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DISTRICT II

August 2, 2023

To:

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Circuit Court Judge
Electronic Notice

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Larry W. Rader
2411 Ridge View Dr.
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You are hereby notified that the Court has entered the following opinion and order:

2021AP1882

Larry W. Rader v. Dunkin Donuts Co. (L.C. #2021CV852)

Before Gundrum, P.J., Neubauer and Lazar, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Larry W. Rader, pro se, appeals from an order of the circuit court granting the motion to dismiss his action against Travelers Property Casualty Company of America (“Travelers”).¹ Based upon our review of the briefs and record, we conclude at conference that this case is

¹ Rader also raises arguments on appeal challenging circuit court orders related to parties in addition to Travelers. However, by order of this court dated March 17, 2022, we directed that “Travelers is the only respondent in this appeal.” We therefore do not address Rader’s arguments related to any other parties to this action.

appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).² We summarily affirm the circuit court's order.

After allegedly spilling hot coffee into his lap and sustaining related injuries, Rader filed this action against “Dunkin Donuts Co., a foreign corp., Holiday Wholesale, Inc., and, EMC Insurance.” Rader subsequently filed an amended complaint, naming as defendants “DUNKIN DONUTS CO, a/k/a Dunkin Donuts Franchising LLC,(DE) a subsidiary of DUNKIN Brands, Inc. (DE), insured by Travelers Insurance, a/k/a, Travelers Property Casualty Ins. Co., and EMC Insurance companies, insurers of Wisconsin franchisees and operators of Dunkin Donut stores as Tmart Operations I, LLC or Holiday Wholesale, Inc.” The details of the claims in the amended complaint do not matter to our disposition today; suffice it to say that Rader filed affidavits of service on the Dunkin defendants, but he did not file an affidavit of service with respect to Travelers. Rather than serve Travelers with the summons and amended complaint, Rader emailed the complaint to a claims adjuster at Travelers.

In lieu of answering the amended complaint, Travelers filed a motion to dismiss in the circuit court. Travelers stated three grounds in support of its motion: (1) Rader could not assert a permissible direct action claim against Travelers where Rader fails to allege any negligence claim against Travelers's insured; (2) the complaint contains no viable claim against Travelers because “tortious interference with settlement” is not a recognized cause of action; and (3) Rader failed to properly serve the summons and amended complaint on Travelers. Rader filed a number of motions with the court as well.

² All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

The circuit court held a hearing on Travelers’s motion to dismiss, Rader’s various motions, and the motions of the other defendants who are not a party to this appeal. Following the hearing, the court issued an oral ruling granting Travelers’s motion to dismiss with prejudice on all grounds. The circuit court subsequently issued a written order confirming its oral ruling. Rader appeals.

Personal jurisdiction and service of process are controlled by statute. *See, e.g.*, WIS. STAT. §§ 801.11 and 801.04(2)(a). “The interpretation of a statute is a question of law that we independently decide.” *Sacotte v. Ideal-Werk Krug & Priester Maschinen-Fabrik*, 119 Wis. 2d 14, 16, 349 N.W.2d 701 (Ct. App. 1984).

“A circuit court obtains personal jurisdiction over a defendant when the defendant is served with a summons in the manner prescribed by the statutes.” *Hagen v. City of Milwaukee Emps. Ret. Sys. Annuity & Pension Bd.*, 2003 WI 56, ¶12, 262 Wis. 2d 113, 663 N.W.2d 268. Service over a defendant that is an LLC or corporation is governed by WIS. STAT. § 801.11(5). It is accomplished “[b]y personally serving the summons upon an officer, director or managing agent” of the business organization. Sec. 801.11(5)(a). “In lieu of delivering the copy of the summons to the officer specified, the copy may be left in the office of such officer, director or managing agent with the person who is apparently in charge of the office.” *Id.* Service on an insurer can be made pursuant to paragraph (a) or “to any agent of the insurer as defined by [WIS. STAT. §] 628.02.” Sec. 801.11(5)(d). However, “[s]ervice upon an agent of the insurer is not valid unless a copy of the summons and proof of service is sent by registered mail to the principal place of business of the insurer within 5 days after service upon the agent.” *Id.*

A defendant may bring a motion to dismiss an action based on lack of personal jurisdiction due to untimely or insufficient service of process. WIS. STAT. § 802.06(2)(a)3.-5. *See* WIS. STAT. § 801.04(2)(a) (“A court of this state having jurisdiction of the subject matter may render a judgment against a party personally only if there exists one or more of the jurisdictional grounds set forth in [WIS. STAT. §§] 801.05 or 801.06 and ... [a] summons is served upon the person pursuant to [WIS. STAT. §] 801.11.”). When a plaintiff fails to properly serve a defendant within ninety days of filing the action with the court, the action is not properly commenced and the court has no personal jurisdiction over the defendant. *See* WIS. STAT. §§ 801.02(1); 801.04(2)(a). If a defendant “challenges the service of summons upon the defendant, ... [p]ersonal or substituted personal service shall be proved by the affidavit of the server indicating the time and date, place and manner of service; that the server is an adult resident of the state of service,” and that the summons was left with the defendant or an acceptable substitute for the defendant in accordance with the statutory definitions. WIS. STAT. § 801.10(4)(a).

Despite the fact that defective service of process was a dispositive issue before the circuit court, Rader fails to address that issue in his principal briefing to this court. In fact, rather than challenge that ground for dismissal, Rader himself argues on appeal that the circuit court lacked jurisdiction over Travelers, referring to the insurance company as a “deceitful interloper[.]” But Rader seems to directly contradict this position at various times throughout the briefing, including by asking for “proper and just relief on appeal against [the Dunkin entity] and its pseudo liability insurers,” including Travelers. Rader also contends that he has “an absolute right” to recover damages against Travelers. As such, we construe Rader to be requesting reversal of the motion to dismiss Travelers that the circuit court granted.

On appeal, Travelers advances the same arguments in support of its motion to dismiss that it did in the circuit court. Because, as we now explain, we conclude that Rader's failure to properly and timely serve Travelers is a fundamental defect resulting in the circuit court lacking personal jurisdiction over Travelers, we affirm the circuit court's dismissal order on this ground.

It is undisputed that after Travelers challenged service in the circuit court, Rader did not produce an affidavit of service proving that he properly served the summons and amended complaint on Travelers. Rader could not have done so because he has never served the summons and complaint on any Travelers officer, director, or managing agent, either in Wisconsin or elsewhere. Likewise, Rader has never sent a copy of the summons and proof of service by registered mail to any agent of Travelers as defined by WIS. STAT. § 628.02. Instead, Rader merely emailed a copy of his amended complaint to a Travelers claims adjuster.

Rader does not suggest that any of these recited facts related to service on Travelers are inaccurate. Instead, in response to Travelers's argument to this court that dismissal was warranted due to the deficient service, Rader directs our attention to a letter sent by a Travelers claims professional to one of the other parties to this action after Rader filed his original complaint. Rader argues that "[t]he letter is a general admission of service of the complaint and the amended complaint served on counsel per their Notice of Retainer."

We construe Rader's argument to be that because Travelers obviously had notice of the action as evidenced by the letter, the fact that he did not properly or timely serve the summons and amended complaint in compliance with Wisconsin statutes is of no consequence. However, under Wisconsin law, a circuit court does not have jurisdiction over a corporate defendant unless

service was properly executed. In *Danielson v. Brody Seating Co.*, our supreme court stated as follows:

The service of a summons in a manner prescribed by statute is a condition precedent to a valid exercise of personal jurisdiction, even though a different method might properly have been prescribed, and notwithstanding actual knowledge by the defendant.

....

The evidence does support actual notice, but actual notice alone is not enough to confer jurisdiction upon the court. Service must be made in accordance with the manner prescribed by statute.

Id., 71 Wis. 2d 424, 429-30, 238 N.W.2d 531 (1976). Consistent with *Danielson*, our supreme court has also explained that failure to properly or timely serve a defendant is a “fundamental defect,” and when “the defect is fundamental, no personal jurisdiction attaches regardless of prejudice or lack thereof.” *American Fam. Mut. Ins. Co. v. Royal Ins. Co. of Am.*, 167 Wis. 2d 524, 533, 481 N.W.2d 629 (1992). Applying these principles here, it is clear that Rader’s failure to properly serve Travelers was a fundamental defect. This defect was fatal to Rader’s case because it resulted in the circuit court lacking personal jurisdiction over Travelers. The fact that Travelers may have had actual notice is irrelevant to our inquiry. See *Danielson*, 71 Wis. 2d at 430. Under these circumstances, the circuit court properly granted the motion to dismiss.

We further note that even if emailing a summons and complaint to a corporate agent constituted proper service or if actual notice was a sufficient substitute for service, we would still uphold the circuit court’s dismissal of Rader’s action against Travelers because he did not “serve” a proper person. Rader emailed the amended complaint to a claims adjuster for Travelers. A claims representative is not a person authorized to receive service. See *Archer v.*

Wilcox, 185 Wis. 587, 201 N.W. 768 (1925) (holding that service on a claims adjuster is not service on a managing agent of an insurance company).

We conclude that the circuit court properly dismissed Rader's complaint as to Travelers. Rader's failure to properly serve Travelers with the amended complaint justifies dismissal of his claims against it under WIS. STAT. § 802.06(2)(a)5.

Upon the foregoing, therefore,

IT IS ORDERED that the order of the circuit court is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals