STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0691

Bank of New York Mellon fka The Bank of New York,
as Trustee for the Certificateholders CWALT, Inc.,
Alternative Loan Trust 2006-OA21,
Mortgage Pass-Through Certificates, Series 2006-OA21,
Respondent,

vs.

Brad Everett, et al.,
Appellants.

Filed January 13, 2014
Affirmed
Schellhas, Judge

Wright County District Court
File No. 86-CV-13-337

David R. Mortensen, Greta L. Burgett, Wilford, Geske & Cook, P.A., Woodbury, Minnesota (for respondent)

William Bernard Butler, Butler Liberty Law, LLC, Minneapolis, Minnesota (for appellants)

Considered and decided by Stauber, Presiding Judge; Schellhas, Judge; and Minge, Judge.*

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

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

SCHELLHAS, Judge

Appellants challenge the district court's grant of summary judgment to respondent. We affirm.

FACTS

On October 16, 2010, respondent Bank of New York Mellon fka The Bank of New York as Trustee for the Certificateholders CWALT, Inc., Alternative Loan Trust 2006-OA21, Mortgage Pass-Through Certificates, Series 2006-OA21 (the bank) served appellant Anna Everett at 16311 61st Street NW, South Haven, MN 55382, in Wright County (the property), with a notice of mortgage foreclosure sale. On September 19, 2011, the bank purchased the property at a sheriff's sale and received a sheriff's certificate. In March 2012, the bank mailed to appellants Anna Everett and Chad Everett written notice that the bank owned the property and that their failure to vacate the property by June 25, 2012, "WILL RESULT IN THE COMMENCEMENT OF AN EVICTION ACTION." The Everetts failed to vacate the property.

In January 2013, the bank proceeded to evict Chad Everett, Anna Everett, and appellants Brad Everett and Lily Everett, alleging that Brad Everett and Lily Everett were property mortgagors and that Anna Everett and Chad Everett were tenants, and the bank sought a writ of recovery of the premises. The bank's counsel averred in an affidavit that

Everetts "cannot be found, or . . . are not in the State of Minnesota." D.B.[1] averred in an affidavit that she served an eviction summons and complaint on Everetts "by placing a true and correct copy of the documents in an envelope addressed to [Everetts] at [their] last known address of [the property]" and "depositing the envelope, with sufficient postage in the U.S. Mail at the Post Office located in the City of Woodbury, State of Minnesota." Similarly, a process server averred in an affidavit that she served an eviction summons and complaint on Everetts "by posting a true and correct copy of each document in a conspicuous place at [their] residence," on the front door of the property. In a separate affidavit, the process server also averred that she twice attempted to serve the summons and complaint on Everetts at the property—once on January 18 at 7:20 p.m., and once on January 19 at 12:10 p.m.—because "no personal service could be made" and, "to the best of [her] knowledge," Everetts "cannot be found or on belief that" they "are not in this State."

Everetts answered the eviction complaint and affirmatively alleged that "satisfactory service of process was not made" and that the complaint "failed to state a claim." But Everetts did not move the district court for dismissal; rather, they moved for a stay of the eviction proceeding "pending the outcome of a [federal] quiet title

[1] Although not stated in the affidavit of service, the bank's counsel stated at oral argument that D.B. is an employee of the bank's counsel and, indeed, counsel's law-firm name and address are typed on the affidavit.

action captioned *Mustafa, et al. v. Bank of America, N.A., et al.*" or, alternatively, to convert the action "into common law ejectment."[2]

The bank moved for summary judgment. Everetts opposed the motion, arguing that (1) the bank could not serve the eviction summons and complaint by posting because the bank failed to establish that Everetts could not be found in the county and (2) the bank failed to state a claim or make a prima facie showing that Everetts possessed the property. In reply, the bank argued, among other things, that Everetts' service-of-process argument was unsupported by Minn. Stat. § 504B.331(d) (2012) and contrary to Everetts' concession that they possessed the property.

The district court denied Everetts' motion to stay and granted summary judgment to the bank. The court did not address Everetts' improper-service argument or their motion to convert the action into a common-law-ejectment action. This appeal follows.

D E C I S I O N

Everetts argue that the district court erred by not dismissing the bank's eviction complaint on the bases of lack of personal jurisdiction over them and the bank's failure to state a claim on which relief could be granted. We disagree. Everetts did not *move* the district court to dismiss the eviction complaint; they merely sought dismissal in their answer. By not moving the court for dismissal, Everetts failed to comply with Minn. R. Civ. P. 7.02(a), which requires that "[a]n application to the court for an order shall be *by motion*." (Emphasis added.) *See State v. Mudgett*, 748 N.W.2d 921, 923 (Minn. App.

[2] After Everetts moved to stay the bank's eviction proceeding, the Eighth Circuit Court of Appeals affirmed the federal district court's dismissal of Everetts' complaint in that action. *Mustafa v. Bank of Am. N.A.*, 515 F. App'x 627, 628 (8th Cir. 2013).

2008) (stating that "an application is simply a request"). The district court therefore did not err by not dismissing the bank's eviction complaint and by not addressing dismissal in its order.

Everetts argue that the district court erred by granting the bank summary judgment on its eviction complaint. "[S]ummary judgment shall be granted only when the evidence 'show[s] that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law.'" *Dickhoff ex rel. Dickhoff v. Green*, 836 N.W.2d 321, 328 (Minn. 2013) (quoting Minn. R. Civ. P. 56.03). An eviction proceeding is "a summary court proceeding to remove a[n] . . . occupant from or otherwise recover possession of real property." Minn. Stat. § 504B.001, subd. 4 (2012); *see Cimarron Vill. v. Washington*, 659 N.W.2d 811, 817 (Minn. App. 2003) ("[G]enerally, the only issue for determination [in an eviction proceeding] is whether the facts alleged in the complaint are true.").

Everetts first contend that the district court erred by granting the bank summary judgment because the court lacked personal jurisdiction over them, arguing that the bank improperly served the eviction summons by posting on the property because no evidence shows that they could not be found in the county of the property. Although the district court did not address this issue, we conclude that Everetts' argument is unpersuasive. "Before a court may exercise personal jurisdiction over a defendant, the procedural requirement of service of process must be satisfied." *Koski v. Johnson*, 837 N.W.2d 739, 742 (Minn. App. 2013) (quotations omitted), *review denied* (Minn. Dec. 17, 2013); *accord Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97, 104, 108 S. Ct. 404, 409

(1987), *superseded by statute on other grounds*, 7 U.S.C. § 25(c) (2012). As questions of law, an appellate court reviews de novo "[t]he determination of whether personal jurisdiction exists," *Patterson v. Wu Family Corp.*, 608 N.W.2d 863, 866 (Minn. 2000), and the interpretation of a statute, applying the plain meaning of an unambiguous statute, *500, LLC v. City of Minneapolis*, 837 N.W.2d 287, 290 (Minn. 2013).

"The goal of all statutory interpretation is to ascertain and effectuate the intention of the legislature." *City of Moorhead v. Red River Valley Coop. Power Ass'n*, 830 N.W.2d 32, 37 (Minn. 2013) (quotation omitted). As to service of an eviction summons, section 504B.331(d) provides the following:

> Where the defendant *cannot be found in the county*, service of the summons may be made upon the defendant by posting the summons in a conspicuous place on the property for not less than one week if: (1) the property described in the complaint is: . . . (ii) residential and service has been attempted at least twice on different days, with at least one of the attempts having been made between the hours of 6:00 p.m. and 10:00 p.m.; and (2) the plaintiff or the plaintiff's attorney has signed and filed with the court an affidavit stating that: (i) the defendant cannot be found, or that the plaintiff or the plaintiff's attorney believes that the defendant is not in the state; and (ii) a copy of the summons has been mailed to the defendant at the defendant's last known address if any is known to the plaintiff.

(Emphasis added.) "[S]ection 504B.331 . . . requires strict compliance." *Koski*, 837 N.W.2d at 740; *see Color-Ad Packaging, Inc. v. Kapak Indus., Inc.*, 285 Minn. 525, 526 n.1, 172 N.W.2d 568, 569 n.1 (1969) ("It is well settled that the requirements of the statute governing service of summons must be strictly observed."), *overruled on other*

grounds by Twp. Bd. of Lake Valley Twp. Traverse Cnty. v. Lewis, 305 Minn. 488, 234 N.W.2d 815 (1975).

"[A] prima facie case simply means one that prevails in the absence of evidence invalidating it." *Tousignant v. St. Louis Cnty.*, 615 N.W.2d 53, 59 (Minn. 2000) (quotation omitted). "[W]hen the moving party makes out a prima facie case, the burden of producing facts that raise a genuine issue shifts to the opposing party." *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988); *see also Shamrock Dev., Inc. v. Smith*, 754 N.W.2d 377, 384 (Minn. 2008) ("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."). Here, no record evidence indicates that a sheriff failed to serve Everetts. *See* Minn. Stat. § 504B.331(c) (2012) ("Failure of the sheriff to serve the defendant is prima facie proof that the defendant cannot be found in the county."). But, by producing affidavits of attempted personal service and "not found," the bank made a prima facie showing that Everetts could not be found in the county. Everetts produced no evidence to contradict or rebut the bank's prima facie showing.

Moreover, although Everetts mention strict-compliance caselaw in their brief, they do not argue that the district court lacked personal jurisdiction over them due to any failure by the bank to strictly comply with section 504B.331(d). Instead, they argue that, "[b]ecause [the] requisite showing was not made" to trigger section 504B.331(d)'s application, "it was not necessary to determine whether Bank could serve under [section] 504B.331(d)." Everetts therefore have waived a challenge to the bank's service of process under section 504B.331(d) based on a lack of strict compliance. *See Peterson v.*

BASF Corp., 711 N.W.2d 470, 482 (Minn. 2006) (stating that "failure to address an issue in brief constitutes waiver of that issue"). Everetts' personal-jurisdiction challenge fails.

"The person entitled to the premises may recover possession by eviction when: [] any person holds over real property: [] after a sale of the property on an execution or judgment; or [] after the expiration of the time for redemption on foreclosure of a mortgage . . . ." Minn. Stat. § 504B.285, subd. 1(1) (2012). Everetts' sole argument on the merits of the district court's grant of summary judgment and writ of restitution to the bank is that the bank produced no evidence showing that Everetts are holding over on the property by being "in actual possession of the premises." Their argument fails.

Everetts impliedly conceded through their legal memorandum prepared by their counsel in support of their motion for a stay that they then possessed the property. Counsel stated that "the Defendants risk losing possession" and "the loss of possession would prejudice . . . Everetts." "[I]n addition to the pleadings, affidavits and depositions, the trial court in deciding a motion may consider . . . concessions of counsel." *Lundgren v. Eustermann*, 370 N.W.2d 877, 881 n.1 (Minn. 1985). Additionally, Everetts moved for a stay "pending the outcome of a [federal] quiet title action . . . because the quiet title action involves claims and defenses that are necessary for a fair determination of the eviction complaint and *would resolve the issue of possession in its entirety*." (Emphasis added.) And, before the district court, referring to Everetts' possession, their counsel argued as follows:

> *Their possession* is one of the elements for adverse possession. . . . So if . . . Everetts are able to control or have the ability to keep [the bank] from having possession of the

> property, and also from having [the bank] move someone into the property other than . . . Everetts, then that's an important element in their other action . . . .

(Emphasis added.)

Everetts' counsel also conceded in Everetts' memorandum in support of their supersedeas-bond motion that, "[a]s the court already found, [Everetts] are mortgagors in possession of the property" and they "intend to possess the subject property during the pendency of appeal." Although those statements are outside of the appellate record because they are in a memorandum that Everetts filed one month after they noticed this appeal, *see* Minn. R. Civ. App. P. 110.01 ("The papers filed in the trial court, the exhibits, and the transcript of the proceedings, if any, shall constitute the record on appeal in all cases."), we consider the concessions because they are documentary, conclusive, and support the district court's summary-judgment order. *See In re Livingood*, 594 N.W.2d 889, 895–96 (Minn. 1999) ("Normally, this court will not consider papers not filed in the trial court. However, when the evidence is documentary evidence of a conclusive nature (uncontroverted) which supports the result obtained in the lower court, we may do so." (quotation and citation omitted)).

For the first time in their reply brief, Everetts request that this court take judicial notice of a trust pooling and service agreement and argue that the district court erred by not considering whether the bank "lacked standing, was not the real party in interest, and was the of-record heir to a void foreclosure." We decline to address these arguments. *See* Minn. R. Civ. App. P. 128.02, subd. 4 ("The reply brief must be confined to new matter raised in the brief of the respondent."); *Moorhead Econ. Dev. Auth. v. Anda*, 789 N.W.2d

860, 887 (Minn. 2010) (indicating that, generally, "raising issues for appeal in one's reply brief is not proper practice and is not to be permitted" (quotation omitted)).

We conclude that the district court properly granted the bank summary judgment.

Affirmed.