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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0849**

Aquarius Holdings, LLC,
Respondent,

vs.

City of Walker,
Appellant.

**Filed January 16, 2018
Reversed
Kirk, Judge**

Cass County District Court
File No. 11-CV-13-2043

Robert M. Wallner, FullerWallner, Bemidji, Minnesota (for respondent)

John E. Valen, Walker, Minnesota (for appellant)

Considered and decided by Kirk, Presiding Judge; Peterson, Judge; and Jesson,
Judge.

UNPUBLISHED OPINION

KIRK, Judge

Appellant City of Walker (the city) appeals a district court order vacating an assessment levied against respondent Aquarius Holdings LLC's (Aquarius) commercial property under Minn. Stat. § 429.061, subd. 1 (2016). The district court vacated the assessment because it found that the city failed to comply with the improvement hearing

notice requirements under Minn. Stat. § 429.031, subd. 1(a) (2016). Because we conclude that the district court's finding, that the city failed to comply with the notice requirements of Minn. Stat. § 429.031, subd. 1(a), is clearly erroneous, we reverse for reinstatement of the assessment.

FACTS

On January 9, 2012, the Walker City Council (the city council) passed a resolution ordering that a public hearing on a proposed improvement to the city sewer system be held on February 6. The city council ordered the city clerk to publish and mail notice of the improvement hearing as required by Minn. Stat. § 429.031, subd. 1(a). Aquarius owns commercial real estate on a street affected by the proposed improvements.

It is undisputed that the publication requirements of Minn. Stat. § 429.031, subd. 1(a), were met. On January 20, the city clerk completed, and had notarized, an affidavit of service by mail that read:

I, [the city clerk], being first duly sworn, deposes and states that on the 20 day of January, 2012, I delivered, for mailing, to the United States Postal Service in the City of Walker the Public Hearing Notice for Front Street, Sixth Street & 4th St. to the people listed on the following attachments.

The affidavit included a handwritten notation that postage to mail the notices was \$19.36. Aquarius was listed in the attachments as an affected property owner along with the correct mailing address. The mailing notified affected property owners of the improvement hearing. Aquarius claims that it did not receive this notice.

On February 6, the city council held the improvement hearing and passed resolutions adopting the proposed plan and ordering the improvements. After advertising

for bids on the project, the city council accepted a construction bid and authorized the city clerk and the mayor to enter into a contract with the construction company. On September 9, 2013, the city council passed resolutions to assess construction costs against benefited property owners including Aquarius, and to schedule an October 7 public hearing on the proposed assessment. The city clerk was ordered to publish and mail notice of the assessment hearing as required by Minn. Stat. § 429.061, subd. 1.

It is undisputed that the publication and mailing requirements of Minn. Stat. § 429.061, subd. 1, were met. On September 17, the deputy city clerk completed, and had notarized, an affidavit of service by mail that stated that she “deposited in the United States mail at Walker, Minnesota, copies of the attached notice of a hearing on proposed special assessments, . . . addressed to the following persons at the addresses appearing opposite their respective names: . . . Aquarius Holdings LLC,” at the correct mailing address. Aquarius acknowledges that it received seven copies of this mailed notice, one for each of the units within its commercial property.

Aquarius filed a written objection to the proposed assessment and orally objected at the assessment hearing. The city levied the assessment against Aquarius’s property. Aquarius appealed the assessment to the district court pursuant to Minn. Stat. § 429.081 (2016), arguing that the city failed to comply with the notice requirements of Minn. Stat. § 429.031, subd. 1(a), and thereby lacked jurisdiction to levy an assessment against Aquarius. Aquarius requested that the district court vacate the assessment.

A trial was held on January 25, 2017. Aquarius’s owner, Jason Pederson, testified and verified that Aquarius’s mailing address is the address listed in both affidavits of

mailing. Mr. Pederson testified that he did not receive notice of the improvement hearing, but that he did receive notice of the assessment hearing. He also testified that only he and his wife have access to Aquarius's P.O. Box and that he is not aware of any problems with receiving mail at the P.O. Box.

The city clerk also testified. She identified the affidavit of service by mail that she completed for the improvement hearing notices, and stated:

The first page is an affidavit of service by mail where I signed that I was taking public hearing notices for Front Street, Sixth Street and Fourth Street, as this project when it started was much larger than just the Sixth Street, to the mail. This was notarized by then staff member, [S.B.]. And attached to that is a list of all of the addresses that were notified.

Other than Aquarius, there is no evidence in the record that any property owner listed in the attachments to the affidavit of service for the improvement hearing failed to receive the improvement hearing notice. Aquarius presented evidence that there were two affected property owners who did not receive mailed notice of the improvement hearing, but neither of them was listed in the attachments to the related affidavit of service. The record shows that the city did not mail notice to the first affected property owner because the property had recently been sold and the owner's information was not updated with Cass County. The city did not mail notice to the second affected property owner because the city did not believe his property would be affected by the project when the notices were mailed. Aquarius also presented evidence that there were errors in the assessment hearing notice, but there is no evidence that any property owner listed in the affidavit of service by mail for the assessment notices failed to receive the assessment hearing notice.

On February 23, the district court filed an order vacating the assessment against Aquarius. The court concluded that “the [c]ity failed to establish that notice of the [improvement] hearing was mailed to Aquarius as required by Minn. Stat. § 429.031, subd. 1(a),” and that “the [c]ity has no jurisdiction to assess Aquarius’[s] property.” On March 27, the city filed a motion for amended findings of fact and an amended judgment. The court did not amend its findings or judgment, but issued another order and memorandum emphasizing the difference between the “past-progressive tense”¹ the city clerk used when she testified about the affidavit of mailing for the improvement hearing notices, and the “past-perfect tense”² used in the affidavit itself. The court concluded that because the city clerk did not speak in the past-perfect tense, her testimony indicated that she “prepared and executed the affidavit of mailing before actually mailing the letters” The court found that the city clerk’s affidavit of mailing was therefore unreliable, and that the city failed to establish that the notices for the improvement hearing were mailed.

D E C I S I O N

Aquarius argued, and the district court found, that because the city failed to comply with the mailed-notice requirements for the improvement hearing under Minn. Stat. § 429.031, subd. 1(a), the city could not levy an assessment against Aquarius’s property. Minn. Stat. § 429.031, subd. 1(a), provides in relevant part that:

¹ Use of the past tense “denotes an act, state, or condition that occurred or existed at some explicit or implicit point in the past” *The Chicago Manual of Style*, § 5.130 (Univ. of Chicago Press ed., 17th ed. 2017). Use of the past-progressive tense denotes an act, state, or condition that progresses or continues through the past. *See id.* at § 5.135.

² The past-perfect tense “refers to an act, state, or condition that was completed before another specified or implicit past time or past action.” *Id.* at § 5.133.

Before the municipality awards a contract for an improvement or orders it made by day labor . . . the council shall hold a public hearing on the proposed improvement[.] . . . Not less than ten days before the hearing, ***notice of the hearing must also be mailed to the owner of each parcel within the area proposed to be assessed***[.]

Id. (emphasis added).

The parties agree, and the plain language of Minn. Stat. § 429.031, subd. 1(a), required, the city to mail notice of the improvement hearing to Aquarius, an affected property owner.³ The statute’s plain language also does not require actual receipt of the notices by affected property owners.

Here, the city presented an affidavit of service by mail to establish that it mailed an improvement hearing notice to Aquarius, but Aquarius asserts that it was able to overcome “the presumption of mailing” created by the affidavit by presenting credible evidence that it did not actually receive the notice, thereby invalidating the later-imposed assessment. But the issue here is not whether Aquarius actually received the improvement hearing

³ The language of Minn. Stat. § 429.031, subd. 1(a), was modified in 1961, from what was previously subd. 1(c), to require mailed notice. 1961 Minn. Laws ch. 525, § 1, at 910-11. In *Meadowbrook Manor, Inc. v. City of St. Louis Park*, a decision issued in 1960, notice of the improvement and assessment hearings was published, but the property owner did not see the notices, and no notices were mailed to the property owner. 258 Minn. 266, 270, 104 N.W.2d 540, 543-44 (1960). The *Meadowbrook* court concluded that the property owner did not actually receive notice and was deprived of “an opportunity to question the validity of the amount of the assessment” levied against it.” *Id.* at 270, 104 N.W.2d at 543. In concluding that mailed notice to the property owner was necessary before an assessment could be levied, the *Meadowbrook* court concluded that, mailed notice, though not necessarily “effective in reaching every person who has an interest in property, . . . is ‘reasonably calculated’ to reach the party to be informed,” and is sufficient to meet the due-process requirements of Minn. Stat. §§ 429.031, subd. 1(a), .061, subd. 1. *Id.* at 273, 104 N.W.2d at 545.

notice, it is whether the district court's finding, that the city did not mail notice of the improvement hearing to Aquarius, is clearly erroneous. If the city mailed the improvement hearing notice to Aquarius, then the city complied with Minn. Stat. § 429.031, subd. 1(a), and Aquarius was afforded the necessary due process. *See Meadowbrook Manor, Inc. v. City of St. Louis Park*, 258 Minn. 266, 273, 104 N.W.2d 540, 545 (1960) (holding that due process requires mailed notice of the improvement and assessment hearings to affected property owners before an assessment can be levied against those property owners).⁴

“Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the [district] court to judge the credibility of the witnesses.” Minn. R. Civ. P. 52.01. “It is not the province of this court to reconcile conflicting evidence.” *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999). We give great deference to a district court's findings of fact on appeal, and will not set them aside unless they are clearly erroneous. *Id.*

Here, the district court found that the affidavit, “signed and dated contemporaneously with the mailing of the [improvement hearing] notices, [was] sufficient to create a presumption that the [c]ity provided proper notice by mail,” but also found that

⁴ Because an assessment is akin to a tax, a “property owner is entitled to a reasonable notice and hearing before his property is subjected to the lien of a special assessment for a local improvement,” so the property owner “ha[s] an opportunity to question the validity of the amount of the assessment.” *Meadowbrook*, 258 Minn. at 269-70, 104 N.W.2d at 543. Here, there is no question that Aquarius was afforded an opportunity to question the assessment at the assessment hearing, and that as such, notice of the improvement hearing was not necessary to facilitate that opportunity.

the notices were not mailed, in part because it found that the city clerk's affidavit of service by mail was completed before the improvement hearing notices were mailed. These findings are inconsistent, and we conclude that the district court's finding that the improvement hearing notices were not mailed is clearly erroneous.

In reaching its erroneous finding of fact, the district court reasoned that because "some property owners were not given notice of the hearing without reasonable explanation, . . . it [was] more likely that others, like Aquarius, were not given notice of the hearing." But the record indicates that the other two property owners who did not receive the mailed improvement hearing notice were omitted from the city's mailing because they were not believed to be affected property owners. It is unclear to this court how this omission, acknowledged by the city, relates to whether the property owners, such as Aquarius, who were listed in the attachments to the affidavit of service by mail, were mailed their notices.

The district court also reasoned that because the assessment hearing notices, which were mailed by the city and received by Aquarius over a year and a half after the improvement hearing notices were mailed, included clerical and administrative errors, it was "more likely . . . that other mistakes occurred." It is unclear how the district court determined that errors in the assessment hearing notice, which did not affect Mr. Pederson's ability to attend the *assessment* hearing on behalf of Aquarius, invalidated the affidavit of mailing for the *improvement* hearing notices. This determination is particularly problematic because the record is devoid of evidence that any of the improvement hearing notices were returned to the city, that Aquarius's address was listed incorrectly, or that any

other property owners listed in the affidavit of service by mail's attachments failed to receive the mailed improvement hearing notice.

The district court also reasoned that, because the city clerk testified in the past-progressive tense rather than the past-perfect tense about completing the affidavit of service for the improvement hearing notices, she “prepared and executed the affidavit of mailing before actually mailing the letters.” This led to the court’s conclusion that the notices were not mailed. The past-progressive tense is used to describe actions that were progressing in the past. It allows for an action to either have reached its conclusion in the past, or for the action to be ongoing into the present.⁵ When the city clerk testified that she “was taking” notices “to the mail,” her use of the past-progressive tense indicated either that her action of taking was completed when she arrived at the mail, or that she was, at the time of her testimony, still en route to the mail with the notices five years later. Only one of these interpretations is sound on this record; the city clerk completed the action of taking the notices to the mail.

Furthermore, the form of the past tense that was used in testimony given five years after the city clerk completed the affidavit of service by mail does not itself rebut the presumption created by the properly executed affidavit. If it did, our legal system could not function. This record contains an affidavit of service by mail, signed and notarized, and no evidence to suggest that the affidavit or its attachments contain false information.

⁵ For example, the phrase, “I was caring for my grandmother last month,” could indicate either that the speaker cared for his grandmother last month and is no longer providing care, or that he cared for his grandmother last month and is continuing to provide care.

Allowing the affidavit of service to be disregarded on this record, which is devoid of evidence to support the district court's finding that the improvement hearing notices were never mailed, would essentially require that all improvement hearing notices, and all notices required by similar statutory language, be personally served. This is not what the plain language of Minn. Stat. § 429.031, subd. 1(a), or due process, requires, and imposing such a requirement would have larger unintended impacts on the legal process in general. Because this record shows that the city complied with the mailed-hearing notice requirement for improvement hearing notices under Minn. Stat. § 429.031, subd. 1(a), the district court's contrary finding of fact is clearly erroneous. We therefore reverse the judgment vacating the assessment levied against Aquarius's property.

Reversed.