and other issues.

The cover sheet to the faxed response stated, "Twenty day response." The district court concluded that appellant's fax was "for all intents and purposes . . . his answer to the Plaintiff's original complaint."

Appellant's response lacks some of the basic requirements of an answer under Minn. R. Civ. P. 8.02, which requires defenses to each claim and that the defendant "admit or deny the averments upon which the adverse party relies." Appellant does not "admit" or "deny" the multiple facts pleaded in respondent's complaint. Appellant also does not plead defenses. Nevertheless, we conclude that the substance of appellant's letter disputes respondent's claims, which constitutes a denial under rule 8.02. Additionally, we agree with respondent that by writing "Twenty day response" on the cover sheet to his faxed response, appellant demonstrated that he was aware of the deadline for submitting an answer. In construing appellant's response reasonably and liberally, we conclude that appellant answered respondent's complaint. Because appellant's answer did not raise the defense of personal jurisdiction, that defense was waived. *See Nicollet Cnty.*, 633 N.W.2d at 31.

II

A district court may vacate a final judgment for "fraud, misrepresentation, or other misconduct of an adverse party." *Palladium Holdings, LLC v. Zuni Mortg. Loan Trust 2006-OA 1*, 775 N.W.2d 168, 173 (Minn. App. 2009) (citing Minn. R. Civ. P. 60.02), *review denied* (Minn. Jan. 27, 2010). Whether to open a judgment rests largely within the district court's discretion and is reviewed for an abuse of discretion. *Id.*

A trial court's discretion in vacating a judgment, however, is limited by the application of the four *Hinz* factors. *Finden v. Klaas*, 268 Minn. 268, 271, 128 N.W.2d 748, 750 (1964) (citing *Hinz v. Northland Milk & Ice Cream Co.*, 237 Minn. 28, 30, 53 N.W.2d 454, 456 (1952)). We have held that relief under rule 60.02 should be granted if the movant satisfies the following four *Hinz* factors: (1) a reasonable defense on the merits, (2) a reasonable excuse for failure to answer, (3) diligence after notice of entry of judgment, and (4) a demonstrated lack of prejudice to the judgment creditor. *Northland Temps., Inc. v. Turpin*, 744 N.W.2d 398, 402 (Minn. App. 2008), *review denied* (Minn. Apr. 29, 2008).

Appellant argues that the district court erred in denying his motion to vacate summary judgment based on respondent's fraud or misrepresentation. Appellant correctly notes that the district court did not conduct a *Hinz* analysis. But to obtain relief, appellant must provide a defense on the merits. *See id.* Here, appellant failed to do so because the oral forbearance agreement is unenforceable under Minnesota law.

Appellant contends that the unwritten agreement to forbear on the deficiency gave rise to a promissory estoppel claim. "[A] debtor may not maintain an action on a credit agreement unless the agreement is in writing"; this includes agreements by a creditor to forbear "from exercising remedies under prior credit agreements." Minn. Stat. § 513.33, subds. 2, 3 (2010). Here, appellant argues a new credit agreement was reached orally. Respondent argues that such an agreement is barred unless it is in writing.

Appellant cites only to a federal district court case to argue that "Minnesota law is clear" that if a borrower acts in reliance on an oral promise from a lender, the promise

can be enforced "on a theory of promissory estoppel." *See Resolution Trust Corp. v. Flanagan*, 821 F. Supp. 572, 574 (D. Minn. 1993). Federal caselaw is not binding and, on this point, is not persuasive. *State ex rel. Hatch v. Emp'rs Ins. of Wausau*, 644 N.W.2d 820, 828 (Minn. App. 2002) ("[F]ederal court interpretations of state law are not binding on state courts."), *review denied* (Minn. Aug. 6, 2002). Furthermore, we have held that claims on agreements that fall under Minn. Stat. § 513.33 "fail as a matter of law if the agreement is not in writing." *Greuling v. Wells Fargo Home Mortg., Inc.*, 690 N.W.2d 757, 761–62 (Minn. App. 2005) (rejecting promissory estoppel claim and holding that statute's plain and ambiguous language "clearly prohibits a claim that a new credit agreement is created unless the agreement is in writing . . ."). The district court did not abuse its discretion in denying appellant's motion to vacate.

Affirmed.