STATE OF MINNESOTA
IN COURT OF APPEALS
A09-646

Kelly Cedarberg,
Appellant,

vs.

Henry Astudillo,
Defendant,

Jesus Salvador Calle,
Defendant,

State Farm Mutual Automobile Insurance Company,
Respondent.

Filed December 29, 2009
Affirmed
Johnson, Judge

Hennepin County District Court
File No. 27-CV-07-24536

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Considered and decided by Lansing, Presiding Judge; Stoneburner, Judge; and Johnson, Judge.

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

JOHNSON, Judge

In January 2002, Kelly Cedarberg was injured in an automobile accident. In late 2007 and early 2008, she attempted to commence a lawsuit against the driver of the other vehicle, the owner of that vehicle, and her own insurer. The district court concluded that service of process on each defendant was insufficient. The district court also denied Cedarberg's motion to amend, which was intended to cure the insufficient service of process on her insurer. The district court ultimately granted summary judgment in favor of the insurer and dismissed the claims against the driver and owner of the other vehicle. We affirm.

FACTS

According to Cedarberg's complaint, she was a passenger in a vehicle that was involved in an accident at the intersection of East 38th Street and Fourth Avenue South in Minneapolis on January 15, 2002. She alleges that Henry Astudillo negligently drove a 1990 Hyundai Sonata that was owned by Jesus Salvador Calle and caused it to collide with the vehicle in which Cedarberg was a passenger, injuring her. Cedarberg alleges that neither Astudillo nor Calle was covered by an automobile liability insurance policy at the time of the accident. Cedarberg also alleges that her own automobile insurer, State Farm Mutual Automobile Insurance Company, wrongfully denied her claim for uninsured-motorist benefits.

To commence the action against Astudillo and Calle, Cedarberg attempted to serve process on them by publication. On November 30, 2007, Cedarberg filed with the district

court a summons and a complaint along with an affidavit of her attorney, which was intended to fulfill the requirements of service by publication. *See* Minn. R. Civ. P. 4.04(a). Cedarberg later filed an affidavit of an agent of the *Finance and Commerce* weekly newspaper, which stated that the summons was published on three separate occasions in December 2007. Astudillo and Calle did not respond to the summons and have not appeared in this action.

Cedarberg later moved for a default judgment against Astudillo and Calle. At the hearing on the motion, the district court inquired whether Cedarberg had complied with the requirements of service by publication. The district court analyzed the caselaw concerning those requirements and concluded that Cedarberg's attorney's affidavit did not state facts sufficient to satisfy the applicable rule. The district court concluded that it lacked personal jurisdiction over Astudillo and Calle and, accordingly, denied Cedarberg's motion for default judgment and dismissed the claims against Astudillo and Calle *sua sponte*.

To commence the action against State Farm, Cedarberg attempted to serve State Farm in two ways. First, Cedarberg delivered a copy of the summons and complaint to the commissioner of commerce on December 10, 2007. *See* Minn. Stat. § 45.028 (2008). Second, Cedarberg mailed a copy of the summons and complaint to State Farm on January 10, 2008, at an address that her attorney had obtained from the commissioner of commerce, which address turned out to be incorrect. Cedarberg did not include a form for acknowledgment of service of process by mail, and State Farm never returned such an acknowledgment, thus making the mailing to State Farm ineffectual. *See* Minn. R. Civ.

P. 4.05. The district court determined that State Farm did not receive a copy of the summons and complaint until January 23, 2008, which was six years and eight days after Cedarberg's automobile accident. State Farm served an answer to the complaint on February 12, 2008. State Farm alleged the affirmative defenses of insufficiency of service of process and expiration of the statute of limitations, among others.

On April 15, 2008, State Farm moved for dismissal or for summary judgment. On May 5, 2008, Cedarberg filed a motion to amend, seeking either to amend her complaint to comply with the requirements of substituted service in section 45.028 or to cure the insufficient service of process. The district court denied Cedarberg's motion to amend and granted State Farm's motion for summary judgment on the ground that service of process on State Farm was not effected during the six-year limitations period.

Cedarberg appeals from the district court's *sua sponte* dismissal of the claims against Astudillo and Calle and the district court's denial of her motion to amend with respect to State Farm.

D E C I S I O N

I. Service of Process on Astudillo and Calle

Cedarberg first argues that the district court erred by dismissing, *sua sponte*, her claims against Astudillo and Calle due to insufficient service of process. We apply a *de novo* standard of review to a district court's determination regarding the sufficiency of service of process. *Shamrock Dev., Inc. v. Smith*, 754 N.W.2d 377, 382 (Minn. 2008).

Proper service of process is a fundamental requirement of commencing a lawsuit. *Doerr v. Warner*, 247 Minn. 98, 103, 76 N.W.2d 505, 511 (1956). A district court cannot

exercise personal jurisdiction over a defendant unless the plaintiff has commenced the action by a means that is consistent with the requirements of due process and the Minnesota Rules of Civil Procedure. *Wick v. Wick*, 670 N.W.2d 599, 603 (Minn. App. 2003). If a plaintiff fails to follow the proper procedures for service by publication, a judgment thereafter entered is void for lack of personal jurisdiction. *Pugsley v. Magerfleisch*, 161 Minn. 246, 247, 201 N.W. 323, 323-24 (1924).

Service of process by publication is permitted in five enumerated circumstances. Minn. R. Civ. P. 4.04(a). Only one of those circumstances is at issue in this case, the situation in which a "defendant is a resident individual domiciliary having departed from the state with intent to defraud creditors, or to avoid service, or remains concealed therein with the like intent." Minn. R. Civ. P. 4.04(a)(1). To properly effect service by publication, a plaintiff must file with the district court both the complaint and an affidavit stating "the essential jurisdictional facts of one of the enumerated cases" described in rule 4.04(a). *Shamrock*, 754 N.W.2d at 383; *see also Schuett v. Powers*, 288 Minn. 542, 543-44, 180 N.W.2d 253, 254-55 (1970) (holding that service by publication was ineffective, in part because of failure to cite jurisdictional facts). "Because [s]ervice by publication is in derogation of the common law, the prescribed requirements for such service must be strictly complied with." *Shamrock*, 754 N.W.2d at 382 (alteration in original) (quotation omitted).

In this case, the affidavit of Cedarberg's attorney stated only that Astudillo and Calle lived in Minnesota at the time of the accident, that "upon investigation" they no longer were living at the same Minnesota address, and that Cedarberg's attorney was

unable to find a forwarding address or any reference to Astudillo and Calle "at any address within the State of Minnesota." The affidavit did not state that Astudillo and Calle had "departed from the state with intent to defraud creditors, or to avoid service" or that Astudillo and Calle "remain[ed] concealed [within the state] with the like intent." Minn. R. Civ. P. 4.04(a)(1). Because the affidavit failed to state the jurisdictional facts essential for service under rule 4.04(a)(1), it did not strictly comply with the rule, as required by *Shamrock*.

Cedarberg contends that the district court erred by failing to make findings of fact with respect to the requirements of rule 4.04(a)(1). She relies on that part of *Shamrock* in which the supreme court held that the district court "did not make the necessary factual findings as to whether [the defendant had] left the state with the intent to defraud creditors or avoid service of process." 754 N.W.2d at 385. But the issue of the defendant's intent to defraud was in dispute in *Shamrock*, and both plaintiff and defendant had introduced evidence to support their respective positions. *Id*. at 384-85. In this case, however, Cedarberg's attorney's affidavit failed to make a *prima facie* showing that the essential jurisdictional facts existed. *See id.* at 383. The district court properly analyzed the issue by concluding that the affidavit was, on its face, insufficient to justify service by publication.

Cedarberg also contends that the district court erred by raising the issue of her compliance with rule 4.04(a)(1) *sua sponte*, without any appearance or argument by Astudillo and Calle. Cedarberg does not cite any legal authority for the proposition that a district court may not raise and decide that issue *sua sponte*. The alternative would have

been to enter a default judgment that is void because the district court did not have jurisdiction over Astudillo and Calle. *See Pugsley*, 161 Minn. at 247, 201 N.W. at 323-24. Even if such a default judgment could be vacated at a later date, *see* Minn. R. Civ. P. 60.02(d), the district court in this case reasonably concluded that it was preferable not to enter a flawed judgment. In light of the circumstances of this case and Cedarberg's failure to cite any legal authority supporting her argument, we reject the contention that the district court erred by raising and deciding the issue *sua sponte*.

Thus, service of process on Astudillo and Calle was insufficient, and the district court did not err by dismissing Cedarberg's claims against Astudillo and Calle.

II. Service of Process on State Farm

Cedarberg also argues that the district court erred by denying her motion to amend. We apply an abuse-of-discretion standard of review to a district court's denial of a motion to amend pleadings. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). But we apply a *de novo* standard of review to the construction and application of a rule of civil procedure. *T.A. Schifsky & Sons, Inc. v. Bahr Constr., LLC*, 773 N.W.2d 783, 786 (Minn. 2009).

A. Motion to Amend the Complaint

Cedarberg first challenges the district court's denial of her motion to amend the complaint to specifically allege a violation of the type described in Minn. Stat. § 45.028, so as to remedy her failure to satisfy the requirements for substituted service on the commissioner of commerce. Cedarberg also seeks to have the amendment relate back to an earlier date, before the limitations period expired. *See* Minn. R. Civ. P. 15.03.

A party may amend a pleading after a responsive pleading has been served "only by leave of court or by written consent of the adverse party." Minn. R. Civ. P. 15.01. Leave to amend "shall be freely given when justice so requires," *id.*, "except where to do so would result in prejudice to the other party." *Fabio*, 504 N.W.2d at 761.

As an initial matter, we question whether Cedarberg may take advantage of the relation-back doctrine contained in rule 15.03, which is necessary if the amendment is to be beneficial to her. If certain requirements are satisfied, the rule allows a "claim or defense asserted in the amended pleading" to "relate[] back to the date of the original pleading." Minn. R. Civ. P. 15.03. Relation back, however, generally is unavailable if an "action has not been properly commenced in the first instance." *Van Slooten v. Estate of Schneider-Janzen*, 623 N.W.2d 269, 271 (Minn. App. 2001). But in *Save Our Creeks v. City of Brooklyn Park*, 682 N.W.2d 639 (Minn. App. 2004), *aff'd*, 699 N.W.2d 307 (Minn. 2005), this court allowed an amendment to a complaint to relate back to the earlier service of a defective summons and complaint because the summons and complaint were timely served and the defect in the documents was curable. *Id.* at 641, 646-48. Here, by contrast, the summons and complaint were not timely; State Farm did not receive a copy of Cedarberg's complaint until after the limitations period had expired.

Regardless, Cedarberg's argument fails. As the district court reasoned, State Farm would be substantially prejudiced if Cedarberg were permitted to amend her complaint because the statute of limitations expired. The caselaw supports the district court's reasoning. In *Fabio*, the supreme court affirmed a district court's denial of a motion to amend a complaint to allege additional facts because the amendment would have

permitted the plaintiff to revive otherwise time-barred claims. 504 N.W.2d at 761-63. This case presents an even stronger case of prejudice than *Fabio* because State Farm did not have actual notice of Cedarberg's action until after the statute of limitations expired. Thus, the district court did not abuse its discretion by denying Cedarberg's motion to amend the complaint to allege facts that would allow for substituted service on the commissioner of commerce.

B. Motion to Amend Service of Process

Cedarberg also challenges the district court's denial of her motion to "amend service of process." She relies on rule 4.07 of the Minnesota Rules of Civil Procedure. It is necessary to begin by considering whether rule 4.07 authorizes a district court to allow the type of amendment Cedarberg seeks. The text of the rule refers to the amendment of "any summons or other process or proof of service." Minn. R. Civ. P. 4.07. Each of these things is a document. In contrast, service of process is an action or an event, and it is difficult to conceive how such a thing can be amended. It appears that Cedarberg seeks a second opportunity to effect service of process, or a declaration by the district court that service of process is deemed to have been properly performed. Rule 4.07 does not authorize a district court to allow that type of amendment.

In addition, the record amply supports the district court's reasoning that an amendment should not be allowed because it would be prejudicial to State Farm. In *Tharp v. Tharp*, 228 Minn. 23, 36 N.W.2d 1 (1949), the supreme court held that a district court properly denied a motion to amend a defective summons pursuant to rule 4.07 after the statute of limitations had expired. *Id.* at 27, 36 N.W.2d at 3-4. The supreme court

reasoned that the defendant "would obviously be prejudiced" by such an amendment because "a defense which would bar the cause of action would be destroyed." *Id.* Here, the statute of limitations expired on January 15, 2008, before State Farm received notice of Cedarberg's action. If Cedarberg were allowed to "amend" service of process after that date, State Farm would be deprived of a meritorious defense to Cedarberg's action. *See id.* The prejudice to State Farm that would result from the sought-after amendment justifies the district court's denial of Cedarberg's motion. Thus, the district court did not abuse its discretion by denying Cedarberg's motion to "amend" her service of process on State Farm.

III. Service of *Kwong* Notice on State Farm

Cedarberg also argues that the district court erred by not allowing her to pursue a claim against State Farm for the recovery of damages that cannot be recovered from Astudillo and Calle, assuming she were able to obtain a default judgment against them. Cedarberg gave notice to State Farm on April 24, 2008, pursuant to *Kwong v. Depositors Ins. Co.*, 627 N.W.2d 52 (Minn. 2001), of her intent to seek compensation from State Farm for any uncollected damages arising from a judgment against Astudillo and Calle. The parties dispute the effect of the *Kwong* notice in light of the fact that Cedarberg served it after the statute of limitations had expired. Given our disposition of Cedarberg's first argument, that the district court did not err by dismissing Cedarberg's claims against Astudillo and Calle, the issue of the *Kwong* notice is moot. Therefore, we need not address it.

Affirmed.