

NO. A05-0869

State of Minnesota
In Court of Appeals

DENISE SMITH,

Appellant,

v.

HAROLD J. FLOTTERUD,

Respondent.

RESPONDENT'S BRIEF

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STATEMENT OF LEGAL ISSUES

- I. Did the Trial Court err by granting Respondent's Motion to dismiss due to insufficient service of process?**

The Trial Court held in the negative.

STATEMENT OF THE CASE

Appellant Denise Smith purportedly commenced a civil action against Respondent Harold J. Flotterud on or about April 7, 2004. Respondent Flotterud filed a timely Answer and asserted as an Affirmative Defense “insufficient service of process.”

Appellant did not make any effort to perfect service of process. Respondent therefore moved to dismiss the action by Motion before The Honorable Robert R. King, Goodhue County District Court, on January 21, 2005. The Court allowed Appellant to submit additional evidence by way of an evidentiary hearing on March 7, 2005. The Trial Court then granted Defendant’s Motion to dismiss due to insufficient service of process.

Appellant now appeals.

STATEMENT OF FACTS

Appellant Denise Smith is alleging injuries arising out of a motor vehicle accident which occurred involving Respondent Harold Flotterud on September 30, 1998. On or about April 7, 2004;¹ an Affidavit of Personal Service was signed by the process server, Jim Little, on the 8th day of “_____”, 2004 and notarized.²

Process server Jim Little’s Affidavit was false. Harold Flotterud was not at the residence of 20915 453rd Street Way, Zumbrota, Minnesota 55992. It is uncontroverted that Mr. Flotterud, who was in failing health, was confined to a nursing home for many months prior to April 7, 2004. In addition, it is uncontroverted that there was no “adult over the age of 18” living at that residence as it was empty. Mr. Little admitted that he did not deliver the papers to anyone at the identified address at the Evidentiary Hearing conducted by the Trial Court. (T.9-“I had no idea” where Mr. Flotterud was.)

The false Affidavit of Service would be fatal to the service of process issue in and of itself. Appellant’s fallback position is that there was successful “alternate” service which preserves the action. However, this “alternate” process service was also insufficient.

¹ The Appellant Court will note that the date April 8, 2004 appears on the Affidavit of Service, but this is then crossed out and the date of April 7, 2004 is inserted. For purposes of this Appeal, Respondent will assume that the actual date is April 7, 2004, although whether it is the 7th or the 8th makes no material difference to the legal issues presented.

² Respondent will assume for purposes of the legal discussion that the month which is left blank on the Affidavit of Service is intended to be April, but this again points out another defective element of the Affidavit of Service.

It is undisputed that Mr. Little was an extremely inexperienced process server. He believes he may have served suit papers once or twice before. (T.7). Mr. Little could not remember for whom he served the papers. (T.7). Mr. Little did not know that he was actually serving suit papers at all. (T.7). He acknowledged that the papers were in a plain envelope without any identification that it came from a law firm. (T.7). Mr. Little had no knowledge as to the requirements for service of process under Minnesota law. (T.8). He had never taken any classes or received any instruction on how to serve the papers properly. (T.8).

Mr. Little testified that there was no one home at the Flotterud residence identified by its address of 20915 453rd Street Way, Zumbrota, Minnesota 55992. He describes the residence as being "abandoned." (T.5). Mr. Little then noticed a neighbor at an adjacent residence who it turns out was an individual named Valerie Leonard. Mr. Little gave the unopened, plain envelope to Ms. Leonard. (T.8). Mr. Little acknowledges that it is possible he did not tell Ms. Leonard what was in the envelope. (T.9). Mr. Little acknowledged that he had no idea as to where Mr. Flotterud was on the date in question, nor did he know that Mr. Flotterud was confined to a nursing home. (T.9).

This is the sum of knowledge that Mr. Little has as to the service of the suit papers.

Ms. Leonard's version of events was presented by way of two Affidavits. Ms. Leonard indicated in no uncertain terms that if she was aware that these were suit papers, she would not have delivered the appears to Ronald Flotterud, Harold's son, at his separate residence. Instead, she simply dropped those off and gave them to Ronald Flotterud's minor daughter (Harold Flotterud's granddaughter). The minor daughter gave

the papers to Mrs. Ronald Flotterud who then showed the papers to Mr. Ronald Flotterud who had power of attorney for his father, Harold Flotterud. Valerie Leonard had no intention to act as a process server and did not knowingly deliver any suit papers. In addition, the Flotterud minor daughter could certainly not act in any capacity as a process server.

The record is empty as to any efforts to perfect service of process after April 7, 2004. Apparently relying upon the false Affidavit of Service, Appellant's counsel did nothing to inquire or to attempt to perfect service of process. Appellant's counsel apparently also failed to notice or failed to act upon the Affirmative Defense of insufficient service of process until after the Motion was brought. This course of action on or about April 7, 2004 was the only effort to serve Harold Flotterud with suit papers in this action.

Not surprisingly, Judge King at the Trial Court level granted Respondent's Motion to Dismiss due to insufficient service of process. Judge King made a number of notable findings both of fact and law to support the dismissal.

First, he noted that the allegation that Valerie Leonard knew that the papers were suit papers was a misreading of the two Affidavits. The Court made the factual finding as follows:

"I guess the argument is made because she used the phrase 'Summons and Complaint' that she knew at the time was a Summons and Complaint, and I don't take it that way at all. Based upon the other evidence I have seen, what I take it is first of all likely a lawyer drafted this and she signed it based upon what she told the lawyer and later on she knew it was a Summons and Complaint because that's what ended up in Court. The easier way to refer to the papers being handed to her was to state the Summons and Complaint. That's not to say

at the time that the papers were handed to her she was told there was a Summons and Complaint or she knew. In fact, in the testimony of Mr. Little, it was apparently she didn't know it was a Summons and Complaint because he didn't know it was a Summons and Complaint."

I invited you all here today because I wanted to give the parties an opportunity to pursue the lawsuit. I think that should be the bedrock principle to act upon, but I also have to follow the law, so I say with regret I feel obligated to dismiss the Complaint because I don't see service here. He did not tell her what the papers were and I think it was important she had to know what it was. I don't think she needed to know in detail, but that it was a Summons and Complaint. When she served the papers, she had no idea what she was passing on. The cases I indicate in my memo indicate there should be some knowledge on the part of the process server as to what they're doing and that their serving has to be in attempt to serve legal papers. Here her own Affidavit indicates she didn't know they were legal papers. I will draft up an Order and short memo to that effect. **It's so clear I don't see any sense to keep people on pins and needles.**" (Emphasis added.)

(T.35-36).

After additional argument from Plaintiff's counsel, the Court noted as follows:

"The problem is she didn't know they were papers being served. The key word is service. We talk about service usually in the context of service of process. She just knew there were papers this man wanted delivered to him. There's nothing about service. She didn't know they were lawsuit papers. She says in her Affidavit if she had known they were lawsuit papers, she wouldn't have passed them on, wouldn't have volunteered. How you can reconcile that with intent to serve when the lady said I never would have served them if I knew what I was passing on...that's why I asked for additional information and evidence because there wasn't enough there the first time for me to make a really informed decision and give the Plaintiff a chance to show the service was done. As I indicated, the burden shifted because she showed the Affidavit signed with a process server wasn't accurate so the burden shifted back to you, so I was giving you a chance to respond to that. You could have called her as a witness today, but chose not to...I'm obligated to follow the law."

(T.38-39).

ARGUMENT

I. THE TRIAL COURT PROPERLY GRANTED DISMISSAL DUE TO INSUFFICIENT SERVICE OF PROCESS.

A. STANDARD OF REVIEW.

Appellant's Brief asserts that the Standard of Review is strictly that of a question of law. This is not correct. The Trial Court, Judge King, made a mixed finding of law and fact in reaching his decision. Judge King had an opportunity to see and evaluate the credibility of the process server, Mr. Jim Little, at the Evidentiary Hearing. Judge King made an assessment of that testimony in the context of Valerie Leonard's Affidavits and the other evidence in the case.

The standard of review applied to Appellate scrutiny of a Trial Court's factual findings is rigorous. The reviewing court will not disturb the findings of fact of the Trial Court unless they are clearly erroneous, either without substantial evidentiary support or induced by an erroneous review of the law. *Reserve Mining Company v. State*, 310 N.W.2d 487. Appellant here must therefore establish that the Court's factual findings apply to the law in this matter was "clearly erroneous."

B. THE COURT'S FACTUAL FINDING WAS CLEARLY SUPPORTED BY THE EVIDENCE.

The Trial Court reviewed the Affidavits submitted by the parties, actually inspected the envelope in which the suit papers were enclosed, and listened to the direct and cross-examination of the process server, Jim Little. After reviewing the body of evidence, Judge King concluded that "it's so clear I don't see any sense to keep people on pins and needles." (T.36).

Judge King's conclusion was not "clearly erroneous." The process server, Jim Little, was extremely inexperienced and completely untrained. Furthermore, the process server himself did not even know what was inside the envelope. Mr. Little conceded under oath that the residence where he claimed in his Affidavit of Service he served suit papers was "abandoned" and that the papers were not left with anyone at the identified residence. This is tantamount to an admission that the Affidavit of Service itself was completely false, and the Court so found.

Mr. Little fortuitously noticed a neighbor pulling into the driveway, Ms. Valerie Leonard. He gave the envelope to her, and the Judge concluded that Mr. Little would not have been able to inform Ms. Leonard what was in the envelope since Mr. Little himself did not know what was in the envelope. This is corroborated by Ms. Leonard's Affidavit indicating she would never have agreed to serve suit papers upon her neighbor. The envelope itself was a plain envelope with no indication of what was inside it. That envelope was then delivered down to Ronald Flotterud's residence where it was handed to a minor daughter. The minor daughter then handed it to her mother, and the mother passed it on to Ronald Flotterud who had power of attorney for Harold Flotterud.

Appellant has submitted zero evidence that the Affidavit of Service is correct. Appellant has provided zero evidence that Valerie Leonard acted as a process server or agreed to act as a process server or knew she was acting as a process server in delivering the envelope down to Ronald Flotterud's home. Appellant's counsel has provided zero evidence that the Ronald Flotterud minor daughter could have or did knowingly act as a process server. The same is equally true for Mrs. Ronald Flotterud.

There are at least three “breaks in the chain” for the purported service of process. Given the weight of that evidence, Judge King concluded that he had no alternative but to dismiss the lawsuit.

The Trial Court’s decision was fully supported by the law. First, Judge King noted that Rule 4.03 of the Minnesota Rules of Civil Procedure was not satisfied since service was not made at **Defendant’s** place of abode. (Emphasis in original.) Harold Flotterud was no longer living at the address identified in the Affidavit of Service on 453rd Street Way in Zumbrota, Minnesota, but was living in a nursing home. The Court properly concluded that if the papers had been left with *anyone* at the 453rd Street Way abode, that would not have been effective service.

Second, the Court notes that “of course, the process server failed to do even that. He left the Summons with a next door neighbor. Clearly, service of process was not accomplished by the giving of the Summons and Complaint to Ms. Leonard.”

Third, the “substitute service” was also defective. The Trial Court, citing *Berryhill v. Sepp*, 106 Minn. 458, 119 N.W.2d 404 (1909) identified the strict compliance requirement for service of process as follows:

“If, for example, a Summons were in fact served on the wrong person, and that person handed it to the proper Defendant, there would be no service. By parity of reasoning, if the Summons should be left at a house which was not the usual abode of the person, by leaving it with some person of suitable age and discretion then residing therein, and that person subsequently delivered it to the proper Defendant, the service there is not substituted service.”

The Court also cited with approval *Lee v. Skrukud*, 42 N.W.2d 544 (Minn. 1950), which involved a case in which the Plaintiff handed a piece of paper to a police officer who then delivered it to a daughter of the Defendant. The *Lee* Court found that there was

no sufficient service of process, noting the factual finding that the police officer did not know he was serving a Summons in a civil action and did not fill out an Affidavit of Service (neither did Ms. Leonard). The Supreme Court stated as follows:

“The service of a Summons as authorized by §543.03 and the making of proof thereof in compliance with §543.14, by necessary statutory implication requires the act of effecting such service upon a Defendant must be performed both *knowingly and intentionally*.”

The Trial Court acknowledged the changes to Rule 4 under the modern Rules of Civil Procedure, but indicated that “the substance has not changed.” Judge King held that “thus it appears that in order for proper service of a Summons in a civil action to occur, the party who was serving the process must know that they are doing so, and intend to be making service.”

Finally, Appellant argues that the defective service of process in this case including the wholly incorrect Affidavit of Service nonetheless should be ignored because Ronald Flotterud ended up turning the suit papers over to his father’s insurance company, citing as authority *O’Sell v. Peterson*, 595 N.W.2d 870 (Minn. App. 1999). *O’Sell* is easily distinguishable because in that case the service was made at Defendant’s actual abode and left with a resident of that abode. Appellant here accomplished none of the factors relied upon by the *O’Sell* Court: Harold Flotterud was not served personally; Harold Flotterud no longer resided at the address in which service was attempted; and no individual was home at the abode where service was attempted as it was “abandoned.”

Appellant cites zero other authority to support the contention that the Court should overlook the strict requirements of service of process in order to initiate a civil lawsuit. In the absence of any such authority, the Trial Court’s decision should be affirmed.

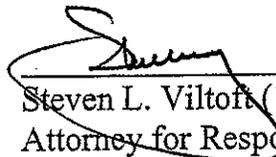
CONCLUSION

Appellant's efforts to reverse the Trial Court's factual and legal determination that service of process in this matter was insufficient should be rejected. Respondent respectfully requests that the Appeal be denied.

DATED:

Respectfully submitted,

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