Summary judgment in Minnesota

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It appears that it is to be used only sparingly and that courts do not favor it.

In 8th circuit summary judgment is viewed as an extreme remedy which should rarely be granted.

Charmoll Fashions, Inc. v. Texam Intern. Corp. 59 F.RD 22 (D.C. Minn. 1973)

Summary judgment should be granted very, very sparingly.

Williams v. U.S., 336 F. Supp. 1392 (D.C. Minn 1972)

Summary judgment should not be used as a substitute for trial but only when it is quite clear what the truth is and that no genuine issue of fact remains for trial.

In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 538 F.2d 180 (C.A. Minn 1976) cert. den. 429 U.S. 1040

Party moving for summary judgment has the burden of proof. Polk v. Mutual Service Life Ins., 344 NW2d 487 (1984)

Attached are ~~the~~ 30 of the most recent cases concerning s.j.

the same reasons for placing the burden upon the secured party to prove the commercial reasonableness of the notice of sale support placing the burden upon the secured party to prove a fair price was received despite lack of a commercially reasonable notice of sale. Generally in law, the party who stands to benefit from the establishment of the affirmative of a proposition of fact essential to a claim bears the burden of proof as to that proposition. *Fedders Corp. v. Taylor,* 473 F.Supp. at 972. Consequently, once the debtor establishes that the sale was commercially unreasonable because of failure to give commercially reasonable notice of sale and alleges an amount of loss incurred, it seems to us reasonable to require the secured party to prove that the debtor suffered less or no loss by the disposition. As is the case with the burden of proving the commercial reasonableness, once the secured party makes a prima facie case indicating the debtor did not suffer the damage alleged, the burden of persuasion but not the burden of proof would shift to the debtor.

[20, 21] In this case, the appellants allege the computer equipment was worth $10,000 to $12,000. The equipment sold for $2,500. Respondent presented testimony of its agent that the best offer received by Chemlease was $2,500 and that it was "a fair price under the circumstances." Neither side presented non-party expert testimony on the market value of the equipment at the time of disposition. The burden of proving its entitlement to the deficiency remained on Chemlease. The trial court's placing the burden on appellants to show the sale price was commercially unreasonable was misplaced. The reasonableness of the sale price to Chicago Cash Register Company was a close factual question. Considering the closeness of the factual question and that Chemlease had the burden of proving the commercial reasonableness of the sale, and accepting as true the evidence favorable to appellants, the directed verdict against them was inappropriate.

Accordingly, we reverse and remand to the trial court for a new trial on the question of damages, if any, sustained by appellants under U.C.C. § 9–507(1).

Reversed and remanded.

DALCO CORPORATION, Appellant,

v.

Maurice DIXON and Brissman-Kennedy, Inc., Respondents.

No. C1–82–1520.

Supreme Court of Minnesota.

Sept. 23, 1983.

Corporation brought suit against former employee and employee's subsequent employer, alleging breach of noncompete employment agreement and other claims. The District Court, Hennepin County, Susanne Sedgwick, J., denied plaintiff's motion for temporary injunction, denied employee's motion for summary judgment, and granted subsequent employer's motion for summary judgment. The court then granted plaintiff's motion for entry of judgment, thereby making first order appealable, and also ordered plaintiff to pay subsequent employer's attorney fees. Upon plaintiff's appeal, the Supreme Court, Kelley, J., held that: (1) depositions and affidavits submitted in opposition to motion for summary judgment, which were submitted after hearing on motion but before decision, were properly not considered by trial court; (2) temporary injunction was properly denied where record showed it was unlikely that plaintiff

burdens of proof in the text is an intermediary position and an equally acceptable construction of section 9–507(1). Fair price is an element of a commercially reasonable sale. It seems proper to place the burden of proof on the same party on this single factual issue as to both the commercial reasonableness issue and the damages question.

would prevail on merits and plaintiff had failed to demonstrate irreparable harm if injunction was denied; and (3) genuine issues of material fact existed as to plaintiff's allegation of conspiracy to engage in campaign of unfair competition, precluding summary judgment against former employee and his subsequent employer.

Affirmed in part, reversed in part, and remanded.

1. Judgment ⟹185.1(1)

Trial court was precluded from considering depositions and affidavits submitted in opposition to motion for summary judgment which were submitted after hearing but before decision on motion. 51 M.S.A., Special Rules of Practice, Fourth Judicial District, Rule 3.02(c).

2. Judgment ⟹187

Record did not remain open after hearing on motion for summary judgment, despite fact that trial court had not made its order granting summary judgment final by making express determination that there was no just reason for delay in entry of judgment. 48 M.S.A., Rules Civ.Proc., Rule 54.02.

3. Injunction ⟹136(3), 147

Trial court properly denied plaintiff corporation's motion for temporary injunction where it appeared from record that corporation was unlikely to prevail on merits, corporation had failed to demonstrate it would suffer irreparable harm if injunction was denied, and, if corporation were to prevail on merits, it had an adequate remedy at law for damages.

4. Trade Regulation ⟹546

Claim for unfair competition and unlawful use of confidential information is properly brought against both former employee and his current employer.

5. Judgment ⟹185(2)

All doubts as to existence of genuine issue of material fact must be resolved against party moving for summary judgment.

6. Judgment ⟹181(21)

In action alleging conspiracy and unfair competition against former employee and his subsequent employer, genuine issue of material fact existed as to existence of conspiracy, precluding summary judgment for either former employee or his subsequent employer.

7. Costs ⟹172

When party prevails, even in part, claim of bad faith in litigation must fail, precluding an award of attorney fees for bad faith in prosecuting action.

8. Appeal and Error ⟹843(2)

Since trial court, in suit brought against former employee and subsequent employer for breach of noncompete agreement, erred in granting subsequent employer's motion for summary judgment, it was unnecessary for Supreme Court to determine whether trial court erred in granting subsequent employer an award of attorney fees for plaintiff's alleged bad faith in prosecuting the action.

Syllabus by the Court

1. Trial court properly refused to consider depositions and affidavits submitted in opposition to motion for summary judgment which were submitted after the hearing but before decision on the motion.

2. A motion for a temporary injunction was properly denied when the court concluded there was considerable doubt whether movant would prevail on the merits and where movant had an adequate remedy at law for damages.

3. In a suit alleging conspiracy and unfair competition against a former employee and his subsequent employer, it was error to grant the subsequent employer's motion for summary judgment where the evidence failed to remove all doubts as to the existence of a genuine issue of material fact.

Jerome S. Rice Law Offices, Minneapolis, for appellant.

O'Neill, Burke & O'Neill, St. Paul, for respondents.

Considered and decided by the court en banc without oral argument.

KELLEY, Justice.

Appellant, Dalco Corporation (Dalco), instituted this action against a former employee, respondent Maurice Dixon, and against Dixon's subsequent employer, respondent Brissman-Kennedy, Inc. (B–K), alleging that Dixon breached a non-compete employment agreement; that both respondents are unfairly competing with Dalco; that B–K has tortiously interfered with Dalco's employment contract with Dixon and other contractual rights; and that as a result of all the foregoing, respondent B–K has illegally obtained an unfair competitive advantage over Dalco. Appellant sought both injunctive relief and damages. In three separate pretrial orders, the trial court (1) in the first order denied Dalco's motion for a temporary injunction, denied Dixon's motion for summary judgment and granted B–K's motion for summary judgment; (2) in the second order granted Dalco's motion for entry of judgment, thereby making the first order appealable; and (3) in the third order ordered Dalco to pay B–K $9,000 in attorney fees B–K incurred in defending the action. Dalco appeals from all three orders. We affirm in part and reverse in part.

Dalco and B–K are competitors in the sale of cleaning and janitorial supplies. Dixon commenced working for Dalco in 1959. After a 3-year lapse from 1964 to 1967, Dixon returned to employment at Dalco and was thereafter continuously employed until the fall of 1981. Up until July of 1981, Dixon was executive vice president and sales manager. The day following his resignation from Dalco, Dixon began working for Professional Building Supply Company, a Minneapolis cleaning products distributor, as vice president of sales. He left this position approximately 6 weeks later to enter employment with B–K.

Dixon denies that he ever signed or promised to sign a non-compete agreement during the course of his employment with Dalco. He was asked to sign one in July of 1981, 2 or 3 months before he resigned, but he refused to do so on advice of counsel. On the other hand, Dalco's president asserts Dixon did sign a non-compete agreement when he first commenced working for Dalco in approximately 1959; however, Dalco had been unable to locate it for production at the hearing. Dalco's president further claimed that sometime after Dixon returned to Dalco in 1967, Dixon had agreed to sign another modified non-compete agreement then, and now, being used by Dalco. All of Dalco's sales personnel had to execute such modified non-compete agreements, and part of Dixon's duties as vice president of sales for Dalco was to insure that the non-compete agreements were executed by the sales personnel. However, Dalco was unable to produce any non-compete agreement containing Dixon's signature.

Dalco seeks to enforce the alleged non-compete agreement against Dixon; claims that B–K interfered with its contract with Dixon and with contract rights it had with others; and contends that Dixon's knowledge of Dalco's pricing policies and the use of that knowledge on behalf of B–K constitutes unfair competition giving B–K—one of Dalco's chief competitors—an unfair competitive advantage. In support of its claim against B–K, Dalco submitted affidavits of some of its sales personnel which alleged with respect to sales accounts served by them that Dixon had knowledge of Dalco's pricing information and that B–K was engaging in price competition with Dalco in such a manner as to indicate that B–K must be using the confidential price and sales information obtained by Dixon from Dalco.

1. Following the hearing by the trial judge on Dalco's motion for a temporary injunction and the respondents' motion for summary judgment, Dalco attempted to submit a deposition of Thomas Fischer, a former B–K vice president, who raised some questions as to the propriety of B–K's hiring of Dixon away from Dalco and as to

whether B–K or Dixon engaged in unfair competition through suppressing information. Dalco likewise sought to present three affidavits raising a question of fact regarding B–K's alleged piracy of Dalco employees and the alleged improper use of confidential pricing information. The trial court refused to consider the deposition and the affidavits. Dalco contends that the trial court should have permitted further discovery between the date of the hearing and the date of the ruling, and that had the court done so, the deposition and affidavits should have been considered by the court in ruling on B–K's summary judgment motion.

[1] We have previously held that in order to successfully oppose a motion for summary judgment a party may not rely on general statements of fact but rather "must demonstrate at the time the motion is made that specific facts are in existence which create a genuine issue for trial." *Erickson v. General United Life Insurance Co.*, 256 N.W.2d 255, 259 (Minn.1977). Moreover, Rule 3.02(c) of the Rules of Court for the Fourth Judicial District provides: "The Court will not consider any memoranda, documentation or letters submitted after the hearing unless an extended date is allowed by the court at the hearing." Because the trial judge had not explicitly granted Dalco an extension to complete discovery or file additional documents, the court was precluded by our decisions and by its own procedural rules from considering the submitted affidavits and deposition.

[2] Dalco contends that since the trial court had not made its order granting summary judgment final by making the express determination that there was no just reason for delay in the entry of judgment under Minn.R.Civ.P. 54.02, the record remained open even after the hearing had been held. If we were to adopt Dalco's theory, a ruling on a pretrial summary judgment motion not made appealable by express determination under Rule 54.02 would be subject to continued changes throughout the course of litigation as new evidence was discovered and submitted. In our view, such a result undermines the expediency which makes summary judgment a useful procedural practice. Accordingly, we affirm the trial court's ruling declining to consider the proffered documents.

[3] 2. The trial court denied Dalco's motion for a temporary injunction because it felt it unlikely that Dalco would prevail on the merits and because Dalco had failed to demonstrate it would suffer irreparable harm if the injunction was denied. An examination of the record sustains the trial court's denial of the temporary injunction. There did exist considerable doubt whether Dalco would prevail on the merits, and even if it did, it is clear it had an adequate remedy at law for damages.

3. A more troublesome issue arises from the trial court's granting of B–K's motion for summary judgment, while at the same time denying Dixon's motion for summary judgment. Had the trial court based its refusal to grant summary judgment in Dixon's favor on the grounds that the contrasting testimony of Dalco's president and that of Dixon created a genuine dispute as to whether and when Dixon may have entered into or agreed to enter into a non-compete agreement, Dixon should not have been granted summary judgment. But the court's memorandum attached to the July 26, 1982 order makes it clear that such was not the basis for denying Dixon's motion for summary judgment. After analyzing the criteria by which employment restrictive covenants are to be judged as set forth in *Bennett v. Storz Broadcasting Co.*, 270 Minn. 525, 134 N.W.2d 892 (1965), and applying the criteria to the facts of this case, the trial court stated:

> [I]t is clear that the restrictions are invalid. There is nothing unique about the products sold by plaintiff or defendants. Dalco claims Dixon had knowledge of its pricing policies, but in this type of business, with 10,000 separate items, it is unlikely that this knowledge would be useful in a competitive market for any length of time. Dixon was a salesman for some time prior to leaving Dalco, and was employed elsewhere for two months

before joining Brissman-Kennedy, so his knowledge of pricing was not current.

This covenant serves primarily to prevent the employee from working for others or for himself in the same competitive field, and does not protect any legitimate interest of Dalco.

Therefore, we conclude that the trial judge's refusal to grant Dixon summary judgment was not based upon the factual dispute between the testimony of Dalco's president and Dixon as to whether there were restrictive covenants. Even if Dalco's position on the issue of the existence or non-existence of the restrictive covenant could be sustained, the trial court ruled they were "clearly invalid." [1]

[4–6] It then follows that denial of Dixon's motion for summary judgment must be based on claims made against both Dixon and B–K in paragraph 6 of Dalco's complaint. The trial court stated in its memo that there were "no affidavits corroborative of the allegations [of paragraph 6 of the complaint] and no testimony was taken which raised questions of fact." In paragraph 6 of the complaint, Dalco alleged a conspiracy to engage in a vigorous campaign to unfairly compete and interfere with contractual relations of Dalco. We fail to perceive why the trial court was "unable to find that no genuine issue of fact exists for trial" with respect to those claims against Dixon but was able to find with respect to the same claims against B–K the absence of any genuine issue of fact. A claim for unfair competition and unlawful use of confidential information is properly brought against both the former employee and his current employer. *See, e.g., Alside, Inc. v. Larson,* 300 Minn. 285, 220 N.W.2d 274 (1974); *Sanitary Farm Dairies, Inc. v. Wolf,* 261 Minn. 166, 112 N.W.2d 42 (1961). In our view, the affidavits of Panzer, Gabbert, Kennedy, Sims and Peterson tend to support the allegations against both respondents in paragraph 6 of the complaint. While the trial court's observation that Dalco "is unlikely to prevail on the merits" against Dixon may be true and may be an equally appropriate observation with respect to Dalco's claim against B–K, all doubts as to the existence of a genuine issue of material fact must be resolved against the party moving for summary judgment—here, B–K. *Anderson v. Twin City Rapid Transit Co.,* 250 Minn. 167, 186, 84 N.W.2d 593, 605 (1957). Applying that standard, we hold the trial court erred in granting B–K summary judgment.

[7, 8] 4. Since we hold that the trial court erred in granting B–K's motion for summary judgment, it is unnecessary to determine whether the trial court erred in granting B–K an award of attorney fees for Dalco's alleged bad faith in prosecuting this action. When a party prevails, even in part, the claim of bad faith in litigation must fail. *Northwestern National Bank of Minneapolis v. Shuster,* 307 N.W.2d 767, 772 (Minn.1981).

We affirm the trial court's ruling on excluding depositions and affidavits presented after the hearing on the summary judgment motions, the trial court's order refusing to grant Dalco a temporary injunction, and its order denying Dixon summary judgment. We reverse its order granting B–K's motion for summary judgment and its order awarding B–K attorney fees. We remand this case for trial on the remaining issues.

Affirmed in part, reversed in part and remanded.

1. The trial court, of course, did not have the benefit of our recent case of *Freeman v. Duluth Clinic, Ltd.,* 334 N.W.2d 626 (Minn.1983). Under the ruling of that case, if Dixon promised to sign a non-compete agreement a few months prior to his resignation, it is doubtful whether the promise would be enforceable because of lack of consideration.

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itations on the right to appeal linn.Stat. § 429.061 (1982), s in part that: "[a]ll objec- sessments not received at the earing in the manner pre- s section are waived, unless object at the assessment e to a reasonable cause." 29.061, subd. (2) (1982).

hisago City v. Poulter, 342 linn.App.1984), we held that he written notice of assess- as reasonable cause for fail- bject. Here respondent re- d the notice of assessment imately two weeks before Ier personal belief that the not apply to her property is cause she asserts.

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nbiguities in the notice of ing would also have been nple inquiry. Respondent otice approximately two hearing date. The notice o whom it may concern" teen different projects to ıe notice also states, how- roposed assessments are inspection at the Clerk's rthouse Boulevard" and ubstance of Minn.Stat. 2 and 429.081 quoted le, a simple phone call to would have revealed the assessment to respon-

With respect to the council meetings, we do observe that the minutes of the March 3, 1980 council meeting indicate the developers' attorney advised the council that his clients had reached an understanding regarding bearing the entire cost of the assessment and that there was no objection to the project from the neighbors. However, no claim of either fraud or misrepresentation was raised as an issue in this case. It is unfortunate that the council did not take this commitment into consideration in the preparation of the assessment roll; that the developers were not joined in the action; and that the issue was not pursued at trial by the appellant.

[1, 2] Minn.Stat. §§ 429.061, subd. 2 and 429.081 are not ambiguous. They require timely written objections or a reasonable cause for failing to so object to preserve the right to appeal. The clear objective of the statutes was to improve the assessment process by promoting participation in the process and to insure a degree of finality. Permitting a judicial appeal based on the property owner's subjective belief is inconsistent with both of these objectives.

[3, 4] It is also inconsistent with our rules of statutory construction which provide:

> The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature. *Every law shall be construed, if possible, to give effect to all its provisions.*
>
> When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.

Minn.Stat. § 645.16 (1982) (emphasis added); *see also State v. United States Fidelity and Guaranty Company*, 303 Minn. 131, 133, 226 N.W.2d 322, 323–24 (1975). In order for the requirement to file timely objections to have any effect, the reasonable cause exception must require objective reasons for failing to file. Otherwise the statutory exception would swallow the general rule requiring timely written objections to preserve a right of appeal.

[5] Having concluded that Minn.Stat. § 429.081 (1982) precluded respondent's appeal, we need not address the other issues raised. We note, however, that the trial court's failure to make findings on the before and after market value of respondent's property would have been a separate and sufficient ground for reversing and remanding this case. *See In Re Village of Burnsville*, 310 Minn. 32, 245 N.W.2d 445, 450 (Minn.1976); *Gibbish v. Village of Burnsville*, 294 Minn. 318, 322–23, 200 N.W.2d 310, 314 (1972).

Finally, although we are upholding this assessment because the City council has followed the present statute, we are troubled by the statute as it reads and invite the legislature to review the notice requirements concerning assessments so that property owners will have a clearer picture of what is involved in the proposed assessment. We are primarily troubled by the fact that in the notice a dollar figure of the proposed assessment is not set out against a particular described property.

DECISION

The trial court's order of March 29, 1983 is reversed. The case is remanded to the trial court for dismissal.

Reversed and remanded.

STATE of Minnesota, Respondent,

v.

$14,000 DOLLARS IN VARIOUS DENOMINATIONS OF UNITED STATES CURRENCY, Appellant.

No. C4-83-1442.

Court of Appeals of Minnesota.

March 14, 1984.

Defendant was arrested and charged with drug-related felonies, and, pursuant to

a search warrant, $14,000 in unmarked United States currency was seized from the trunk of his car. The State commenced an action for forfeiture of the money. The District Court, Hennepin County, Peter J. Lindberg, J., granted State's motion for summary judgment, and denied defendant's motion to vacate that judgment. Upon defendant's appeal, the Court of Appeals, Sedgwick, J., held that: (1) trial court properly granted State's motion for summary judgment, since defendant did not present specific facts substantiating his allegations that the money was obtained from sale of property and rental income; (2) trial court did not err in refusing to set aside the summary judgment on grounds of excusable attorney neglect, where defendant's attorney failed to submit either appropriate affidavits to oppose summary judgment or an affidavit requesting continuance; and (3) defendant's attorney, to whom the money had been assigned before commencement of the forfeiture proceedings, had no interest in the money, since the attorney had only a contingent interest subject to the outcome of the forfeiture action.

Affirmed.

1. Judgment ⟹181(2), 186

Summary judgment is only proper where there are no genuine issues of material fact, and in determining whether genuine issues of fact exist, the pleadings, depositions, answers to interrogatories, admissions on file and affidavits may be considered. Rules Civ.Proc., Rule 56.03.

2. Judgment ⟹185.3(2)

In forfeiture action, the trial court properly granted summary judgment to the State, which submitted affidavits from two experienced narcotics agents who stated that, in their opinion, the money seized was used or intended for use in drug transactions, since defendant failed to submit affidavits stating specific facts substantiating allegation that money was obtained from sale of property and rental income and failed to submit affidavit requesting continuance. Rules Civ.Proc., Rules 56.03, 56.05, 56.06; M.S.A. § 152.19.

3. Judgment ⟹368

Before court can properly set aside judgment for attorney neglect under rule, the moving party must: possess a reasonable defense on merits; have reasonable excuse for the failure or neglect involved; have acted with due diligence after notice of entry of judgment; and show that no substantial prejudice will result to other party. Rules Civ.Proc., Rule 60.02.

4. Judgment ⟹368

Trial court, in regard to its entry of summary judgment for the State is forfeiture action, did not err in refusing to set aside the summary judgment on grounds of excusable attorney neglect, where defendant's attorney failed to submit either appropriate affidavits to oppose summary judgment or an affidavit pursuant to rule requesting a continuance. 48 M.S.A., Rules Civ.Proc., Rules 56.03, 56.05, 56.06, 60.02.

5. Secured Transactions ⟹11

One cannot have a security interest in money, since section of Uniform Commercial Code defining such interest does not specify cash as something which is properly subject to a security interest. M.S.A. § 336.9-105.

6. Secured Transactions ⟹10

Where criminal defendant assigns cash, seized pursuant to valid search warrant and subject to a forfeiture action, the assignee has only a contingent interest, not a security interest, in the money. M.S.A. § 152.19.

7. Drugs and Narcotics ⟹193

After entry of judgment for State in forfeiture action, defendant's attorney had no interest in money which had been assigned to him by defendant, whose interest was subject to the outcome of the forfeiture proceeding arising from seizure of that money pursuant to defendant's arrest for drug-related felonies. M.S.A. § 152.19.

Syllabus by the Court

1. The trial court did not err in refusing to set aside its summary judgment on the grounds of excusable attorney neglect where defendant's attorney failed to submit either appropriate affidavits to oppose summary judgment or an affidavit pursuant to Minn.R.Civ.P. 56.06 requesting a continuance.

2. Where a criminal defendant assigns cash, seized pursuant to a valid search warrant and subject to a forfeiture action, the assignee has only a contingent interest, not a security interest, in the money.

Tracy R. Eichhorn-Hicks, Minneapolis, for appellant.

James B. Early, Sp. Asst. Atty. Gen., St. Paul, for respondent.

Considered and decided by FOLEY, P.J., and WOZNIAK and SEDGWICK, JJ., with oral argument waived.

OPINION

SEDGWICK, Judge.

This is an appeal from a denial of defendant's motion to vacate summary judgment entered in favor of the State. Defendant claimed the court should have set aside the judgment because of excusable attorney neglect pursuant to Minn.R.Civ.P. 60.02. We affirm.

Facts

On November 3, 1981, Jeffrey and Elizabeth Bulgatz were arrested and charged with drug-related felonies. Their arrests were the culmination of a five-month investigation of a cocaine ring in the twin city area by special agents of the Bureau of Criminal Apprehension (BCA).

At the time of their arrests, pursuant to a search warrant, BCA agents found four twist-off oil cans in the trunk of Jeffrey Bulgatz's car; one can contained $14,000 in unmarked U.S. currency; two other cans contained plastic bags which contained traces of cocaine. The agents also found numerous drug notes, one cocaine tester, and a small amount of marijuana in Bulgatz's trunk.

After this money was seized, Jeffrey Bulgatz assigned any interest he had in it to his attorney for payment of legal services.

The Bulgatzes were convicted of the charges against them and sentenced to prison. Thereafter, the State of Minnesota commenced an action pursuant to Minn. Stat. § 152.19 (1982) for forfeiture of the $14,000 cash.

Both plaintiff and defendant filed cross motions for summary judgment. Plaintiff filed affidavits from two experienced narcotic agents from the BCA who opined that the $14,000 was money used or intended for use in drug transactions. They stated that it is common practice for drug dealers to use large quantities of cash in drug transactions; that it is a common practice among drug dealers involved in multiple cocaine transactions to store cash from prior transactions in a secret area or container near the drug supply for ready access in making their next cocaine buy; and that persons with income from drug deals as well as from legitimate sources often commingle funds.

In support of its motion, defendant submitted only one affidavit which did not contain any substantive evidence. The only other evidence submitted in opposition to the motion was defendant's answer, an unexecuted and unsworn "affidavit" and discovery documents. These documents alleged that the money was obtained from the sale of property and rental income. However, specific facts substantiating these allegations were not presented.

The trial court granted plaintiff summary judgment, because defendant presented no specific facts showing a genuine issue for trial.

Issues

1. Was summary judgment properly granted in favor of respondent?

2. Did the trial court abuse its discretion in refusing to vacate summary judg-

ment based on a claim of attorney neglect under Minn.R.Civ.P. 60.02(1) where defendant's attorney failed to submit appropriate affidavits opposing summary judgment, and failed to submit an appropriate affidavit pursuant to Minn.R.Civ.P. 56.06 stating reasons why a continuance was needed?

3. When money is subject to forfeiture pursuant to Minn.Stat. § 152.19, may the drug dealer avoid forfeiture by assigning his interest in the money to his attorney?

Analysis

[1] (1) Summary judgment is proper only where there are no genuine issues of material fact. Minn.R.Civ.P. 56.03. In determining whether genuine issues of fact exist, the pleadings, depositions, answers to interrogatories, admissions on file and affidavits may be considered.

Affidavits, however, must be made on personal knowledge and must show affirmatively that the affiant is competent to testify to the matters stated. Minn.R. Civ.P. 56.05.

Here, two days after the hearing, a member of defendant's attorney's law firm submitted an affidavit with an attached copy of an unexecuted and unsworn "affidavit" of Jeffrey Bulgatz stating that it was being mailed to him in prison for his signature. This was the only supporting material filed on defendant's behalf.

Minn.R.Civ.P. 56.03 requires opposing affidavits be served before the day of hearing. However, Rule 56.06 provides an exception for submitting affidavits later if a party cannot obtain them in time for the hearing by filing an affidavit requesting a continuance.

Defendant failed to either submit timely opposing affidavits or file an affidavit pursuant to Rule 56.06 requesting a continuance.

Rule 56.05 provides that:

> an adverse party may not rest upon the mere averments or denials of his pleading but must present specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

[2] At the time of the motion hearing defendant had submitted nothing establishing specific facts which create genuine issues of fact for trial. Therefore, summary judgment was properly entered for plaintiff.

(2) Defendant's attorney argues that summary judgment is too harsh a penalty since his failure to submit appropriate affidavits was due to excusable neglect.

Minn.R.Civ.P. 60.02 allows reconsideration of an order where there exists:

> (1) Mistake, inadvertence, surprise, or excusable neglect; ... or (6) any other reason for justifying relief from the operation of the judgment.

[3] Four conditions must be met before a court can properly set aside a judgment for attorney neglect under Rule 60.02. The moving party must (1) possess a reasonable defense on the merits, (2) have a reasonable excuse for the failure or neglect involved, (3) have acted with due diligence after notice of the entry of judgment, *and* (4) show that no substantial prejudice will result to the other party. *Finden v. Klaas*, 268 Minn. 268, 128 N.W.2d 748 (1964) as cited in *Edin v. Jostens*, 343 N.W.2d 691 (Minn.App.1984).

[4] Defendant's attorney contends that his failure to submit Jeffrey Bulgatz's affidavit before the hearing was reasonable because communication was difficult and slow since Bulgatz was in prison in Kansas. However, the evidence shows that defendant's attorney had more than six months from the commencement of the forfeiture action to get Bulgatz's affidavit executed, sworn, and filed with the court before the motion hearing. Therefore, we believe defendant does not have a reasonable excuse for the neglect involved here.

Furthermore, a failure to submit an affidavit pursuant to Rule 56.06 requesting a continuance does not constitute *excusable* attorney neglect. *Boulevard Del, Inc. v. Stillman*, 343 N.W.2d 50 (Minn.App.1984).

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1 50 (Minn.App.1984).

[5] (3) Defendant's attorney argues that he has a bona fide security interest in the $14,000 cash because it was assigned to him before the commencement of the forfeiture proceedings. However, one can not have a security interest in money. Minn. Stat. § 336.9-105 (1982) does not specify cash as something which is properly subject to a security interest.

[6, 7] An assignee stands in the shoes of the assignor and has no greater interest in the money than the assignor had. *Marquette Appliances Inc. v. Economy Food Plan,* 256 Minn. 169, 97 N.W.2d 652 (1959). Since Bulgatz's interest in the money became contingent once it was seized, all that was assigned to defendant's attorney was a contingent interest, subject to the outcome of the forfeiture action. Therefore, defendant's attorney has no interest in this money.

Decision

Where defendant's attorney fails to submit either appropriate affidavits in opposition to summary judgment or affidavits requesting a continuance of the hearing, there is no excusable attorney neglect to justify setting aside judgment. The trial court correctly entered summary judgment that defendant's attorney had no security interest in money assigned to him by a client whose interest was subject to the outcome of forfeiture proceedings.

Affirmed.

STATE of Minnesota, Respondent,

v.

Lawrence Lee LIEBFRIED, Appellant.

No. C5-83-1997.

Court of Appeals of Minnesota.

March 14, 1984.

Defendant appealed from the District Court, Martin County, Harvey A. Holtan, J., which revoked his probation and executed 60-month sentence which had been stayed following his release from prison for offense he committed while on probation. The Court of Appeals, Sedgwick, J., held that: (1) trial court erred in failing to impose presumptive sentence or provide departure reasons as ordered by the Supreme Court, and (2) since trial court refused to comply with Supreme Court's order to amend sentence duration only, and failed to comply with rules of criminal procedure in setting a revocation hearing within seven days, defendant had served more time than legally permitted, thereby entitling him to immediate release.

Reversed.

1. Criminal Law ⇐1208.1(3)

Trial court erred in failing to impose presumptive sentence or provide departure reasons as ordered by Supreme Court.

2. Criminal Law ⇐982.9(3)

Trial court's failure to set date for probation revocation hearing within reasonable time constituted error. 49 M.S.A., Rules Crim.Proc., Rule 27.04, subd. 2(4).

3. Criminal Law ⇐982.9(3, 7, 8)

If defendant is incarcerated on a subsequent felony the probation revocation hearing either must be held soon enough so the executing sentencing can run concurrently, or the sentence must credit time already served to prevent a de facto consecutive sentence.

4. Criminal Law ⇐982.9(3)

Fact that defendant was incarcerated for two months while awaiting a probation revocation hearing after he had been released from prison for his subsequent offense constituted error, in that, even if defendant had been rightfully incarcerated for no other reason but parole violation after release from prison, a revocation hearing should have been conducted within

this and the other two occa-
uventory of relator's truck
relator produced invoices for
umber of cases sold. How-
sequent audit of relator's
sed a copy of an invoice for
es sold to a customer on April
loyer claimed that, contrary to
cedure, no matching original
een turned in by the relator
n. The relator had received
was not turned in to the
accounted for. Relator made
explain this incident. The
found that this was theft
lisqualifying misconduct.

rage, equivalent to the value
se, occurred on May 11, 1983.
ed the employer of this over-
in an invoice for the extra pop
en the evening inventory re-
es matching the number of
d, relator voided the addition-
l kept the cash.

er complaints were made to
related to any of the three
a result of the errors, how-
loyer discharged relator.

r's claim for unemployment
benefits, a claims deputy de-
he had been discharged for
d was disqualified from re-
its. On appeal, the appeal
d that the employer had not
burden that relator was dis-
illful misconduct. The Com-
presentative reversed and
e overage on April 22, 1983
misconduct.

ISSUE

e record supports the decision
ssioner of Economic Security
as discharged for misconduct
refore, disqualified from re-
ployment compensation bene-

ANALYSIS

ssioner's representative deter-
relator's actions constituted

misconduct and that he was therefore disqualified from receiving unemployment compensation benefits pursuant to Minn. Stat. § 268.09, subd. 1(2). The representative based his finding of misconduct solely on the April 22, 1983 incident.

[1] This court's scope of review is limited. In an economic security case:

> The narrow standard of review requires that findings be reviewed in the light most favorable to the decision, and if there is evidence reasonably tending to sustain them, they will not be disturbed.

White v. Metropolitan Medical Center, 332 N.W.2d 25 (Minn.1983); *see Booher v. Transport Clearings of Twin Cities, Inc.*, 260 N.W.2d 181 (Minn.1977); *Group Health Plan, Inc. v. Lopez*, 341 N.W.2d 294, 296 (Minn.Ct.App.1984).

[2] The record in this case supports the decision of the Commissioner. The inference of theft drawn by the Commissioner's representative is supported by the evidence and is a sufficient basis for a finding of misconduct as defined in *Tilseth v. Midwest Lumber Co.*, 295 Minn. 372, 375, 204 N.W.2d 644, 646 (1973).

DECISION

There is sufficient and adequate evidence reasonably supporting the finding of the Commissioner's representative that relator was terminated for misconduct.

The decision of the representative of the Commissioner of Economic Security is hereby affirmed.

Affirmed.

Clarence C. CAMPION, Jr., Respondent,

v.

COUNTY OF WRIGHT, Appellant.

No. C6-83-1233.

Court of Appeals of Minnesota.

April 24, 1984.

Landowner brought declaratory judgment action challenging county commissioners' denial of landowner's request for rezoning and a special use permit. On cross motions for summary judgment, the District Court, Wright County, Glen W. Swenson, Retired County Judge, ordered the rezoning and issuance of the special use permit, and the county appealed. The Court of Appeals, Foley, J., held that substantial fact issues existed as to whether county's comprehensive plan would be violated by the proposed rezoning, precluding summary judgment.

Reversed and remanded.

1. Judgment ⇐185(2)

In determining whether summary judgment is proper, facts shall be viewed in light most favorable to nonmoving party. 48 M.S.A., Rules Civ.Proc., Rule 56.03.

2. Judgment ⇐186

Sole question before court determining whether summary judgment is proper is whether an issue of established material fact exists. 48 M.S.A., Rules Civ.Proc., Rule 56.03.

3. Zoning and Planning ⇐609

Under narrow standard of judicial review of a municipality's zoning decision, zoning or rezoning, as a legislative act, must be upheld unless opponents prove that the classification is unsupported by any rational basis related to promoting the public health, safety, morals or general welfare. M.S.A. § 462.361, subd. 1.

4. Zoning and Planning ⇐603

On appeal, court makes an independent examination of the county's record and decision in a zoning case. M.S.A. § 462.361, subd. 1.

5. Zoning and Planning ⇐194

With respect to determining whether there was a legally sufficient reason for county commissioners' denial of a rezoning, a "legally sufficient reason" cannot be merely a conclusion, but must be supported by facts.

See publication Words and Phrases for other judicial constructions and definitions.

6. Judgment ⇐181(15)

In declaratory judgment action by landowner challenging county commissioners' denial of landowner's request for rezoning, substantial fact issues existed concerning whether the county's comprehensive plan would be violated by the proposed rezoning, precluding summary judgment.

Syllabus by the Court

Because of the deference paid to municipal bodies' legislative decisions on rezoning, summary judgment for land owner was inappropriate where issues of fact exist concerning whether the County's Comprehensive Plan would be violated by the proposed rezoning.

Gerald T. Carroll, Carroll & Faulconer, Minneapolis, for respondent.

Robert W. Adams, Asst. Wright County Atty., Buffalo, for appellant.

Heard, considered, and decided by POPOVICH, C.J., and FOLEY and WOZNIAK, JJ.

OPINION

FOLEY, Judge.

After the Wright County Commissioners denied Clarence Campion's request for rezoning of and a special use permit for property he owns in Victor Township of Wright County, Campion filed a declaratory judgment action against the county. On cross motions for summary judgment, the trial court ordered the rezoning and issuance of the special use permit. The county appeals. We reverse and remand.

FACTS

Wright County, located between the Twin Cities metropolitan area and St. Cloud, has been feeling pressure from both as they grow. In an attempt toward rational land use planning, Wright County adopted a Comprehensive Land Use Plan in 1978. The goals of the plan are to protect agricultural land, discourage premature, scattered development, protect environmentally-sensitive areas, promote development where services can be provided, maintain the highest standard of living for residents, protect the natural environment, and enlist public support and participation in planning decisions.

Victor Township, where Campion's property is located, has some of the richest farmland in Wright County. The property is in the east central portion of the township located on the east side of a shallow lake called Lake Ann. The soil in that area is called "Esterville-Hubbard-Wadena Association." According to the Comprehensive Plan, the major obstacle to development with this type of soil is "the rapid permeability of the soils. There is a high hazard of pollution to underground water supplies when these soils are used for on-site sewer absorption fields."

The Plan foresees only a modest growth rate in Victor Township. For the eleven years immediately preceding the adoption of the Plan, an average of only eight residential building permits have been issued per year and only 1% (264 acres) of agricultural land was taken out of production. Future growth is predicted east of the City of Howard Lake in the north central portion of the township and "will continue to expand in those areas adjacent to the major lakes in the township."

Campion owns a split level piece of property. Out of a swampy shoreline, a steep

bluff rises to a rolling plain. The swamp and the bluff are zoned as open areas unsuitable for development. The rolling plain is zoned as agricultural land.

On August 21, 1981, Campion filed for a rezoning of his property so that he could develop it. He proposed dividing the acreage into a number of smaller lots, building homes on the top of the bluff.

A meeting of the Planning Commission was held on September 24, 1981. A number of citizens raised objections to the rezoning petition and proposed development. One questioned whether the area was buildable because of the elevation, another that drainage would cause problems, another that the lake might not be able to handle the sewage, another that traffic would be a problem. The Planning Commission decided not to take any action until they had inspected the site.

On October 29, 1981, after an on-site inspection, another public meeting was held. Again, public objections that the development would create drainage problems, take agricultural land out of production, and violate the Comprehensive Plan were raised. LeRoy Engstrom, a county commissioner, moved "to deny the request for rezoning because it does not comply with the Comprehensive Plan." The motion carried unanimously.

ISSUE

1. Did the county raise any material issues of fact concerning any legitimate reasons, rationally related to public health, safety, or morals, for denying the proposed rezoning?

2. Could the trial court order the issuance of a special use permit?

ANALYSIS

[1, 2] 1. Summary judgment is proper under the Minnesota Rules of Civil Procedure when:

> the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to judgment as a matter of law.

Minn.R.Civ.P. 56.03. Facts shall be viewed in the light most favorable to the non-moving party. In such instances, the sole question before the court is whether an issue of established material fact exists. *Bennett v. Storz Broadcasting Co.*, 270 Minn. 525, 531, 134 N.W.2d 892, 897 (1965).

[3] Under Minnesota law, parties are entitled to judicial review of a zoning decision by a municipality. Minn.Stat. § 462.361(1) (1982). The typical vehicle for review, as here, is a declaratory judgment action. *Honn v. City of Coon Rapids*, 313 N.W.2d 409, 416 (Minn.1981). The standard of review is quite narrow. "As a legislative act, a zoning or rezoning must be upheld unless opponents prove that the classification is unsupported by any rational basis related to promoting the public health, safety, morals, or general welfare." *State, by Rochester Assoc. of Neighborhoods v. City of Rochester*, 268 N.W.2d 885, 888 (Minn.1978). The Supreme Court has noted:

> The mere fact that the trial court might have reached a different conclusion had it been a member of the council, does not invalidate the judgment of the City officials if they acted in good faith and within the broad discretion accorded them....
>
> The setting aside of routine municipal decisions should be reserved for those rare instances in which the City's decision has no rational basis. Except in such cases it is the duty of the judiciary to exercise restraint and accord appropriate deference to civil authorities in the performance of their duties.

White Bear Docking and Storage, Inc. v. City of White Bear Lake, 324 N.W.2d 174, 176 (Minn.1982).

[4] On appeal, the court makes "an independent examination of [the county's] record and decision." *Northwestern College v. City of Arden Hills*, 281 N.W.2d 865, 868 (Minn.1979) (adopting the standard of *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808 (Minn.1977)).

[5] Campion challenges the county commissioners' determination on the ground that they gave no legally sufficient reason for their decision. When the commissioners voted on the rezoning, it was moved that the rezoning be denied because it conflicts with the Comprehensive Plan. While the commissioners could well have done a better job of listing their reasons, the Supreme Court has determined that inconsistency with a comprehensive plan is a "legally sufficient reason" for denial. *Hubbard Broadcasting, Inc. v. City of Afton*, 323 N.W.2d 757, 763 (Minn.1982). A legally sufficient reason cannot, however, be merely a conclusion, but must be supported by facts. *See Zylka v. City of Crystal*, 283 Minn. 192, 198, 167 N.W.2d 45, 50 (1969).

[6] Recognizing that as a practical matter municipal bodies cannot be expected to keep detailed records of their proceedings, the Supreme Court allows additional testimony and evidence if it is related to reasons for denial of the rezoning. *Honn v. City of Coon Rapids*, 313 N.W.2d 409, 416 (Minn.1981). Here, the county has submitted affidavits in opposition to the motion for summary judgment asserting that the rezoning might well violate the comprehensive plan. Concerns about drainage, sewage, traffic, and taking agricultural land out of production were expressed. As well, the Comprehensive Plan seems to indicate that development is expected around the lakes in Victor Township. The plan is unclear, however, as to whether development should be on the west side of the lake which is zoned for residential housing or the east side where Campion's land is located. The county has raised material issues of fact concerning a violation of the Plan and these concerns should be factually addressed at trial on the merits.

2. Having determined to reverse and remand this case for trial, this court need not canvass in depth the issue of a special use permit. The land is presently zoned for agricultural use. Unless and until the Campion land is rezoned for development of residential lots, to grant a special use permit is premature.

DECISION

Because there are substantial issues of fact, this court reverses and remands this case for a full trial as to whether the county's denial of Campion's rezoning petition had a rational basis, related to promoting the public health, safety, morals, or general welfare. The order granting the special use permit is also reversed as premature.

Terrance A. BURTMAN, Relator,

v.

DEALERS DISCOUNT SUPPLY, Respondent,

Commissioner of Economic Security, Respondent.

No. C2-83-2069.

Court of Appeals of Minnesota.

April 24, 1984.

Unemployment compensation claimant petitioned for writ of certiorari following decision of the Department of Economic Security's representative reversing referee and holding that claimant had duty to inform his employer of objections to required sales tactics prior to terminating employment. The Court of Appeals, Wozniak, J., held that where employee voluntarily terminated his employment due in part to employer's insistence upon sales tactics the employee considered illegal and immoral, and employee failed to first make his objections known, his failure to do so rendered termination voluntary without good cause attributable to employer.

Affirmed.