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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1841**

The Jonathan Association, Plaintiff,

and

S3 Holdings, LLC, its assignee,
Appellant,

vs.

Chase Wirth,
Respondent,

John Doe, et al., Defendants.

**Filed July 22, 2019
Affirmed
Smith, Tracy M., Judge**

Carver County District Court
File No. 10-CV-16-1117

Kelly Griffiths, Griffiths Law Offices, PLLC, Eagan, Minnesota (for appellant)

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respondent)

Considered and decided by Schellhas, Presiding Judge; Smith, Tracy M., Judge; and
Kirk, Judge.*

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

UNPUBLISHED OPINION

SMITH, TRACY M., Judge

The Jonathan Association, predecessor in interest to appellant S3 Holdings LLC, won a default judgment in a suit to foreclose a lien on a condominium unit owned by respondent Chase Wirth after attempting to serve Wirth by publication under Minn. R. Civ. P. 4.04(a). The district court subsequently vacated the default judgment as void, finding that Jonathon did not diligently attempt to personally serve or to locate Wirth and concluding that the affidavit filed by Jonathan's attorney did not satisfy the requirements of rule 4.04(a). S3 appeals, arguing that the district court's interpretation of Minn. R. Civ. P. 4.04(a) is erroneous as a matter of law and that the district court's finding that Jonathan had not made a diligent search for Wirth is clearly erroneous. We affirm.

FACTS

In 2009, Chase Wirth purchased a condominium that is part of the Village Grace Association, to which Wirth has paid association dues. However, Jonathan claims that the condo is also part of its association. Wirth has never paid association dues to Jonathan.

In July 2016, Jonathan recorded a lien against Wirth's condo based on the unpaid dues. In October 2016, Jonathan prepared a summons and complaint against Wirth, seeking a judgment on the unpaid dues, foreclosure of the lien, an order directing sale, and a deficiency judgment if sale did not satisfy the judgment on the dues. On two days in October, a process server attempted to serve the summons and complaint on Wirth at the condo. On the first attempt, the server found that the complex was locked and that Wirth was not listed in the directory that the complex used to let residents remotely unlock the common front door for visitors. The process server thereafter conducted a "skip trace"—a

search for public records indicating a person's address—and found only the condo address and a telephone number with a North Dakota area code for Wirth. Five days later, the process server returned to the condo. After failing to contact the property manager, he called Wirth, received no answer, and did not leave a message. On November 4, the server swore an affidavit briefly summarizing his attempts to contact Wirth and stating that Wirth could not be “contacted or found . . . and service could not be made.”

Late in December, Jonathan's attorney, Brian Hoelscher, mailed a copy of the summons and complaint, addressed to Wirth, to the condo. The same day, Hoelscher swore an affidavit stating that (1) “the subject of the action is real property within the state in or upon which the Defendants have or claim a lien or interest, or the relief demanded consists wholly or partly in excluding the Defendants from any such interest or lien,” (2) he believed Wirth was not a resident of Minnesota or could not be found in Minnesota, (3) he did not know Wirth's address unless Wirth lived at the condo without his knowledge, and (4) he had mailed a copy of the summons and complaint to the condo. This affidavit was intended to satisfy Minn. R. Civ. P. 4.04(a) in order to allow service by publication. The summons was then served by publication, being printed in two local newspapers on the first, second, and third Thursdays of January 2017.

In March 2017, Jonathan moved for default judgment. It affirmed that it had served Wirth but had not received an answer or any other pleading. The district court ordered default judgment in favor of Jonathan, granted Jonathan a decree of foreclosure, and ordered that the property be sold by the sheriff. In June 2017, Jonathan purchased the condo at the sheriff's sale. On Jonathan's motion, the district court confirmed the sale with a 12-month redemption period from the date of the order and a zero-dollar deficiency judgment.

In February 2018, Jonathan sold its interest in the condo to S3 for \$8,291.10 by assigning the sheriff's certificate of sale to S3. S3 also became Jonathan's assignee in the underlying foreclosure action against Wirth. In August 2018, the examiner of titles certified the foreclosure and directed the registrar of titles to issue a new certificate of title in favor of S3. S3 then received a writ of recovery and order to vacate; it served those documents on Wirth in August. On Wirth's motion, the district court vacated its writ and order and scheduled a hearing to determine whether the eviction should proceed.

In September 2018, Wirth moved to vacate the March 2017 default judgment pursuant to Minn. R. Civ. P. 60.02(d), arguing that the judgment was void for lack of personal jurisdiction. The district court granted Wirth's motion, concluding that Jonathan's service of process had failed to establish personal jurisdiction over Wirth because Jonathan did not exercise due diligence in attempting to serve or locate Wirth and because Hoelscher's affidavit did not satisfy Minn. R. Civ. P. 4.04(a). It therefore voided the sheriff's sale and its confirmation thereof.

S3 appeals, arguing that (1) the district court erred as a matter of law by holding that Hoelscher's affidavit did not satisfy Minn. R. Civ. P. 4.04(a), (2) due process does not require a diligent attempt at personal service, and (3) as a matter of law, Jonathan's efforts at personal service satisfied any diligence requirement that does exist. Wirth opposes S3's arguments and also contends that, even if this court accepts that Jonathan's service satisfied rule 4.04(a), it should affirm the district court's order vacating the default judgment because the published summons did not include information about alternative dispute resolution.

DECISION

In general, “[t]he decision to vacate judgment under rule 60.02 rests within the district court’s discretion and will not be reversed absent an abuse of that discretion.” *Gams v. Houghton*, 869 N.W.2d 60, 64 (Minn. App. 2015) (quotation omitted), *aff’d*, 884 N.W.2d 611 (Minn. 2016). “A district court abuses its discretion when it bases its conclusions on an erroneous interpretation of the applicable law.” *Fannie Mae v. Heather Apartments Ltd. P’ship*, 811 N.W.2d 596, 599 (Minn. 2012). However, when a district court is asked to vacate a judgment under rule 60.02(d) on the grounds that it is void, “[n]o question of discretion is involved. . . . If a judgment is void, it must be set aside. It has no force and effect. A void judgment is one where the court lacks jurisdiction . . . over the parties.” *Zions First Nat’l Bank v. World of Fitness, Inc.*, 280 N.W.2d 22, 25 (Minn. 1979) (first omission in original) (quoting *Lange v. Johnson*, 204 N.W.2d 205, 208 (Minn. 1973)). Because the district court here ruled that the default judgment was void, this court reviews that legal conclusion de novo.

In this case, the district court’s conclusion that the default judgment was void was based on its conclusion that Jonathan’s attempt to serve Wirth by publication was ineffective. “Whether service of process was effective, and personal jurisdiction therefore exists, is a question of law that [appellate courts] review[] de novo.” *DeCook v. Olmsted Medical Center, Inc.*, 875 N.W.2d 263, 270 (Minn. 2016). But this court reviews the factual findings challenged by S3 for clear error. *See Rasmussen v. Two Harbors Fish Co.*, 832 N.W.2d 790, 797 (Minn. 2013). A finding of fact is clearly erroneous if the reviewing court is “left with the definite and firm conviction that a mistake has been made.” *Id.* (quotation omitted).

Service by publication may establish jurisdiction when one of five circumstances exists, specifically:

- (1) When the defendant is a resident individual domiciliary having departed from the state with intent to defraud creditors, or to avoid service, or remains concealed therein with the like intent;
- (2) When the plaintiff has acquired a lien upon property or credits within the state by attachment or garnishment, and
 - (A) The defendant is a resident individual who has departed from the state, or cannot be found therein, or
 - (B) The defendant is a nonresident individual or a foreign corporation, partnership or association;

. . . .

- (3) When the action is for marriage dissolution or separate maintenance and the court has ordered service by published notice;
- (4) When the subject of the action is real or personal property within the state in or upon which the defendant has or claims a lien or interest, or the relief demanded consists wholly or partly in excluding the defendant from any such interest or lien;
- (5) When the action is to foreclose a mortgage or to enforce a lien on real estate within the state.

Minn. R. Civ. P. 4.04(a).

To serve a defendant by publication, a plaintiff must both publish the summons and file an affidavit with the court. *Id.* The affidavit must state three things: (1) “the existence of one of the enumerated cases”; (2) “that the affiant believes the defendant is not a resident of the state or cannot be found therein”; and (3) “either that the affiant has mailed a copy of the summons to the defendant at the defendant’s place of residence or that such residence is not known to the affiant.” *Id.* The actual existence of one of the five enumerated circumstances is a jurisdictional requirement; it is not enough for an affiant to state a belief that one of the circumstances exists. *Shamrock Dev., Inc. v. Smith*, 754 N.W.2d 377, 383

(Minn. 2008) (“Rule 4.04(a) is not satisfied if the affiant merely affirms that he ‘believes’ that one of the enumerated circumstances exist. The essential jurisdictional facts . . . must actually exist in order to confer jurisdiction.”).

Here, there is no dispute that the first and third requirements of the affidavit were met. As to the first requirement, the subject of the action is indisputably real property in Minnesota to which Wirth had or claimed an interest, meaning that the fourth enumerated circumstance existed, and the action was to enforce a lien on real estate, so the fifth circumstance also existed. *See* Minn. R. Civ. P. 4.04(a). As to the third affidavit requirement, Hoelscher mailed the summons to Wirth at the condo and was unable to find any other address for him, so that requirement is met as well. *See id.* The dispute in this case concerns the second affidavit requirement—“that the affiant believes the defendant is not a resident of the state or cannot be found therein.” *Id.*

Actual Fact vs. Belief

S3 argues that the district court erroneously extended *Shamrock*’s rule that the essential jurisdictional facts must actually exist—not just that the affiant believes them to exist—to the second affidavit requirement. It contends that the affiant’s stated belief regarding the defendant’s out-of-state residence or the inability to locate the defendant in the state satisfies the second requirement even if that belief is mistaken. Wirth, on the other hand, argues that *Shamrock*’s rule that the essential jurisdictional facts must actually exist also applies to the underlying facts of the second affidavit requirement. That is, Wirth argues that the affiant’s belief is not enough—it must actually be the case that the defendant is not a resident of the state or cannot be found in the state.

Wirth's view of the law is incorrect. The plain language of the rule requires only the affiant's belief that the defendant is not in the state or cannot be found therein to satisfy the second affidavit requirement. Minn. R. Civ. P. 4.04(a). In *Shamrock*, the relevant enumerated circumstance was that "the defendant is a resident individual domiciliary having departed from the state with intent to defraud creditors, or to avoid service, or remains concealed therein with like intent." *Id.*; *Shamrock*, 754 N.W.2d at 384. Under the particular facts of *Shamrock*, the essential jurisdictional facts that were required to actually exist for purposes of the first affidavit requirement happened to overlap with the facts that the affiant was required to believe for purposes of the second affidavit requirement. Here, in contrast, the enumerated circumstances relate to the fact that the action was to foreclose Jonathan's lien, not whether Wirth was in the state or could be found. *Shamrock* does not require that Wirth actually be a nonresident or unable to be found in the state to satisfy the second requirement.

S3 argues that the district court erred by adopting Wirth's erroneous view of the law. But the district court did not actually do so. S3 is correct that the district court's discussion of *Shamrock* emphasized its language requiring that the essential jurisdictional facts actually exist. But the district court went on to state that, "if [Jonathan] had taken enough additional steps at service to satisfy the diligence requirement, publication may have been the appropriate method of service" This statement indicates that the district court did not adopt Wirth's view that the facts underlying the second affidavit requirement must actually exist. If the standard of actual existence from *Shamrock* applied to the second affidavit requirement, as it does to the first, then no amount of diligence would be sufficient because the standard under *Shamrock* is actual fact, not diligence. Thus, the district court

did not err, because it did not hold that the elements of the second affidavit requirement must actually exist.

Diligence

S3 argues that the district court erred as a matter of law by requiring a diligent attempt at personal service. S3's briefing to this court argues that a diligent effort at personal service was not required because due process was satisfied when the summons and complaint were mailed to Wirth's last-known address. S3's argument, as briefed, depends on an unstated proposition: that due diligence is required only to satisfy due process, such that the need for due diligence ends if due process is satisfied by other means.

The cases that establish the requirement of due diligence do not rely on due process but rather on an obligation that affidavits be made in good faith. In *Van Rhee v. Dysert*, the supreme court construed an earlier version of the rule allowing service by publication, which was at that time codified in statute¹:

We think the statute means that after . . . the proper affidavit has been made by plaintiff or his attorney that defendant cannot be found in the state, the service of summons by publication is valid and gives jurisdiction, unless it be shown that plaintiff or his attorney by the use of ordinary diligence could have ascertained where defendant could be found.

¹ The statute interpreted in *Van Rhee* was very similar to the current version of the rule. One section laid out six situations in which service by publication would be effective; they closely match the enumerated circumstances of the current rule. *Compare* Minn. Gen. Stat. § 7738 (1913) *with* Minn. R. Civ. P. 4.04(a)(1)-(5). The other section specified the procedure for serving by publication, which required an affidavit with the same three parts that are currently required and three weeks' publication. *Compare* Minn. Gen. Stat. § 7737 (1913) *with* Minn. R. Civ. P. 4.04(a). The biggest difference between the two is that the statutory version of the rule required the sheriff of the county in which the action was brought to determine that the defendant could not be found in that county. Minn. Gen. Stat. § 7737.

191 N.W. 53, 53-54 (Minn. 1922). The supreme court explained that the use of ordinary diligence was required so that “the affidavit can be said to be made in good faith.” *Id.* at 54. Thus, *Van Rhee* imposed the requirement of diligence based on its construction of the statute as requiring good faith when an affidavit states that the defendant cannot be found in the state. Subsequent cases rely on *Van Rhee* without further analysis of or justification for the requirement. *E.g.*, *Shamrock*, 754 N.W.2d at 384 n.4; *Gill v. Gill*, 152 N.W.2d 309, 314 (Minn. 1967); *Wiik v. Russell*, 218 N.W. 110, 111-12 (Minn. 1928).

During oral argument, S3 further clarified its position, arguing that, even if diligence is a requirement of the rule, what is required is a diligent search for the defendant but not a diligent attempt to serve the defendant. Published cases from the supreme court universally refer to diligent searches. *See, e.g.*, *Shamrock*, 754 N.W.2d at 381 (“diligent effort to locate him”); *Gill*, 152 N.W.2d at 314 (“due diligence in searching for him” (quoting *Wiik*, 218 N.W. at 111)); *Van Rhee*, 191 N.W. 53 *passim* (repeatedly using the phrase “diligent search”); *Arnold v. Boggs*, 152 N.W. 640, 641 (Minn. 1915) (denying jurisdiction because the defendant was not found even though a person using “reasonable diligence would have found” the defendant). Recent unpublished cases of this court have not always made a distinction between a search and an attempt at service.²

We need not decide whether, in another case, a meaningful distinction might exist between a lack of diligence in attempting service and a lack of diligence in locating the

² Two examples are *Midland Funding, LLC v. Coyne*, A17-0607, 2017 WL 5560065, at *3 (Minn. App. Nov. 20, 2017), and *Mowers v. LeCuyer*, C6-01-1250, 2002 WL 47060, at *2 (Minn. App. Jan. 15, 2002). In both cases, this court cited *Arnold*, 152 N.W. at 641—which denied jurisdiction because of its conclusion that a reasonably diligent effort to *find* the defendant would have been successful—but described the rule as requiring that the plaintiff make a diligent effort to *serve* the defendant.

defendant. Here, it does not. Jonathan had what it thought was Wirth's address and sought to locate Wirth and serve him. The district court found both that Jonathan's "limited attempts to personally serve [Wirth] were not diligent" and that Jonathan "did not diligently attempt to locate [Wirth]." As we discuss next, both findings were supported by the record.

Lack of Diligence

Whether a plaintiff made a diligent effort to locate a defendant is a question of fact. *See, e.g., Duresky v. Hanson*, 329 N.W.2d 44, 49 (Minn. 1983) ("Whether the plaintiff has made a 'diligent search' [for purposes of a tolling statute] is a fact question"); *Shamrock Dev., Inc. v. Smith*, 737 N.W.2d 372, 380 (Minn. App. 2007) ("Whether a party's efforts at service were diligent is a question of fact." (citing *Duresky*, 329 N.W.2d at 49)), *rev'd on other grounds*, 754 N.W.2d 377, 385 (Minn. 2008). Thus, the district court's finding that Jonathan did not make a diligent effort to serve or locate Wirth is reviewed for clear error. *See Gams v. Houghton*, 884 N.W.2d 611, 620 (Minn. 2016) (stating that a district court's factual findings are reviewed for clear error on appeal from a ruling on a rule 60.02 motion).

S3 argues that Jonathan satisfied the requirement of diligence, pointing to the steps that the process server took when attempting to serve Wirth: going to the condo building twice, finding it locked both times; looking in the condo directory without finding Wirth; conducting a skip trace; calling Wirth; and trying to contact the property manager for the condo building.³

³ During oral argument, counsel for S3 raised an additional argument in support of its position that the search was clearly diligent, asserting that it was diligent because Jonathan had found the address where Wirth was residing. But if the search successfully found where Wirth was residing, then Jonathan's attorney knew that Wirth was in fact in the state and

Wirth, on the other hand, points out things that the process server failed to do. The process server did not successfully contact the building manager, did not attempt service at other times in case Wirth was not home, did not wait outside the building to try to catch Wirth coming or going, did not knock on Wirth's ground-level windows or patio door, did not try to gain access to the building by contacting another resident, did not call Wirth more than once, and did not leave a message on Wirth's phone after Wirth did not answer.

Neither party cites any law defining “diligent.” We find guidance in two cases. In *Arnold*, the supreme court affirmed a district court's order vacating a default judgment because there had not been a diligent search. 152 N.W. at 641. In that case, Joseph Vezina, sued under the last name Visenau, was not found or personally served; the court stated that “an officer with a summons directed to Joseph Visenau with reasonable diligence would have found Joseph Vezina.” *Id.* *Van Rhee*, on the other hand, provides an example of a diligent search. 191 N.W. at 54. There, the plaintiff had sought information on the defendant's address from numerous government officials and at least one relative of the defendant but did not learn anything. *Id.* And the defendant's affidavits stating that he lived in the state and could have been found did not explain how the plaintiff could have found him. *Id.*

Here, unlike the defendant in *Van Rhee*, Wirth did describe how he could have been contacted. While some of his suggestions—hiring a private investigator and staking out the condo—may be beyond the requirements of diligence, others—leaving a message, calling

he did not have the necessary belief to establish jurisdiction through service by publication. Minn. R. Civ. P. 4.04(a). Thus, if S3's argument is factually correct, there was no jurisdiction and the district court's vacation of the default judgment was correct.

more than once, or actually contacting the management company—are eminently reasonable. If diligence would lead an officer to find a defendant despite a seriously misspelled but homophonous last name, *Arnold*, 152 N.W. at 641, then calling more than once, leaving a telephone message, or contacting the entity that controls the common areas of a condo are minimum steps to satisfy the requirement of diligence. The district court did not clearly err by finding that Jonathan’s attempt to find and serve Wirth was not sufficiently diligent to support service by publication.

Because the district court did not err by concluding that service by publication was ineffective and personal jurisdiction was therefore lacking, it did not err by vacating Jonathan’s default judgment as void.⁴

Affirmed.

⁴ Because we affirm on the ground that the district court did not err in concluding that the default judgment is void for lack of personal jurisdiction, we do not reach Wirth’s alternative ground that the summons was defective as a matter of law because it did not include information about alternative dispute resolution.