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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0892**

Mary Brown,
Appellant,

vs.

MSP Services LLC, d/b/a MSP Home Rental,
Respondent.

**Filed April 22, 2019
Reversed
Cochran, Judge**

Dakota County District Court
File No. 19HA-CV-17-1384

Colin J. Pasterski, Christopher J. Moreland, Halunen Law, Minneapolis, Minnesota (for appellant)

Daniel R. Spicer, Thomas M. Fafinski, Nathan W. Nelson, Steven V. Rose, Virtus Law, PLLC, Brooklyn Park, Minnesota (for respondent)

Considered and decided by Hooten, Presiding Judge; Reyes, Judge; and Cochran, Judge.

UNPUBLISHED OPINION

COCHRAN, Judge

Appellant Mary Brown challenges the district court's order granting respondent MSP Services LLC's motion to vacate a default judgment in favor of Brown. The district court granted the motion under Minn. R. Civ. P. 60.02 based on its determination that all

four *Finden* factors were met. Because the third *Finden* factor was not met, the district court abused its discretion when it vacated the default judgment. We reverse.

FACTS

In April 2017, Mary Brown sued MSP Services LLC's (MSP) for disability discrimination in violation of the Minnesota Human Rights Act (MHRA), Minn. Stat. §§ 363A.01-.44 (2018). Brown claimed that MSP terminated her employment in violation of the MHRA after she told her manager, Michael T. Schaeffer (also the chief executive officer of MSP), that she would require a third surgery and other treatment related to a medical diagnosis.

On April 21, 2017, Brown served a summons and complaint on MSP by handing them to Schaeffer. The summons read, in part:

YOU MUST REPLY WITHIN 20 DAYS TO PROTECT YOUR RIGHTS. You must give or mail to the person who signed this Summons a **written response** called an Answer within 20 days of the date on which you received this Summons.

The summons also provided that if MSP did not answer within 20 days it would “lose this case.” Further, the summons indicated in bold print that even if MSP did not retain the assistance of a lawyer, it must provide a written answer to the complaint. May 11, 2017 was the 20th day after service on April 21, 2017.

MSP did not answer the complaint. On June 7, 2017, 47 days after service of the summons and complaint, Brown filed a notice of motion and motion for default judgment. On June 9, 2017, she served MSP by sending the notice of the motion by U.S. mail and email to Schaeffer. The notice of motion indicated that the motion would be heard by the

district court on July 12, 2017, at 9:00 a.m. On June 9, 2017, after receiving the email, Schaeffer sent an email response that read, “It was my understanding that my attorney reached out to you and never heard back from you. We assumed after all this time that you dropped this matter. I will talk with him on Monday and figure out what happened.” There is no other evidence in the record that MSP was represented at this time.

On June 13, 2017, the district court entered a scheduling order that set several deadlines. The first deadline was September 29, 2017—the deadline to join parties and to complete discovery. Trial was scheduled for January 29, 2018. The scheduling order did not refer to the default-judgment hearing that was scheduled for July 12, 2017.

MSP did not appear at the July 12, 2017 default-judgment motion hearing. In an order dated July 12, 2017, the district court granted Brown’s motion for default judgment against MSP. The order did not determine Brown’s damages. The district court scheduled a hearing to determine damages for August 17, 2017. On July 13, 2017, Brown served MSP by mail and email with the order granting entry of default judgment and notice of the August 17 hearing. The notice stated, “You are expected to appear fully prepared.”

MSP did not appear at the August 17 hearing. In an August 23, 2017 order, the district court awarded Brown \$915,330.65 in damages. Judgment was entered on August 23, 2017. On August 24, 2017, Brown served a copy of the order for judgment on MSP by mail and email.

In an effort to collect the judgment, Brown asked for an order for disclosure of MSP’s financial information. The district court directed MSP to disclose financial information in an order filed on September 25, 2017. The order was mailed to MSP, but

MSP did not comply. In an order filed on October 16, 2017, the district court ordered MSP to appear on November 16, 2017 to show cause why it should not be held in contempt for failure to provide the financial information as ordered.

On or around November 8, 2017, MSP retained counsel for the first time to represent it in the matter involving Brown. On November 10, 2017, MSP's counsel provided Brown with a completed financial disclosure form. The show-cause hearing was canceled.

On December 22, 2017, MSP filed a motion to vacate the August 23, 2017 default judgment under Minn. R. Civ. P. 60.02.¹ In support of the motion, MSP filed an affidavit from Schaeffer stating that MSP was not aware that a judgment had been entered until September 25, 2017, when it received the demand for financial disclosure. Schaeffer stated in his affidavit that when he received the court's scheduling order in June 2017, it "appeared that the deadline for actions to be taken started on September 29, 2017 and ended on January 29, 2018—the date the jury trial was scheduled to occur." Schaeffer further asserted that MSP "believed the process was similar to conciliation court and housing court, where no written response to the claim is necessary, and believed it could explain its position regarding [Brown's] claims with the [c]ourt at one of the stated times between September 29, 2017 and January 29, 2018." MSP also filed other documents to support its assertion that it had a reasonable defense on the merits of the claim.

¹ MSP brought the motion under Minn. R. Civ. P. 60.02(a), (f). Along with the motion, counsel for MSP filed a certificate of representation. This was the first time a certificate of representation was filed on behalf of MSP in the matter.

Over Brown's objection, the district court granted MSP's motion to vacate the default judgment. This appeal follows.

DECISION

Brown argues that the district court abused its discretion when it granted MSP's motion to vacate the default judgment. Minn. R. Civ. P. 60.02 provides that the court may relieve a party from a final judgment and order a new trial or grant other relief in the event of mistake, inadvertence, surprise, or excusable neglect, or for any other reason justifying relief from the operation of the judgment. Whether relief under this rule is appropriate is "committed to the sound discretion of the district court and is based upon all the surrounding circumstances of each case." *Cole v. Wutzke*, 884 N.W.2d 634, 637 (Minn. 2016). Minnesota courts are to be liberal in vacating default judgments because the goal of all litigation is to bring about judgments after trials on the merits. *Taylor v. Steinke*, 203 N.W.2d 859, 860 (Minn. 1973). This court reverses the district court only when there has been a clear abuse of discretion. *Cole*, 884 N.W.2d at 637. A court abuses its discretion if it misapplies the law or if its factual findings are clearly erroneous. *Gams v. Houghton*, 884 N.W.2d 611, 620 (Minn. 2016).

The Minnesota supreme court has "long stated" that a motion to vacate:

should be granted where the movant affirmatively satisfies four requirements: (1) a reasonable defense on the merits . . . ; (2) a reasonable excuse for his or her failure or neglect to act; (3) that he or she acted with due diligence after learning of the error or omission; and (4) that no substantial prejudice will result to the other party.

Cole, 884 N.W.2d at 637 (quotations omitted). These factors are known as the *Finden* factors, based on the opinion in *Finden v. Klaas*, 128 N.W.2d 748 (Minn. 1964). In *Finden*, the appellant’s attorney failed to answer the respondent’s complaint and a default judgment was entered against the appellant. 128 N.W.2d at 749-50. The district court denied the appellant’s motion to vacate the default judgment. *Id.* at 750. The supreme court reversed and remanded, holding that a court should “relieve a defendant from the consequences of his attorney’s neglect” in cases where a defendant seeking to vacate a default judgment makes an affirmative showing of all four *Finden* factors. *Id.*

While *Finden* involved the negligence of an attorney, the factors have been applied consistently to evaluate whether a default judgment should be vacated in cases involving a pro se defendant. *See, e.g., Black v. Rimmer*, 700 N.W.2d 521 (Minn. App. 2005).

A party seeking relief under Minn. R. Civ. P. 60.02 must establish *all* four *Finden* factors. *Cole*, 884 N.W.2d at 637; *see also Gams*, 884 N.W.2d at 620 (rejecting the notion that a party seeking relief under Minn. R. Civ. P. 60.02 need not “categorically establish all four” of the *Finden* factors (quotation omitted)).

Brown argues, *inter alia*, that the district court abused its discretion when it found all four *Finden* factors were met and granted MSP’s motion to vacate the default judgment under rule 60.02.² She contends that the third *Finden* factor—that the movant acted with

² In its order, the district court granted MSP’s motion under rule 60.02. The district court did not specify whether it was granting the motion under rule 60.02(a) or (f). The only issue on appeal is whether the district court properly applied the four part *Finden* test in granting the motion.

due diligence after learning of the error or omission—was not met, noting that the district court itself found that MSP was not diligent. We agree.

Minn. R. Civ. P. 60.02 requires that a motion to vacate be brought within a “reasonable time.” What constitutes a reasonable time is determined on a case-by-case basis. *Sommers v. Thomas*, 88 N.W.2d 191, 195-96 (Minn. 1958). Due diligence in bringing a motion to vacate is measured from the time that the *movant* learned of his error or omission. *Cole*, 884 N.W.2d at 639. A party’s conduct during the pendency of the lawsuit, including its knowledge and awareness of the suit and its failure to respond to notices, may be considered by a court in determining whether the due-diligence factor is met. *Hovelson v. U.S. Swim & Fitness, Inc.*, 450 N.W.2d 137, 142 (Minn. App. 1990), *review denied* (Minn. Mar. 16, 1990).

Here, the district court expressly found that MSP “was not diligent [itself] after receiving notice of judgment in August.” Yet, the district court went on to conclude that the due-diligence *Finden* factor was met because MSP “retained counsel in November and the motion [to vacate] was filed in December.”³ The district court based its determination on its finding that MSP’s attorney was diligent after he was retained, not that MSP was diligent. But the *Finden* factors, established in part to relieve a *movant* from his attorney’s

³ The district court measured due diligence from August 24, 2017 and found that MSP was not diligent. We believe that the appropriate time from which the district court should have measured due diligence is July 13, 2017, when MSP was served with notice of the order granting entry of default judgment. See *Cole*, 884 N.W.2d at 639 (indicating that due diligence is measured from the time that the party seeking to vacate the default judgment learns of his error or omission). Considering MSP’s conduct, we agree with the district court that MSP was not diligent even assuming that it learned of its error in August.

neglect, ask whether the *movant* was diligent after learning of his error or omission.⁴ *Cole*, 884 N.W.2d at 639; *Finden*, 128 N.W.2d at 750. The district court’s express factual finding that MSP was *not diligent* precludes a determination that the due-diligence factor was met.

The district court’s finding that MSP was not diligent is supported by the record. MSP was aware of the lawsuit once the summons and complaint were served on it in April 2017. MSP received multiple notices of motions and hearings but consistently failed to respond to the motions or appear at hearings. The only time over the course of the litigation that MSP did respond was on June 9, 2017, when Schaeffer sent an email to Brown suggesting that MSP was represented by an attorney. MSP failed to act after receiving notice of the default judgment entered in July 2017. MSP did not retain an attorney until November 2017 and did not seek to vacate the default judgment until late December 2017. MSP ignored the proceedings until it was ordered to appear in court to show cause as to why it should not be held in contempt.

The district court’s conclusion that the due-diligence factor was met is inconsistent with the facts in the record and its own finding that MSP was “not diligent.” As a result, the district court erred in ruling that this *Finden* factor was met. Because one of the *Finden* factors was not met, the district court abused its discretion in granting MSP’s motion to

⁴ To determine that an attorney’s diligence alone can remedy a movant’s lack of diligence is inconsistent with the purpose of the *Finden* factors.

vacate under Minn. R. Civ. P. 60.02. *See Gams*, 884 N.W.2d at 620 (noting that a party seeking relief from a default judgment must establish all four *Finden* factors).⁵

Reversed.

⁵ Because we find that the district court abused its discretion by granting the motion to vacate despite finding that MSP was not diligent, we do not reach Brown's other arguments concerning the other *Finden* factors and the strength of MSP's showing on each factor.