STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1646

Hubert C. Haselsteiner,
Respondent,

vs.

LISEC America, Inc., a Delaware corporation, et al.,
Appellants.

Filed July 28, 2009
Reversed
Schellhas, Judge

Dakota County District Court
File No. 19-C1-08-006677

Diane B. Bratvold, John C. Hauge, Lindsey D. Saunders, Briggs & Morgan, P.A., 2200 IDS Center, 80 South Eighth Street, Minneapolis, MN 55402 (for respondent)

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Considered and decided by Schellhas, Presiding Judge; Ross, Judge; and Larkin, Judge.

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

SCHELLHAS, Judge

The two individually named appellants challenge the denial of their motion to dismiss because of insufficiency of service of process. We reverse.

FACTS

Appellant LISEC America, Inc. is a sales organization that has its principal place of business in Eagan, and is engaged in selling glass-making machinery manufactured in Austria. Appellant Peter Lisec is the chairman of the board of directors for LISEC America, and appellant Gerhard Sonnleitner and respondent Hubert Haselsteiner were LISEC America's other two directors. LISEC America is one of several entities owned and controlled by Lisec and Sonnleitner, which are collectively referred to here as the LISEC Group.

Haselsteiner maintains a 10% ownership interest in LISEC America and, prior to this lawsuit, was also employed by a different company within the LISEC Group. Haselsteiner suspected that other entities within the LISEC Group were interfering with LISEC America's business. His employment with LISEC America ended after he discussed his suspicions with Lisec and Sonnleitner. Haselsteiner filed suit against Lisec, Sonnleitner, and LISEC America, claiming breach of fiduciary duties and breach of contract, among other claims. Appellants do not challenge the sufficiency of personal service on LISEC America. Appellants do challenge service of the summons and complaint on Lisec and Sonnleitner.

An affidavit of service by mail states that Lisec and Sonnleitner were served by mailing copies of the summons and complaint to their business address in Austria. A separate affidavit of service states that Sonnleitner was personally served while in Minnesota on April 9, 2008. On that date, Sonnleitner was in Minneapolis to be deposed in a different lawsuit. With Sonnleitner was Hans Hoenig, a vice president and employee

of LISEC America. While Sonnleitner and Hoenig were in a reception area of the law office at which the deposition was to occur, a process server handed an envelope containing a copy of the summons and complaint to one of the men. Sonnleitner and Hoenig state in their affidavits that the process server gave the envelope to Hoenig; the process server states in the affidavit of service that he handed the summons and complaint to, and left them with, Sonnleitner.

Appellants asserted in their answer the affirmative defense of insufficient service of process on Lisec and Sonnleitner, and they later moved to dismiss the claims against Lisec and Sonnleitner on that basis. The district court denied the motion to dismiss, ruling that mailing the summons and complaint to Austria from the United States constituted satisfactory service on Lisec[1] and that delivery of the summons and complaint on April 9 to either Sonnleitner or Hoenig constituted satisfactory service on Sonnleitner. This appeal follows.

D E C I S I O N

Proper service of process is a fundamental requirement for initiating suit. *See Doerr v. Warner*, 247 Minn. 98, 103, 76 N.W.2d 505, 511 (1956) (stating that a civil action is commenced and jurisdiction attaches when the defendant is personally served). For a district court to exercise personal jurisdiction over a defendant, the plaintiff must

[1] The affidavit of service by mail states that service was mailed to both Lisec and Sonnleitner at the same address. The district court concluded that Lisec was properly served in this manner without specifying whether Sonnleitner also was properly served in this manner, apparently because the court separately concluded that personal service was effected on Sonnleitner. For the purpose of this appeal, we presume that the district court's conclusion that service by mail was proper as to Lisec also applied to Sonnleitner.

commence the action by a means "that is consistent with the requirements of due process and that satisfies those portions of the Minnesota Rules of Civil Procedure that govern the commencement of civil actions and the personal service of process." *Wick v. Wick*, 670 N.W.2d 599, 603 (Minn. App. 2003). An order denying a motion to dismiss for lack of personal jurisdiction acts "not merely as a retention of an action for trial, but as a determination of right," which compels a defendant "to take up the burden of litigation in this state that might otherwise be avoided." *Hunt v. Nevada State Bank*, 285 Minn. 77, 89, 172 N.W.2d 292, 300 (1969). The issue of whether a summons and complaint is properly served is a jurisdictional question of law. *Amdahl v. Stonewall Ins. Co.*, 484 N.W.2d 811, 814 (Minn. App. 1992), *review denied* (Minn. July 16, 1992); *see also McBride v. Bitner*, 310 N.W.2d 558, 563 (Minn. 1981).

"Once the plaintiff submits evidence of service, a defendant who challenges the sufficiency of service of process has the burden of showing that the service was improper." *Shamrock Dev., Inc. v. Smith*, 754 N.W.2d 377, 384 (Minn. 2008). Whether service of process was effective is reviewed de novo, but this court defers to the factual findings of the district court unless they are clearly erroneous. *Id.* at 382.

I

Appellants argue that Sonnleitner was not personally served. Personal service can be effected in Minnesota "[u]pon an individual by delivering a copy to the individual personally or by leaving a copy at the individual's usual place of abode with some person of suitable age and discretion then residing therein." Minn. R. Civ. P. 4.03(a). "Service of process in a manner not authorized by the rule is ineffective service." *Tullis v.*

Federated Mut. Ins. Co., 570 N.W.2d 309, 311 (Minn. 1997); *see Thiele v. Stich*, 425 N.W.2d 580, 584 (Minn. 1988) (concluding that service on a receptionist at defendant's place of business was ineffective because it did not comply with rule 4 in any way, despite whether defendant had actual notice).

Here, the record contains an affidavit of service from a professional process server stating that service papers were personally handed to Sonnleitner, but the record also contains affidavits from both Sonnleitner and Hoenig stating that the process server gave the envelope containing the service papers to Hoenig, not Sonnleitner. None of these affidavits describes what else occurred in the reception area at the time the envelope was handed to either Sonnleitner or Hoenig or immediately after. The district court observed that Sonnleitner and Hoenig were business colleagues "waiting together, for the same purpose, representing the same business entity, in the same legal matter," determined that "[i]f the Summons and Complaint were not directly handed to Sonnleitner, they would have been promptly delivered to him by Hoenig, his associate, most likely seconds thereafter," and concluded that Sonnleitner was therefore properly served regardless of who received the envelope.

Appellants had the burden of overcoming Haselsteiner's affidavit of service with clear and convincing evidence. *See Imperial Premium Fin. Inc. v. GK Cab Co.*, 603 N.W.2d 853, 858 (Minn. App. 2000) ("A party challenging an affidavit of service must overcome it by clear and convincing evidence."). Haselsteiner argues that Sonnleitner's assertion in his affidavit that "a young man gave Hans Hoenig an envelope" was based on secondhand information and therefore constituted inadmissible hearsay. *See* Minn. R.

Evid. 801(c) (defining hearsay as an assertion made outside of court and offered for the truth of the matter asserted); Minn. R. Evid. 802 (stating that hearsay is generally not admissible). But Sonnleitner's assertion in his affidavit that the young man "did not give [him] an envelope or any legal papers" and Hoenig's assertion in his affidavit that "a young man in a black messenger costume gave [him] an envelope with Mr. Sonnleitner's name on the outside" are the affiants' recollections of their personal experiences and are not based on secondhand information. These assertions would reasonably support a conclusion that Hoenig was given the envelope instead of Sonnleitner and, being recollections of the affiants' personal experiences, did not constitute inadmissible hearsay.

The district court did not determine whether the process server handed the envelope to Sonnleitner or Hoenig. We construe the district court's lack of resolution of this factual issue as a determination that Haselsteiner's evidence was insufficient for the court to determine that the envelope was handed to Sonnleitner. We also construe the district court's lack of a determination that the envelope was handed to Sonnleitner as a determination that appellants overcame Haselsteiner's affidavit of service. We will not disturb this determination on review. *See Straus v. Straus*, 254 Minn. 234, 235, 94 N.W.2d 679, 680 (1959) (stating that conflicts in the evidence, even though presented in affidavits, are to be resolved by the district court).

The district court concluded that Sonnleitner was properly served even if the process server delivered the envelope to Hoenig. But if the process server handed the envelope to Hoenig, the attempted service of process did not comply with Minn. R. Civ.

P. 4.03(a), which requires that personal service upon an individual shall be "by delivering a copy to the individual *personally*." (Emphasis added.) *See Berryhill v. Sepp*, 106 Minn. 458, 459, 119 N.W. 404, 404 (1909) ("[S]ervice must accord strictly with statutory requirements. If, for example, a summons were in fact served on the wrong person, and that person handed it to the proper defendant, there would be no service.").

Haselsteiner argues that Sonnleitner's actual notice of the lawsuit overcomes any technical flaw in the personal service of process upon Sonnleitner. But the '"actual notice' exception . . . has been recognized only in cases involving substitute service at defendant's residence." *Thiele*, 425 N.W.2d at 584 (concluding that service on a receptionist at defendant's place of business was ineffective because it did not comply with rule 4 in any way, despite whether defendant had actual notice). Because Haselsteiner did not attempt to serve Sonnleitner at Sonnleitner's residence, Sonnleitner's actual notice of the lawsuit is irrelevant. *See Turek v. A.S.P. of Moorhead, Inc.*, 618 N.W.2d 609, 612 (Minn. App. 2000) ("Since personal service was not made at the defendant's usual place of abode, the actual notice exception does not apply in this case."), *review denied* (Minn. Jan. 26, 2001).

The district court erred in its application of law when it concluded, based on its factual determinations, that personal service on Sonnleitner was effective even if the envelope was delivered to Hoenig. Accordingly, we reverse the district court's denial of appellants' motion to dismiss the complaint as to Sonnleitner on this basis.

II

Appellants also argue that service by mail from the United States to Lisec's and Sonnleitner's business address in Austria did not give the court personal jurisdiction over them. "Service of process abroad is one of the most challenging issues that a district court can face," *Hilska v. Jones*, 217 F.R.D. 16, 23 (D.D.C. 2003), and potentially implicates the sovereignty of the foreign country. *See, e.g.*, *Schiffer v. Mazda Motor Corp.*, 192 F.R.D. 335, 338 (N.D. Ga. 2000) (observing that the Hague Convention allowed contracting nations to consider whether "service by mail was an infringement of their sovereignty" (quotation omitted)); *East Cont'l Gems, Inc. v. Yakutiel*, 582 N.Y.S.2d 594, 595 (N.Y. Sup. Ct. 1992) (determining that service by mail on a foreign entity must comply with state law and must also "not violate the sovereignty of a foreign country"), *aff'd*, 591 N.Y.S.2d 778 (N.Y. App. Div. 1992).

Rule 4.04(c) governs service on individuals outside the United States and provides that service may be effected in a place not within this state "by any internationally agreed means reasonably calculated to give notice." Minn. R. Civ. P. 4.04(c)(1). Rule 4.04(c)(1) provides as an example of an internationally agreed-upon means of service those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents. Austria is not a party to this convention, *Prewitt Enters., Inc. v. Org. of Petroleum Exporting Countries*, 353 F.3d 916, 922-23 n.10 (11th Cir. 2003), and the parties do not indicate whether any other means of service have been agreed upon between Austria and the United States. Where there is no internationally agreed-upon means of service, service may be effected in the following manner:

> (A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or
>
> (B) as directed by the foreign authority in response to a letter rogatory or letter of request; or
>
> (C) unless prohibited by the law of the foreign country, by
>
> (i) delivery to the individual personally of a copy of the summons and the complaint; or
>
> (ii) any form of mail requiring a signed receipt, to be addressed and dispatched by the court administrator to the party to be served[.]

Minn. R. Civ. P. 4.04(c)(2). Rule 4.04(c) is nearly identical to the federal rule providing for service on parties outside the United States. Minn. R. Civ. P. 4.04 1996 advisory comm. cmt.; *see also* Fed. R. Civ. P. 4(f) (describing methods of service for parties outside the United States).

But in determining that service by mail was proper in this case, the district court did not consider whether service by mail to Austria from the United States satisfied rule 4.04(c). Rather, the district court concluded that service by mail was proper as to Lisec because his attorney had actual notice of Haselsteiner's claims and because service by mail was "reasonably calculated to reach Lisec." The district court relied on *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652 (1950), and *O'Sell v. Peterson*, 595 N.W.2d 870 (Minn. App. 1999), in determining that actual notice, plus Haselsteiner's "reasonable service attempts," constituted adequate service upon Lisec. *See Mullane*, 339 U.S. at 314-15, 70 S. Ct. at 657 (stating that "notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance," but that "if with due regard for the

practicalities and peculiarities of the case these conditions are reasonably met the constitutional requirements [of due process] are satisfied" (citation omitted)); *O'Sell*, 595 N.W.2d at 872 ("[S]ubstantial compliance combined with actual notice will subject an individual to personal jurisdiction."). But in *Mullane*, the Supreme Court permitted service by publication alone where it was "not reasonably possible or practicable to give more adequate warning" because "interests or whereabouts [of parties] could not with due diligence be ascertained." 339 U.S. at 317, 70 S. Ct. at 658-59. The record does not reflect that the circumstances present in *Mullane* are present in this case.

Moreover, in *O'Sell*, the plaintiff showed substantial compliance with the applicable rule of civil procedure. 595 N.W.2d at 873 (concluding that substitute service on a 14-year-old stepson who did not reside with the defendant, but visited regularly, substantially complied with Minn. R. Civ. P. 4.03(a)). As the Eleventh Circuit observed in *Prewitt Enters.*, "receipt of actual notice is an important factor in considering whether service of process is adequate," but service of process nonetheless requires substantial compliance with the rules of civil procedure. 353 F.3d at 924 n.14.

Here, to support his claim that Lisec and Sonnleitner were properly served, Haselsteiner presented an affidavit of service by mail. This affidavit states only that service papers were mailed to Lisec and Sonnleitner and is not sufficient to show that Haselsteiner substantially complied with rule 4.04(c). Rule 4.04(c) requires that service on Lisec and Sonnleitner be (1) in a manner prescribed by Austrian law, (2) in a manner directed by Austria in response to a letter rogatory or letter of request, or (3) via personal delivery or mail addressed and dispatched by the court administrator and requiring a

signed receipt. Haselsteiner did not show that he complied in any way with either of the latter two requirements and, as to the first requirement, offered no evidence that service by mail from abroad is prescribed by Austrian law.[2] We therefore conclude that Haselsteiner did not present evidence of either substantial compliance with the rules of civil procedure or proper service. *See Shamrock Dev.*, 754 N.W.2d at 384 (requiring the plaintiff to show evidence of service, and then shifting the burden to the defendant to show that service was insufficient). The district court erred in its denial of appellants' motion to dismiss as to Lisec and Sonnleitner, and we reverse on this basis as well.

Reversed.

[2] Unpublished authority suggests that service by mail from abroad is not permitted under Austrian law. *In re Ski Train Fire in Kaprun, Austria on Nov. 11, 2000*, No. MDL 1428 SAS, 2003 WL 21659368, at *3 (S.D.N.Y. July 15, 2003) (stating that "service by direct mail is prohibited by Austrian law" and that, under the terms of Fed. R. Civ. P. 4(f), effective service of foreign legal documents on Austrian individuals or entities must be effected by letters rogatory).