

STATE OF VERMONT
WASHINGTON COUNTY, SS.

FILED
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GREGORY MOTT, }
Plaintiff, }
v. }
CAROLYN R. GEIGER, STATE OF }
VERMONT DEPARTMENT OF TAXES, }
TOWN OF WORCESTER, and JARED }
TANK, MAGGIE MILCARECK, JEFF }
LANG, and STACEY BOESKOR, Tenants, }
Defendants. }

SUPERIOR COURT
WASHINGTON COUNTY
Washington Superior Court
Docket No. 533-8-02 Wncv

Entry Order

In this foreclosure case, Gregory Mott, Plaintiff-mortgagee, seeks a Rule 55 default judgment against Carolyn Geiger, Defendant-mortgagor. Geiger has never appeared in this case. This motion is denied at this time for lack of sufficient service on Defendant Geiger.

“Generally, the rules relating to default judgments should be liberally construed in favor of defendants, and of the desirability of resolving litigation on the merits, to the end that fairness and justice are served.” Desjarlais v. Gilman, 143 Vt. 154, 158-59 (1983). “The tenor [of Rule 55] is to avoid summary action fraught with due process difficulties.” Pizzano Constr. Co. v. Hadwen, 133 Vt. 495, 498 (1975). “[T]he requirement of reasonable notice must be regarded as part of the constitutional due process limitations on the jurisdiction of a state . . . court.” 4A Wright and Miller, Federal Practice and Procedure § 1074, at 357-58.

After filing the complaint, Plaintiff unsuccessfully attempted personal service on Geiger at her out of state residence. By affidavit, Plaintiff’s attorney describes the lack of success as follows:

- 3. On Monday September 16, 2002, I spoke with an administrator at the Lancaster County Sheriff’s Office. She advised that the Sheriff was unable to complete service of Defendant Geiger at the hours that Ms. Geiger is at her residence, and that Ms. Geiger had told the Lancaster Sheriff that she would accept service by personally picking up the Summons and Complaint at the sheriff’s office by Friday September 20, 2002. Ms. Geiger failed to pick up the Summons and Complaint during that week or later.
- 4. On October 5, 2002, the undersigned received the Summons and

Complaint back from the Lancaster County Sheriff with a statement from the sheriff advising that: (i) service could not be completed; (ii) Ms. Geiger was not home when deputies are available; (3) [sic] Ms. Geiger called and stated that she would pick up the papers; and (iv) Ms. Geiger failed to show up to pick up the papers.

Based on this failure at personal service, Plaintiff sought an enlargement of time for service and then attempted alternative service by mail under V.R.C.P. 4(f). Rule 4(f)(1) states:

(f) Service by Mail.

(1) Where service cannot with due diligence be made personally within or outside the state, service of the summons and complaint may be made by mail upon a person described in subdivision (e) in the following cases:

(A) Where the person to be served has an interest in, title to, or right to the possession of goods, chattels, rights, credits, land, tenements, or hereditaments in the state which has been or on pending motion may be attached or secured by trustee process in the commencement of the action, or will be affected by a judgment in the action;

(B) Where the person to be served is one against whom a judgment for divorce or annulment of marriage is sought.

Such service shall be by delivery to the defendant outside the state by registered or certified mail, with restricted delivery and return receipt requested. Service by registered or certified mail under this paragraph shall be complete when the registered or certified mail is delivered and the return receipt signed or when acceptance is refused, provided that the plaintiff shall file with the court an affidavit setting forth the efforts made to obtain personal service and either the return receipt or, if acceptance was refused, an affidavit that upon notice of such refusal a copy of the summons and complaint was sent to the defendant by ordinary first class mail.

Plaintiff's restricted delivery, certified mailing was returned to sender "unclaimed." Plaintiff's counsel then sent the summons and complaint by ordinary first class mail.

The first issue related to the propriety of service under Rule 4(f) is whether Plaintiff sufficiently exercised "due diligence" in attempting personal service prior to the certified mailing. Courts typically require more diligence than present in this case before allowing alternative methods of service. See, e.g., Lepeska v. Farley, 833 P.2d 437 (Wash. Ct. App. 1992) (affidavit not setting out specific facts showing intent to evade or diligence of search held insufficient); Collier v. Dunne, 712 S.W.2d 38 (Mo. Ct. App. 1986) (eight separate attempts at

service by various means sufficiently diligent to warrant service by alternative procedure).

In the present case, Plaintiff's counsel asserts that the Sheriff's office has been unable to effect personal service because the defendant was not at home when the deputies were available, and the defendant failed to voluntarily go to the Sheriff's office to accept the summons and complaint. The affidavit does not state when any attempts at service were made, whether they were made at different times, whether there is any reason to believe that defendant was at home during any of the attempts, or even whether any attempts were in fact made (the affidavit only states that the deputies were not available when, presumably, Defendant was).

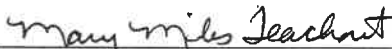
Plaintiff's affidavit does not make a sufficient showing of "due diligence" to warrant service by mail. The Collier court, for instance, in determining whether the plaintiff had "good cause" for not serving the defendant within ninety days, describes the applicable standard as follows: "A showing of good cause requires: 1) proof which must pertain to difficulties in obtaining service of process; 2) proof which shows circumstances that prevent or impair service; and 3) proof that those difficulties and circumstances are attributable to persons and things beyond the control of the plaintiff." Collier, 712 S.W.2d at 40. This is a measure of the diligence required for timely personal service. The affidavit submitted in this case suggests little more than ordinary inconvenience to the process server in arranging personal service.

Even assuming Plaintiff's diligence was sufficient, however, service by first class mail requires the prior refusal of service by certified mail. Plaintiff has not set out any circumstances demonstrating that the "unclaimed" certified mailing was "refused." For an example of circumstances demonstrating a refusal rather than a mere failure to claim a mailing, see Lesowitz v. Miller, 579 N.E.2d 227 (Ohio Ct. App. 1989) (failure to accept service by certified mail sufficiently refused to warrant service by ordinary mail when certified mail rejected because postage due).

Order

For the foregoing reasons, Plaintiff's motion is denied at this time.

Dated at Montpelier, Vermont this 2nd day of May, 2003.



Mary Miles Teachout
Superior Court Judge