

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA01-846

NORTH CAROLINA COURT OF APPEALS

Filed: 4 June 2002

CLIFFORD POWELL,  
Plaintiff,

v.

Wake County  
No. 99 CVS 10539

GALEN QUINN,  
Defendant.

Appeal by plaintiff from order entered 12 March 2001 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 28 May 2002.

*Browne, Flebotte, Wilson & Horn, PLLC, by Martin J. Horn, for plaintiff-appellant.*

*Yates, McLamb & Weyher, L.L.P., by John W. Minier, for defendant-appellee.*

HUDSON, Judge.

Plaintiff appeals from an order dismissing his complaint for lack of jurisdiction, insufficiency of process, and insufficient service of process. The sole issue presented is whether plaintiff exercised due diligence in attempting to serve defendant with process before resorting to service by publication. The trial court concluded that plaintiff did not. We affirm.

Plaintiff filed a complaint on 6 October 1999 alleging that injuries and damages sustained by plaintiff in an automobile accident on 15 November 1996 were proximately caused by defendant's

negligence in operating his vehicle. Summons was issued on 6 October 1999 listing defendant's address as 444 Drummond Drive, Raleigh, N.C. This summons was returned unserved by the sheriff. Plaintiff caused the issuance of alias and pluries summons to the same address on 4 November 1999, 17 December 1999, and 23 February 2000. All were returned unserved. Plaintiff also attempted to serve defendant by certified mail by letter addressed to defendant at 444 Drummond Drive, Raleigh, N.C. 27609. This letter was returned to the sender marked forwarding order expired. Plaintiff then served notice by publication for three consecutive weeks beginning 27 March 2000.

In concluding that plaintiff failed to exercise due diligence in attempting to serve defendant before resorting to service by publication, the trial court found that on 9 April 1998, the Wake County Clerk of Superior Court adjudicated defendant incompetent and appointed his son, Dr. Stephen F. Quinn, to serve as his guardian. The clerk's order, a public document, showed defendant had been placed at Sunrise Assisted Living of Raleigh. The court also found that at the time service was attempted defendant's wife, Patricia Quinn, continued to reside at 444 Drummond Drive, and that the telephone directory listed her name, her address as 444 Drummond Drive, Raleigh, and her telephone number. Plaintiff contends that he did not know defendant's marital status, nor that Patricia Quinn was defendant's wife.

As provided by our Rules of Civil Procedure, "[a] party that cannot with due diligence be served by personal delivery or

registered or certified mail may be served by publication." N.C. Gen. Stat. § 1A-1, Rule 4(j1) (1999). Because service of process by publication is in derogation of common law, statutes authorizing such service are strictly construed in determining whether service by publication has been properly made. *Sink v. Easter*, 284 N.C. 555, 560, 202 S.E.2d 138, 142 (1974). We have stated that due diligence requires the plaintiff to "use all resources reasonably available" to the plaintiff in attempting to locate the defendant, and that when the information required for proper service can be ascertained, service of process by publication is improper. *Fountain v. Patrick*, 44 N.C. App. 584, 587, 261 S.E.2d 514, 516 (1980). We have also stated that the determination of whether due diligence has been employed is not based upon a restrictive mandatory checklist but upon the facts and circumstances of each case. *Emanuel v. Fellows*, 47 N.C. App. 340, 347, 267 S.E.2d 368, 372, *disc. review denied*, 301 N.C. 87 (1980).

This Court has considered the checking of public records significant in determining whether due diligence has been exerted. *Winter v. Williams*, 108 N.C. App. 739, 742, 425 S.E.2d 458, 460, *disc. review denied*, 333 N.C. 578, 429 S.E.2d 578 (1993). In *Barclays American/Mortgage Corp. v. BECA Enterprises*, 116 N.C. App. 100, 103-04, 446 S.E.2d 883, 886-87 (1994), we held that the plaintiff did not exercise due diligence when the correct address of a defendant was listed on the public record in the Office of the Register of Deeds of Pitt County. Similarly, in the case of *In re Clark*, 76 N.C. App. 83, 87, 332 S.E.2d 196, 199, *appeal dismissed*,

314 N.C. 665, 335 S.E.2d 322 (1985), we held that due diligence was not employed when the defendant's address was listed on his North Carolina driver's license, property tax records, voter registration records, and college records. In *Winter* we held that the plaintiff exercised due diligence when, *inter alia*, the plaintiff checked the public records, including records of the Division of Motor Vehicles, and could not obtain a current address of the defendant. See 108 N.C. App. at 744, 425 S.E.2d at 461.

In the present case, defendant's new address was listed in public records by virtue of a special proceeding brought in defendant's name prior to the institution of the present action. In addition, the record before the trial court shows that the public records of the North Carolina Division of Motor Vehicles contained a notice of defendant's adjudication of incompetency and of his address as of 9 April 1998. There is no evidence that plaintiff attempted substituted service upon Mrs. Quinn at 444 Drummond Drive or that plaintiff attempted to call the number listed in the telephone directory or defendant's insurer (shown on the accident report) to inquire of defendant's whereabouts.

Under these circumstances, we hold the trial court properly concluded that plaintiff did not exercise due diligence in attempting to serve defendant prior to service by publication. The court's order dismissing the action is affirmed.

Affirmed.

Judges GREENE and TYSON concur.

Report per Rule 30(e).

