

COURT FILE NO. A06-1171

**STATE OF MINNESOTA
IN COURT OF APPEALS**

Joseph Aaron Weinstock, *Appellant*,

v.

LeAnn van den Bosch, *Respondent*

RESPONDENT'S BRIEF

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LEGAL ISSUES

- I. Did the Respondent fail to comply with the trial court's Order of June 27, 2005, directing how service upon Appellant should be accomplished?

TRIAL COURT HELD: Denied Appellant's motion to vacate the trial court's Order of September 26, 2005, on the grounds Respondent's service of her motion of August 22, 2005, upon Appellant was ineffective because it did not comply with the trial court's Order of June 27, 2005, directing how service upon appellant should be accomplished.

- II. Did the Respondent fail to comply with Minn.R.Civ.P. 404?

TRIAL COURT HELD: Denied Appellant's motion to vacate the trial court's Order of September 26, 2005, on the grounds Respondent's service of her motion of August 22, 2005, upon Appellant was ineffective because the service did not comply with Minn.R.Civ.P. 404.

- III. Did the Respondent fail to provide the pleadings (serve her motion of August 22, 2005) to Appellant at least 14 days prior to the hearing in violation of Minnesota law and due process?

TRIAL COURT HELD: Denied Appellant's motion to vacate the trial court's Order of September 26, 2005, on the grounds Respondent fail to provide the pleadings (serve her motion of August 22, 2005) to Appellant at least 14 days prior to the hearing in violation of Minnesota law and due process.

STATEMENT OF CASE AND FACTS

For purposes of this appeal, the Respondent does not contest the factual representations of Appellant's "Consolidated Statement of the Case and Facts".

STANDARD OF REVIEW

In his brief, Appellant argues that trial court lacked personal jurisdiction over him to consider Respondent's Motion of August 22, 2005, due to ineffective service of process. Appellant concludes that since the issue of whether service of process was proper is a question of law, the standard of review by this Court is de novo. However, the trial court's personal jurisdiction over Appellant is not in question. Respondent's Motion of August 22, 2005, concerned issues of on-going child support and parenting time in a marriage dissolution action. Minn. Stat. Sec. 518.64 gives trial courts continuing jurisdiction over dissolution proceedings and enables them to modify prior orders.

While the issue of whether the method of service was proper is a question of law that is reviewed de novo on appeal, no one is questioning the actual method of service of Respondent's Motion of August 22, 2005, upon Appellant. The parties agree that in a Memorandum attached to the trial court's Order of June 27, 2005, the trial court noted that Respondent could "properly effect" service of process upon Appellant by "sending its Notice of Motion and Motion through registered mail with return receipt requested" (Appellant's Appendix, pg. 30). The parties agree that Respondent filed with the trial court an affidavit of service reflecting that her Notice of Motion and Motion of August 22, 2005, was served upon Appellant that day by "registered mail, return receipt requested."

Appellant does not deny that he received Respondent's motion papers by registered mail, but he simply argues in his brief that because there was no return receipt submitted by Respondent, it must be assumed that Respondent did not actually send the motion papers to him by "registered mail, return receipt requested."

The question of whether Respondent sent her motion papers by “registered mail, return receipt requested” is a question of fact. Findings of fact are overruled by appellate courts only when the reviewing court is left with the definite and firm conviction that a mistake has been made. Appellate courts are to review the record in the light most favorable to the district court’s findings and will uphold those findings unless there is clear error.” Vangness v. Vangness, 607 N.W.2d 468, 472 (Minn.App. 2000).

ARGUMENTS

I. THE RESPONDENT DID NOT FAIL TO COMPLY WITH THE TRIAL COURT'S ORDER OF JUNE 27, 2005, DIRECTING HOW SERVICE OF PROCESS UPON APPELLANT SHOULD BE ACCOMPLISHED.

In its Memorandum attached to the trial court's Order of June 27, 2005, the trial court noted that Respondent could "properly effect" service of process upon Appellant by "sending its Notice of Motion and Motion through registered mail with return receipt requested" (Appellant's Appendix, pg. 30).

The requirement that service of process mailed to an individual located outside the United States be by registered mail with return receipt requested is stated in Minn.R.Civ.P. 4.04(c). Respondent would suggest that in a marriage dissolution proceeding, the need to serve process to an individual residing outside the United States be by registered mail with return receipt requested would only be needed to serve the Summons and Petition in order for the trial court to gain personal jurisdiction over the respondent. Service of a post-dissolution motion would be governed by Minn.Gen.R.Prac. 303(a)(1) and Minn.R.Civ.P. 5.02 which can be done "by mailing a copy to the attorney or party at the attorney's or party's last known address" (no requirement of registered mail).

Appellant argues that the trial court's Memorandum of June 27, 2005, became the "law of the case" and required Respondent to serve future motions upon Appellant by registered mail with return receipt requested. Appellant concludes that Respondent did not comply with the trial court's Order of June 27, 2005, because there was no return receipt submitted to the trial court.

The trial court did not require a “return receipt” be submitted to the court in order for there to be effective service of a motion upon Appellant. The requirement was that service be done by “registered mail with return receipt requested.” Respondent did that, filing with the trial court an affidavit of service stating so. Appellant wants this court to find that that Respondent’s affidavit of service was a lie, or erroneously or mistakenly made. This court is in no position to make such a determination on the basis that no return receipt was submitted to the trial court.

Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous. Minn.R.Civ.P. 52.01. When reviewing the record in the light most favorable to the district court’s finding, this Court cannot say that it was clearly erroneous that Respondent served her motion papers by registered mail with return receipt requested.

Appellant does not deny that he actually received the motion papers by registered mail. When the “intended recipient receives actual notice of the action, the rules governing such service should be liberally construed to avoid depriving a litigant of his day in court.” Pederson v. Clarkson Lindley Trust, 519 N.W.2d 234, 235 (Minn.App. 1994). 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. See Thiele v. Stich, 425 N.W.2d 580, 584 (Minn. 1988). The purpose of service of process is to give notice “reasonably calculated, under all circumstances to apprise interested parties of the pendency of the action.” O’Sell v. Peterson, 595 N.W.2d 870, 872 (Minn.App. 1999).

Because Appellant received actual notice of the Respondent's Motion of August 22, 2005, whether or not the motion papers were sent with return receipt requested, Appellant's due process rights were not violated as there was substantial compliance with the so-called "law of the case" regarding service upon Appellant.

I. THE RESPONDENT DID NOT FAIL TO COMPLY WITH MINN.R.Civ.P. 4.04.

Appellant's second argument is actually the same as his first argument. Since the trial court's Memorandum of June 27, 2005, regarding service of process upon Appellant quoted Minn.R.Civ.P. 4.04, the analysis is the same as in the first issue. This Court cannot find that Respondent failed to comply with that rule.

III. THE RESPONDENT DID NOT FAIL TO PROVIDE THE PLEADINGS (SERVE HER MOTION OF AUGUST 22, 2005) UPON APPELLANT AT LEAST 14 DAYS PRIOR TO THE HEARING IN VIOLATION OF MINNESOTA LAW AND/OR DUE PROCESS.

Minn.Gen.R.Prac. 303(a)(1) states that no motion in a dissolution action shall be heard unless the initial moving party serves and files the motion papers "at least 14 days prior to the hearing." Respondent clearly complied with this requirement. Respondent filed her motion papers and mailed them to Appellant on August 22, 2005, when the hearing was not scheduled to be heard until September 13, 2005. As such, Respondent served her motion papers 22 days prior to the hearing.

Because Respondent sent the motion papers to Appellant by registered mail, service was effective upon mailing. When a statute expressly provides service by certified or registered mail, service is effective on mailing. Eischen Cabinet v. Hildenbrandt, 683 N.W.2d 813 (Minn. 2004).

Appellant never indicated to the trial court exactly when he received Respondent's motion papers in the mail. He contends that because he did not receive Respondent's motion papers in the mail until less than 14 days prior to the hearing on September 13, 2005, his due process rights were violated. However, Appellant cites no authority in his brief to support his contention.

It is interesting to note that Minn.Gen.R.Prac. 303(b) only states that in the event an initial moving party fails to timely serve and file his/her motion documents, the hearing **may** be cancelled by the trial court. The rule was not violated here by Respondent, but even if it was, cancellation of the hearing is not required by the rules.

There is no basis for this Court to find that Appellant's due process rights were violated when Respondent sent the motion papers to Appellant by registered mail 22 days prior to the scheduled hearing, even if Appellant did not actually receive the papers until less than 14 days prior to the hearing.

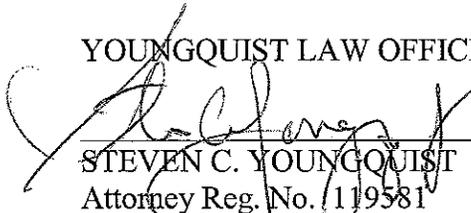
CONCLUSION

Appellant was properly served with the motion and pleadings which are the subject of this appeal consistent with the previous Order of the court. His due process rights were not violated with entry of the Order dated September 26, 2005.

Dated: 10-17-06

Respectfully submitted,

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