STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0530

Atlantic Credit & Finance,
Respondent,

vs.

James R. Dustrude,
Appellant.

Filed March 4, 2008
Affirmed
Crippen, Judge[*]

Hennepin County District Court
File No. 27-CV-06-13654

Michael D. Johnson, Gurstel Staloch & Chargo, 401 North Third Street, Suite 590, Minneapolis, MN 55401 (for respondent)

James R. Dustrude, 2001 Arbor Lane, Mound, MN 55364 (pro se appellant)

Considered and decided by Willis, Presiding Judge; Shumaker, Judge; and Crippen, Judge.

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

CRIPPEN, Judge

Appellant James Dustrude contends that the district court abused its discretion in refusing to vacate a default judgment that was entered when he failed to appear at the

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

summary judgment proceeding. Because appellant failed to show he has a meritorious defense or other factors constituting cause for vacation, we affirm.[1]

FACTS

In July 2002, appellant purchased a central air conditioning system from Sears Roebuck, Co. with his GM credit card. After concluding that the product was defective, appellant refused to pay the amount due on the credit card, believing that it was the credit card company's responsibility to "charge back" the amount to Sears. Appellant claims he contacted the credit card company several times between September 2002 and December 2003 to discuss the dispute.

Respondent Atlantic Credit, having purchased GM credit card debts, commenced a collection action against appellant. Appellant failed to appear at a November 2006 hearing conducted on respondent's summary-judgment motion, and default judgment for $6,731.04 was entered against him. Appellant moved to vacate the judgment, claiming that he was not notified of the summary-judgment hearing and that the credit card company did not properly resolve his dispute with Sears. The district court denied this motion.

D E C I S I O N

Under Minn. R. Civ. P. 60.02, a district court may relieve a party from final judgment on the basis of mistake, inadvertence, surprise, excusable neglect, or "any other reason justifying relief from the operation of the judgment." On review, our inquiry is

[1] Because we affirm the district court's denial of appellant's motion to vacate, we also must deny appellant's incidental claims for costs, interest, and damages.

limited to the question of whether the district court abused the discretion accorded to it on a motion to vacate. *Nelson v. Siebert*, 428 N.W.2d 394, 395 (Minn. 1988). We are to view 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).

When examining the request for vacating the default judgment under rule 60.02, the district court must consider whether the petitioner has shown the so-called *Finden* factors: (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 default judgment; and (4) that no substantial prejudice will result to the opposing party. *Finden v. Klaas*, 268 Minn. 268, 271, 128 N.W.2d 748, 750 (1964); *Hinz v. Northland Milk & Ice Cream Co.*, 237 Minn. 28, 30, 53 N.W.2d 454, 455-56 (1952). When, as here, the district court does not employ the *Finden* test in its decision on a motion to vacate, this court must apply the test de novo. *Carter v. Anderson*, 554 N.W.2d 110, 115 (Minn. App. 1996), *review denied* (Minn. Dec. 23, 1996).

Appellant's diligence in attacking the judgment is not questioned, but he has failed to establish any of the other three *Finden* factors.

A. Prejudice to opposing party

Appellant first fails the fourth *Finden* factor, which requires the party seeking to vacate a judgment to "establish[] that no substantial prejudice will result to the other party." *Imperial Premium Fin. Inc. v. GK Cab Co.*, 603 N.W.2d 853, 858 (Minn. App. 2000). Appellant did not address this factor in his motion to vacate or in his appellate

brief. Because issues not briefed on appeal are waived, *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982), appellant does not satisfy his burden and fails this prong of the test.

B. Reasonable excuse

Appellant contends that he did not attend the summary judgment hearing because he did not receive notice. Minn. R. Civ. P. 5.02 authorizes service of a notice of motion by mail. Service is complete on mailing. *Id.* It is well established that proof of mailing creates a presumption that the letter was received by the addressee. *Outcault Adver. Co. v. Farmers & Merchs. State Bank*, 151 Minn. 500, 501, 187 N.W. 514, 514 (1922). "A party challenging an affidavit of service must overcome it by clear and convincing evidence." *Imperial*, 603 N.W.2d at 858.

Respondent presented an affidavit of service, demonstrating that the notice of motion for summary judgment was mailed to appellant's current address. Appellant did not assert that the address was incorrect. In appellant's motion to vacate, he simply stated that he did not receive the notice and motion. Viewed in the light most favorable to the decision, appellant's assertion, without further explanation, fails to clearly and convincingly defeat respondent's affidavit of service.

C. Defense on the merits

It is most critical in examining appellant's petition to recognize that before relief can be granted under rule 60.02, the moving party must "establish to the satisfaction of the court that it possesses a meritorious claim." *Charson v. Temple Israel*, 419 N.W.2d 488, 491 (Minn. 1988). A meritorious defense, "must ordinarily be demonstrated by more than conclusory allegations in moving papers." *Id.* On appeal, appellant contends

that he is not required to pay the credit card debt because respondent violated the Truth In Lending Act (TILA), 15 U.S.C. §§ 1601-1667f (2000), by failing to follow a prescribed dispute-resolution procedure. *See* 12 C.F.R. § 226.13(c)-(h) (2002) (setting forth dispute resolution procedures; providing that the credit card company must conduct a "reasonable investigation" of the matter and, depending on the outcome, credit the cardholder's account); 15 U.S.C. § 1666(a)(3) (after conducting a reasonable investigation, credit card company has no further responsibility to the cardholder).

Appellant fails to satisfy this factor for several reasons. First, he failed to assert his truth-in-lending defense in his answer, violating Minn. R. Civ. P. 12.02, which states that "[e]very defense, in law or fact . . . shall be asserted in the responsive pleading." Second, appellant raises this defense for the first time on appeal, and this court may consider "only those issues that the record shows were presented and considered by the [district] court in deciding the matter before it." *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (quotation omitted). Finally, he references several letters, faxes, and telephone correspondence logs to support his claim that the credit card company improperly investigated the matter, but none of these documents are part of the trial court record. We are not permitted to rely on appellant's unsupported assertions in determining whether he has a defense on the merits. *See* Minn. R. Civ. App. P. 110.01 (the record on appeal consists of "[t]he papers filed in the trial court, the exhibits, and the transcript of the proceedings").

Although appellant may not have recognized the importance of asserting his defenses in his responsive pleading, presenting his truth-in-lending defense to the district

court, and preserving the record by offering exhibits into evidence, "[p]ro se litigants are generally held to the same standards as attorneys." *Heinsch v. Lot 27, Block 1 For's Beach*, 399 N.W.2d 107, 109 (Minn. App. 1987). Viewed in the light most favorable to the decision, appellant did not properly assert any defense on the merits.

Because appellant failed to show a meritorious defense, as well as other factors demonstrating cause for vacation, the district court did not err in denying his motion.

Affirmed.