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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0607**

Midland Funding, LLC, as successor in interest
to FIA Card Services, N.A.,
Respondent,

vs.

David Coyne,
Appellant.

**Filed November 20, 2017
Affirmed
Bjorkman, Judge**

Ramsey County District Court
File No. 62-CV-16-4672

Ryan Supple, Messerli & Kramer P.A., Plymouth, Minnesota (for respondent)

Anthony P. Chester, Hyde & Swigart, Minneapolis, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Hooten, Judge; and Kirk,
Judge.

UNPUBLISHED OPINION

BJORKMAN, Judge

Appellant challenges the denial of his motion to dismiss this collection action for lack of personal jurisdiction, asserting that respondent (1) did not comply with the procedural requirements for service by publication under Minn. R. Civ. P. 4.04 and (2) did

not make a diligent effort to personally serve appellant before serving by publication. We affirm.

FACTS

On August 10, 2016, respondent Midland Funding, LLC filed a summons and complaint alleging appellant David Coyne owes \$23,811.93 in credit-card debt. Midland Funding also filed an affidavit providing the requisite grounds to serve Coyne by publication. The affidavit recounts 14 attempts to personally serve Coyne over the course of eight months. Also on August 10, Midland Funding mailed to Coyne at his address copies of the summons and complaint, along with notice of its intent to serve him by publication.

Midland Funding published the summons and complaint for three consecutive weeks beginning August 15. After receiving no response, Midland Funding mailed Coyne a notice of intent to seek a default judgment. Within two weeks, Midland Funding's representatives received a response from Coyne, who confirmed that he resides at the address where Midland Funding had repeatedly attempted to serve him. The next day, Midland Funding mailed another copy of the summons and complaint to Coyne's address.

On December 15, 2016, Coyne moved to dismiss the lawsuit for lack of personal jurisdiction. Midland Funding opposed the motion, submitting a declaration from its attorney, and four affidavits of non-service. In denying Coyne's motion, the district court found that Midland Funding made 14 attempts to personally serve Coyne, including at least one attempt when Coyne's car was in his driveway; called Coyne 23 separate times; mailed multiple letters and copies of the pleadings to Coyne's address; and continued to make

good-faith efforts to locate Coyne after receiving the final affidavit of unsuccessful service on May 4, 2016. The district court concluded that Midland Funding made diligent efforts to personally serve Coyne and complied with the rule governing service by publication. And the court noted that Coyne’s avoidance of service and delay in seeking dismissal would substantially prejudice Midland Funding because the statute of limitations governing the debt expired in November 2016. Coyne appeals.

D E C I S I O N

I. Midland Funding complied with the requirements for service by publication under Minn. R. Civ. P. 4.04.

“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). But during our review, we must apply the facts as found by the district court unless those findings are clearly erroneous. *Id.*

Rule 4.04(a) provides that service by publication confers personal jurisdiction when one of five enumerated circumstances is present and specific procedures are followed. The procedures for effectuating service by publication include publishing notice for three weeks and filing an affidavit of plaintiff’s counsel stating that (1) one of the enumerated cases exists, (2) affiant “believes the defendant is not a resident of the state or cannot be found therein,” and (3) a copy of the summons has been mailed to defendant’s residence. Minn. R. Civ. P. 4.04(a).

Since “[s]ervice by publication is in derogation of the common law, . . . all statutory requirements must be strictly complied with.” *Wiik v. Russell*, 173 Minn. 580, 583, 218

N.W. 110, 111 (1928). Specifically, an affidavit supporting publication must set forth both (1) the essential jurisdictional facts of one of the enumerated circumstances and (2) the affiant's belief that the defendant is not a resident of the state or cannot be found in the state. *Shamrock*, 754 N.W.2d at 383. "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." *Id.* at 384.

Midland Funding's publication affidavit states that Coyne is "a resident individual domicili[ary] having departed from the state with intent to defraud creditors, or to avoid service, or remains concealed therein with the like intent." This is one of the circumstances enumerated in the rule. See Minn. R. Civ. P. 4.04(a)(1). Midland Funding also submitted affidavits demonstrating that it published notice the requisite three consecutive weeks of publication and that it mailed a copy of the summons to Coyne's residence. See Minn. R. Civ. P. 4.04(a).

Coyne does not contend that Midland Funding departed from the procedural requirements of rule 4.04(a). Rather, he argues that the publication affidavit is not sufficient because it is premised on only the affiant's "information and belief" that one of the five jurisdictional circumstances enumerated in rule 4.04(a) exists. Coyne relies heavily on *Shamrock*, in which the supreme court held that an affiant's expressed belief, in and of itself, is not sufficient to establish that a defendant is a Minnesota resident; the defendant must *actually be* a resident individual domiciliary to confer jurisdiction under rule 4.04(a). 754 N.W.2d at 383. Coyne's reliance on *Shamrock* is misplaced for two reasons. First, unlike in *Shamrock*, the district court made supported findings regarding

the jurisdictional facts underlying an enumerated publication ground. Second, and more importantly, the fundamental jurisdictional concern identified in *Shamrock* is not implicated in this case because it is undisputed that Coyne *actually is* a resident individual domiciliary of Minnesota.

Coyne also asserts that Midwest Funding's publication affidavit and other supporting materials do not establish that Coyne could not be found in the state. We are not persuaded. The affidavit lists the repeated efforts county sheriffs and private process servers made to personally serve Coyne at his actual residence. On at least one occasion, a process server saw Coyne's car in his driveway. The 14 service attempts were made at various times on different dates between August 2015 and April 2016. And we are not convinced by Coyne's contention that Midland Funding has not refuted his own affidavit stating that he was not trying to evade service. Coyne's affidavit confirms that Midland Funding had the right address when it attempted to personally serve him 14 times. And his explanation about his busy schedule and long work days is countered by Midland Funding's affidavit stating Coyne worked out of his home.

In sum, we discern no clear error in the district court's finding that Coyne avoided numerous service attempts. Coyne had the burden to show that service was improper, in light of Midland Funding's evidence of service by publication. *See id.* at 384. We agree with the district court that Coyne did not meet his burden. On this record, we conclude that Midland Funding complied with the requirements for service by publication outlined in Minn. R. Civ. P. 4.04.

II. The district court did not clearly err in finding Midland Funding made a diligent effort to personally serve Coyne.

As a prerequisite to service by publication, a plaintiff must make a diligent effort to serve the defendant personally. *See Arnold v. Boggs*, 129 Minn. 270, 271, 152 N.W. 640, 641 (1915) (denying jurisdiction because plaintiff failed to search diligently for defendant who lived in the state at the same location for many years). Whether efforts to personally serve a defendant are diligent is a question of fact. *Duresky v. Hanson*, 329 N.W.2d 44, 49 (Minn. 1983). We review a district court’s findings of fact for clear error. *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999).

Coyne argues that *Wiik* compels the conclusion that Midland Funding did not make a diligent effort to personally serve him because more than seven months elapsed between the last service attempt and publication. *See* 173 Minn. at 581-82, 218 N.W. at 111. We disagree. *Wiik* is a mechanic’s lien action that was decided before our supreme court adopted the rules of civil procedure. In that case, the sheriff attempted, without success, to locate and personally serve the defendant over the course of three days. Seven months later, the plaintiff published notice of the action. *Id.* at 581, 218 N.W. at 111. The defendant moved for dismissal on jurisdiction grounds, which the district court denied. The supreme court reversed for two reasons—because the seven-month delay between plaintiff’s attempt at personal service and publication was unreasonable and because the publication affidavit was deficient. *Id.* at 584, 218 N.W. at 112. In deciding what constituted a reasonable time, the supreme court considered two then-existing statutes that established timelines “under somewhat similar circumstances.” *Id.* at 582, 218 N.W. at

111. The statutes established 60-day grace periods during which a party could initiate an action after a statute of limitations had expired. Minn. Gen. Stat. ch. 77, §§ 9199, 9342 (1923). Neither statute has a current counterpart. *Cf.* Minn. R. Civ. P. 3.01(c) (allowing a 60-day grace period for a sheriff to serve a summons after its delivery, without regard to the statute of limitations). In short, we are not persuaded that the unique circumstances in *Wiik* establish that a seven-month delay between attempted personal service and publication reflects a lack of reasonable diligence as a matter of law.

Moreover, we discern no clear error in the district court's factual determination that Midland Funding last attempted to serve Coyne personally on April 15, 2016—four months before Midland Funding proceeded with publication. Coyne challenges the district court's finding based on the undisputed fact that the process server was sent to the wrong address on April 15.¹ But the fact that a typographical error directed the process server to the wrong address does not mean that Midland Funding did not attempt to personally serve Coyne on that date. And even if we concluded that the district court's finding that April 15 was the last attempt by Midland Funding at personal service is clearly erroneous, Coyne has not persuaded us that Midland Funding's efforts lacked sufficient diligence. Rather, we conclude that Midland Funding's more than one dozen attempts at personal service, 23 phone calls, multiple mailings of the summons and various correspondence, and ongoing

¹ The affidavit of non-service lists Coyne's address with a house number of 323. His actual address, where the other 13 personal-service attempts were made, is house number 1323 on the same street.

attempts to find a better address for Coyne, support the district court's finding of a diligent effort to personally serve him.

In sum, we conclude, on this record, that the district court did not err by determining that Midland Funding complied with the rule 4.04 requirements for service by publication and made diligent efforts to serve Coyne personally.

Affirmed.