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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0570**

Nicholas J. Carney, et al.,
Respondents,

vs.

Michael A. Lange, et al.,
Appellants.

**Filed January 14, 2019
Affirmed
Worke, Judge**

Houston County District Court
File No. 28-CV-15-601

Nicholas Carney, Tasha Carney, La Crescent, Minnesota (pro se respondents)

William L. French, French Law Office, Rochester, Minnesota (for appellants)

Considered and decided by Bjorkman, Presiding Judge; Worke, Judge; and
Klaphake, Judge.*

UNPUBLISHED OPINION

WORKE, Judge

Appellants challenge the district court's denial of their motion to vacate judgment pursuant to Minnesota Rules of Civil Procedure 60.02(a), (c), and (f). Appellants argue

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

the district court erred in analyzing the merits of their motion under the four *Finden* factors. We affirm.

FACTS

Appellants Michael and Patricia Lange and respondents Nicholas and Tasha Carney were neighbors in Houston, Minnesota. In April 2015, Mr. Carney called the police, seeking to remove Mr. Lange from a .76 acre strip of land that Mr. Lange was planting on and that Mr. Carney claimed was rightfully his. Officers made contact with Mr. Lange, and he claimed that he owned the property. The police left without settling the dispute.

In June 2015, a surveyor hired by the Carneys called the police to complain that Mr. Lange had disrupted his survey of the disputed land. Mr. Lange refused to speak reasonably with the officers. The officers left the Langes' property and advised the Carneys to apply for a court ordered survey of the land.

In October 2015, the district court ordered a survey of the disputed land, which was conducted in November of 2015. On February 1, 2016, the Carneys filed a motion for partial summary judgment on their quiet-title claim, and included with their filing an affidavit from an employee of a local title company who had reviewed the recent survey and determined that the Carneys owned the disputed land. On February 10, 2016, the Carneys further moved for sanctions and an award of attorney fees under Minnesota Rules of Civil Procedure 11.

On March 4, 2016, the district court granted the Carneys' motion for partial summary judgment with regard to title to the .76 acre parcel, as well as their motion for rule 11 sanctions, awarded attorney fees to the Carneys, and granted them leave to amend

their complaint to include an additional request that the district court order the Langes to move their driveway so it did not encroach on an adjacent 3.87 acre parcel of land allegedly owned by the Carneys. The Langes failed to offer any evidentiary support for their claims or defenses, and the Carneys moved for summary judgment on the amended complaint.

On June 30, 2016, a hearing was held on the Carneys' second summary judgment motion. At that time, Mr. Lange was in jail on a related criminal matter involving threats against a Houston County commissioner. Despite being in jail, Mr. Lange appeared at this hearing.

On September 23, 2016, the district court granted the Carneys' motion and ordered the Langes to move their encroaching driveway and pay the Carneys \$12,067.90 in attorney fees and other costs.

Nearly one year later, on September 22, 2017, the Langes moved to vacate the court's March 4 and September 23, 2016 judgments pursuant to Minnesota Rules of Civil Procedure 60.02(a), (c), and (f). The Langes argued that the judgments should be vacated for three reasons. First, at the time of the June 30, 2016 hearing, they did not have an attorney, they did not receive proper notice of the hearing, and Mr. Lange was in jail, all of which they claimed constituted excusable neglect under rule 60.02(a). Second, the Carneys brought a claim against a vulnerable adult, Mr. Lange, which constituted misconduct of a prevailing party under 60.02(c). Finally, the catchall provision of 60.02(f) was implicated because they had been treated unfairly and would likely win their case if it were argued in front of a jury rather than a judge.

On February 9, 2018, after taking the Langes’ arguments under consideration, the district court denied their motion to vacate the court’s judgments and awarded attorney fees based on additional rule 11 sanctions. This appeal followed.

D E C I S I O N

“The decision whether to grant Rule 60.02 relief is based on all the surrounding facts of each specific case, and is committed to the sound discretion of the district court. As such, a district court will not be reversed on appeal except for a clear abuse of discretion.” *Gams v. Houghton*, 884 N.W.2d 611, 620 (Minn. 2016) (quotation and citations omitted).

When considering a motion under rule 60.02, the district court undertakes an analysis of the four *Finden* factors. See *Finden v. Klaas*, 128 N.W.2d 748, 750 (Minn. 1964). The court “must consider, and expressly find that a party satisfied, all four of the *Finden* factors” to grant relief. *Gams*, 884 N.W.2d at 619. The factors are: “(1) a debatably meritorious claim; (2) a reasonable excuse for the movant’s failure . . . to act; (3) the movant acted with due diligence after learning of the error or omission; and (4) no substantial prejudice will result to the other party if relief is granted.” *Id.* at 620 (quotations omitted).

Here, the district court found that appellants had not satisfied any of the four prongs of the *Finden* analysis. We agree.

A debatably meritorious claim

Under rule 60.02, the Langes must provide specific information demonstrating a debatably meritorious claim or defense on the merits. *Charson v. Temple Israel*, 419

N.W.2d 488, 492 (Minn. 1988). “[A] debatably meritorious claim is one that, if established at trial, presents a cognizable claim for relief.” *Cole v. Wutzke*, 884 N.W.2d 634, 638 (Minn. 2016). Ordinarily, a claim must be demonstrated “by more than conclusory allegations in moving papers.” *Charson*, 419 N.W.2d at 491.

The Langes argue that they have a reasonable defense on the merits in the form of adverse possession. Specifically, they contend that their use of the encroaching driveway was open, continuous, exclusive, and extended back to 1954 when combined with the former owner.

The district court here stated that “[w]hile it is theoretically possible that an adverse possession claim could have been successful, Defendants submitted only an unsupported claim that their family had been using the property since at least 1954.” The district court went on to note that “[n]o claim was made that said possession was at any point adverse,” and that the claim was made “in Defendant’s 2015 Answers, and the Court has already ruled on it.”

The record indicates that the Langes in fact did not provide the district court with information sufficient to demonstrate a debatably meritorious claim or defense. At the time of their motion to vacate judgment, the Langes had not provided any evidence to support their alleged defense other than conclusory statements in their 2015 answer and their moving papers. Thus, the district court did not abuse its broad discretion when it concluded that appellants failed to demonstrate a debatably meritorious claim or defense.

The Langes failed to satisfy the first *Finden* factor, therefore we need not address the remaining factors. *Gams*, 884 N.W.2d at 619 (concluding that the district court must

consider and find that a party satisfied all four *Finden* factors to grant relief under rule 60.02). However, we will address the remaining factors in the interests of justice. See Minn. R. Civ. App. P. 103.04.

A reasonable excuse for the movant's failure to act

This court defers to the district court's analysis of the reasonableness of the excuse. *Cole*, 884 N.W.2d at 638-39.

The Langes argue that they have a reasonable excuse for failing to answer the Carneys' amended complaint or present a defense to summary judgment because the amended complaint for the June 30, 2016 hearing was not properly before the district court, it was not in compliance with Minnesota Rules of General Practice 115.03, Mr. Lange was in jail at the time of the summary judgment hearing, and also Mr. Lange was the subject of a commitment proceeding at that same time.

The district court stated in its memorandum that appellants indeed did not receive the required 28 days' notice for the June 30, 2016 hearing, but rather 25 days' notice due to a mailing delay. However, at the hearing both parties were given an opportunity to submit proposed orders to the district court, which were due on July 15, 2016. Because of this second opportunity to be heard, the district court concluded that any error caused by the shorter notice period was harmless. We agree. The notice requirements can be waived in the interests of justice, and any error was harmless. See Minn. R. Gen. Prac. 115.07.

As to the argument that Mr. Lange was in jail and the subject of a commitment proceeding, the district court noted that Ms. Lange, who was also a named defendant and is an appellant here, was not in jail or subject to commitment, but still failed to appear at

the hearing, and there were no arguments made that she was unavailable, or that her neglect was in any way excusable. As a co-defendant, who now claims that Mr. Lange was ill-equipped to handle the motion hearing, Ms. Lange's unexcused absence is not reasonable.

Our supreme court has commented that "our case law generally reflects a strong policy favoring the granting of relief when judgment is entered through no fault of the client." *Cole*, 884 N.W.2d at 638 (quotation omitted). But, as the district court indicated in its memorandum, and as the Carneys argued at the motion hearing, the Langes were unrepresented throughout their case, despite encouragement from the Carneys to seek counsel, and despite having over a year to procure counsel. This is therefore not an attorney error that harms an innocent client, but rather a party error.

The Langes did not provide a reasonable excuse for their failure to act and consequently failed to satisfy the second *Finden* factor.

Due diligence after learning of the error or omission

A motion under rule 60.02 must be made "within a reasonable time, and for reasons (a), (b), and (c) *not more than* one year after the judgment, order, or proceeding was entered or taken." Minn. R. Civ. P. 60.02 (emphasis added). What constitutes a reasonable time varies from case to case depending on the facts, because "[t]he very nature of the exercise of discretionary power in cases of this kind is such as to prevent any absolute rule being laid down." *Pilney v. Funk*, 3 N.W.2d 792, 795 (Minn. 1942); *see also Hovelson v. U.S. Swim & Fitness, Inc.*, 450 N.W.2d 137, 142 (Minn. App. 1990) (determining that appellants did not act diligently, even though they responded to a complaint nine days after they received notice of default), *review denied* (Minn. Mar. 16, 1990). The one-year reference

in Minnesota Rules of Civil Procedure 60.02 establishes a limit; it is not a safe-harbor provision.

Here, the Langes argue that, despite waiting 364 days to properly file their motion to vacate, due diligence on their part is “obvious” because the same district court judge was presiding over this civil matter and Mr. Lange’s criminal matter. The Langes assert that “[i]t is simply a good practice not to do anything to irritate a judge, particularly one already known to be adverse.” The Langes claim that the judge’s award of significant monetary sanctions establishes adversity.

The district court stated in its memorandum that legal strategy is not an excusable ground for failure to exercise due diligence. Additionally, the district court noted that Mr. Lange’s criminal case was concluded on July 15, 201[7], but appellants’ motion was not filed till near the end of September.

The Langes argue that, while the commitment proceeding against Mr. Lange was dismissed on May 17, 2017, “the criminal proceeding was not effectively dismissed until a hearing was canceled on November 8, 2017.” The record does not provide any evidence to support this assertion, and we will not vacate judgment based on unsubstantiated claims regarding a separate criminal matter.

The district court therefore did not abuse its discretion in determining that the Langes failed to exercise due diligence by waiting 364 days to file their motion to vacate.

No substantial prejudice to respondents

In considering whether a dismissal should be vacated, courts measure substantial prejudice resulting from delay from the date of dismissal. *Lund v. Pan American Machs.*

Sales, 405 N.W.2d 550, 554 (Minn. App. 1987) (“[D]elays prior to the date of dismissal are irrelevant to this issue.”). “In general, when the only prejudicial effect of vacating a judgment is additional expense and delay, substantial prejudice of the kind necessary to keep a judgment from being reopened does not exist.” *Black v. Rimmer*, 700 N.W.2d 521, 528 (Minn. App. 2005) (quotation omitted), *review dismissed* (Minn. Sept. 28, 2005). However, as more time passes from the dismissal and before relief from it is sought, “the need to search for identifiable and concrete examples of prejudice diminishes.” *Peterson v. Skutt Ceramic Prod., Inc.*, 417 N.W.2d 648, 651 (Minn. App. 1987), *review denied* (Minn. Mar. 18, 1988).

The Langes argue that the Carneys “have not made, really, any showing of prejudice.” The district court, however, found that the Carneys had relied upon the monetary judgment to pay attorney fees, survey and zoning fees, and the cost to remove the encroaching driveway. Additionally, in its memorandum, the court noted that the land in dispute had already been re-marked and the driveway had already been moved.

The Langes waited 364 days to file their motion to vacate. At that point, the money awarded had been spent and the physical work to satisfy the judgment and move the encroaching driveway was already completed. The Carneys additionally assert that they have sold and moved from their home, and that this continued litigation of the issues decided in 2016 has prevented them from selling the 3.87 acre parcel to the new homeowners.

Given the length of time passed, the district court’s repeated finding that the Langes’ claims and motions were frivolous, the Carneys’ reliance on the judgment, and the

deference we afford to the district court, we conclude that the district court did not abuse its discretion by finding that the Langes failed to satisfy the fourth *Finden* factor.

Because the district court did not clearly err in finding that the Langes failed to satisfy any of the four *Finden* factors, there was no abuse of discretion in denying their rule 60.02 motion.

Affirmed.