REL: May 3, 2019

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2018-2019

2170867

Brittony Mays

v.

Trinity Property Consultants, LLC

Appeal from Shelby Circuit Court
(CV-18-99)

On Second Application for Rehearing

MOORE, Judge.

Trinity Property Consultants, LLC, seeks a rehearing of this court's decision issued on March 8, 2019. In its

application for a rehearing, Trinity Property argues that this court's decision is in conflict with Greene v. Lindsey, 456 U.S. 444 (1982). In Greene, the United States Supreme Court considered whether service of process under Ky. Rev. Stat. § 454.030 (1975), "as applied to tenants in a public housing project, fails to afford those tenants the notice of proceedings initiated against them required by the Due Process Clause of the Fourteenth Amendment." 456 U.S. at 445. Section 454.030, as it read at that time, provided:

> "If the officer directed to serve notice on the defendant in forcible entry or detainer proceedings cannot find the defendant on the premises mentioned in the writ, he may explain and leave a copy of the notice with any member of the defendant's family thereon over sixteen (16) years of age, and if no such person is found he may serve the notice by posting a copy thereof in a conspicuous place on the premises. The notice shall state the time and place of meeting of the court."

The Supreme Court in Greene explained that "'due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" 456 U.S. at 449-50 (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)). The Supreme Court concluded

that notice by posting under § 454.030, after only one failed attempt at personal service, did not afford tenants "adequate notice of the proceedings against them before issuing final orders of eviction, [and thereby] deprived them of property without the due process of law required by the Fourteenth Amendment." 456 U.S. at 456.

At one point in its discussion, the Supreme Court noted, in dicta, that "[n]otice by mail in the circumstances of this case would surely go a long way toward providing the constitutionally required assurance that the State has not allowed its power to be invoked against a person who has had no opportunity to present a defense despite a continuing interest in the resolution of the controversy." 456 U.S. at 455. Trinity Property asserts that because the United States Supreme Court indicated that notice by mailing in addition to posting after one failed attempt at personal service may not offend the notions of due process, then the service in this case, i.e., posting of notice and mailing notice after one failed attempt at personal service, did not violate Brittony Mays's due-process rights.

The issue in this case is not whether posting and mailing is sufficient under a due-process standard. The statute at issue in this case specifically provides that "reasonable effort" must be made before resorting to notice by posting and mailing. Although the statute at issue in Greene did not require "reasonable effort" to perfect service, the Supreme Court discussed whether one attempt at personal service would be considered sufficient to afford a tenant due process, stating:

> "To be sure, the statute requires the officer serving notice to make a visit to the tenant's home and to attempt to serve the writ personally on the tenant or some member of his family. But if no one is at home at the time of that visit, as is apparently true in a 'good percentage' of cases, posting follows forthwith. Neither the statute, nor the practice of the process servers, makes provision for even a second attempt at personal service, perhaps at some time of day when the tenant is more likely to be at home. The failure to effect personal service on the first visit hardly suggests that the tenant has abandoned his interest in the apartment such that mere pro forma notice might be held constitutionally adequate."

456 U.S. at 454 (footnote omitted; emphasis added). The Supreme Court did not hold that one attempt at personal service alone followed by posting and mailing would satisfy due process, as Trinity Property asserts. To the contrary,

the Supreme Court indicated in the foregoing excerpt that a process server making a reasonable effort to personally serve a tenant should attempt service at a place and time when the tenant is likely to be at home, requiring more than one attempt at personal service if necessary.

At one time, Alabama law provided for service of unlawful-detainer actions much in the same manner as the Kentucky statute at issue in Greene. Following the Greene decision, the United States District Court for the Middle District of Alabama struck down former § 35-9-82, Ala. Code 1975, the statute governing service in unlawful-detainer actions, as unconstitutional. See Thorton v. Butler, 728 F.Supp. 679, 684 (M.D. Ala. 1990). In 1990, the Alabama Legislature amended former § 35-9-82 to require "reasonable effort" at personal service before posting and mailing. The legislature carried forward the "reasonable effort" requirement when it adopted the Alabama Uniform Residential Landlord and Tenant Act, § 35-9A-101 et seq., Ala. Code 1975, in 2006. In so doing, the legislature basically incorporated the holding in Greene into Alabama law. Accordingly, we conclude that this court's holding in our opinion issued on

March 8, 2019, construing the phrase "reasonable effort" in this context is in complete harmony with Greene and the legislative intent in using those words.

APPLICATION OVERRULED.

Thompson, P.J., and Donaldson, Edwards, and Hanson, JJ., concur.