

North Carolina Appellate Court Discusses Service of Process By "Posting" and Due Diligence Enabling "Posting"

Article By:
Michael C. Thelen

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The North Carolina Court of Appeals issued a fractured ruling today on the manner of service and the interpretation of North Carolina Rule of Procedure 4(j1). The case is [In re Powell, No. COA14-498 \(December 2, 2014\)](#).

The heart of the matter is the manner of service. Specifically, whether the holder of the debt properly served the notice of foreclosure, a legal prerequisite.

Service of Foreclosure Notice

The law governing the service of notice of foreclosure provides: **"The notice shall be served and proof of service shall be made in any manner provided by the Rules of Civil Procedure for service of summons, including service by registered mail or certified mail, return receipt requested."** NCGS 45-21.16(a).

The law continues, in the event **"service upon a party cannot be effected after a reasonable and diligent effort"** for **"service of a summons, including service by registered mail or certified mail, return receipt requested"** service by **"publication"** is authorized, which is made **"by posting a notice in a conspicuous place and manner upon the property not less than 20 days prior to the date of the hearing"**. NCGS 45-21.16(a). Notably, **"[s]ervice by posting may run concurrently with any other effort to effect service."** NCGS 45-21.16(a).

Service Pursuant to Rule 4

Rule 4(j1) of the North Carolina Rules of Civil Procedure provides that "when a party cannot with due diligence be served by personal delivery, registered or certified mail, or by a designated delivery service," the party may be served by publication. NCGS 1A-1, Rule 4(j1).

Analysis

The foreclosed-upon appellant made two arguments, neither of which the majority accepted: (1) the use of the word "or" in Rule 4(j1) is conjunctive rather than disjunctive, and therefore a party must attempt service by personal delivery, registered/certified mail, and designated delivery service

before it may rely on posting notice to the subject property; or, in the alternative, (2) if the word "or" is disjunctive, [appellee debtholder] did not exercise due diligence before relying on posting."

On the first issue, the majority determined, "In the considerable amount of caselaw interpreting Rule 4(j1), neither this Court nor our Supreme Court has ever adopted the interpretation espoused by appellant in this case - that a party must attempt personal service, service through registered or certified mail, and service through a designated delivery service before resorting to publication."

To the majority, Rule 4(j1) is disjunctive and appellee debtholder's attempts at mail service and personal service, concurrently with posting, were sufficient to trigger the viability of service by posting.

To the concurring judge, however, Rule 4(j1) is conjunctive and appellee debt holder must show that the foreclosed-upon appellant "cannot with due diligence be served" by mail service, personal service, or designated delivery service. Importantly, the concurring judge notes that, though conjunctive, "a party must [not] actually attempt to serve the opposing party in all three ways before utilizing service by publication" to satisfy Rule 4(j1).

Is this a distinction without a difference? Does the combination of efforts matter? For example, if I try to serve by mail and designated delivery service, but not by personal service, have I shown that the target "cannot with due diligence be served" such that posting is viable? What if I only try by mail, but I try three different times? Have I shown then that the target "cannot with due diligence be served" such that posting is viable?

To the majority, one proper mailing satisfies Rule 4(j1) and NCGS 45-21.16(a) as a matter of law: "[T]his Court has held that where a petitioner attempted to serve the respondent at their known mailing address via certified mail, but the mail was not claimed by the party to be served, the petitioner exercised due diligence sufficient to allow service by publication."

By the concurrence, however, the inquiry becomes factual as to whether "due diligence" can be shown in the case of one mailing.

We'll see if the Supreme Court puts this issue to rest.



It doesn't get much more diligent than a bird.

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