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STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1834

Keith Welsh,
Appellant,

vs.

Auto-Owners Insurance Company,
Respondent.

Filed April 21, 2014
Affirmed
Harten, Judge[*]

Hennepin County District Court
File No. 27-CV-13-2935

Timothy M. O'Keeffe, Tatum O. Lindbo, Kennelly & O'Keeffe, Ltd., Fargo, North Dakota (for appellant)

Jeffrey A. Muszynski, Reding & Pilney, PLLP, Lake Elmo, Minnesota (for respondent)

Considered and decided by Schellhas, Presiding Judge; Halbrooks, Judge; and Harten, 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

HARTEN, Judge

Appellant challenges the dismissal of his lawsuit for insufficiency of service of process under Minn. R. Civ. P. 12.02(d), arguing that the district court abused its discretion in determining that respondent had not waived its affirmative defense of insufficient service of process and that appellant's claims were not barred by the statute of limitations. Because we see no abuse of discretion and because appellant's claims are barred by the statute of limitations, we affirm the dismissal.

FACTS

On 13 January 2007, appellant Keith Welsh, a Minnesota resident, was injured while riding in a car belonging to his father, Luis Welsh. Luis Welsh was insured by respondent Auto-Owners Insurance Company, a Michigan corporation; the driver of the other car involved in the collision was uninsured. Respondent refused coverage for treatment of appellant's injuries. It is undisputed that appellant had six years from the date of his accident, i.e., until 13 January 2013, to bring a claim under Minn. Stat. § 541.05, subd. 1(1) (2012) (providing six years to assert a claim based on a contract).

On 24 May 2011, respondent recorded with the Minnesota Department of Commerce the name and address of the agent authorized to accept service for respondent in Minnesota. On 14 June 2012, appellant mailed copies of his summons and complaint to respondent's corporate headquarters in Lansing, Michigan, and to the Minnesota Secretary of State. Respondent acknowledged receipt of the summons and complaint and

submitted a timely answer, asserting the affirmative defense of lack of proper service of process.

In August 2012, appellant sent interrogatories to respondent; in September, October, and November 2012, appellant wrote respondent requesting answers to the interrogatories. On 6 December 2012, respondent provided answers to some of the interrogatories but objected to those interrogatories that concerned lack or insufficiency of service of process, saying that its affirmative defenses were self-explanatory.

On 13 January 2013, the statute of limitations on appellant's claim expired. Respondent moved to dismiss the claim for insufficient service of process and as barred by the statute of limitations, following a hearing, the motion was granted with prejudice. Appellant challenges the dismissal, arguing that respondent did not waive the affirmative defense of insufficient service of process and that his claims are not barred by the statute of limitations.

D E C I S I O N

1. Waiver

"Whether service of process was effective, and personal jurisdiction therefore exists, is a question of law that we review de novo." *Shamrock Dev., Inc., v. Smith*, 754 N.W.2d 377, 382 (Minn. 2008).

> Service of process [on foreign insurance companies] may be made by leaving a copy of the process in the office of the commissioner, or by sending a copy of the process to the commissioner by certified mail, and is not effective unless: (1) the plaintiff . . . sends notice of the service and a copy of the process by certified mail to the defendant or respondent at the last known address; and (2) the plaintiff's affidavit of

> compliance is filed in the action . . . on or before the return day of the process, if any . . . .

Minn. Stat. § 45.028, subd. 2 (2012). Appellant "concedes the fact that his complaint was not properly served as prescribed by [this statute]." Absent proper service, a district court has no jurisdiction over a party's claim. *Wick v. Wick*, 670 N.W.2d 599, 603 (Minn. App. 2003). Thus, the district court lawfully dismissed appellant's complaint.

Appellant argues that respondent waived the right to assert insufficient service as an affirmative defense by failing to comply with Minn. R. Civ. P. 26.05 (requiring that incomplete or incorrect responses to discovery requests be supplemented). Appellant asked respondent to "[e]xplain in detail any defense that you will or may impose against [appellant's] claims. . . ." Respondent replied, "[T]he Answer and affirmative defenses speak[] for themselves regarding defenses to any claims made by [appellant]." The district court agreed, concluding that "[appellant] had ample time to research and remedy his service of process deficiencies before the statute of limitations expired." The record supports this conclusion: appellant had over six months, because respondent first asserted the defense in its answer on 26 June 2012, and the statute of limitations did not expire until 13 January 2013.

Appellant also argues that respondent waived the insufficient-service defense by "engaging in conduct inconsistent with asserting such a defense." For this argument, appellant relies on *Thorson v. Zollinger Dental, P.A.*, 728 N.W.2d 261, 267-68 (Minn. App. 2007) (affirming district court's discretionary decision to strike affirmative defense of insufficient service of process as a discovery sanction), *review denied* (Minn. 15 May

2007). But *Thorson* is distinguishable. In that case, the summons and complaint had been left with the defendant's office receptionist, whom the plaintiff had no way of knowing was not authorized to accept service, and who was identified on the affidavit of service with her name and the letters AAFS, denoting "authorized agent for service." *Id.* at 262. Thus, the plaintiff did not understand what the defendant meant by asserting insufficient service of process as an affirmative defense in its answer. *Id.* The plaintiff asked in an interrogatory that, if the defendant was asserting this defense, it state all facts that supported the defense, and in an accompanying letter said the plaintiff was "waiting for written confirmation that you are withdrawing the affirmative defense alleging improper service" and asking to be informed accordingly. *Id.* A month later, having received no reply, the plaintiff again wrote the defendant saying, "'I have written to you on several occasions asking about the status of your improper service defense. I am obviously concerned because of the short statutes of limitations. . . . Please . . . [indicate] whether you continue to maintain this defense.'" *Id.* at 263. In a phone conversation, the defendant's attorney told the plaintiff's attorney that the defendant did not want to pursue the improper-service issue and would rather settle the case. *Id.* The answer the defendant eventually provided to the interrogatory asking for all facts supporting the improper-service defense was non-responsive, saying that discovery continued and the answer would be updated. *Id.* Not until a month after the statute of limitations had run did the defendant tell the plaintiff that the receptionist had not been authorized to accept service. *Id.*

Here, the improper-service defense was based on information contained in a statute that appellant's attorney knew or should have known, not information known only to, and concealed by, respondent. Respondent did not waive the right to assert an improper-service defense.

2. Dismissal with Prejudice

This court reviews the "construction and application of a statute of limitations . . . de novo." *Park Nicollet Clinic v. Hamann*, 808 N.W.2d 828, 831 (Minn. 2011) (quotation omitted). An action is properly dismissed with prejudice if the complaint was not properly served before the statute of limitations expired. *See Johnson v. Husebye*, 469 N.W.2d 742, 745-46 (Minn. App. 1991) (affirming summary judgment granted because statute of limitations had expired before the complaint was properly served), *review denied* (Minn. 2 Aug. 1991). Here, the statute of limitations expired on 13 January 2013, by which time appellant had not properly served his complaint on respondent in compliance with Minn. Stat. § 45.028, subd. 2. The district court lawfully dismissed appellant's action with prejudice.

Affirmed.