

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1135**

Alerus Financial, N.A.,
Respondent,

vs.

Aaron Carlson Corporation,
Appellant,

Jason Horner,
Defendant.

**Filed August 9, 2021
Affirmed
Jesson, Judge**

Hennepin County District Court
File No. 27-CV-19-18847

David A. Orenstein, Dewitt LLP, Minneapolis, Minnesota (for respondent)

Brandon M. Schwartz, Michael D. Schwartz, Schwartz Law Firm, Oakdale, Minnesota (for appellant)

Considered and decided by Florey, Presiding Judge; Jesson, Judge; and Smith, Tracy M., Judge.

SYLLABUS

A party is not required to file an affidavit of attempted service on a foreign corporation with the district court before effectuating substitute service on the Minnesota Secretary of State under Minnesota Statutes section 5.25, subdivision 4(a)(2) (2020).

OPINION

JESSON, Judge

Appellant Aaron Carlson Corporation (ACC) owes respondent Alerus Financial N.A. (Alerus) \$997,197.78 under the terms of a loan agreement between the parties. ACC defaulted on the loan in 2019 and refused to pay the remaining balance, causing Alerus to sue for breach of contract. But when Alerus sued, it was unable to serve ACC's registered agent with the summons and complaint and instead effectuated substitute service on the Minnesota Secretary of State.

In response, ACC raised an affirmative defense of improper service, arguing that Alerus was required to file an affidavit of attempted service with the district court before serving the secretary of state. But the court, in granting Alerus's motion for summary judgment, concluded that the process server's affidavit of nonservice—filed seven months after the server attempted service—showed that Alerus properly served ACC via substitute service on the secretary of state. ACC appeals. Because parties are not required to file an affidavit of attempted service on a foreign corporation with the court before effectuating substitute service on the Minnesota Secretary of State, we affirm.

FACTS

ACC was an architectural woodworking company incorporated in Delaware and conducting business in Minnesota. In 2009, ACC entered into a loan agreement for a revolving line of credit with Alerus. Over the next ten years, amendments to the agreement increased the maximum loan amount from one million to four million dollars and added ACC's sole owner and chief executive officer (CEO) as a personal guarantor. But when

the loan matured in 2019, ACC failed to pay the remaining balance. After demands for repayment went unanswered—and after ACC dissolved—Alerus sued for breach of contract.

Before filing the summons and complaint with the district court, Alerus attempted to serve ACC at its registered Minnesota office via a process server. But when the process server arrived at ACC’s office, the doors were locked. There was no way for the server to communicate with anyone who may have been inside. Because the process server could not serve ACC, Alerus effected substitute service on the Minnesota Secretary of State.¹

In its answer to Alerus’s complaint, ACC raised an affirmative defense of insufficient service of process. Several months later, when Alerus moved for summary judgment on its breach-of-contract claim, ACC opposed summary judgment on the ground of insufficient service of process. Alerus replied to this asserted affirmative defense and filed an affidavit of nonservice detailing the process server’s attempt to serve ACC at its registered offices—seven months earlier. Concluding that the affidavit of nonservice was “uncontroverted evidence” that Alerus had properly served ACC via substitute service and that “the filing of an affidavit of no service with the court is not mandatory to effectuate service of [Alerus’s] summons and complaint,” the district court rejected ACC’s

¹ When a foreign corporation—one incorporated under the laws of a different state—conducts business in Minnesota, the secretary of state acts as its appointed representative, upon whom process in proceedings against the corporation may be served. Minn. Stat. § 5.25, subd. 4(b) (explaining the relationship between a foreign corporation and the secretary of state), 302A.011, subd. 12 (defining “foreign corporation”) (2020). As a result, when process cannot be served on a foreign corporation’s registered agent, officer, manager, or general partner, a plaintiff may serve the secretary of state instead as a “substitute” for those agents. Minn. Stat. § 5.25, subd. 1 (2020).

affirmative defense and granted Alerus's motion for summary judgment on the breach-of-contract claim.

ACC appeals.²

ISSUE

Was Alerus required to file an affidavit of attempted service with the court before effectuating service on the Minnesota Secretary of State?

ANALYSIS

ACC challenges the district court's grant of summary judgment, arguing that the court erred by determining that Alerus properly served the summons and complaint. Specifically, ACC asserts that Alerus could not serve the secretary of state without first showing—by filing an affidavit of attempted service—that ACC's registered agent could not be found. We review a district court's grant of summary judgment *de novo* to determine whether there are any genuine issues of material fact and whether the court erred in its application of the law. *Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 628 (Minn. 2017).

Here, the facts are not in dispute. The parties agree that ACC owes Alerus the remaining balance on the loan under the terms of the loan agreement. And although ACC takes issue with the timing of the filing of the affidavit of nonservice, it does not dispute that the attempt at service of the summons and complaint at ACC's registered address

² ACC's sole owner and CEO also appealed, but because he was discharged in a separate bankruptcy proceeding, we removed him as an appellant from these proceedings. ACC remains the sole appellant.

occurred before Alerus served the documents on the secretary of state. Because the facts are undisputed, there are no genuine issues of material fact with regard to the issue of service.

As a result, we turn to whether the district court erred in its application of the law. *Id.* Whether service of process was effective and personal jurisdiction exists is a question of law we review de novo. *Shamrock Dev., Inc. v. Smith*, 754 N.W.2d 377, 382 (Minn. 2008). Because there is no caselaw on the precise issue of whether a party must file an affidavit of attempted service *before* serving the secretary of state as substitute service, we engage in statutory interpretation to ascertain the meaning of the relevant statute.³ To do so, we first determine whether the language at issue is ambiguous, or “subject to more than one reasonable interpretation.” *Roberts v. State*, 945 N.W.2d 850, 853 (Minn. 2020). We read the statute as a whole, interpreting each section in light of surrounding sections. *Id.* If the language is ambiguous, we look to the legislative intent in enacting the statute. *Id.* But if the language is unambiguous, “we apply its plain meaning.” *State v. Henderson*, 907 N.W.2d 623, 625 (Minn. 2018).

At issue is Minnesota Statutes section 5.25, subdivision 4(a)(2), which provides that a summons may be served on a voluntarily dissolved foreign corporation, such as ACC, by:

delivering to and leaving with the secretary of state . . . one copy of it and a fee of \$50 in the following circumstances: . . . (2) whenever a registered agent cannot be

³ The parties have not identified—and we have not found—any Minnesota appellate caselaw that addresses the question of whether a party must file an affidavit of attempted service before effectuating substitute service on the secretary of state.

found at its registered office in this state, as shown by the return of the sheriff of the county in which the registered office is situated, or by an affidavit of attempted service by a person not a party[.]

(Emphasis added.) ACC argues that this subdivision requires parties to *file* an affidavit of attempted service *before* effectuating substitute service on the secretary of state. Alerus contends that an affidavit need not be filed at all.

Despite the parties' opposing interpretations, the language of the statute is plain. The statute does not create a requirement that an affidavit of attempted service be *filed* to effectuate substitute service. Nor does the statute establish *when* such an affidavit must be produced to show that the registered agent could not be found. Rather, the sole focus of the statute is *service* of process. And it provides that substitute service of process on the secretary of state may be effective for a voluntarily dissolved foreign corporation when an affidavit of attempted service confirms that the registered agent could not be served.⁴ *Id.*

Applying subdivision 4(a)(2) to the undisputed facts in this case, we conclude that Alerus met the requirements of the statute. A process server was unable to serve ACC's registered agent with the summons and complaint, as shown by the affidavit of nonservice.

⁴ Additionally, we note that the *filing* requirements for service-related documents are outlined not in the statute, but in Minnesota Rule of Civil Procedure 5.04. That rule establishes that "all documents after the complaint required to be served upon a party, together with a certificate of service specifying the details of how and when service was accomplished . . . shall be filed with the court *within a reasonable time after service.*" Minn. R. Civ. P. 5.04(b) (emphasis added). Like subdivision 4(a)(2), rule 5.04 does not require an affidavit of attempted service be filed before effectuating substitute service on the secretary of state. But the parties here do not address the general applicability of this rule. Nor does ACC claim that Alerus failed to file the affidavit within the timeframe established in rule 5.04.

Alerus then effectuated substitute service on the secretary of state, completing the statutory requirements for serving ACC. Because the district court correctly applied subdivision 4(a)(2) to the uncontroverted facts, the court did not err by granting Alerus's motion for summary judgment.

DECISION

The plain language of Minnesota Statutes section 5.25, subdivision 4(a)(2), does not require a party to file an affidavit of attempted service on a foreign corporation with the court before effectuating substitute service on the Minnesota Secretary of State. Because there are no genuine issues of material fact, and the district court correctly applied section 5.25, subdivision 4(a)(2), to the undisputed facts, the court did not err by granting Alerus's motion for summary judgment.

Affirmed.