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STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0742

Laura L. Walsh,
Appellant,

vs.

U. S. Bank, N. A.,
Respondent.

Filed November 18, 2013
Reversed and remanded
Smith, Judge

Hennepin County District Court
File No. 27-CV-12-25292

Martin A. Carlson, Law Offices of Martin A. Carlson, Ltd., Minneapolis, Minnesota; and

Roy B. Henline, Henline Law, P.A., Maple Grove, Minnesota (for appellant)

Charles F. Webber, Colton D. Long, Faegre Baker Daniels, LLP, Minneapolis, Minnesota (for respondent)

Considered and decided by Cleary, Presiding Judge; Kirk, Judge; and Smith, Judge.

UNPUBLISHED OPINION

SMITH, Judge

We reverse and remand because the district court erred by (1) dismissing appellant Laura Walsh's claim under Minn. R. Civ. P. 12.02(e) that respondent U. S. Bank, N. A. (USB) failed to properly serve a notice of foreclosure and (2) ruling that the sheriff's

certificate from the sale pursuant to Minn. Stat. § 580.19 (2012) conclusively showed that the service of notice was proper.

FACTS

When Walsh defaulted on her mortgage, USB, the holder of that mortgage, began a nonjudicial foreclosure proceeding. USB served a notice of the foreclosure sale and other documents on a woman at the property who refused to identify herself. The process server's affidavit of service states that he was at the premises and served the documents

> on the person(s) in possession thereof; that on said day and for some time prior thereto, said premises were and have been occupied by Jane Doe, adult female occupant who refuses to give her name or acquiesce to service and no one else; that (s)he served the attached by handing to and leaving with Jane Doe personally one (1) true and correct copy thereof. At the time of service, Jane Doe refused to open the door and accept service in hand. I displayed the Notices to her and told her that I would leave them in the door if she didn't want to cooperate. She began shouting at me about trespassing . . . much of what she said was unintelligible. I left the Notices in a secure place in her door.

After the foreclosure sale, Walsh sued USB, asserting that the foreclosure sale was defective because USB had not properly served the notice of foreclosure. USB moved to dismiss Walsh's suit with prejudice, under Minn. R. Civ. P. 12.02(e), arguing that her complaint failed to state a claim on which relief may be granted. After a hearing, the district court granted USB's motion to dismiss, stating that Walsh "failed to establish any evidence or facts giving rise to a plausible claim for relief[,]" and that "[a]ll of the appropriately considered facts fail to establish improper service. Instead, her purported claim directly contradicts the Affidavit of Service on Occupant attached to her

Complaint. In addition, pursuant to Minn. Stat. § 580.19, the Sheriff's Certificate serves as prima facie evidence that service was proper."

D E C I S I O N

I.

When a property is foreclosed by advertisement, a copy of the notice of a foreclosure sale "shall be served in like manner as a summons in a civil action" on "the person in possession of the mortgaged premises, if the same are actually occupied[.]" Minn. Stat. § 580.03 (2012). Here, it is undisputed that the premises were occupied. A summons in a civil action is served "by delivering a copy to the individual personally or by leaving a copy at the individual's usual place of abode with some person of suitable age and discretion then residing therein." Minn. R. Civ. P. 4.03(a).

The parties agree that if the Jane Doe mentioned in the affidavit of the process server was in fact Walsh, service was proper. Thus, we focus on whether Walsh adequately alleges that the process server failed to leave the papers at Walsh's "usual place of abode with some person of suitable age and discretion then residing therein[,]" as required by rule 4.03(a) for substitute service.

Although rule 4.03(a) requires substitute service to be accomplished by serving a person "residing" at the usual place of abode of the person to be served, the affidavit of USB's process server refers to Jane Doe as an "occupant" of the premises without addressing whether Jane Doe resided at the premises. Walsh asserts that "the persons residing at the Property were [Walsh] and [] her roommate." USB accepts the notion asserted by Walsh that she and her roommate were the *only* persons then residing at the

premises. Further, Walsh alleges that USB failed "to serve the required notice upon a person then residing at [Walsh's] usual place of abode." Given the fact that only Walsh and her roommate resided at the premises, the complaint asserts that Jane Doe did not then "reside" at the premises for purposes of substitute service under rule 4.03.

An appellate court "will not uphold a Rule 12.02(e) dismissal if it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded." *Radke v. Cnty. of Freeborn*, 694 N.W.2d 788, 793 (Minn. 2005) (quotation omitted). Thus, if Walsh might be able to produce evidence demonstrating that Jane Doe did not reside at the premises for purposes of substitute service under rule 4.03, the dismissal under rule 12.02(e) was improper. Rule 4.03 does not define "residence," but caselaw addressing substitute service under rule 4.03(a), for service of process, notes that "residence means something more than mere physical presence and something less than domicile." *O'Sell v. Peterson*, 595 N.W.2d 870, 872 (Minn. App. 1999) (quotations omitted). Noting that service is intended to give notice, the *O'Sell* court went on:

> In deciding whether an individual is "then residing therein" for purposes of service of process, there must be a nexus between the individual and the defendant that establishes some reasonable assurance that notice would reach the defendant. For example, a relationship of confidence, including but not limited to a familial relationship, may establish a nexus and support the conclusion that notice would reach the defendant. In addition, the duration of an individual's presence, the frequency of the presence, or the intent to return may also establish nexus between the individual and defendant. Finally, evidence that the service actually reached the intended person strongly supports a

> conclusion that service is valid because due process has been afforded.

Id. at 872-73 (citations omitted).

Whether, under *O'Sell*, a nexus existed between Jane Doe and Walsh "establish[ing a] reasonable assurance that notice would reach [Walsh,]" is unclear. Neither the complaint nor the incorporated affidavit of USB's process server address whether Jane Doe's relationship to Walsh was one of confidence, familial or otherwise. Similarly, neither the complaint nor the affidavit address whether Jane Doe intended to return to the premises.

Regarding the duration of Jane Doe's presence at the premises and the frequency of that presence, the affidavit of the process server states, among other things, that he went to the property on November 16, 2011, and that, "on said day and for some time prior thereto, said premises were and have been occupied by Jane Doe, adult female occupant[.]" Thus, apparently, Jane Doe was seen at the premises on November 16, 2011, and on at least one unidentified prior day. Jane Doe's presence at the property *might* show the necessary basis for substitute service, however, this would not preclude Walsh from presenting evidence demonstrating that Jane Doe did not, in fact, reside at the premises. Because Walsh asserts that Jane Doe did not satisfy the residency requirement for substitute service, and because it is possible for Walsh to produce evidence consistent with this theory and because Walsh asserts a legally sufficient claim for relief, dismissal of her action under rule 12.02(e) is not merited. For this reason, we need not address the parties' other disputes regarding service.

II.

The district court also stated that the sheriff's certificate "conclusively establishes that service of the Notice was lawful." Under Minn. Stat. § 580.19 (2012), however, a sheriff's certificate of sale generated by the foreclosure sale of a property foreclosed by advertisement "shall be prima facie evidence that all the requirements of law in that behalf have been complied with[.]" Walsh argues that the district court erred by deeming the sheriff's certificate to be conclusive.

While the memorandum incorporated into the district court's judgment states that the sheriff's certificate "conclusively" shows proper service, it also states twice that, under section 580.19, the sheriff's certificate is only "prima facie evidence" that service was proper. On this record, we read the district court's reference to the conclusive nature of the sheriff's certificate as an imprecise articulation of its adoption of USB's argument in support of the motion to dismiss. Specifically, USB's memorandum supporting its motion to dismiss argued that, because the sheriff's certificate was "prima facie evidence," the requirements for the foreclosure had been satisfied. USB also argued that Walsh had not made any contrary allegations, and the certificate was conclusive. But because Walsh alleges that Jane Doe lacks the residency that would satisfy the requirements for substitute service under rule 4.03(a), the complaint includes allegations contrary to the prima facie evidence provided by the sheriff's certificate.[1] Thus, the

[1] Walsh admits that caselaw indicates "that [section 580.19's] presumption of regularity extends to service of the notice [of sale,]" but she "suggests that a better reading of the statute would be that the sheriff's certificate of sale is prima facie evidence that the sale itself was conducted with regularity, which is something the sheriff would naturally have

sheriff's certificate cannot be used as an alternative basis to show proper service and dismiss Walsh's action.

On remand, the parties shall be allowed to conduct discovery, and the case shall be allowed to proceed accordingly.

Reversed and remanded.

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foundation to certify in a certificate of sale." Any request that presumption generated by section 580.19 should be limited to the sale itself is a request that this court change the reading of that statute. This court does not change existing law. *See Lake George Park, L.L.C. v. IBM Mid-America Employees Fed. Credit Union*, 576 N.W.2d 463, 466 (Minn. App. 1998) (stating that "[t]his court, as an error correcting court, is without authority to change the law"), *review denied* (Minn. June 17, 1998). Alterations of existing law come from the supreme court or the legislature. *See Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987) (stating that "the task of extending existing law falls to the supreme court or the legislature, but it does not fall to this court"), *review denied* (Minn. Dec. 18, 1987).