

*This opinion is nonprecedential except as provided by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
A20-0880**

Robert Martsching, et al.,
Respondents,

vs.

Holly Zillmer,
Appellant.

**Filed March 1, 2021
Reversed and remanded
Segal, Chief Judge**

Washington County District Court
File No. 82-CV-20-1467

David J. McGee, Natalie R. Walz, Tomsche, Sonnesyn & Tomsche, P.A., Minneapolis,
Minnesota (for respondents)

Aaron R. Thom, Samantha J. Ellingson, Thom Ellingson, PLLP, Minneapolis, Minnesota
(for appellant)

Considered and decided by Bryan, Presiding Judge; Segal, Chief Judge; and Ross,
Judge.

NONPRECEDENTIAL OPINION

SEGAL, Chief Judge

Appellant-purchaser challenges the district court's order temporarily enjoining the
cancellation of a purchase agreement for a house. Appellant also argues that the district

court abused its discretion by granting temporary injunctive relief because the order is not supported by the evidence. We reverse and remand.

FACTS

On February 20, 2020, appellant-purchaser Holly Zillmer and respondent-sellers Robert and Jane Martsching entered into a residential purchase agreement for the sale of the Martschings' home. The home is located in a common-interest community with a homeowners association.

The Minnesota Common Interest Ownership Act, Minn. Stat. §§ 515B.1-101 to .4-118 (2020) (the act), which applies to this home sale, requires sellers within a homeowners association to provide the purchaser with “documents relating to the association,” including “copies of the declaration . . . , the articles of incorporation and bylaws, any rules and regulations, and any amendments or supplemental declarations.” Minn. Stat. § 515B.4-107(a)(1). If the seller fails to provide the required documents “more than ten days prior to the execution of the purchase agreement,” then the purchaser may “cancel the purchase agreement within ten days after receiving the information.” Minn. Stat. § 515B.4-108(a).

To satisfy this requirement, the Martschings sent a common-interest community resale disclosure certificate to Zillmer. On February 27, 2020, Zillmer signed a receipt acknowledging that she had received not only the resale disclosure certificate, but also copies of the association's declaration, articles of incorporation, bylaws, rules and regulations, and any amendments, all of which were required to be provided to Zillmer under the act.

The Martschings soon became concerned that restrictions related to the COVID-19 pandemic could impact the closing scheduled for March 26, 2020, and they sought an earlier closing date. In response, Zillmer requested that the closing be delayed for 30 days. According to the Martschings, Zillmer then told them “that she was going to walk away from the deal because she believed the stock market to be too volatile.” On March 20, Zillmer sent the Martschings a voluntary cancellation of the purchase agreement that would have allowed the Martschings to retain the earnest money. The Martschings did not sign the voluntary cancellation agreement.

On March 25, Zillmer asserted that the Martschings had failed to provide her with a copy of the association’s articles of incorporation, one of the documents required to be provided under the act. Minn. Stat. § 515B.4-107(a)(1). The closing scheduled for the following day did not occur. On March 31, Zillmer served the Martschings with a notice of cancellation of the purchase agreement based on their alleged failure to provide a copy of the association’s articles of incorporation.

On April 3, the Martschings filed a summons and complaint against Zillmer with the district court, alleging breach of contract, breach of the duty of good faith and fair dealing, and seeking declaratory judgment that the notice of cancellation was void. Along with the summons and complaint, the Martschings also filed a motion for a temporary restraining order (TRO) or temporary injunction enjoining the notice of cancellation. The district court issued the TRO on April 7 and, following the receipt of written submissions from both parties, granted the motion for a temporary injunction on June 10. Zillmer now appeals.

DECISION

Zillmer argues that the district court erred in concluding that it had the authority to issue the ex parte TRO prior to the commencement of an underlying action and that the TRO was thus void ab initio. She maintains that the statutory time period for challenging the notice of cancellation of the purchase agreement thus continued to run and, because the district court issued the temporary injunction after the time period had expired, it was also issued in error. These claims present questions of law that we review de novo. *Harlow v. Dep't of Human Servs.*, 883 N.W.2d 561, 566 (Minn. 2016).

Chapter 559 of the Minnesota statutes contains provisions detailing the procedure to cancel a purchase agreement for real property. The chapter, in relevant part, provides that, if a “default occurs or an unfulfilled condition exists” after the deadline for compliance has passed, the purchaser or seller may initiate a cancellation of the agreement by serving a notice setting out the default or unfulfilled condition and “stating that the purchase agreement will be canceled 15 days after service of the notice” unless the other party cures the default or satisfies the condition within that time frame. Minn. Stat. § 559.217, subd. 3(a)(3) (2020).

Upon the delivery of a cancellation notice, the other party may go to court to seek a TRO or an injunction to stop the running of that 15-day clock. The applicable section provides:

In an action arising under or in relation to a contract for the conveyance of real estate or any interest therein, the district court, notwithstanding the service or publication pursuant to the provisions of section 559.21 of a notice of termination of the contract, has the authority at any time prior to the effective

date of termination of the contract and subject to the requirements of rule 65 of the Rules of Civil Procedure for the District Courts to enter an order temporarily restraining or enjoining further proceedings to effectuate the termination of the contract.

Minn. Stat. § 559.211, subd. 1 (2020); *see* Minn. Stat. § 559.217, subd. 6 (2020) (incorporating the procedure in Minn. Stat. § 559.211 (2020)).

Here, Zillmer served the notice of cancellation on March 31, claiming that the Martschings had failed to provide a copy of the association’s articles of incorporation. Zillmer asserts that this started the time clock on the 15-day cure period.¹ On April 3, the Martschings filed a summons and complaint with the district court along with a motion for a TRO or temporary injunction. The TRO was considered on an *ex parte* basis by the district court and was granted on April 7. The temporary injunction was not issued until June 10, well after the cure period would have expired.

Zillmer argues that the district court lacked the authority to issue the TRO because the Martschings had not yet commenced “an action” against her when the TRO was issued. Under the Minnesota Rules of Civil Procedure, a civil action is commenced when the summons is served upon the defendant. Minn. R. Civ. P. 3.01(a). In the context of a cancellation proceeding, service can be accomplished by mailing the pleadings to the

¹ We note, for background, that the Martschings dispute Zillmer’s claim that she did not receive a copy of the articles of incorporation and point to the receipt signed by Zillmer acknowledging that she received the resale disclosure certificate and other documents. The Martschings also point out that if they had “cured” the alleged defect by providing what they maintain would be an additional copy of the articles of incorporation during the 15-day cure period, Zillmer would have had a ten-day period of time to cancel the purchase agreement pursuant to Minn. Stat. § 515B.4-108(a).

attorney for the party seeking to cancel the agreement. Minn. Stat. § 559.217, subd. 8 (2020). That statutory section goes on to provide that, if service is accomplished by mail, that the service is only “effective upon delivery.” *Id.* The Martschings’ affidavit of service filed with the court shows that the summons and complaint were deposited in the mail addressed to Zillmer’s attorney on April 3. There is nothing in the record to demonstrate when the summons and complaint were actually delivered to Zillmer’s attorney. The district court therefore determined that the Martschings did not commence their action prior to April 7, the date the TRO was issued. Neither party appealed this determination, and we accept it as correct.²

The district court nonetheless concluded that the TRO was not void. The district court noted that the caselaw cited by Zillmer related to temporary injunctions, rather than TROs. *See Smith v. Spitzenberger*, 363 N.W.2d 470, 471-73 (Minn. App. 1985); *Lumbar v. Welsh*, No. A06-1232, 2007 WL 1531971, at *2-3 (Minn. App. May 29, 2007). Relying on the fact that a TRO may be issued on an ex parte basis (Minn. R. Civ. P. 65.01), the district court determined that a TRO could be issued prior to the commencement of an underlying action. We disagree.

² The Martschings ask this court to take judicial notice that their summons and complaint were delivered prior to April 7. Judicial notice is appropriate for undisputed facts of common knowledge and “those for which neither expertise nor foundation is needed.” *State v. Pierson*, 368 N.W.2d 427, 434 (Minn. App. 1985); *see also* Minn. R. Evid. 201 (establishing when a court may take judicial notice of a fact). The Martschings argue that the timing and delivery of mail is a matter of common knowledge and therefore we may take judicial notice that their summons and complaint were delivered before the TRO was issued. We decline to do so. The pertinent time period here included a weekend. We cannot take judicial notice that a letter deposited in the mail on a Friday would have been delivered to Zillmer’s attorney on Monday, especially during the COVID-19 pandemic.

In *Smith*, a district court issued a temporary injunction, pursuant to Minn. Stat. § 559.211 (1982), enjoining the cancellation of a contract for deed. 363 N.W.2d at 471. The party seeking cancellation of the contract appealed the issuance of the injunction, and argued that the district court lacked authority to issue the injunction because there was no underlying cause of action. *Id.* at 471-72. This court observed that “[u]nder section 559.211 and principles of equity, a trial court may not grant injunctive relief unless an underlying cause of action exists.” *Id.* at 472. The court then noted that “[i]njunctive relief is a remedy and not, in itself, a cause of action, and a cause of action must exist *before* injunctive relief may be granted.” *Id.* (quotation omitted); *see also Carlson v. Mixell*, 412 N.W.2d 771, 772 (Minn. App. 1987) (“A party can move to enjoin the cancellation of a contract for deed if an underlying cause of action exists.”).³

A TRO is a form of injunctive relief and, like other forms of such relief, it constitutes a “remedy,” temporarily freezing the status quo until a temporary-injunction hearing can be scheduled; a TRO does not constitute a cause of action in itself. *See, e.g., Bio-Line, Inc. v. Burman*, 404 N.W.2d 318, 320 (Minn. App. 1987) (“There is a continuum of injunctive relief, beginning with a TRO and encompassing separate steps until a permanent determination is reached after considering the merits of the case . . .”). The mere fact that

³ We note that *Smith* and *Carlson* involved attempts to temporarily enjoin the cancellation of contracts for deed, whereas this case involves the attempt to temporarily enjoin the cancellation of a purchase agreement. But because both proceedings are governed by Minn. Stat. § 559.211, subd. 1, and all three cases involve questions of statutory interpretation, the analysis is equally applicable.

courts may issue TROs on an ex parte basis does not provide courts with the jurisdiction to issue such injunctive relief in the absence of an underlying action.⁴

Moreover, the statutory section referencing the restraining or enjoining of proceedings to terminate a purchase agreement expressly requires that there be “an action.” Minn. Stat. § 559.211, subd. 1. The very first line of the section provides that, “[i]n an *action* arising under or in relation to a contract for the conveyance of real estate . . . , the district court, . . . has the authority . . . to enter an order temporarily restraining or enjoining further proceedings to effectuate the termination of the contract.” *Id.* (emphasis added). As set out in Minn. R. Civ. P. 3.01, an action is commenced upon service of process. In the absence of evidence that the summons and complaint were delivered to Zillmer’s attorney prior to the issuance of the TRO, the district court correctly determined that there was no action pending at the time the TRO was issued. We conclude that, without an action pending, the district court lacked jurisdiction to issue the TRO.

We turn next to Zillmer’s argument that the temporary injunction was improvidently granted and must be vacated. Zillmer claims that, with no TRO, the clock on the 15-day

⁴ It is noteworthy that the rules limit the circumstances under which a TRO can be issued on an ex parte basis. Minn. R. Civ. P. 65.01 provides that a TRO can be issued on an ex parte basis only when “it clearly appears from specific facts shown by affidavit . . . that immediate and irreparable injury, loss or damage will result to the applicant before the adverse party . . . can be heard in opposition.” The rule goes on to state that, as part of the application for an ex parte TRO, the applicant’s attorney must provide “to the court in writing the efforts . . . which have been made to give notice [to the opposing party] or the reasons supporting the claim that notice should not be required.” *Id.* Here, even though the Martschings knew the contact information for Zillmer’s attorney, no affidavit or other evidence in the record demonstrates that they made any effort to notify Zillmer or her attorney of the TRO proceedings despite the requirement in the rule.

cure period continued to run and had already expired by the date the temporary injunction had issued. Zillmer maintains that the purchase agreement was thus cancelled by operation of the statute and that the district erred by granting the temporary injunction. Minn. Stat. § 559.217, subd. 3(c) (2020).

We agree that the temporary injunction must be vacated because the district court's order was premised on its determination that the TRO was valid.⁵ In so holding, however, we express no opinion on the question of whether the purchase agreement was cancelled by operation of law. As noted above, the Martschings dispute the allegation in the notice of cancellation that Zillmer did not receive the articles of incorporation; this is an issue that has not been addressed by the district court. On remand the district court may consider this and any other claims or theories of relief that have been asserted.

Reversed and remanded.

⁵ In light of our reversal of the temporary injunction, we need not address Zillmer's argument that the district court abused its discretion because there was insufficient evidence in the record to support the district court's conclusions.