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Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1747**

Village Homes of Grandview Square II Association,
Respondent,

vs.

R. E. C., Inc. d/b/a Ron Clark Construction, et al.,
Defendants,

and

R. E. C., Inc. d/b/a Ron Clark Construction,
Defendant and Third Party Plaintiff,

vs.

Savenok Construction, Inc., et al.,
Third Party Defendants,

Fox Valley Contractors, LLC, third party defendant,
Appellant.

**Filed May 7, 2018
Affirmed
Bjorkman, Judge**

Hennepin County District Court
File No. 27-CV-16-2304

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Considered and decided by Smith, Tracy M., Presiding Judge; Bjorkman, Judge; and Rodenberg, Judge.

UNPUBLISHED OPINION

BJORKMAN, Judge

In this interlocutory appeal, appellant-subcontractor challenges the district court's denial of its motion to dismiss an action based on lack of personal jurisdiction due to ineffective service of process. We affirm.

FACTS

On February 22, 2016, respondent Village Homes of Grandview Square II Association, a condominium homeowners' association, sued general contractor R.E.C., Inc. d/b/a/ Ron Clark Construction for construction defects and resulting damage that occurred during construction of a multi-unit residential condominium building. R.E.C. initiated a third-party action against 11 subcontractors, including appellant Fox Valley Contractors, LLC.

According to the third-party complaint, "Fox Valley is an Illinois limited liability company whose principal office is identified as 1061 North Raddant Road, Batavia, IL 60510. Fox Valley's Registered Agent is listed as Gregory MacDonald, located at 2300 Barrington Road, Suite 220, Hoffman Estates, IL 60169." In an affidavit, process server Mark Grena stated that on June 10 he personally served the third-party complaint on Fox Valley by delivering it to "L.S. (Paralegal, Authorized to Accept)" at MacDonald's address. On June 30, Village Homes served an amended complaint by mail, adding direct claims against the subcontractors, including Fox Valley. Fox Valley answered the third-

party complaint 11 months later, on May 26, 2017, specifically asserting “[t]hat the service of process herein is inadequate and insufficient.”

On August 31, Fox Valley moved for summary judgment, arguing that no evidence supports a finding that Fox Valley’s work was performed negligently, and that R.E.C.’s indemnification claim fails as a matter of law. Fox Valley did not challenge personal jurisdiction or rely on any jurisdictional defense in this motion. In an October 2 order, the district court denied the motion as untimely under the scheduling order.

On October 20, Fox Valley brought a motion in limine, noting service of process must be made on its registered agent and asking the district court to “exclud[e] any and all evidence being proffered against Fox Valley premised upon a finding of no jurisdiction.” Six days later, Fox Valley moved to dismiss on the additional grounds that Village Homes’ claims are barred by the statute of repose and its recent settlement with the other parties.

The district court denied Fox Valley’s motions, concluding that Fox Valley submitted to the jurisdiction of the court by participating in the litigation and “waived any defense or objection to personal jurisdiction or service by failing to raise this defense in any pleadings.” The district court also denied Fox Valley’s motion to dismiss based upon the statute of repose. In a separate order addressing service of process, the court concluded that Fox Valley had invoked the court’s “jurisdiction prior to challenging service of process or personal jurisdiction,” thus waiving objections or defenses to personal jurisdiction or service of process. Fox Valley appeals.

DECISION

I. Fox Valley waived its jurisdictional defense.

“[S]ervice of process is the means by which a court obtains personal jurisdiction over a defendant.” *McCullough & Sons, Inc. v. City of Vadnais Heights*, 883 N.W.2d 580, 590 (Minn. 2016). Service of process upon a corporation is accomplished “by delivering a copy to an officer or managing agent, or to any other agent authorized expressly or impliedly or designated by statute to receive service of summons.” Minn. R. Civ. P. 4.03(c). We review de novo the question whether “service of process was effective, and personal jurisdiction therefore exists.” *DeCook v. Olmsted Med. Ctr., Inc.*, 875 N.W.2d 263, 270 (Minn. 2016).

A party waives its insufficient-service-of-process defense by failing to raise it by a motion based on a party’s defenses or in its responsive pleading. Minn. R. Civ. P. 12.08(a); *Patterson v. Wu Family Corp.*, 608 N.W.2d 863, 867 (Minn. 2000); see *Larson v. New Richland Care Ctr.*, 520 N.W.2d 480, 481 (Minn. App. 1994) (“A defendant who submits himself to the jurisdiction of the court cannot later raise a defense of insufficient service.”). “[S]imple participation in the litigation . . . does not, standing alone, amount to a waiver of a jurisdictional defense. Rather, it is the failure to provide the court an opportunity to rule on the defense before affirmatively invoking the court’s jurisdiction on the merits of the claim that is determinative.” *Shamrock Dev., Inc. v. Smith*, 754 N.W.2d 377, 381 (Minn. 2008) (quotation omitted). “Where a party simultaneously invokes the court’s jurisdiction on the merits and asks the court to rule on a jurisdictional defense, waiver will not result unless other circumstances clearly demonstrate the party’s acquiescence to the court’s

jurisdiction.” *Id.* (quotation omitted). But when a defendant raises the defense of lack of personal jurisdiction and fails “to act promptly[] in order” to ensure “that the jurisdictional issue be timely decided,” the defendant “[b]y his inaction, . . . waive[s] the jurisdictional defense.” *Federal-Hoffman, Inc. v. Fackler*, 549 N.W.2d 93, 95-96 (Minn. App. 1996), *review denied* (Minn. Aug. 20, 1996).

Fox Valley argues that delivery of the third-party complaint to a paralegal was not effective service of process. And it contends that it has consistently maintained the defense of insufficiency of process throughout this litigation. We disagree with the second contention, which is determinative. In its May 26, 2017 answer, Fox Valley asserted the jurisdictional defense of ineffective service of process. But thereafter, Fox Valley affirmatively invoked the court’s jurisdiction by requesting summary judgment on two legal grounds, neither of which was based on lack of jurisdiction. Only after the district court denied the summary-judgment motion did Fox Valley seek to assert a jurisdiction defense. By that time, Fox Valley had waived this defense.

This case is like *Patterson*, where our supreme court held that the defendant waived the insufficient-service-of-process defense it asserted in its answer by moving for partial summary judgment on other grounds. 608 N.W.2d at 867. The supreme court reasoned that “it is the failure to provide the court an opportunity to rule on the defense before affirmatively invoking the court’s jurisdiction on the merits of the claim that is determinative.” *Id.* at 868. This rationale applies with equal force here. Moreover, Fox Valley’s failure to seek resolution of the jurisdictional issue earlier in the proceeding caused procedural confusion in a complex case involving numerous parties, needless

expense, and delay in the proceedings. *See Federal-Hoffman, Inc.*, 549 N.W.2d at 95-96 (ruling that defendant waived jurisdictional defense when defendant failed to “act promptly” by waiting three months after asserting the defense to bring a motion to dismiss for lack of jurisdiction). By asking the district court to grant summary judgment on substantive grounds other than jurisdiction, Fox Valley waived its defense that service of process was insufficient.¹

II. Fox Valley’s remaining arguments are not within the scope of our review.

Fox Valley also argues that the district court erred by denying summary judgment based on the statute of repose and the preclusive effect of Valley Homes’ settlements with other parties on Fox Valley’s liability. But in an interlocutory appeal, such as this, our review is limited to the issue for which an immediate appeal is available. *Pigs R Us, LLC v. Compton Twp.*, 770 N.W.2d 212, 217 (Minn. App. 2009); *McDonough v. City of Rosemount*, 503 N.W.2d 493, 496 (Minn. App. 1993), *review denied* (Minn. Sept. 10, 1993). Fox Valley’s arguments regarding the statute of repose and the settlements do not pertain to personal jurisdiction and therefore exceed this court’s scope of review. And we decline to consider issues on an undeveloped district court record and upon which the district court has not ruled. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that an appellate court will “consider only those issues that the record shows were presented [to] and considered by the trial court in deciding the matter before it” (quotation omitted)).

Affirmed.

¹ Because Fox Valley waived its jurisdictional defense, we need not decide whether service of process was effective.