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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-2001**

Tesye Maskalo,
Appellant,

vs.

Howard W. Hilton,
Respondent.

**Filed August 3, 2020
Affirmed
Florey, Judge**

Ramsey County District Court
File No. 62-CV-19-7734

Peter J. Nickitas, Peter J. Nickitas Law Office, Minneapolis, Minnesota (for appellant)

Richard N. Newcome & R.J. Newcome, Attorneys at Law, St. Paul, Minnesota (for respondent)

Considered and decided by Reilly, Presiding Judge; Connolly, Judge; and Florey, Judge.

UNPUBLISHED OPINION

FLOREY, Judge

Appellant challenges the order denying his demand for removal to district court following a conciliation court judgment, asserting that his demand was timely filed because an amended motion curing the defective removal related back to the original date of filing

and that the court erred in denying his demand for removal before the district court had assigned a judicial officer to the case. We affirm.

FACTS

In February 2019, appellant Tesye Maskalo's motor vehicle was involved in an accident with respondent Howard W. Hilton. In April 2019, he filed a claim in conciliation court. After a hearing, the conciliation court entered judgment on October 8, 2019, determining appellant was not entitled to relief. The October 8, 2019 order stated that the parties had until October 31, 2019, to appeal and remove the case.

On October 31, 2019, appellant filed a demand for removal from conciliation court to district court and a certificate of service. Appellant did not include a certificate of good faith. On November 11, 2019, appellant filed an amended motion including the following statement: "Plaintiff brings this case in good faith, and not for the purpose of delay or obstruction."

On November 14, 2019, the district court issued its order denying appellant's motion to vacate the judgment and remove the case to district court based on Minnesota Rules of General Practice Rule 521. The district court denied appellant's motion because it was "not timely filed," further explaining, "The affidavit of good faith by party or the party's lawyer was not timely filed because it was filed on November 9, 2019, which is after the deadline of October 31, 2019. See MN Rules of Practice Rule 521(b)(3)."

On November 24, 2019, appellant filed a motion for reconsideration of his motion to vacate the conciliation court judgment and remove the case to district court. In this motion, appellant asserted that removal was timely and that, although counsel's good faith

was “inherent” in the original motion to remove, he had amended the motion to include “the phrase, inadvertently omitted by counsel” after advisement from the assistant court administrator. Appellant’s motion for reconsideration and any request to make further motions was denied. The court concluded, “Counsel’s failure to complete the required process within the timeline outlined in the applicable Rules is not a ‘compelling circumstance’ that justifies reconsideration of the Court’s determination that the district court did not acquire jurisdiction to hear this matter.”

Appellant now appeals the November 14, 2019 district court order denying his motion for removal as untimely.

D E C I S I O N

I. Timeliness of removal

A person may remove a conciliation court matter to district court following a trial and entry of an order for judgment. Minn. R. Gen. Prac. 521(a). In order to remove a case to district court, within twenty days after notice of judgment, the person must (1) serve on the opposing counsel or self-represented party by first-class mail or personal service a demand for removal of the cause to district court; (2) file the original demand for removal with proof of service with the court administrator; and (3) “[f]ile with the court administrator an affidavit by the aggrieved party or that party’s lawyer stating that the removal is made in good faith and not for purposes of delay.” Minn. R. Gen. Prac. 521(b)(1)-(3). “When all removal documents have been filed properly and all requisite fees paid as provided under Rule 521(b), the removal is perfected, and the court shall issue

an order vacating the order for judgment in conciliation court” Minn. R. Gen. Prac. 521(d).

Appellant acknowledges his initial demand for removal of the conciliation court action was defective because it did not include the affidavit of good faith. Nevertheless, citing *Save Our Creeks v. City of Brooklyn Park*, 682 N.W.2d 639, 643-44 (Minn. App. 2004), *aff’d*, 699 N.W.2d 307 (Minn. 2005), appellant argues that this omission was a “curable defect” which he promptly addressed after it was identified. And, because appellant promptly added the missing affidavit, which he deems to be a “curable defect,” appellant asserts the court erred in denying his motion as untimely.

In *Save Our Creeks*, the supreme court determined that an amendment curing the lack of an attorney’s signature on a complaint may be allowed under certain circumstances, and if such an amendment is permitted, will relate back to the original date of filing. *Save Our Creeks v. City of Brooklyn Park*, 699 N.W.2d 307, 308 (Minn. 2005) (“A complaint filed on behalf of a corporation signed by a nonattorney is defective and *may* be cured by the addition of an attorney’s signature if: (1) the corporation acts without knowledge that its action was improper; (2) the corporation diligently corrects its mistake by obtaining counsel, but in no event may it appear in court in the matter without an attorney; (3) the nonattorney’s participation is minimal; and (4) the nonattorney’s participation results in no prejudice to the opposing party.” (emphasis added)).

We are unpersuaded by appellant’s curable-defect argument. *Save Our Creeks* addressed a specific and distinguishable situation, and is not conclusive. There is no suggestion in that decision that the articulated test has broader application to the specific

defect at issue here—failure by a licensed attorney to include an affidavit of good faith in a demand for removal from conciliation court. No curable-defect analysis is required, and appellant’s failure to timely perfect removal was fatal. *See* Minn. R. Gen. Prac. 521.

Moreover, we observe that *Save Our Creeks* does not grant a party the absolute right to amend their complaint to fix any “curable” defect. Rather, it instructs that the district court may allow amendment to a complaint to cure a specific defect at its discretion based on the application of a four-part test. 699 N.W.2d at 312; *see also See 301 Clifton Place L.L.C. v. 301 Clifton Place Condo. Ass’n*, 783 N.W.2d 551, 561 (Minn. App. 2010) (observing that “[t]he supreme court in [*Save Our Creeks*] gave courts discretion to sometimes allow amendment based on considerations of fault, diligence, and prejudice” (quotation omitted)). Finally, we note that, in applying the *Save Our Creeks* test, the Minnesota Supreme Court emphasized, “[I]f a corporation knows or should know that its action is improper, amendment will not be allowed.” 699 N.W.2d at 311. Here appellant’s licensed attorney should have known that his motion for removal was defective without an affidavit of good faith; this requirement is plainly stated in Minnesota Rule of General Practice 521(b). Thus, even under the *Save Our Creeks* analysis, appellant’s curable-defect argument fails.

Appellant concedes that his original demand for removal did not meet the requirements of Minnesota Rule of General Practice 521(b), albeit due to his attorney’s inadvertence, and that his amended motion was filed after the October 31, 2019 deadline. Because appellant’s removal was not perfected before the October 31, 2019 deadline, the court did not err in denying the motion as untimely.

II. Judicial assignment

Appellant also argues the court infringed on his exercise of constitutional and statutory “right to preemptory removal” by denying his motion for removal from the conciliation court before the district court had issued a notification of judicial assignment.

Appellant cites Minnesota Rule of Civil Procedure 63.03 and Minn. Stat. § 542.16 in support of this argument. A party may prevent a judge from presiding over a matter by filing a notice to remove within ten days of receiving notice the judge was assigned to preside over the trial or hearing. Minn. Stat. § 542.16, subd. 1 (2018); Minn. R. Civ. P. 63.03. However, Minnesota Statutes section 542.16 applies to “a cause pending in District Court.” Because appellant’s motion to remove to the district court was denied, the matter was never pending in district court as to require the assignment of a judge. *See* Minn. Stat. § 542.16, subd. 1. Likewise, the Minnesota Rules of Civil Procedure generally do not apply to conciliation court matters, which are governed by distinct rules in the Minnesota Rules of General Practice. *See* Minn. R. Gen. Prac. 501-525. Appellant’s cited authority is inapposite. Because removal was not timely perfected, the conciliation court case was not removed to the district court and accordingly not yet assigned a judicial officer. Appellant’s right of removal was not impeded.

Affirmed.