STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1218

Scott Selmer,
Appellant,

vs.

Alan Kozicky,
Respondent,

Home Key Mortgage, et al.,
Defendants,

All American Title,
Respondent.

Filed March 11, 2013
Affirmed
Connolly, Judge

Hennepin County District Court
File No. 27-CV-10-28718

Scott Selmer, Conner McAlister Selmer, LLC, Minneapolis, Minnesota (attorney pro se)

Alan Kozicky, Mound, Minnesota (pro se respondent)

Ernest F. Peake, Patrick J. Lindmark, Leonard, O'Brien, Spencer, Gale & Sayre, Ltd., Minneapolis, Minnesota (for respondent All American Title)

Considered and decided by Connolly, Presiding Judge; Stauber, Judge; and Bjorkman, Judge.

U N P U B L I S H E D O P I N I O N

CONNOLLY, Judge

Appellant challenges the district court's dismissal of his case on the ground of lack of personal jurisdiction because of improper service, arguing that service is irrelevant because the Federal Rules of Civil Procedure state that an action is commenced by filing and that his action was governed by the Federal Rules rather than the Minnesota Rules of Civil Procedure. Because appellant's argument is contrary to law, we affirm.

FACTS

In December 2010, appellant Scott Selmer, an attorney acting for himself, filed a complaint against respondents Alan Kozicky and All American Title (AAT).[1] He did not, however, file an affidavit of service. In January 2012, AAT moved to dismiss on grounds of failure to state a claim on which relief can be granted. Following a hearing, the district court directed appellant to file affidavits of service by close of business on January 9, 2012.

On January 18, 2012, AAT's president filed an affidavit stating that "AAT has never been served with the Summons and Complaint in the . . . lawsuit" and that "Alan Kozicky is not currently, and has never been, an officer, managing agent, part owner or an individual authorized to accept service of process on behalf of AAT."

On February 15, 2012, appellant filed an affidavit stating that he mailed a copy of the summons and complaint to respondents at their last-known addresses. During a

[1] Only respondent AAT takes part in this appeal.

second hearing on AAT's motion to dismiss, Kozicky joined orally in the motion and said that he, like AAT, had never been properly served.

The district court granted the motion to dismiss, concluding that service was insufficient and that it therefore lacked personal jurisdiction over respondents. Appellant challenges the dismissal.[2]

D E C I S I O N

> Before a . . . court may exercise personal jurisdiction over a defendant, the procedural requirement of service of process must be satisfied. Service of process is the procedure by which a court having venue and jurisdiction of the subject matter of the suits asserts jurisdiction over the person of the party served. Where service is insufficient, a district court must dismiss an action . . . . The existence of personal jurisdiction is a question of law that we review de novo.

Uthe v. Baker, 629 N.W.2d 121, 123 (Minn. App. 2001) (quotations and citations omitted).

Appellant argues that he "had effectively served respondents when he filed the summons and complaint." But "[a] civil action is commenced against each defendant: (a) when the summons is served upon that defendant, or (b) at the date of acknowledgement of service if service is made by mail . . . ." Minn. R. Civ. P. 3.01. Thus, an action is not commenced by filing.

[2] In his brief, appellant argues that the statute of limitations on his action has not expired and that estoppel applies to toll the statute of limitations. Because the district court did not address these issues, they are not properly before this court. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). In any event, in light of our affirmance of the district court's conclusion that it lacked jurisdiction, additional issues are moot.

Appellant also claims he "mailed copies of the summons and complaint to the defendants at their last known addresses." But service by mail requires

> mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgement conforming substantially to Form 22 and a return envelope, postage prepaid, addressed to the sender. If acknowledgement of service under this rule is not received by the sender within the time defendant is required by these rules to serve an answer, service shall be ineffectual.

Minn. R. Civ. P. 4.05. Appellant did not send the notice and acknowledgement or a return envelope, and AAT did not send him an acknowledgement of service. Thus, service on AAT was ineffectual.

Appellant relies on Fed. R. Civ. P. 3 ("A civil action is commenced by filing a complaint with the court") and argues that the Federal Rules of Civil Procedure apply because the facts he stated in his complaint implied a civil-rights claim under 42 U.S.C. § 1983. But

> although state courts hearing section 1983 claims are bound to apply substantive federal law as developed in the federal courts, the states have great latitude to determine the jurisdiction of their own courts and "may apply their own neutral procedural rules to federal claims, unless those rules are preempted by federal law."

Carter v. Cole, 526 N.W.2d 209, 214 (Minn. App. 1995) (quoting *Howlett by Howlett v. Rose*, 496 U.S. 356, 372, 110 S. Ct. 2430, 2441 (1990)), *aff'd*, (Minn. 1995). Thus, Minnesota courts are empowered to restrict their own jurisdiction to cases begun by service conforming to the Minnesota Rules of Civil Procedure. "Each state has the right to prescribe by law how its citizens shall be brought into its courts." *Bloom v. Am.*

Express, 222 Minn. 249, 257, 23 N.W.2d 570, 575 (1946) (quotation omitted). Minnesota has determined that either personal service on a defendant or a defendant's acknowledgement of service by mail must occur before jurisdiction vests in its courts. "Provisions of a statute relating to the filing and service of notice must be strictly followed if a court is to acquire jurisdiction." *Allstate Ins. Co. v. Allen*, 590 N.W.2d 820, 822 (Minn. App. 1999); *see also Duncan Elec. Co. v. Trans Data, Inc.*, 325 N.W.2d 811, 812 (Minn. 1982) (holding that, when service was defective, "the trial court erred in failing to set aside the [default] judgment as void for lack of jurisdiction").[3]

The district court properly dismissed appellant's case for lack of personal jurisdiction due to ineffective service.

Affirmed.

[3] The two cases on which appellant relies for his argument that the case he filed in Minnesota state court is governed by the Federal Rules of Civil Procedure, *Jackson v. Duke*, 259 F.2d 3 (5th Cir. 1958) and *Bomar v. Keyes*, 162 F.2d 136 (2d Cir. 1947) are not dispositive, because they are from foreign jurisdictions, nor even persuasive, because they are distinguishable. In *Jackson*, "[t]he original complaint allege[d] that the court ha[d] jurisdiction under 42 U.S.C.A. § 1983, the section creating an action for deprivation of civil rights[,]" and the "allegations [in the complaint] ma[d]e out a prima facie case for federal jurisdiction based on a complaint alleging deprivation of civil rights." 259 F.2d at 7. Appellant's action was brought in state court, and his complaint did not mention federal law. In *Bomar*, the United States Second Circuit Court of Appeals held that the Federal Rules of Civil Procedure "have made no longer applicable Sec. 17 of the New York Civil Practice Act which fixes the beginning of the action at the date when the writ is served . . . ." 162 F.2d at 140. But there is no equivalent case from the United States Eighth Circuit Court of Appeals determining that Minn. R. Civ. P. 3.01 has been made inapplicable by Fed. R. Civ. P. 3.