
COURT FILE NO. A06-1171

*STATE OF MINNESOTA
IN COURT OF APPEALS*

Joseph Aaron Weinstock, *Appellant*,

v.

LeAnn Van Den Bosch, *Respondent*

APPELLANT JOSEPH WEINSTOCK'S REPLY BRIEF

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REPLY ARGUMENT

1. RESPONDENT'S ARGUMENT IS BASED UPON IRRELEVANT AND SUPPORTED FACTS. Respondent argues in her reply brief that Appellant, “*does not deny*” that he received Respondent’s motion papers by registered mail. It is unclear how Respondent came to that conclusion. A major portion of Appellant’s argument is based on the Respondent’s failure to comply with procedural rules and the law of the case. Another unsupported argument made by the Respondent is that Appellant does not deny having received her entire motion. There is no such concession. There was no indication in the Appellant’s *Notice of Special Appearance* of what had actually been received. In fact, Appellant only refers to the “motion” and does not refer to any other documents, such as the affidavit that was purportedly sent. [A 33]

Respondent asserts that the mere filing of an affidavit of service (by one of his office staff) is sufficient to meet his burden that the mailing was done by registered mail, return receipt requested. The facts demonstrate otherwise. When a parcel or letter is sent by registered or certified mail, the sender is provided with a paper receipt that shows such mailing was made. Respondent provided no such evidence with her affidavit. Since no return receipt was provided by Respondent, and Respondent could not even provide the paper receipt that is given to the sender, the weigh of the evidence is that the mailing *was not* done by registered mail.

While Respondent argues that review of the “registered mail” issue requires review

by an abuse of discretion standard, Respondent ignores the decision of the trial court. The trial court did not “find” that the Respondent sent the pleadings by registered mail. The trial court merely determined that the pleadings had been, “*duly and properly served.*” [A 37]

Respondent engages in another irrelevant argument when she discusses the issue of jurisdiction. Respondent argues that jurisdiction is not in question once a summons and petition has been properly served. There is no legal basis for such an argument. If that were the case there would be no requirement that a party be served with a motion. While the trial court had jurisdiction over the Appellant as a general proposition in the dissolution file, it did not have jurisdiction over the Appellant to hear the motion in question since he was not properly served with process regarding the motion.

The Respondent argues that the trial court is not in the position to make a determination of whether service was in fact accomplished by registered mail, return receipt requested. Clearly, the reason why the courts have required “*return receipt requested*” is two-fold: (1) oversea mailing is not the same as mailing within the United States. Once the mailing leaves the country the process of seeing that it gets to the intended receiver falls into the hands of another country, whose procedures, safeguards and timeliness often are not the same as in the United States; and (2) common sense dictates that while three days may be sufficient time to assume service within the United States, three days clearly *is not* sufficient time outside of the United States.

Respondent cites *Thiele v. Stich*, 425 N.W.2d 580, 584 (Minn.App. 1988) purportedly

for the proposition that, “*when a party receives actual notice of a lawsuit and there is substantial compliance with Minn.R.Civ.P. 4 regarding service of process, a district court obtains personal jurisdiction over a defendant.*” Respondent apparently did not read the *Thiele* decision. The *Thiele* decision involved service of a summons and complaint by substitute service at a defendant’s place of employment, as opposed to his home. The Minnesota Supreme Court held that such service was not effective, even though there was acknowledgment that the pleadings were received by the defendant. While Appellant acknowledged receipt of the “motion” in this case, there was no “return receipt” involved and no registered mail. “Substantial compliance” does not occur where registered mail, return receipt requested is required, and it is not employed.

Respondent cites, *O’Sell v. Peterson*, 595 N.W.2d 870, 872 (Minn.App. 1999) for the proposition that the purpose of service of process is to give notice “reasonably calculated, under all circumstances to appraise interested parties of the pendency of the action.” However, the *O’Sell* decision relies on the holding in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). In the *Mullane* case, the holding was that, “*due process requires notice reasonably calculated, under all circumstances, to appraise interested parties of the pendency of the action and an opportunity to present their objections.*” (Emp. added). As noted herein, even if service were allowed *without return receipt requested*, due process would require that a litigant living over seas be accorded the same rights as one living in this country, to-wit: in the very least the same 14 days notice required under the family rules.

Finally, Respondent (as well as the trial court) asserted that Appellant provided no authority for the requirement that an overseas respondent actually be accorded 14-days notice of a hearing. To hold otherwise would result in a legal absurdity. To buy Respondent's argument, so long as the mailing is by registered mail, return receipt requested, it makes no difference when the pleadings are received, i.e., they could be received *after* the motion is heard. The rules of statutory construction (Minn.Stat. §645.17(1)) provide that it is presumed that the legislature did not intend a result or interpretation that is absurd or unreasonable. Rule 4.04 is not a statute, it is a rule; however, common sense dictates that the same standard should apply to service rules. *See, i.e., Year 2001 Budget Appeal of Landgren v. Pipestone County Board of Com'rs*, 633 N.W.2d 875, 877 (Minn.App. 2001)(interpretation of a rule that leads to an absurd result is not permitted).

Minn.Gen.R.Prac., Rule 301, provides as follows:

"Rules 301 through 313 and, where applicable, the Minnesota Rules of Civil Procedure shall apply to family law practice except where they are in conflict with applicable statutes or the Expedited Child support Process Rules, Minn. Gen. R. Prac. 351 through 379. Rules 301 through 313 do not apply to proceedings commenced in the Expedited Child Support Process, except for Rules 302.04, 303.05, 303.06, 308.02, and 313."

Rule 303.03 *requires* that a non-dispositive motion be served at least 14 days prior to the hearing. Rule 301 makes it clear that, *"where applicable, the Minnesota Rules of Civil Procedure shall apply to family law practice except where they are in conflict with applicable statutes."* The requirements of Minn.R.Civ.P. 4.04 pertaining to service of

foreign residence are not in conflict with Rule 303.03 (or any statute). Rule 303.03(4) (pertaining to the computation of time for service) pertains to service by mail. It does not apply to service by registered mail on a foreign resident, as required by Rule 4.04 of the Minnesota Rules of Civil Procedure. Rule 4.04 does not alter the family rule requiring service at least 14 days prior to a motion. The inescapable conclusion is that in order to comply with the 14 day requirement of Rule 303.03, the registered mail must *reach* a foreign resident at least 14 days prior to the motion, which is evidenced by the return receipt.

CONCLUSION

The Respondent failed to acquire jurisdiction over the Appellant. The trial court's September 2005 order should be vacated in its entirety.

Respectfully submitted,

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