STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1060

Patrick Wandersee, et al.,
Appellants,

vs.

RAM Mutual Insurance Company,
Respondent.

Filed February 28, 2022
Affirmed
Slieter, Judge

Sherburne County District Court
File No. 71-CV-20-864

Edward E. Beckmann, Beckmann Law Firm, LLC, Bloomington, Minnesota (for appellants)

John J. Neal, Boe M. Piras, Willenbring, Dahl, Wocken & Zimmermann, PLLC, Cold Spring, Minnesota (for respondent)

Considered and decided by Gaïtas, Presiding Judge; Smith, Tracy M., Judge; and Slieter, Judge.

NONPRECEDENTIAL OPINION

SLIETER, Judge

Within four days of a two-year limitation to bring a claim, appellants attempted substitute service of their complaint against respondent through the commissioner of commerce. The district court dismissed the complaint, without prejudice, for insufficient service of process. After the two-year limitation period expired, appellants served an

"amended" complaint, which the district court dismissed as untimely. Appellants claim the district court erred in both orders.

Because the district court properly dismissed the first complaint for insufficient service of process, relation back does not apply to the "amended" complaint, and the district court did not err in dismissing the second complaint as untimely, we affirm.

FACTS

Appellants Patrick and Jean Wandersee were insured by respondent RAM Mutual Insurance Company for loss caused by, among other perils, fire, windstorm, or hail. The insurance policy contained a Minnesota Amendatory Endorsement which included a provision requiring that any suit to recover for a property loss commence within two years after the date of the loss.

On August 30, 2018, Wandersees' property sustained wind and hail damage for which they filed a claim. RAM denied coverage after its adjuster reviewed the scope of the damage and determined repair costs would not exceed the deductible. Wandersees disagreed with the determination and, on August 26, 2020, demanded that RAM nominate a disinterested appraiser as provided by the insurance policy. In compliance with the policy, RAM appointed an appraiser within 20 days.

On August 27, 2020, Wandersees attempted to commence a suit against RAM by substitute service of process on the commissioner of commerce pursuant to Minn. Stat. § 45.028 (2020). RAM moved to dismiss the complaint for insufficient service of process, arguing the complaint did not meet the requirements for substitute service. The district court agreed and, on March 2, 2021, ordered the complaint "dismissed without prejudice,"

though no entry of judgment was ordered. On March 12, 2021, Wandersees personally served RAM with an "amended" complaint. The district court concluded that the "amended" complaint was untimely pursuant to the two-year contractual limitation period and entered a judgment of dismissal on June 22, 2021. Wandersees appeal from the judgment of dismissal.

DECISION

As a preliminary matter, we address the scope of our review. Wandersees appeal the June 22 judgment of dismissal. In that order, the district court determined the "amended" complaint was untimely filed because the suit-limitation period had expired and, as it determined in its March 2 order dismissing the original complaint, Wandersees had not commenced a suit by effectively completing service of process. Because Wandersees' appeal of the June 22 order "involve[es] the merits" of the March 2 order, we first review the March 2 order. Minn. R. Civ. App. P. 103.04.

I. First Order: The district court properly dismissed Wandersees' August 27 complaint for insufficient service of process.

Appellate courts review "whether service of process was effective, and personal jurisdiction therefore exists" *de novo*. *Shamrock Dev., Inc. v. Smith*, 754 N.W.2d 377, 382 (Minn. 2008). Where service of process is governed by statute, the "[p]rovisions 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) (citing *Lebens v. Harbeck*, 243 N.W.2d 128, 129 (Minn. 1976)).

Minn. Stat. § 45.028, subd. 1, allows substitute service on the commissioner of commerce when a person "engages in conduct prohibited or made actionable by chapters 45 to 83, 155A, 309, and 332, and section 326B.802, or any rule or order under those chapters" and an action "against the person which is based on that conduct . . . is brought under" the same statutes, rules, or orders. Wandersees commenced this action alleging violation of one of the listed chapters, specifically, Minn. Stat. § 65A.01 (2020).

Minn. Stat. § 65A.01, subd. 3, provides required minimum protections for insureds in a policy covering the peril of fire.[1] *Poehler v. Cincinnati Ins. Co.*, 899 N.W.2d 135, 145 (Minn. 2017) (reiterating that the statutory provisions are mandatory and may not be waived, but insurance companies may include provisions offering more protection). As is relevant to Wandersees' complaint, if an insured and an insurer cannot agree on the cash value or amount of a partial loss, "then, on the written demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within 20 days of such demand." Minn. Stat. § 65A.01, subd. 3.

The district court found that RAM "appointed an appraiser on September 11, 2020, which was within the statutory 20-day deadline" and Wandersees failed to "make any allegations that the insurance policy does not meet the coverage requirements set out by Minn. Stat. § 65.01" or "point to any other conduct of [RAM] that was prohibited by, or made actionable pursuant to, Minn. Stat. § 65A.01." For these reasons, the district court

[1] For certain policies, the statutory minimum requirements for an insurance policy covering peril of fire apply to other perils. *See Leamington Co. v. Nonprofits' Ins. Ass'n*, 615 N.W.2d 349, 353 n.3 (Minn. 2000). The parties agree that the required suit-limitation period applies to the policy here, which covers wind and hail loss.

concluded, "the requirements of Minn. Stat. § 45.028 ha[d] not been satisfied" and, therefore, "[s]ervice of process was not completed."

Wandersees argue the district court improperly dismissed their complaint for failing to meet the substitute service requirements because it "include[d] multiple legal theories under Minn. Stat. Ch. 65A, and hypothetical, future facts are permissible under the Rules of Civil Procedure." This argument misunderstands the requirements for substitute service pursuant to section 45.028 and application of Minnesota's notice-pleading standard.

First, substitute service pursuant to section 45.028 requires the complaint to allege the defendant "engage[d] in conduct prohibited or made actionable" by section 65A. Minn. Stat. § 45.028, subd. 1. The plain language of the statute, therefore, requires an allegation that the defendant engaged in a prohibited act or behavior for substitute service to be available. *Allstate*, 590 N.W.2d at 822. Wandersees' complaint alleged that RAM had "not nominated an appraiser" and "[r]efusal to nominate an appraiser is contrary to the policy and Minn. Stat. § 65.01, subd. 3." Wandersees' complaint also requested declaratory judgment that Wandersees were entitled to "an appraisal for the entire amount of all loss or damage" and "full coverage of all loss or damage."

Wandersees served the complaint on the commissioner the day after demanding appraisal. As the district court noted, as of that date, RAM had not "engage[d] in conduct prohibited or made actionable" by section 65A.01, subd. 3, because 19 days remained within which it may comply with the statutory obligation. Ultimately, RAM did timely appoint an appraiser. This allegation of a violation of section 65A.02, subdivision 3, therefore fails. Wandersees' request for declaratory judgment similarly fails because it

simply requests a declaration of coverage but makes no allegation that RAM had engaged in any prohibited or actionable conduct.

Second, Wandersees are correct that "Minnesota is a notice-pleading state." *Halva v. Minn. State Colls. & Univs.*, 953 N.W.2d 496, 502 (Minn. 2021) (quoting *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 604-05 (Minn. 2014)). However, this undisputed axiom does not answer the question before us. The notice-pleading standard addresses whether a pleading sufficiently "sets forth a claim for relief . . . showing that the pleader is entitled to relief." *Walsh*, 851 N.W.2d at 601 (quoting Minn. R. Civ. P. 8.01). The district court properly dismissed Wandersees' complaint for insufficient service of process because the complaint did not identify "conduct prohibited or made actionable by" section 65A to authorize substitute service pursuant to section 45.028, not failure to state a claim. Whether the complaint sufficiently stated a claim is immaterial because Wandersees never effected service.

In sum, Wandersees' complaint did not meet the statutory requirements for substitute service and therefore the district court properly dismissed the complaint without prejudice. *Wessin v. Archives Corp.*, 592 N.W.2d 460, 467 (Minn. 1999) ("[T]he law favors cases being decided on their true merits, and thus a dismissal without prejudice may be preferable to a dismissal with prejudice where the dismissal is based on failure to follow pleading requirements." (quotation omitted)).

II. Second Order: The district court properly dismissed Wandersees' "amended" complaint.

The district court dismissed the second complaint as time-barred because "[s]ervice on this matter was completed . . . over six months beyond the two-year window to bring a suit."

Appellate courts review a rule 12.02(e) dismissal for failure to timely commence an action *de novo*, "look[ing] only to the facts alleged in the complaint, accepting those facts as true." *Hansen v. U.S. Bank Nat'l Ass'n*, 934 N.W.2d 319, 325 (Minn. 2019). When the dismissal is based on a statute of limitations, "a motion to dismiss should be granted only when it is clear from the stated allegations in the complaint that the statute of limitations has run." *Id.* at 326.

Wandersees argue the "amended" complaint was not time-barred because it relates back to the defectively served complaint.[2]

A claim or defense which may otherwise be time-barred may be pleaded in an amended pleading if it relates back to "the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Minn. R. Civ. P. 15.03. However, relation back "does not allow the creation of a lawsuit when action has not been properly commenced in the first instance." *Van Slooten v. Estate of Schneider-Janzen*, 623 N.W.2d 269, 271 (Minn. App. 2001) (citing *Regie de l'assurance Auto. du Quebec v. Jensen*, 399

[2] Wandersees also argue that the "amended" complaint was not time-barred because judgment on the first order was not entered and thus "the file remained active[] [w]ith continuation of the case but a dismissed pleading." The argument lacks merit. Service was not properly effected, therefore there was no case to "remain active." Minn. R. Civ. P. 3.01.

N.W.2d 85, 92 (Minn. 1987)). "If the original notice is invalid, it cannot be validated by later amendment after the expiration of the statutory period." *Greenly v. Indep. Sch. Dist. No. 316*, 395 N.W.2d 86, 90 (Minn. App. 1986).

We have already concluded that the district court, by its first order, properly dismissed the complaint for insufficient service of process. Wandersees do not dispute that the "amended" complaint would be time-barred if it does not relate back. *Van Slooten* compels our conclusion that the "amended" complaint cannot relate back to a lawsuit that was never properly commenced. The district court properly dismissed Wandersees' "amended" complaint.

Affirmed.