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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1382**

Kelbro Company,
Respondent,

vs.

Vinny's on the River, LLC,
Defendant,

River Fun LLC,
Appellant.

**Filed June 10, 2019
Reversed and remanded
Bratvold, Judge**

Washington County District Court
File No. 82-CV-13-5851

John A. Markert, Patrick H. O'Neill III, Larson King, LLP, St. Paul, Minnesota (for respondent)

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Considered and decided by Bratvold, Presiding Judge; Rodenberg, Judge; and Reilly, Judge.

UNPUBLISHED OPINION

BRATVOLD, Judge

Appellant River Fun LLC (River Fun) seeks to reverse the district court's judgment entered in favor of respondent Kelbro Company (Kelbro) on its breach-of-contract claim

and raises seven issues. We resolve this appeal by deciding only one issue: whether the district court erred in failing to grant River Fun’s motion to dismiss Kelbro’s complaint for insufficient service of process. Because the district court erred in its legal analysis of the issue and did not determine whether Kelbro effectively served process on River Fun through the secretary of state, we reverse and remand for additional proceedings consistent with this opinion. We do not reach the other issues raised by River Fun.

FACTS

The procedural history of this case is protracted and has already yielded one decision from this court. *See Kelbro Co. v. Vinny’s on the River, LLC*, 893 N.W.2d 390, 404 (Minn. App. 2017) (“*Kelbro I*”). The relevant facts relating to the breach-of-contract action are fully summarized in *Kelbro I* and we repeat only what is necessary to understand the service-of-process issue.

River Fun is a limited liability company that is owned by Tim Kennedy and Jhalpaul Narpaul. River Fun owns Vinny’s on the River, LLC (Vinny’s), which operates a restaurant by the same name. Kelbro distributes restaurant supplies and equipment. In April 2010, River Fun entered into several contracts with Kelbro: (1) a credit agreement, in which River Fun stated that it was doing business as Vinny’s and in which River Fun promised to “pay for any and all products, equipment, services or other merchandise purchased on credit” from Kelbro; and (2) purchase and lease agreements, in which River Fun promised that Vinny’s would exclusively purchase minimum amounts of product from Kelbro, and Kelbro promised to provide carbon dioxide tanks and install soda equipment.

In April 2013, Kelbro pursued damages in conciliation court and filed a statement of claim and summons against Vinny's and Kennedy, alleging that they breached the contracts in 2012. River Fun was not a defendant. Vinny's and Kennedy counterclaimed, alleging that Kelbro had breached the contract and owed storage fees for equipment left on Vinny's property.

In October 2013, the conciliation court conducted a trial and issued a judgment against Kelbro and in favor of Vinny's and Kennedy. Kelbro filed a demand for removal to district court, and the district court then vacated the conciliation-court judgment.

The district court conducted a bench trial in December 2014 and May 2015 and issued a written order for judgment in favor of Kelbro and against Vinny's, awarding damages, attorney fees, and costs, as provided in the parties' contracts.¹ The district court's written order included the finding that River Fun "entered into a Credit Account Agreement using Vinny's as a business name and is responsible for any debts incurred under that agreement and subsequent agreements involving Vinny's." In September 2015, Kelbro moved to amend its pleadings under Minn. R. Civ. P. 15.02, seeking to add River Fun as a defendant, and under Minn. R. Gen. Prac. 119, seeking an amended award of attorney fees and costs against Vinny's and River Fun. Vinny's opposed the motion.

After a hearing, the district court granted Kelbro's motion. Relying on rule 15.02, the district court determined that River Fun had "impliedly consented" to "trying the case

¹ As noted in *Kelbro I*, before the bench trial began, the district court granted Kelbro's motion to dismiss Kennedy without prejudice and denied Kennedy's motion for a dismissal with prejudice. 893 N.W.2d at 394. This court affirmed the dismissal without prejudice. *Id.* at 398.

on the merits with River Fun included as a named defendant.” The district court directed Kelbro to amend its statement of claim, summons, and demand for removal to add River Fun as a defendant and directed entry of an amended judgment for damages and attorney fees against Vinny’s and River Fun. On February 8, 2016, Kelbro filed an amended statement of claim and summons and a second amended demand for removal from conciliation court to district court, which listed both Vinny’s and River Fun as defendants.

The first appeal followed. In *Kelbro I*, this court affirmed in part, reversed in part, and remanded. 893 N.W.2d at 393. We concluded that the district court erred in allowing Kelbro to amend its pleadings after trial to add River Fun as a defendant and make River Fun a judgment debtor. *Id.* at 404. This court reasoned that, while rule 15.02 allows amendments to the pleadings when “issues not raised by the pleadings are tried by express or implied consent of *the parties*,” the rule did not authorize the amended judgment against River Fun. *Id.* (quoting Minn. R. Civ. P. 15.02). “A party added after trial could not have consented as a party to anything that occurred during trial.” *Id.* at 404-05. We concluded that River Fun was a party added after trial and, therefore, did not consent under rule 15.02. *Id.* We reversed the amended judgment against River Fun and remanded for further proceedings consistent with the opinion. *Id.* at 405.

On remand, the district court vacated the order entering judgment against River Fun. Kelbro then moved to amend its statement of claim and add River Fun as a defendant pursuant to Minn. R. Civ. P. 15.01, which the district court granted over River Fun’s opposition. The district court “deemed” Kelbro’s previously-filed statement of claim, summons, and demand for removal “to include River Fun, LLC as a named defendant” and

gave River Fun ten days to answer Kelbro's amended statement of claim and summons. In its answer, River Fun asserted ineffective service of process and other affirmative defenses, including improper venue and the statute of limitations.

River Fun then filed a combined motion to dismiss and motion for summary judgment. River Fun asserted that the district court lacked personal jurisdiction over it because Kelbro had not effected service of process, among other grounds. Kelbro also moved for summary judgment on its breach-of-contract claim against River Fun.

In response to River Fun's contention that it had not been properly served, Kelbro's attorney filed an affidavit, along with eight exhibits relevant to service of process. Exhibit A is a copy of Kelbro's amended statement of claim, signed by Kelbro's attorney on February 8, 2016. No proof of service is included. Exhibit B is a copy of the second amended demand for removal, signed by Kelbro's attorney on February 8, 2016. A certified mail receipt for delivery on River Fun's attorney is attached. Exhibit C is a copy of an affidavit of service by Laurie Burks, stating that she served River Fun's attorney with the second amended demand for removal by regular mail on February 8, 2016. Exhibits D, E, F, and G are copies of affidavits of nonservice, describing five failed attempts to personally serve Kennedy and Narpaul, River Fun's owners, on November 17, 18, and 21, 2017. Finally, exhibit H is an acknowledgment of service of process by the Minnesota Secretary of State, dated December 1, 2017, identifying Kelbro as the plaintiff and River Fun as the defendant, but with no indication of what was served.

The district court granted Kelbro's motion for summary judgment and denied River Fun's motions, determining that Kelbro had served River Fun with its amended statement

of claim and summons on February 8, 2016, and, therefore, was entitled to judgment against River Fun, jointly and severally with Vinny's. Additionally, the district court stated that Kelbro was entitled to "additionally incurred attorney fees, in an amount yet to be established by affidavit."

River Fun appealed, but this court dismissed the appeal as premature because the district court's judgment was not yet final, after determining that the district court had not yet entered judgment on the attorney-fee award. In June 2018, the district court awarded attorney fees in favor of Kelbro and directed entry of an amended judgment against River Fun and Vinny's in the following amounts: \$5,437.23 for breach of contract, \$21,250.50 for attorney fees leading up to the first appeal, \$7,200 for appellate attorney fees, \$20,098.50 in additional attorney fees after the first appeal, and \$838.23 in costs. River Fun again appeals.

D E C I S I O N

I. The district court erred in denying River Fun's motion to dismiss for insufficient service of process.

Service of process is a fundamental requirement for initiating suit and obtaining personal jurisdiction over a defendant. *See Wick v. Wick*, 670 N.W.2d 599, 603 (Minn. App. 2003). Service of process must comply with due process and statutory or rule requirements. *Id.*; *see also Doerr v. Warner*, 76 N.W.2d 505, 511 (Minn. 1956) ("As a general rule a civil action is commenced, and the court thereby acquires jurisdiction, when personal service upon the defendant is actually made as prescribed by statute or rule."). "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). We also review de novo a district court’s interpretation of procedural rules. *Zirnhelt v. Carter*, 843 N.W.2d 270, 274 (Minn. App. 2014).

As they did in the district court, the parties on appeal disagree about which rules govern Kelbro’s service of process on River Fun.² The district court relied on the conciliation-court rules for service of the amended statement of claim and determined that Kelbro had effectively served process on River Fun because Kelbro had served River Fun’s attorney by certified mail. See Minn. R. Gen. Prac. 508(d)(2) (providing that, if a claim exceeds \$2,500, plaintiff must serve the summons on a defendant by certified mail and file proof of service with the court administrator).³ The district court also found that “given the lengthy procedural history of this case,” it was “fair, reasonable, and just” to conclude that service was proper.

River Fun argues that the district court erred when it failed to apply the rules of civil procedure because when Kelbro amended its statement of claim in February 2016 to include River Fun, this case “was in district court, having been removed from conciliation

² We note that, in *Kelbro I*, River Fun raised whether it had been effectively served with process, but this court did not reach this issue because we determined that River Fun was not a defendant.

³ The district court also found that Kelbro effectively served process on River Fun through the court’s electronic service system. This appears to be another reference to service on River Fun’s attorney, which we reject as insufficient for the reasons stated below. Additionally, we note that while both the conciliation-court rules and the civil rules authorize service of *documents* through the court’s electronic filing system, the rules do not authorize service of a *summons*, claim, or complaint via electronic means. See Minn. R. Gen. Prac. 508(d), (f); Minn. R. Civ. P. 4.03, 4.04, 4.06.

court on October 21, 2013 by Kelbro.” Relying on the rules of civil procedure, River Fun contends that Kelbro never effectively served it with process because Kelbro only “served River Fun’s attorney.”

Kelbro responds that the district court was correct to apply the conciliation-court rules, but differs with the district court as to which rule applies. Kelbro contends that it properly served River Fun because it complied with the conciliation-court rules for service of the second amended demand for removal, which may be accomplished by service on opposing counsel. *See* Minn. R. Gen. Prac. 521(b) (providing that to effect removal of a conciliation-court case to district court, an aggrieved party must serve a demand for removal “upon every opposing counsel or self-represented litigant”).

To resolve the issue in this appeal, we first consider which rules govern service of process on River Fun, then consider what those rules require, and finally analyze whether the record supports the district court’s decision that Kelbro effectively served River Fun with process.

Once a case is removed to district court, “[t]he pleadings in conciliation court shall constitute the pleadings in district court.” Minn. R. Gen. Prac. 522. The statement of claim “acts as the complaint in district court” and “must conform to the Minnesota Rules of Civil Procedure.” *Zirnhelt*, 843 N.W.2d at 275. Generally, “the removal from conciliation court to district court constitutes commencement of a civil action” and “the Rules of Civil Procedure are fully applicable.” *Reichel v. Hefner*, 472 N.W.2d 346, 348 (Minn. App. 1991). “The conciliation court rules . . . no longer govern[] . . . upon removal to district court.” *Nicollet Restoration, Inc. v. Turnham*, 475 N.W.2d 508, 510 (Minn. App. 1991),

aff'd, 486 N.W.2d 753 (Minn. 1992); *see also* Minn. R. Civ. P. 1 (“These rules govern the procedure in the district courts of the State of Minnesota in all suits of a civil nature, with the exceptions stated in Rule 81.”); Minn. R. Civ. P. 81.01 (providing exceptions, none of which apply here).

Kelbro’s action began in conciliation court, resulted in an adverse determination to Kelbro, and then Kelbro removed its claim to district court. But Kelbro’s conciliation-court action was against Vinny’s and Kennedy, not River Fun. Similarly, Kelbro’s first demand for removal was made and served on Vinny’s and Kennedy, not River Fun. The earliest point at which River Fun may have become a party was when Kelbro filed its second amended statement of claim on February 8, 2016, more than two years after Kelbro removed its action to district court in October 2013. As we have held in other cases, we conclude in this case that the conciliation-court rules “no longer governed this action upon removal to district court.” *Turnham*, 475 N.W.2d at 510. Thus, we conclude that the district court erred in concluding that Minn. R. Gen. Prac. 508, which governs service of a summons while in conciliation court, governed Kelbro’s service of process on River Fun.

Kelbro does not even attempt to defend the district court’s application of rule 508. Instead, Kelbro urges us to conclude that it need only have complied with the conciliation-court rules for service of its second amended demand for removal. Kelbro’s exhibit C, filed in response to River Fun’s motion to dismiss, is an affidavit of service of the second amended demand for removal on River Fun’s attorney by U.S. mail, although a certified-mail receipt is attached. Kelbro does not explain why it believes that service of the demand for removal suffices for service of the summons and claim, but it cites and

appears to rely on the Minnesota Supreme Court's decision in *Roehrdanz v. Brill*, which held that a litigant may remove an action from conciliation court to district court by serving a demand for removal in compliance with Minn. R. Gen. Prac. 521(b) and need not comply with the rules governing service of a civil summons. 682 N.W.2d 626, 631 (Minn. 2004).

A careful analysis of *Roehrdanz* undercuts Kelbro's reliance on the opinion. In *Roehrdanz*, an attorney sued his former client, Brill, for attorney fees in conciliation court. *Id.* at 628. A sheriff personally served a summons on Brill, in compliance with the conciliation-court rules. *Id.* (discussing Minn. R. Gen. Prac. 508(d)(1)). The conciliation court awarded no damages, and the attorney removed the case to district court, mailing a copy of the demand to Brill, as required by the conciliation-court rules. *Id.* (discussing Minn. R. Gen. Prac. 521(b)(1)). Brill did not acknowledge service and did not appear for trial. *Id.* The district court awarded a default judgment in favor of the attorney and Brill filed a motion to vacate, arguing that the service of the demand for removal did not comply with the requirements for service of a complaint by mail under Minn. R. Civ. P. 4.05. *Id.* In particular, Brill pointed out that she did not respond with a written acknowledgment of service, as required under Minn. R. Civ. P. 4.05. *Id.* The district court denied the motion after concluding that the service was effective by relying on the conciliation-court rules. *Id.* at 629. We reversed the district court, holding that removal to district court constituted a new civil action and that the rules of civil procedure governed service of the demand for removal. *Id.* Accordingly, we determined that the attorney's service was ineffective. *Id.*

The supreme court reversed our decision, holding that the rules of conciliation court govern service of a demand for removal. *Id.* at 631. The supreme court reasoned that Minn.

R. Gen. Prac. 521(b) is more specific than the general civil rules for service of a summons on a defendant. *Id.* Because the specific rule addresses service of a demand for removal and conflicts with the general rule for service of a civil complaint, the court resolved the conflict “by applying the specific rule over the general rule.” *Id.* The court concluded: “Because [the attorney] served the demand for removal by first-class mail in accordance with Rule 521, service was effective.” *Id.*

Roehrdanz appears to have no application to the issue before us for two reasons. First, *Roehrdanz* focused only on service of a demand for removal and did not discuss service of a civil summons on a defendant added after a conciliation-court action has been removed to district court. Here, we are only concerned with service of Kelbro’s amended statement of claim and summons against River Fun. By the time Kelbro served River Fun with its amended pleadings, the action was in district court and the rules of civil procedure governed service. Second, the defendant in *Roehrdanz* was personally served with the summons while the action was pending in conciliation court. *Id.* at 628. In contrast, River Fun was not served while Kelbro’s action was pending in conciliation court. Thus, Kelbro’s service of process on River Fun is governed by the rules of civil procedure.

A plaintiff commences a civil action against a defendant when the plaintiff serves the defendant with a summons. Minn. R. Civ. P. 3.01(a). Minnesota Rule of Civil Procedure 4.03 provides the relevant methods for service upon an individual, partnership or association, corporation, the state, and a public corporation. Minn. R. Civ. P. 4.03(a)-(e). But River Fun is a limited liability corporation and, currently, the civil rules do not provide a method of service for a limited liability corporation. River Fun appears to nonetheless

evaluate Kelbro’s service under rule 4.03. But the legislature adopted specific provisions for service of process upon business entities in 1995. *See* 1995 Minn. Laws ch. 128 (codified as amended at Minn. Stat. § 5.25 (2018)). These changes included requirements for service of process on an entity formed as a limited liability corporation.

Minn. Stat. § 5.25, subd. 1, provides three methods of service for “process, notice, or demand” upon an entity governed under various chapters, including chapter 322C, which pertains to limited liability corporations. Minn. Stat. § 5.25, subd. 1 (2018). The three methods are service upon “(1) the registered agent, if any; (2) if no agent has been appointed then on an officer, manager, or general partner of the entity; or (3) if no agent, officer, manager, or general partner can be found at the address on file with the secretary of state, the secretary of state as provided in this section.” *Id.*⁴ We conclude that these statutes apply to Kelbro’s service of process on River Fun and we therefore evaluate the effectiveness of Kelbro’s service under these statutory provisions.

Kelbro attempted three methods of service on River Fun. First, the district court found, and the parties appear to agree, that Kelbro served River Fun’s attorney on February 8, 2016, with an amended statement of claim by certified mail. While we note that none of the proofs of service filed by Kelbro in response to River Fun’s motion to dismiss include proof of service of the amended statement of claim, we will assume, without deciding, that

⁴ Minn. Stat. § 322B.876, subd. 1 (2012), provided the same three methods of service, using similar wording, but was repealed, effective January 1, 2018. *See* 2014 Minn. Laws ch. 157, art. 1, § 91, at 62. A replacement statute provides that if a limited liability company has no registered agent available to accept service, the secretary of state “is an agent of the company” and can accept service. *See* Minn. Stat. § 322C.0116, subd. 2 (2018).

Kelbro served its amended statement of claim by certified mail on River Fun's attorney.⁵ But Minn. Stat. § 5.25 does not authorize service of a limited liability company on an attorney. Thus, we conclude that the February 8, 2016, service was ineffective.

Second, Kelbro attempted service on River Fun's owners five times in November 2017, but none of these attempts were successful, which Kelbro admitted by filing affidavits of nonservice in district court. Thus, we conclude that none of the November 2017 service attempts were effective.

Third, Kelbro attempted to serve River Fun through the secretary of state. This method of service is authorized "if no agent, officer, manager, or general partner can be found at the address on file with the secretary of state." Minn. Stat. § 5.25, subd. 1.

Neither party's brief on appeal addresses Kelbro's service on the secretary of state. While in district court, the parties argued whether Kelbro's service on the secretary of state was effective. The district court, however, did not determine whether Kelbro's service on the secretary of state was effective. Moreover, the record of service on the secretary of state is less than clear. The record does not include an affidavit of service on the secretary of

⁵ We acknowledge that the conciliation-court rules do not require that a plaintiff file proof of service when service is performed by the court administrator for claims of \$2,500 or less. See Minn. R. Gen. Prac. 508(e) (providing that proof of service by first-class mail or certified mail "shall be proven by an affidavit" and that service "may be alternately proven, when made by the court administrator, by any appropriate notation in the court record of the date, time, method, and address used by the administrator to effect service"). To be clear, the record does not include *either* an affidavit of service of the amended statement of claim on River Fun, *or* a copy of notations in the court record. Moreover, if a claim exceeds \$2,500, the conciliation-court rules require that a plaintiff serve a defendant with a summons by certified mail and file proof of service with the court administrator. See Minn. R. Gen. Prac. 508(d)(2).

state, although it does include an acknowledgment of service by the secretary of state. The acknowledgement of service does not identify what was served.

We cannot decide, in the first instance, whether Kelbro's service on the secretary of state was effective service. "It is not within the province of [appellate courts] to determine issues of fact on appeal." *Kucera v. Kucera*, 146 N.W.2d 181, 183 (Minn. 1966). This court's role "is limited to identifying errors and then correcting them." *Nelson v. Schlener*, 859 N.W.2d 288, 294 (Minn. 2015). Without a determination from the district court regarding whether Kelbro's purported service on the secretary of state complied with section 5.25, subdivision 1, we are unable to review whether Kelbro's service of process on the secretary of state was effective.

The district court also determined that it was "fair, reasonable, and just" to conclude that service was proper because of the case's "lengthy procedural history." The district court cited *Derrick v. Drolson Co.*, where the supreme court upheld service of process on an agent, based on the district court's determination that the agent had implied authority to accept service on behalf of a corporation. 69 N.W.2d 124, 126 (Minn. 1955) ("The agency relationship in the instant case was of such a character as to render it fair, reasonable, and just to imply an authority on the part of the agent to receive service on behalf of the defendant corporation."). We have no similar determination that Kelbro served process on River Fun's agent. Without service of process that "accord[s] strictly with statutory requirements," the district court does not have personal jurisdiction over a defendant. *Jaeger v. Palladium Holdings, LLC*, 884 N.W.2d 601, 609 (Minn. 2016).

Kelbro also appears to contend that River Fun had actual notice of the claim and, without citing legal authority, seems to suggest that actual notice would suffice for service of process. Kelbro argues that the district court properly “deemed” Kelbro’s conciliation-court pleadings to have added River Fun as a named defendant, that River Fun responded to the complaint with an answer, and that Kelbro served River Fun under the rules for conciliation-court proceedings.

First, River Fun’s answer and dispositive motions asserted insufficient service of process, so it has not waived the issue. Second, even when a defendant has actual knowledge of a lawsuit, the supreme court has held that the required method of service must be substantially followed. *See Tullis v. Federated Mut. Ins. Co.*, 570 N.W.2d 309, 311 (Minn. 1997). The actual-notice exception has been applied only in cases involving substitute service at the defendant’s usual place of abode. *Thiele v. Stich*, 425 N.W.2d 580, 584 (Minn. 1988). Because the legislature has specifically authorized three methods for service of process on a limited liability company, *see* Minn. Stat. § 5.25, subd. 1, we reject Kelbro’s suggestion that River Fun’s actual knowledge of the lawsuit is sufficient for service of process.

Because we cannot decide for the first time on appeal whether Kelbro’s service of process on the secretary of state was effective, we reverse and remand to the district court to determine whether Kelbro’s service of process complied with Minn. Stat. § 5.25, subd. 1. On remand, the district court should (1) require proof of service of Kelbro’s amended statement of claim on the secretary of state and (2) determine whether “no agent, officer, manager, or general partner [for River Fun] can be found at the address on file with

the secretary of state.” *See* Minn. Stat. § 5.25, subd. 1. The district court should also determine whether Kelbro satisfied the filing requirements. *See* Minn. Stat. § 5.25, subd. 3 (2018) (requiring that service be made “by filing with the secretary of state one copy of the process, notice, or demand along with payment of a \$35 fee”). Because service of process is fundamental to the court’s exercise of jurisdiction over River Fun, we do not decide the merits of the other issues raised by River Fun.

Reversed and remanded.