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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1717**

Bremer Bank, N.A.,
Respondent,

vs.

Albert B. Beety,
Appellant.

**Filed June 4, 2018
Affirmed; motion denied
Kalitowski, Judge***

Washington County District Court
File No. 82-CV-11-417

Garth G. Gavenda, Lindsay W. Cremona, Anastasi Jellum, P.A., Stillwater, Minnesota (for respondent)

Albert B. Beety, Chanhassen, Minnesota (pro se appellant)

Considered and decided by Jesson, Presiding Judge; Reyes, Judge; and Kalitowski, Judge.

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

UNPUBLISHED OPINION

KALITOWSKI, Judge

Appellant Albert B. Beety challenges the district court's dismissal of his claims against respondent Bremer Bank, N.A., arising out of default judgments entered in 2010 and 2016, arguing that the district court erred by (1) dismissing his claim for relief from the default judgments under Minn. R. Civ. P. 60.02 based on his assertion of improper service by Bremer, and (2) denying his own motion for summary judgment. We affirm.

DECISION

We review de novo the district court's order granting Bremer's motion to dismiss and denying Beety's motion for summary judgment. *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 606 (Minn. 2014) (motion to dismiss); *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002) (summary judgment). To prevail on appeal, Beety must show both error and prejudice resulting from the error. *Midway Ctr. Assocs. v. Midway Ctr. Inc.*, 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975). “[E]rror without prejudice is not ground for reversal.” *Id.* Rather, an error is not grounds for setting aside a judgment unless “refusal to take such action appears to the court inconsistent with substantial justice.” Minn. R. Civ. P. 61. Courts “at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.” *Id.*

Bremer initiated this action to recover amounts due on a loan. After numerous unsuccessful attempts to personally serve Beety, Bremer sought and obtained an order approving service by publication. Bremer subsequently obtained default judgments against

Beety in 2010 and 2016. In March 2017, Beety served a summons and complaint on Bremer, asserting two counts, for “Vacate Judgment” and “Statute of Limitations,” and praying for the relief of vacation of the judgments and dismissal of the underlying claims as barred by the statute of limitations. Bremer brought a motion to dismiss Beety’s complaint, and Beety brought a motion for summary judgment. The district court granted Bremer’s motion and denied Beety’s.

Beety asserts that he brought an independent action to seek vacation of the judgments, and that the district court erred by applying res judicata principles to dismiss his claims. We initially note that, although rule 60.02 does not limit the power of a court to entertain an independent action for relief from judgment, Beety did not bring an independent action. Rather, he filed an unauthorized complaint in an existing action where he was the defendant and where a final judgment had already been entered. See Minn. R. Civ. P. 7.01 (limiting allowed pleadings to complaint, answer, reply to counterclaim, and answer to cross-claim); *cf. Bode v. Minn. Dept. of Nat. Res.*, 612 N.W.2d 862, 866 (Minn. 2000) (holding that the district court erred by granting a procedurally improper rule 60.02(d) motion that was asserted in independent action). Accordingly, even if the district court erred by applying res judicata to dismiss Beety’s claims, we discern no prejudicial error.

Even if we were to conclude that the district court should have construed Beety’s unauthorized complaint as a motion for relief under Minn. R. Civ. P. 60.02(d), we would conclude that Beety was not entitled to relief for at least two reasons.

First, any request for relief under rule 60.02(d) with respect to the first judgment would have been untimely. Minn. R. Civ. P. 60.02 requires that motions for relief from judgment be brought within a reasonable time, which our supreme court has held should be determined “by considering all attendant circumstances such as: intervening rights, loss of proof by or prejudice to the adverse party, the commanding equities of the case, the general desirability that judgments be final and other relevant factors.” *Bode*, 612 N.W.2d at 870 (quotation omitted). The first judgment was entered against Beety in April 2011. Beety had actual notice that Bremer was attempting to collect on the judgment as early as July 2013, when Bremer was able to personally serve him with an order to show cause. Bremer proceeded in reliance on the judgment as valid in attempting to collect a debt. Beety took no action to challenge the judgment until March 2017, when he sought to vacate the judgment and have Bremer’s claims dismissed as barred by the statute of limitations. Beety erroneously asserts that a judgment may be challenged on jurisdictional grounds at any time. In *Bode*, the supreme court departed from the rule, applied in cases cited by Beety, that a judgment may be challenged at any time on the grounds of lack of subject-matter-jurisdiction. *Id.* at 869-70. The “commanding equities of the case,” including the prejudice that Bremer would suffer were the judgment reopened, compel the conclusion that the 2017 request to vacate “does not fall within the reasonable time limits of the rule.” *Id.* at 870.

Second, Beety has not presented a basis on which the district court would have been required to grant relief under rule 60.02(d). Beety argues that service by publication should not have been allowed because Bremer did not prove that Beety was evading service

and the district court did not make an express finding to that effect. See Minn. R. Civ. P. 4.04(a)(1) (providing that service by publication may be sufficient to confer jurisdiction when defendant is concealed within state with intent to defraud creditors or avoid service). Beety's argument is based on the incorrect premise that his state of mind must be directly proved.

"Intent . . . is often proved circumstantially by looking at a person's conduct and inferring from that conduct a person's mental state." *In re Conduct of Karasov*, 805 N.W.2d 255, 266 n.7 (Minn. 2011). Although no witness for Bremer could testify directly as to Beety's state of mind, Bremer submitted a process server's affidavit listing service attempts on 12 separate days, including days when the process server saw Beety's vehicle or Beety himself at the residence. The process server's affidavit was sufficient to support a finding that Beety was evading service, and the district court implicitly made that finding in allowing service by publication. See *Umphlett v. Comm'r of Pub. Safety*, 533 N.W.2d 636, 639 (Minn. App. 1995) (stating that implicit findings may be derived from the district court's final resolution of a matter), *review denied* (Minn. Aug. 30, 1995).

In seeking to vacate the judgments, Beety did not dispute the contents of the process server's affidavit. Rather, Beety relied on that affidavit, but argued that it was insufficient to prove, and that the district court did not find, that Beety was avoiding service. Beety offered no more than conclusory, self-serving assertions in his complaint that he "had not remained concealed in the state with the intention [to] defraud creditors or avoid service as [he] had no such intent and was not concealing himself at all."

Moreover, the evidence submitted by Bremer in opposition to Beety's motion for summary judgment supports the finding that Beety was evading service. A second affidavit from the process server stated his many years of experience with process serving and explained that Beety had been able to enter his house through his attached garage and avoid service by refusing to answer the door. The process server also testified that, when he was finally able to personally serve an order to show cause on Beety at a restaurant in July 2013, Beety "admitted to the fact that he had to make my job difficult and make me earn my money." The process server concluded: "Based on this admission, it was my understanding that Beety was deliberately concealing himself in Minnesota with the intent to defraud creditors and/or avoid service."

For all of the foregoing reasons, we cannot conclude that the district court prejudicially erred by dismissing Beety's complaint and denying his motion for summary judgment.

Finally, after the completion of briefing, Beety filed a motion to strike parts of Bremer's brief, arguing for redaction of (1) references to settlement discussions, which Beety asserts are barred by Minn. R. Evid. 408, and (2) assertions that Beety avoided service. We deny the motion.

Affirmed; motion denied.