

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0718**

Butler & Allen P.A.,
Respondent,

vs.

Ronald William Kammuegger,
Appellant.

**Filed February 1, 2021
Affirmed
Slieter, Judge**

Ramsey County District Court
File No. 62-CV-19-2248

Thurl M. Quigley, Sarah B. Quigley, Quigley Law Firm, Minneapolis, Minnesota; and

James T. Martin, Gislason, Martin, Varpness & Janes, PA, Edina, Minnesota (for
respondent)

Gregory J. Hudalla, St. Paul, Minnesota (for appellant)

Considered and decided by Cochran, Presiding Judge; Jesson, Judge; and Slieter,
Judge.

NONPRECEDENTIAL OPINION

SLIETER, Judge

In this appeal from the district court's grant of summary judgment to respondent
Butler & Allen, P.A. and renewal of a 2009 judgment against appellant Ronald William
Kammuegger, Kammuegger asserts the district court lacked personal jurisdiction over him

because Butler & Allen did not properly effect service by publication. Because Butler & Allen complied with the procedural requirements for service by publication, we affirm.

FACTS

Kammuegger retained Butler & Allen¹ in 2005 and incurred \$25,680.46 in legal fees. Butler & Allen sued Kammuegger for unpaid fees and the district court entered a civil judgment for that amount in favor of Butler & Allen against Kammuegger on May, 12, 2009.

Kammuegger made no payment on the judgment and Butler & Allen elected to renew its judgment by commencing a new civil action against Kammuegger before the ten-year statute of limitations to enforce the judgment expired. According to a certificate of unserved process, a Ramsey County deputy sheriff unsuccessfully attempted to personally serve the summons and complaint on Kammuegger at his address on Bayard Avenue in St. Paul four times between February 26, 2019 and March 4, 2019. On March 6, 2019, Butler & Allen again attempted personal service at the Bayard address through a process server who was also unsuccessful.

Having failed to personally serve Kammuegger, Butler & Allen pursued service by publication pursuant to Minn. R. Civ. P. 4.04(a). On April 3, 2019, Butler & Allen filed with the district court the summons, complaint, and two separate affidavits supporting service by publication.

Kammuegger answered the complaint on May 13, 2019, asserting that the action failed for lack of personal jurisdiction. Kammuegger moved to dismiss, and Butler & Allen

¹ Butler & Allen was known as Butler Huson & Allen at the time it obtained the original judgment.

moved for summary judgment. The district court issued a written order denying Kammuegger's motion to dismiss, granting Butler & Allen summary judgment, and renewing the 2009 judgment. Kammuegger appeals.

DECISION

Kammuegger argues personal jurisdiction over him is lacking because Butler & Allen's affidavit in support of service by publication did not state that he was a domiciliary of Minnesota or include a mailing attestation as required by Minn. R. Civ. P. 4.04. He also argues Butler & Allen failed to make a diligent effort to personally serve him.² We disagree with each assertion.

"Whether service of process was effective, and personal jurisdiction therefore exists, is a question of law that [appellate courts] review de novo." *See Shamrock Dev., Inc. v. Smith*, 754 N.W.2d 377, 382 (Minn. 2008). "[I]n conducting this review, [appellate courts] must apply the facts as found by the district court unless those factual findings are clearly erroneous." *See id.* Noncompliance with Minn. R. Civ. P. 4.04 renders service by publication ineffective. *O'Sell v. Peterson*, 595 N.W.2d 870, 872 (Minn. App. 1999).

Minnesota caselaw provides that "[o]nce 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." *Smith*, 754 N.W.2d at 384. *Smith* further states that "in cases involving the sufficiency of service, we have held that the defendant bears the burden of proof." *Id.* n.4. With this burden of proof in mind, we assess Kammuegger's arguments.

² Kammuegger does not contest the merits of the summary judgment.

Rule 4.04 dictates that service by publication “shall” be sufficient to confer jurisdiction in five particular situations. *See* Minn. R. Civ. P. 4.04(a)(1)-(5). The parties agree, as do we, that the first situation applies here and allows for service by publication 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.*” Minn. R. Civ. P. 4.04(a)(1) (emphasis added).

Rule 4.04 requires that an affidavit “state the existence of one of the enumerated cases” and state 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.” Minn. R. Civ. P. 4.04(a). Finally, a party must make a diligent effort to personally serve the defendant before attempting service by publication. *See Arnold v. Boggs*, 152 N.W. 640, 641 (1915) (denying jurisdiction because plaintiff failed to search diligently for defendant).

I. The attorney affidavit complied with rule 4.04’s requirement of establishing that Kammuegger is a domiciliary of Minnesota.

Butler & Allen submitted two affidavits in support of publication, one titled “Affidavit of Service by Mail” and a second titled “Affidavit in Support of Service by Publication.” This second affidavit stated “[t]he Defendant is a resident individual who cannot be found in state, or remains concealed therein with the like intent to avoid service, for perfecting personal or substitute service at his abode.” Kammuegger argues that because this statement omits the phrase that he is a “resident individual domiciliary,” an “essential jurisdictional fact” is missing and, therefore, the affidavit does not satisfy rule 4.04. It is

true that the word “domiciliary” is not present in the affidavit though Kammuegger has not established this renders the service improper.

The affidavit establishes that the Bayard Avenue location is Kammuegger’s residential address and has been his residential address for several years, and that he was personally served at this address in the past. The affidavit also establishes that Kammuegger indicated the Bayard Avenue location was his residential address in 2018 in financial declaration forms related to the original judgment. Kammuegger submitted no evidence to suggest that he was not domiciled at the Bayard Avenue location or that service would have been appropriate at a different address.

Kammuegger asserts that rule 4.04 requires that the affidavit establish an intent to remain in Minnesota “indefinitely.” No such requirement is found in the text of this rule and Kammuegger cites no legal authority for this proposition. Because we conclude the affidavit complies with rule 4.04’s domiciliary requirement and because Kammuegger did not meet his burden of showing he was not domiciled at the Bayard Avenue address, we conclude the domiciliary requirement was satisfied.

II. The affidavit contained a mailing attestation as required by rule 4.04.

Kammuegger also argues service was ineffective because the affidavit did not include a mailing attestation. The record compels our disagreement.

The “Affidavit of Service by Mail” filed with the district court plainly states that Butler & Allen “served the Summons and Complaint, Affidavit in Support of Service by Publication, Civil Cover Sheet, and Certificate of Representation on Ronald William Kammuegger, Jr., defendant in this action, by mailing to him/her/them a copy thereof” at

the Bayard Avenue address. It also notes that this was Kammuegger's "last known address." We are satisfied that this complies with rule 4.04's requirement that the affiant mail "a copy of the summons to the defendant at the defendant's place of residence." *See* Minn. R. Civ. P. 4.04(a). That the mailing affidavit was separate from the affidavit in support of service does not invalidate the service.

III. The district court did not clearly err by finding that Butler & Allen made diligent efforts to personally serve Kammuegger.

Whether efforts to personally serve a defendant are diligent is a question of fact. *Duresky v. Hanson*, 329 N.W.2d 44, 49 (Minn. 1983). Appellate courts review a district court's findings of fact for clear error. *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999).

The affidavit in support of publication states a Ramsey County deputy sheriff attempted personal service of the summons and complaint on Kammuegger at the Bayard Avenue address in 2019 and a certificate of nonservice is included in the record.

Kammuegger argues the deputy sheriff's certificate of nonservice is inadmissible hearsay. *See* Minn. R. Evid. 802 (stating that hearsay is generally not admissible). "[Appellate courts] review a district court's evidentiary rulings for an abuse of discretion." *See State v. Hallmark*, 927 N.W.2d 281, 291 (Minn. 2019) (quotation omitted). "A district court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record." *Id.* (quotation omitted). The district court determined that this certificate of nonservice was admissible evidence pursuant to the public-records exception to hearsay. Minn. R. Evid. 803(8). This rule provides that

“[u]nless the sources of information or other circumstances indicate lack of trustworthiness, records, reports, statements, or data compilations, in any form, of public offices or agencies” are not excluded by the hearsay rule. *Id.* We agree that the deputy sheriff’s certificate of nonservice is admissible pursuant to this exception.

The affidavit in support of publication also states that Butler & Allen attempted personal service through a process server, and an affidavit of this nonservice is included in the record. KammueLLer believes the affidavit of nonservice is based on inadmissible hearsay because the affiant states that another employee is the person who attempted the service. We are not persuaded by this argument. The rules of evidence provide that “[a] memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge” are not excluded by the hearsay rule “unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.” Minn. R. Evid. 803(6). The affiant states that “agents in his employ” attempted to personally serve KammueLLer “numerous” times in March 2019. We are satisfied that this meets the criteria of an admissible business record according to rule 803(6), and that the district court did not abuse its discretion in considering it.

In summary, Butler & Allen’s affidavit establishes that KammueLLer is a domiciliary of Minnesota and includes a mailing attestation, and the record reflects that Butler & Allen

made diligent efforts to personally serve KammueUer. Because all three requirements of rule 4.04 are met, we discern no error in the district court's conclusion that the requirements for personal jurisdiction of KammueUer were present.

Affirmed.