STATE OF MINNESOTA
IN COURT OF APPEALS
A16-2004

Livingston Financial, LLC,
as successor in interest to US Bank,
Respondent,

vs.

Daniel O. Ward, II,
Appellant.

Filed June 19, 2017
Reversed and remanded
Bratvold, Judge

Ramsey County District Court
File No. 62-CV-08-7877

Ryan Supple, Derrick Weber, Messerli & Kramer P.A., Plymouth, Minnesota (for respondent)

Michael Kemp, MET Law Group, St. Paul, Minnesota (for appellant)

Considered and decided by Bratvold, Presiding Judge; Halbrooks, Judge; and Jesson, Judge.

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

BRATVOLD, Judge

Appellant challenges the district court's denial of his motion, under Minn. R. Civ. P. 60.02(d), to vacate a default judgment. Appellant argues that the judgment was void for lack of personal jurisdiction because substitute service was not completed at his "usual

place of abode." Because we are unable to discern the district court's findings regarding appellant's usual place of abode at the time of service, whether substitute service was effective and, if not, whether the default judgment was void for lack of personal jurisdiction over appellant, we reverse and remand for additional proceedings consistent with this opinion.

FACTS

Respondent Livingston Financial, LLC, sued appellant Daniel Ward to recover on defaulted credit card accounts. On April 3, 2008, Livingston, through the Ramsey County Sheriff's Office, served the summons and complaint on Ward's wife at an address on Dale Street North in Saint Paul, Minnesota (Dale Street address). Ward's wife averred that she informed the deputy Ward no longer lived at the Dale Street address; she accepted "the package and signed for it anyway, but never delivered it." The deputy signed an affidavit of service, stating that service was completed by leaving a copy of the summons and complaint with Ward's wife at his "usual abode."

Ward did not file an answer or otherwise respond to the complaint. In August 2008, the district court granted Livingston's motion to enter a default judgment against Ward for $2,619.99. Between August 2008 and January 2013, Livingston attempted to collect on the judgment by sending Ward several garnishment summonses to the Dale Street address. Livingston did not receive notice of a changed address, and the summonses were not returned for incorrect mailing addresses.

In February 2013, Ward called counsel to discuss settlement, and Ward confirmed that his address was the Dale Street address. For three months, Ward regularly

communicated with Livingston's counsel about garnishment. In June 2013, Ward informed Livingston's counsel that "he may have a new address," but he refused to provide it and requested correspondence be sent to the Dale Street address. Accordingly, Livingston continued to send garnishment summonses to the Dale Street address. In July 2014, Ward told Livingston's counsel that he had received correspondence from Livingston at the Dale Street address. Between August 2014 and June 2016, Livingston sent four additional garnishment summonses to the Dale Street address.

On June 28, 2016, Ward's obligation to Livingston was fully satisfied via garnishment, and Ward's credit account was closed.[1] On June 29, 2016, Ward moved to vacate the default judgment under Minn. R. Civ. P. 60.02(d), arguing that it was void for lack of personal jurisdiction due to ineffective service. Ward contended that substitute service on his wife was ineffective because the Dale Street address was not his "usual place of abode." Ward asserted that he moved out of the Dale Street address before Livingston attempted service in April 2008.

Ward submitted his own affidavit and an affidavit by his wife, averring that, at the time of service, he and his wife were married but had separated. Ward's affidavit states that, in October 2007, he moved out of the Dale Street address and into a property located

[1] Livingston argued to the district court that Ward's motion to vacate was moot because the judgment was satisfied. The district court rejected this argument because the judgment was satisfied involuntarily via garnishment, relying on *Lyon Fin. Servs., Inc. v. Waddill*, 607 N.W.2d 453, 454–55 (Minn. App. 2000). Livingston did not appeal this issue. *Lyon* held an involuntarily satisfied judgment does not preclude a party from moving to vacate the judgment because, unlike a voluntarily satisfied judgment, "it does not involve a waiver of rights that results in mootness." *Id.* at 455.

on Topping Street in Saint Paul (Topping Street address). Ward did not leave personal property or receive mail at the Dale Street address, and he did not intend to return. Wife's affidavit corroborates many details and states that she believed the separation was permanent, but she "did not know where he went after he moved out." Ward submitted exhibits establishing that he listed the Topping Street address on an application for a new driver's license in December 2007, he received mail addressed to him at the Topping Street address in 2008, and the Internal Revenue Service listed the Topping Street address as his address for the 2008 tax year.

In response, Livingston submitted an affidavit by its counsel documenting communications with Ward from 2013 through 2016. Applying a four-factor test set out in *Finden v. Klaas*, the district court determined that: (1) Ward's jurisdictional challenge lacked merit because the evidence that Ward had moved out of the Dale Street address was not clear and convincing; (2) Ward had no reasonable excuse for not answering the complaint; (3) Ward was not diligent in bringing his motion to vacate because he waited more than eight years after judgment was entered; and (4) Livingston would be substantially prejudiced if the judgment was vacated because Livingston's claim might be time-barred. *See* 268 Minn. 268, 271, 128 N.W.2d 748, 750 (1964). Accordingly, the district court denied Ward's motion to vacate. Ward appeals.

D E C I S I O N

At the outset, Ward argues that the district court applied the wrong legal analysis to his motion to vacate a void judgment under Minn. R. Civ. P. 60.02(d). Generally, this court reviews a district court's decision whether to vacate a judgment for an abuse of discretion,

and the district court must consider four "*Finden* factors," including whether: (1) the moving party has a reasonable claim on the merits; (2) there is a reasonable excuse for the moving party's failure to act; (3) the moving party acted with due diligence after receiving notice of the entry of judgment; and (4) the opposing party will suffer any substantial prejudice if judgment is vacated. *Gams v. Houghton*, 884 N.W.2d 611, 619–20 (Minn. 2016) (citing *Finden*, 268 Minn. at 271, 128 N.W.2d at 750).

But when a party moves to vacate a void judgment under Minn. R. Civ. P. 60.02(d), no discretion is involved. *Hengel v. Hyatt*, 312 Minn. 317, 318, 252 N.W.2d 105, 106 (1977). A district court *must* vacate a void judgment, "without regard to such factors as the existence of a meritorious defense." *Peterson v. Eishen*, 495 N.W.2d 223, 225 (Minn. App. 1993), *aff'd*, 512 N.W.2d 338 (Minn. 1994). A judgment is void if the issuing court lacked personal jurisdiction over a party due to ineffective service of process. *Hengel*, 312 Minn. at 318, 252 N.W.2d at 106. Whether service of process was effective, and whether a court therefore had personal jurisdiction, is a legal question that this court reviews de novo. *Shamrock Dev., Inc. v. Smith*, 754 N.W.2d 377, 382 (Minn. 2008). "We also review the construction and application of the Minnesota Rules of Civil Procedure de novo." *Id.* Thus, the issue for this court is whether service of process on Ward was effective.

I. Substitute service must be completed at the defendant's "usual place of abode."

"Service of process in a manner not authorized by the rule is ineffective service." *Tullis v. Federated Mut. Ins. Co.*, 570 N.W.2d 309, 311 (Minn. 1997). The Minnesota Rules of Civil Procedure authorize personal service by leaving "a copy at the individual's *usual place of abode* with some person of suitable age and discretion then residing therein."

Jaeger v. Palladium Holdings, LLC, 884 N.W.2d 601, 604 (Minn. 2016) (emphasis added). This is called "substitute service." *Id.* at 605.

Determination of a person's usual place of abode is a fact question for the district court to determine. *Lundgren v. Green*, 592 N.W.2d 888, 890 (Minn. App. 1999), *review denied* (Minn. July 28, 1999). "'[U]sual place of abode' is a much more restricted term than 'residence,' and means the place *where the defendant is actually living at the time when service is made*." *Holtberg v. Bommersbach*, 236 Minn. 335, 337, 52 N.W.2d 766, 768 (1952) (emphasis added).

When a defendant questions the effectiveness of service, Minnesota courts apply a burden-shifting framework. Plaintiff bears the initial burden of submitting evidence of effective service. *DeCook v. Olmsted Med. Ctr., Inc.*, 875 N.W.2d 263, 271 (Minn. 2016). This initial burden is a "low hurdle," and may be accomplished through submission of an affidavit of service verifying that service was completed. *Id.* If the plaintiff meets its initial burden, the burden shifts to the defendant to show ineffective service. *Id.*

Here, Livingston satisfied its initial burden by submitting the deputy's affidavit of service, which stated that service was completed at the Dale Street address and given to Ward's wife, and that the Dale Street address was Ward's usual place of abode. Therefore, the burden shifted to Ward to prove ineffective service.

II. An affidavit of service is inconclusive evidence of effective service when the process server lacked personal knowledge of the defendant's usual place of abode.

Ward argues that service was ineffective because the Dale Street address was not his usual place of abode. Livingston responds that Ward did not provide sufficient evidence

"that he was living elsewhere on the date of service." The district court stated that Ward was required to rebut Livingston's affidavit of service with clear and convincing evidence.[2] Ward argues that the clear-and-convincing-evidence standard does not apply.

Generally, an affidavit of service is "strong evidence of proper service," and must "be overcome by the production of clear and convincing evidence." *Peterson*, 495 N.W.2d at 225–26. But "when the process server has no personal knowledge regarding where the defendant actually is living, the portion of the affidavit of service relating to the defendant's usual place of abode is inconclusive." *Id.* at 226. Lack of personal knowledge, however, does not wholly overcome "the effect of the [affidavit of service] as prima facie evidence" and the defendant still bears the burden of proving ineffective service. *Kueffner v. Gottfried*, 154 Minn. 70, 73, 191 N.W. 271, 272 (1922).

Livingston did not submit any evidence establishing the deputy's personal knowledge of Ward's usual place of abode. Therefore, the portion of the deputy's affidavit of service related to Ward's usual place of abode is inconclusive. Ward retained the burden to rebut Livingston's affidavit of service, but we can find no legal authority holding that a defendant must prove usual place of abode by clear and convincing evidence when the

[2] Ward also argues that the district court erred because it applied an "undisputed" evidence standard. We disagree. In comparing the facts of this case to another case, the district court noted that Ward's evidence conflicted with Livingston's evidence and that "[t]his contradictory information is not the kind of 'undisputed' information that the court of appeals described in" *Lundgren*, 592 N.W.2d 888, where this court found that substitute service was ineffective. The district court's comment did not state the evidentiary standard it was applying, but rather discussed Minnesota precedent and stated that the evidence in Ward's case created a fact dispute.

plaintiff's evidence of service is inconclusive. Thus, the district court erred in its analysis of Ward's evidence.

Livingston urges us to conclude that the district court found Ward's usual place of abode was the Dale Street address in April 2008 and that this finding is supported by record evidence. While the district court's decision may suggest the likelihood that it would make a finding adverse to Ward, we discern no such finding in the court's decision.

The district court determined that Ward separated from his wife in October 2007 and that both Ward and his wife believed the separation was permanent. But the district court also noted that Ward's assertion that he had moved out of the Dale Street address conflicted with statements he "allegedly" made to Livingston's counsel more than six years after service. The district court also summarized conflicting statements in wife's and the deputy's affidavits and stated that the deputy's affidavit of service "does not reflect the version of events advanced by Ms. Ward." In closing this discussion of the evidence, the district court determined that it was disputed whether Ward "made his own home, removed his personal belongings from his wife's house and, most importantly, had no intent of returning."

We agree that the evidence creates a fact question as to whether Ward had permanently moved out of the Dale Street address with no intent of returning at the time of service. It is unclear to us, however, how the district court resolved this fact dispute, or what weight the district court assigned to the parties' affidavits. *See Lundgren*, 592 N.W.2d at 890 (stating that determination of a person's usual place of abode is a fact question, and appellate review is limited to determining whether the district court's findings are clearly

erroneous); *see also Holtberg*, 236 Minn. at 338, 52 N.W.2d at 769 (noting that this court defers to a district court's assignment of weight to conflicting affidavits).

Livingston also argues that this court should affirm based on the district court's determination that Ward did not have a reasonable defense on the merits.[3] But, as we explained above, whether Ward's jurisdictional defense was reasonable on the merits and whether the court had personal jurisdiction over Ward are two different legal determinations.

We are unable to conduct effective appellate review without relevant factual and credibility determinations. *Wright Elec., Inc. v. Ouellette*, 686 N.W.2d 313, 324 (Minn. App. 2004) ("[T]his court cannot serve as the fact-finder."), *review denied* (Minn. Dec. 14, 2004); *see also Nelson v. Schlener*, 859 N.W.2d 288, 294 (Minn. 2015) (stating that this court's function "is limited to identifying errors and then correcting them" (quotation omitted)). Therefore, we reverse and remand to the district court to determine Ward's usual place of abode at the time of service, whether substitute service was effective and, if not, whether the default judgment was void for lack of personal jurisdiction.

Reversed and remanded.

[3] Livingston argues alternatively that the district court's decision should be affirmed because Ward's vacatur motion was untimely under Minn. R. Civ. P. 60.02. *See Bode v. Minn. Dep't of Nat. Res.*, 612 N.W.2d 862, 869–70 (Minn. 2000) (holding that a motion to vacate a judgment that is void for lack of subject-matter jurisdiction must be brought within a "reasonable time"). Livingston did not raise the timeliness issue in the district court, therefore, it is not properly before us and we do not address it. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).