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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1073**

Carol Eppolite,
Appellant,

vs.

Dustin James Swenson, et al.,
Respondents.

**Filed March 9, 2020
Affirmed
Johnson, Judge**

Chisago County District Court
File No. 13-CV-18-452

Brian D. Stofferahn, Tewksbury & Kerfeld, P.A., Minneapolis, Minnesota (for appellant)

Joseph J. Langel, Timothy A. Sullivan, Ratwik, Roszak & Maloney, P.A., Minneapolis,
Minnesota (for respondents)

Considered and decided by Florey, Presiding Judge; Johnson, Judge; and Segal,
Judge.

UNPUBLISHED OPINION

JOHNSON, Judge

Carol Eppolite attempted to commence a lawsuit against the “Chisago County Sheriff’s Department” and a sheriff’s deputy. A process server left copies of the summons and complaint with an employee of the sheriff’s office. The county and the deputy moved to dismiss the lawsuit for insufficient service of process. The district court granted the

motion, reasoning, in part, that the summons and complaint was not properly served because the county and the deputy had not authorized the sheriff's office employee to accept service of process on their behalf. We conclude that the district court did not err in that factual finding or in its decision to grant the motion to dismiss. Therefore, we affirm.

FACTS

At approximately 10:00 p.m. on June 21, 2012, Eppolite was involved in a motor-vehicle collision with a squad car that was owned by Chisago County and driven by Deputy Dustin James Swenson. Eppolite stopped suddenly to avoid two deer that ran in front of her, and Deputy Swenson was unable to stop his squad car before it collided with Eppolite's car.

On April 16, 2018, an attorney representing Eppolite signed a summons and a complaint that named "Dustin James Swenson" and "Chisago County Sheriff's Department" as defendants. The complaint alleged that Deputy Swenson was negligent and that the sheriff's "department" should be vicariously liable for Deputy Swenson's conduct. On April 19, 2018, a process server hired by Eppolite's attorney visited the Chisago County Sheriff's office and delivered two copies of the summons and complaint—one for Deputy Swenson and one for the sheriff—to Toni Schwartz, who worked for the sheriff's office.

On June 29, 2018, the county and Deputy Swenson moved to dismiss the action on several grounds, including insufficient service of process. *See* Minn. R. Civ. P. 12.02(d). The county and Deputy Swenson argued that service of process was insufficient because they were not properly served when the copies of the summons and complaint were left

with an employee of the sheriff's office. The county also argued that the "Chisago County Sheriff's Department" is not a legal entity that may sue or be sued. Two weeks later, Eppolite filed a motion for default judgment. *See* Minn. R. Civ. P. 55.01. On the same day, the county and Swenson served an answer in which they pleaded several affirmative defenses, including insufficient service of process and statute of limitations. Eppolite later filed a memorandum of law in opposition to the motion to dismiss.

The district court held a hearing on the parties' respective motions in August 2018. At the hearing, the district court instructed the parties to engage in limited discovery concerning whether Schwartz was authorized to accept service of process on behalf of the county, the sheriff's office, or Deputy Swenson.

The process server testified in deposition that he went to the Chisago County Sheriff's office and was greeted by a woman who worked behind the window there. He testified that he told her that he had service of process for the sheriff and for Deputy Swenson but that she informed him that neither person was available. He testified that he delivered two envelopes to the woman to effect service of process pursuant to a protocol that he had followed in the past when serving papers on a deputy sheriff in Chisago County. The process server testified that he did not personally serve Deputy Swenson, the county auditor, or the chair of the county board.

Schwartz testified in deposition that she was the woman who greeted the process server and that she told the process server that neither the sheriff nor Deputy Swenson were present. She testified further that the process server "was very rude to me, and was being very forceful, saying that it needed to be taken care of right now, because he wasn't going

to be driving back up here to deliver the papers, so I said I would take them for him.” Schwartz testified that she could not recall any other occasion when she had received delivery of a summons and complaint on behalf of the sheriff or a deputy.

Deputy Swenson stated in an affidavit that he “never authorized or agreed to permit Toni Schwartz or any other employee or elected official of the Chisago County Sheriff’s office to accept on my behalf personal service of process of any summons or complaint naming me in my individual capacity.” Deputy Swenson also stated in answers to interrogatories that the sheriff’s office never had accepted service of a subpoena or a summons and complaint on his behalf.

In May 2019, the district court filed an order in which it granted the motion to dismiss and denied Eppolite’s motion for default judgment. The district court found that Eppolite did not personally serve Deputy Swenson. The district court also found that neither the county nor Deputy Swenson had authorized Schwartz or anyone else to accept service of process on their behalf and, accordingly, “[t]here was no agreement to serve Ms. Schwartz as a substitute for personal service upon Deputy Swenson or Chisago County.” In addition, the district court concluded that the Chisago County Sheriff’s office is not an entity that may sue and be sued. The district court further concluded that Eppolite did not validly serve process on the county because the process server did not serve the county auditor or the chair of the county board. *See* Minn. R. Civ. P. 4.03(e)(1). Finally, the district court concluded that, because Eppolite did not validly effect service of process, there was no personal jurisdiction over the county and Deputy Swenson and, therefore, the district court could not enter default judgment against either defendant. Eppolite appeals.

D E C I S I O N

Eppolite argues that the district court erred by granting the county's and Deputy Swenson's motion to dismiss and by denying her motion for default judgment. More specifically, she argues that service of process was effective because the process server followed a pre-existing protocol by which the Chisago County Sheriff's office previously had accepted service of process at its service window.

I. Motion to Dismiss

Service of process is governed by rule 4 of the rules of civil procedure, which provides, in relevant part, as follows:

Service of summons within the state shall be as follows:

(a) Upon an Individual. Upon an individual by delivering a copy to the individual personally or by leaving a copy at the individual's usual place of abode with some person of suitable age and discretion then residing therein.

If the individual has, pursuant to statute, consented to any other method of service or appointed an agent to receive service of summons, or if a statute designates a state official to receive service of summons, service may be made in the manner provided by such statute.

. . . .

(e) Upon Public Corporation. Upon a municipal or other public corporation by delivering a copy

(1) To the chair of the county board or to the county auditor of a defendant county;

. . . .

If service cannot be made as provided in this Rule 4.03(e), the court may direct the manner of such service.

Minn. R. Civ. P. 4.03. “Service of process in a manner not authorized by the rule is ineffective service.” *Tullis v. Federated Mut. Ins. Co.*, 570 N.W.2d 309, 311 (Minn. 1997). This court applies a clear-error standard of review to a district court’s findings of facts relevant to service of process and a *de novo* standard of review to a district court’s application of the rules of civil procedure. *Melillo v. Heitland*, 880 N.W.2d 862, 864 (Minn. 2016).

A. Equitable Estoppel

Before reviewing the district court’s decision to dismiss the action for insufficient service of process, we must consider a threshold argument asserted by Eppolite. She argues that the county and Deputy Swenson should be equitably estopped from asserting the defense of insufficient service of process because they did not assert the defense until after the statute of limitations had expired.

Eppolite did not preserve this argument by presenting it to the district court. She is making it for the first time on appeal. Consequently, the district court did not consider the issue. Because Eppolite did not preserve the argument by presenting it to the district court, the argument has been forfeited. This court will not consider a forfeited argument. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988); *Doe 175 v. Columbia Heights Sch. Dist.*, 842 N.W.2d 38, 42-43 (Minn. App. 2014).

Even if we were to consider the argument, it would fail. “To establish a claim of estoppel, plaintiff must prove that defendant made representations or inducements, upon which plaintiff reasonably relied, and that plaintiff will be harmed if the claim of estoppel

is not allowed.” *Northern Petrochemical Co. v. U.S. Fire Ins. Co.*, 277 N.W.2d 408, 410 (Minn. 1979). In *Northern Petrochemical*, the defendant was estopped from asserting a statute-of-limitations defense because it had caused the plaintiff to refrain from timely commencing an action by stating that the plaintiff could wait until a later event. *Id.* at 410-11. Eppolite has not identified any misrepresentation by either the county or Deputy Swenson that was made before the expiration of the statute of limitations. Furthermore, as the county argues, a party seeking to assert equitable estoppel against a governmental entity must satisfy a higher standard. A party seeking to invoke equitable estoppel against a governmental entity must establish four elements: (1) “wrongful conduct” by an authorized government agent, (2) reasonable reliance on the wrongful conduct, (3) “a unique expenditure in reliance on the wrongful conduct,” and (4) equitable considerations that “weigh in favor of estoppel.” *City of North Oaks v. Sarpal*, 797 N.W.2d 18, 25 (Minn. 2011) (citations omitted). Eppolite cannot satisfy any of these four elements.

Thus, the county and Deputy Swenson are not equitably estopped from asserting the defense of insufficient service of process.

B. Service on Deputy Swenson

As stated above, service of process on an individual defendant ordinarily must be made by “delivering a copy to the individual personally or by leaving a copy at the individual’s usual place of abode with some person of suitable age and discretion then residing therein.” Minn. R. Civ. P. 4.03(a). The requirement of personal service “cannot be satisfied by service on defendant’s place of work or business,” such as by leaving a summons and complaint with a receptionist. *Thiele*, 425 N.W.2d at 584. But the second

paragraph of rule 4.03(a) allows for an alternative method of service of process if an individual defendant “has . . . consented to any other method of service.” Minn. R. Civ. P. 4.03(a). It is undisputed that Deputy Swenson was not served personally or at his residence and, thus, that he was not served pursuant to the first paragraph of rule 4.03(a). The key question on appeal is whether Deputy Swenson was served pursuant to the second paragraph of that rule, which applies if an individual defendant has “consented to any other method of service.” See Minn. R. Civ. P. 4.03(a).

If an individual defendant asserts that service of process is insufficient, “the plaintiff must submit evidence of effective service.” *DeCook v. Olmsted Med. Ctr., Inc.*, 875 N.W.2d 263, 271 (Minn. 2016). “A plaintiff’s obligation to submit evidence of service . . . is a low hurdle.” *Id.* “Once the plaintiff submits evidence of service, a defendant who challenges the sufficiency of service of process has the burden of showing that the service was improper.” *Shamrock Development, Inc. v. Smith*, 754 N.W.2d 377, 384 (Minn. 2008). If the defendant introduces evidence that service of process was insufficient, the district court must make findings of fact, which are subject to a clear-error standard of review. See *DeCook*, 875 N.W.2d at 271; see also *Melillo*, 880 N.W.2d at 864.

In this case, the district court determined that Deputy Swenson did not consent to the method of service of process that was utilized by Eppolite’s process server. The district court found, “Deputy Swenson did not authorize or agree to permit Ms. Schwartz, the Chisago County Sheriff, or any other employee of the County to accept service of process on his behalf.” The district court also found, “There was no agreement to serve Ms. Schwartz as a substitute for personal service upon Deputy Swenson”

These findings of fact are not clearly erroneous in light of the evidence submitted by the parties. Eppolite's only evidence in support of an agreement to an alternative method of service is the process server's testimony. The process server testified that there was a protocol at Chisago County, which he had used in the past, by which he left papers intended for a sheriff's deputy with an employee at the sheriff's office's service window. The process server testified that the protocol was communicated to him by two sheriffs who were predecessors of the sheriff in office in April 2018. But Schwartz testified that, although she has accepted service of subpoenas, she has not received delivery of a summons and complaint on behalf of the sheriff or a deputy sheriff. Even if the process server's testimony about a prior protocol were assumed to be true, it would not establish that Deputy Swenson *personally* consented to an alternative method of service. Deputy Swenson stated in an affidavit that he never authorized any employee of the sheriff's office to accept service of a summons and complaint on his behalf. In light of the plain language of the applicable rule, no person other than Deputy Swenson—even the current sheriff—could consent to an alternative means of service on him. *See* Minn. R. Civ. P. 4.03(a); *See also DeCook*, 875 N.W.2d at 270-72.

Thus, the district court did not err by granting the motion to dismiss for insufficient service of process with respect to Deputy Swenson.

C. Service on the County

As stated above, service of process on a county¹ must be made “by delivering a copy . . . [t]o the chair of the county board or to the county auditor.” Minn. R. Civ. P. 4.03(e)(1). The rule specifies one alternative means of serving a public corporation: “If service cannot be made as provided in this Rule 4.03(e), the court may direct the manner of such service.” Minn. R. Civ. P. 4.03(e).

The district court found, “Neither the Chisago County Auditor nor the Chisago County Board Chair were served.” The district court also found that “there is no evidence of Chisago County authorizing Ms. Schwartz, the Chisago County Sheriff, or any other employee of the County to accept service of process on its behalf.” The district court further found, “There was no agreement to serve Ms. Schwartz as a substitute for personal service upon . . . Chisago County.”

¹The district court concluded, as a matter of law, that the “Chisago County Sheriff’s Department” is not an entity that may be sued. Eppolite challenges that conclusion on appeal. She notes that the state trooper’s written report of the collision states that the “Chisago Co. Sheriff Dept” was the owner of the vehicle that was driven by Deputy Swenson, and she argues that the owner of a motor vehicle may be held vicariously liable for the negligence of a person who drove the vehicle with the owner’s consent. *See* Minn. Stat. § 169.09, subd. 5a (2018). In response, the county argues that the district court did not err by reasoning that the “Chisago County Sheriff’s Department” is not an entity that may be sued. It appears that the county is correct. The powers of counties are defined by a statute that expressly provides, “Each county . . . may . . . [s]ue and be sued.” Minn. Stat. § 373.01, subd. 1(a)(1) (2018). The powers of county sheriffs are defined by a statute that does not confer the power to sue and be sued. Minn. Stat. § 387.03 (2018). This court has approved of an argument that a county’s “Sheriff’s Department is not a legal entity subject to suit and that claims against it must be dismissed.” *Maras v. City of Brainerd*, 502 N.W.2d 69, 79 (Minn. App. 1993), *review denied* (Minn. Aug. 16, 1993). Accordingly, in analyzing Eppolite’s argument that service of process on the “Chisago County Sheriff’s Department” was sufficient, we refer to the county itself, not to its sheriff’s department or sheriff’s office.

Eppolite argues that the district court erred on the ground that Schwartz “was in fact authorized to accept service on behalf of” the county. This argument fails for the reasons stated above in our analysis of Eppolite’s argument with respect to service of process on Deputy Swenson. *See supra* part I.B. In addition, as the county notes, it is questionable whether service on Schwartz would have been sufficient even if the sheriff or another county official had purported to authorize her to accept service of process on behalf of the county. The applicable rule states that service of process “shall” be made on a county “by delivering a copy . . . [t]o the chair of the county board or to the county auditor of a defendant county” or, “[i]f service cannot be made as provided . . . , the court may direct the manner of such service.” Minn. R. Civ. P. 4.03. The district court’s finding that Eppolite did not serve the county auditor or the chair of the county board likely concludes the inquiry because the district court did not direct an alternative manner of service.

Thus, the district court did not err by granting the motion to dismiss for insufficient service of process with respect to the county.

II. Motion for Default Judgment

Eppolite also argues that the district court erred by denying her motion for default judgment on the ground that the county and Deputy Swenson did not serve an answer or otherwise respond within 20 days of delivery of the summons and complaint to Schwartz. *See* Minn. R. Civ. P. 12.01, 12.02(d) (2019). In response, the county and Deputy Swenson argue that they were not in default because Eppolite did not properly serve process on them and, thus, the district court did not obtain personal jurisdiction over them.

Service of process in a civil action is necessary to “invoke[] the jurisdiction of the court.” *In re Skyline Materials, Ltd.*, 835 N.W.2d 472, 475 (Minn. 2013). “[D]efault judgment may not be entered against a defendant over whom the court has no personal jurisdiction.” *Laymon v. Minnesota Premier Props., LLC*, 903 N.W.2d 6, 19-20 (Minn. App. 2017), *aff’d*, 913 N.W.2d 449 (Minn. 2018). We have concluded that Eppolite did not properly serve process on the county and Deputy Swenson. *See supra* parts I.B & I.C. Consequently, the district court did not have personal jurisdiction over the county and Deputy Swenson, which precluded the district court from finding them in default. *See In re Skyline Materials*, 835 N.W.2d at 475; *Laymon*, 903 N.W.2d at 19-20.

Thus, the district court did not err by denying Eppolite’s motion for default judgment.

Affirmed.