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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1314**

Tou Lu Yang,
Respondent,

vs.

Barry V. Voss, P.A.,
Appellant.

**Filed April 13, 2010
Affirmed
Shumaker, Judge**

Hennepin County District Court
File No. CV-08-16309

Tou Lu Yang (pro se respondent)

Barry V. Voss, Minneapolis, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Klaphake, Judge; and
Shumaker, Judge.

UNPUBLISHED OPINION

SHUMAKER, Judge

When appellant failed to appear for trial, the district court awarded default judgment to respondent and denied appellant's motion to vacate that judgment. Because the district court did not abuse its discretion in denying the motion to vacate the judgment, we affirm.

FACTS

After this court affirmed his murder and attempted-murder convictions, respondent Tou Lu Yang, through his father, retained appellant Barry Voss, an attorney, to pursue postconviction relief.

Voss began his representation on March 5, 2006, and Yang paid a retainer of \$5,000 in cash and monthly installment payments until he reached the total of \$6,050. In February 2007, Yang discharged Voss, and then, in March of that year, he sued Voss in conciliation court for the return of the fee on the ground that Voss failed to render legal services to him. Voss did not appear for the hearing on the claim and, on July 12, 2007, the court ordered a default judgment in favor of Yang for \$6,050.

Arguing that he had not received notice of the conciliation-court action, Voss moved to vacate the judgment. The court granted the motion; the matter returned to conciliation court; Voss asserted a counterclaim for additional fees; and a trial was held. Voss prevailed in that proceeding.

Yang removed the matter to the district court, and the court ordered the parties to participate in mediation. Voss did not appear for the mediation session that the court set, and default judgment was entered for Yang on July 24, 2008.

On July 30, 2008, Voss moved to vacate the default judgment. After a hearing, the court vacated the default judgment against Voss and scheduled a trial for April 20, 2009, to start at 9:00 a.m.

When the case was called for trial on April 20, 2009, Voss was not present. The presiding judge's clerk called Voss's office at 9:09 a.m. to try to reach Voss but was

unsuccessful. By 9:23 a.m., Voss had neither appeared in person nor contacted the court to explain his absence. The judge then noted the procedural background of the case on the record and awarded a default judgment in favor of Yang. At 9:44 a.m., Voss called the court, spoke with the judge's clerk, stated that he was at a hearing in another county and could come to court when he finished. He also stated that he thought trial was set for April 29 rather than April 20. The judge apparently declined Voss's offer to appear when he had concluded his other business as the judge had already ordered a default judgment for Yang.

Voss prepared a motion that same day to vacate the default judgment. The court denied the motion, and Voss appeals.

DECISION

“The right to be relieved of a default judgment is not absolute. Whether the judgment should be reopened is a matter largely within the trial court's discretion and will not be reversed on appeal absent a clear abuse of discretion.” *Howard v. Frondell*, 387 N.W.2d 205, 207-08 (Minn. App. 1986) (citing *Kosloski v. Jones*, 295 Minn. 177, 180, 203 N.W.2d 401, 403 (1973)), *review denied* (Minn. July 31, 1986). The court's broad discretion to deny a motion to vacate a default judgment is not unlimited. *Spicer v. Carefree Vacations, Inc.*, 370 N.W.2d 424, 426 (Minn. 1985). To guide the exercise of its discretion, the court must consider the four so-called *Hinz* factors: (1) whether the defaulting party has a reasonable defense on the merits; (2) whether the defaulting party has a reasonable excuse for his failure or neglect to act; (3) whether the defaulting party acted with diligence after notice of the default judgment; and (4) whether substantial

prejudice will result to the judgment holder if the judgment is vacated. *Hinz v. Northland Milk & Ice Cream Co.*, 237 Minn. 28, 30, 53 N.W.2d 454, 455-56 (1952).

The district court considered the *Hinz* factors and concluded that Voss acted diligently to vacate the default judgment; that he “potentially has a meritorious defense”; and that he made some showing, albeit weak, that Yang would not be prejudiced by the vacation of the default judgment. But the court found that Voss did “not put forth a reasonable excuse” for failing to appear for the trial.

In considering Voss’s excuse for his failure to appear, the district court noted the procedural background of the case and in particular Voss’s “repeated absences and burden on the court’s time.” Additionally, the court pointed out that “Voss simply did not read the Court’s Trial Order with the care and precision necessary to ensure his appearance at trial.”

Voss’s excuse for his failure to appear for trial is that he simply misread the court’s “Trial Order,” thinking that the trial was set for April 29 rather than April 20. The district court found that his excuse was not reasonable and thus exercised its discretion to deny Voss’s motion. This requires us to assess the reasonableness of Voss’s excuse to determine whether the court’s conclusion is supported by the facts and therefore within the realm of the court’s broad discretion.

We recognize that busy lawyers can sometimes overlook provisions in court orders and on occasion a lawyer might be able to proffer a reasonable excuse for doing so. But, considering the entire background of this case, with prior defaults and restarts and the passage of nearly two years since the first court action, it is reasonable to expect

that the parties would read this order carefully. Furthermore, the trial date was not buried deeply in a lengthy order with numerous directives and other provisions. Rather, the date appeared in the second line of the order and in bold type, as follows

IT IS HEREBY ORDERED that the above-entitled matter is set for a day certain trial **beginning April 20, 2009 at 9:00 a.m.**, before the Honorable Robert A. Blaeser.

A party might yet misread an order as clear and direct and literal as this one, although it strains the imagination to see how such misreading would be reasonable. There is nothing in the order itself that would foster a misreading. Pure neglect to read and follow a court order is a tenuous excuse at best for the failure to act. In some cases, depending on all the circumstances, a court in the proper exercise of its discretion might deem that excuse to be far too tenuous to be reasonable. This is such a case.

Affirmed.