STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1118

Berg, Debele, DeSmidt & Rabuse, P.A.,
f/d/b/a Walling, Berg & Debele, P. A.,
Respondent,

vs.

Robert I. Burns, Jr.,
Appellant.

Filed April 16, 2018
Affirmed
Rodenberg, Judge

Hennepin County District Court
File No. 27-CV-17-1943

Robert A. Judd, Bradley D. Hauswirth, Nathan B. Serr, Wagner, Falconer & Judd, Ltd., Minneapolis, Minnesota (for respondent)

Robert I. Burns, Jr., Edina, Minnesota (pro se appellant)

Considered and decided by Rodenberg, Presiding Judge; Bjorkman, Judge; and Smith, Tracy M., Judge.

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

RODENBERG, Judge

Appellant Robert I. Burns Jr. appeals from the district court's order denying his motion under Minn. R. Civ. P. 60.02 to vacate a default judgment. He argues that the district court did not have personal jurisdiction over him because the respondent did not

satisfy the requirements for service by publication. He also argues that the district court made improper factual findings and erroneously denied his rule 60.02(a) motion. Because respondent met the requirements for serving appellant by publication, and because appellant fails to satisfy the *Finden* elements necessary for a district court to grant a rule 60.02(a) motion, the district court did not err when it denied appellant's motion. Therefore, we affirm.

FACTS

Appellant hired respondent law firm to represent him in a divorce case. Appellant signed a retainer agreement, in which he agreed to be billed monthly for respondent's legal services. He also agreed that payment for each monthly bill was due upon receipt. Appellant made payments to respondent as agreed until appellant sought to withdraw from a settlement agreement that had been read into the record before the dissolution court. Respondent saw no legal basis upon which appellant might withdraw from the settlement agreement, and told him so. With appellant's permission, respondent withdrew from representing appellant in June of 2016. Appellant did not pay his May and June bills, despite emails sent to him by respondent in June, July, and August setting out the total amount due and owing to respondent, which was then over $18,000. Respondent eventually enlisted the help of a collection firm, and that firm began collection efforts. Appellant did not contest the bills until after collection efforts had begun.

Unable to resolve the unpaid bill, the collection firm sought and was granted authorization from respondent law firm to sue appellant. It attempted to serve appellant with process. A process-serving company made 20 separate attempts to serve appellant at

both his place of work and his last-known residence. At one point, the process server arrived at appellant's place of work while appellant was in a meeting, and appellant refused to leave the meeting. A process server also made contact with appellant at his residence, apparently by telephone, but appellant informed the process server that he was out of town. The collection firm then engaged the services of the Hennepin County Sheriff to serve appellant. The sheriff's department made multiple attempts at service, without success. Respondent filed an Affidavit for Publication of Summons with the district court indicating that appellant was residing in Minnesota but was concealing himself to avoid service of process. Respondent law firm then published the summons and complaint on three successive Thursdays. Appellant made no answer or other appearance after service by publication. The district court entered a default judgment against appellant on March 31, 2017.

After he was served with the notice of the entry and docketing of judgment, appellant moved to vacate the default judgment pursuant to rule 60.02. The district court found that an account stated was created when, after a number of months and multiple billings, appellant failed to contest the amount respondent claimed was outstanding. It further found that appellant was avoiding service and, accordingly, service by publication was proper. The district court also concluded that appellant had neither a reasonable excuse for defaulting nor a defense on the merits. It denied appellant's rule 60.02 motion.

This appeal followed.

D E C I S I O N

Appellant challenges the district court's order denying his motion to vacate the default judgment against him, arguing that the district court abused its discretion when it denied him relief under Minn. R. Civ. P. 60.02. Rule 60.02 provides that a district court may vacate a judgment for, among other things: "mistake, inadvertence, surprise, or excusable neglect"; the discovery of new evidence which could not have been obtained by due diligence in time for a new-trial motion; fraud; the judgment being void; or "any other reason justifying relief from the operation of the judgment." Minn. R. Civ. P. 60.02. Appellant makes two distinct arguments on appeal. First, he argues that judgment never should have been entered against him because he was not properly served. Second, he argues that, even if he was properly served by publication, he should have relief under rule 60.02(a) because his failure to answer the complaint was excusable under the circumstances.

I. Service by publication was proper.

We first address appellant's argument that he is entitled to relief under rule 60.02 because he was never properly served, making the judgment void against him and warranting that it be vacated under rule 60.02(d). Minn. R. Civ. P. 60.02(d).

If a judgment is void for want of personal jurisdiction, it must be set aside regardless of the merits of the case. *Hengel v. Hyatt*, 312 Minn. 317, 318, 252 N.W.2d 105, 106 (1977). Appellant contends service was not proper because respondent knew appellant's address at the time it submitted an affidavit to the district court stating that appellant was avoiding service and could not be found. He also argues, as part of this contention, that

respondent's failure to mail him a copy of the summons and complaint makes a difference. Appellant further contends that the district court did not make the necessary findings under Minn. R. Civ. P. 4.04, including whether appellant's place of residence was unknown, whether respondent conducted a due and diligent search for appellant, and whether appellant concealed himself within the state with the intent to avoid service. Finally, appellant argues that the district court's factual findings are clearly erroneous.

"Whether service of process was effective, and personal jurisdiction therefore exists, is a question of law that we review de novo." *Shamrock Dev. Inc. v. Smith*, 754 N.W.2d 377, 382 (Minn. 2008). A defendant challenging sufficiency of service has the burden of showing that service was improper. *Id.* at 384. "[I]n conducting this review, we must apply the facts as found by the district court unless those factual findings are clearly erroneous." *Id.* at 382. To determine whether a finding of fact is clearly erroneous, "we examine the record to see if there is reasonable evidence in the record to support the court's findings. And when determining whether a finding of fact is clearly erroneous, we view the evidence in the light most favorable" to the facts found in the district court. *Rasmussen v. Two Harbors Fish Co.*, 832 N.W.2d 790, 797 (Minn. 2013) (quotations and citations omitted).

Minn. R. Civ. P. 4.04(a) specifies those cases wherein "service by publication shall be sufficient to confer jurisdiction." The applicable provision here, rule 4.04(a)(1), provides that service by publication is appropriate "[w]hen the defendant is a resident individual domiciliary having departed from the state with intent to defraud creditors, or to avoid service, or remains concealed therein with the like intent." Section (a) also provides:

> The summons may be served by three weeks' published notice in any of the cases enumerated herein when the complaint and an affidavit of the plaintiff or plaintiff's attorney have been filed with the court. The affidavit shall state the existence of one of the enumerated cases, and that the affiant believes the defendant is not a resident of the state or cannot be found therein, and either that the affiant has mailed a copy of the summons to the defendant at the defendant's place of residence or that such residence is not known to the affiant.

Minn. R. Civ. P. 4.04(a). In any case, Minnesota law requires that a diligent effort must have been made to personally serve the defendant. *Arnold v. Boggs*, 129 Minn. 270, 271, 152 N.W. 640, 641 (1915).

Here, respondent submitted an Affidavit for Publication of Summons to the district court, which stated that appellant "is a resident individual who has kept himself concealed within the State with the intent of avoiding service of process"; "[t]hat after due and diligent search, the Plaintiff has not been able to find the Defendant within the State of Minnesota"; and "[t]hat the Defendant's place of residence is unknown." Respondent also filed an Affidavit of Not Found from a Metro Legal Services Inc. process server and a similar affidavit from the Hennepin County Sheriff. The record also contains an Affidavit of Publication, showing that the summons was published for three consecutive weeks.

Respondent complied with the requirements of rule 4.04 concerning service by publication. Appellant agrees that he lives in Minnesota. For rule 4.04 to be satisfied, the district court needed to find that appellant "remain[ed] concealed" in the state with the intent "to defraud creditors, or to avoid service." Minn. R. Civ. P. 4.04(a)(1). The district court made this finding, stating in its memorandum "it appears that defendant was avoiding service and the use of service by publication was justified." The district court also made

the implicit finding that respondent conducted a diligent search for appellant when it described in detail the efforts made to personally serve appellant, including over 20 attempts to serve him at what were believed to be his work and residence addresses. To our view, appellant was properly served by publication, and the record supports the district court's factual findings in support of that conclusion. For this reason, we conclude that any defect in the district court's articulation of the basis for this decision regarding the propriety of service by publication is harmless, and therefore not a basis for reversal. *See* Minn. R. Civ. P. 61 (requiring harmless error to be ignored).

Appellant contends that respondent lied in the affidavit submitted to the district court by stating appellant's place of residence was unknown. He also asserts that respondent should have mailed the summons and complaint to appellant. After many failed attempts to serve appellant at what it thought was his place of residence, and not finding appellant there, respondent reasonably concluded that it did not know where appellant resided and so stated by affidavit. Minn. R. Civ. P. 4.04 does not require that a party attempt to mail a summons and complaint to a defendant at his last-known place of residence for service by publication to be proper.[1] The rule requires either that the summons be mailed to a defendant's "place of residence" or that the plaintiff acknowledge in an affidavit that the defendant's place of residence is unknown. The district court did

[1] Minn. R. Civ. P. 4.05 permits service by mail as an alternative to personal service, but the rules do not require service by mail in cases where service by publication is permitted. Respondent made no attempt to serve appellant under rule 4.05, and was not obliged to do so.

not err in concluding that respondent did not know appellant's place of residence and that service was proper despite no copy of the summons having been mailed to appellant.

II. Appellant failed to satisfy the *Finden* elements and is therefore not entitled to relief under Minn. R. Civ. P. 60.02(a).

Appellant next argues that, even if the judgment against him is not void, he should still be entitled to relief from it and that the district court clearly erred by finding that he has no reasonable excuse for defaulting and has no defense on the merits.

A party moving to reopen a default judgment must meet the four *Finden* elements: that he (1) has "a reasonable defense on the merits," (2) "has a reasonable excuse for his failure or neglect to answer," (3) "has acted with due diligence after notice of the entry of judgment," and that (4) "no substantial prejudice will result to the other party." *Finden v. Klass*, 268 Minn. 268, 271, 128 N.W.2d 748, 750 (1964). All four of these elements must be shown by the moving party to obtain relief. *Gams v. Houghton*, 884 N.W.2d 611, 619-20 (Minn. 2016). A district court has broad, though not unlimited, discretion in ruling on a rule 60.02 motion. *Northland Temps., Inc. v. Turpin*, 744 N.W.2d 398, 402 (Minn. App. 2008), *review denied* (Minn. Apr. 29, 2009). If the district court's ruling on a rule 60.02 motion is based on a "misapprehension of the law" or on "facts not supported by the record," we will reverse. *Id.* at 402-03 (quotation and citation omitted).

Here, the district court found that appellant failed to satisfy two of the *Finden* elements. It found that appellant had no reasonable excuse for defaulting, and that appellant has no defense on the merits.

The district court's conclusion that appellant did not have a reasonable excuse for defaulting is based on the finding, which the record supports, that appellant was avoiding service and was on notice regarding the suit against him. It follows from this supported finding that appellant knew that he would be required to respond to the lawsuit. His willful avoidance of service cannot amount to a reasonable excuse for not answering. On this record, it is evident that appellant knew respondent was trying to sue him and that he was actively avoiding service.

The record also supports the district court's determination that appellant has no defense on the merits. "A reasonable defense on the merits is one that, if established, provides a defense to the plaintiff's claim." *Id.* at 403. The district court found that appellant signed a retainer agreement for the respondent to represent him in a divorce and that appellant "agreed to be billed for legal services monthly and understood that payment of the monthly billing was due upon receipt." It found that that appellant followed the agreement and paid his bills until the parties disagreed about the course of representation, after which appellant permitted respondent to withdraw from representing him. The district court also found that appellant did not dispute the total debt for several months, creating an account stated. The record supports the district court's determination that nearly all of the amount claimed to be due on the account relates to services rendered before the parties' disagreement about appellant's desire to withdraw from the stipulated settlement. The record supports the district court's finding that appellant has no reasonable defense against the debt.

Because appellant failed to satisfy all of the *Finden* elements, the district court did not abuse its discretion when it denied appellant's rule 60.02 motion to vacate the default judgment.

Affirmed.