

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA04-110

NORTH CAROLINA COURT OF APPEALS

Filed: 16 November 2004

GULF INSURANCE COMPANY,  
Plaintiff-Appellant,

v.

Cumberland County  
No. 00 CVS 08241

POLLUTION TECHNOLOGY, INC.,  
DENNIS L. MAST, DONNA M. MAST,  
DEBORAH J. EGITTO and  
ENVIRONMENTAL ASPECS, INC.,  
Defendant-Appellees.

Appeal by plaintiff from Orders entered 25 September 2001 and 28 November 2001 by Judge Robert F. Floyd, Jr. in Cumberland County Superior Court. Heard in the Court of Appeals 22 September 2004.

*Anderson, Johnson, Lawrence, Butler & Bock, L.L.P., by Steven C. Lawrence and Robert A. Hasty, Jr., for plaintiff-appellant.*

*The Law Firm of Hutchens, Senter & Britton, by Rudolph G. Singleton, Jr. and H. Terry Hutchens, for defendant-appellees.*

STEELMAN, Judge.

Plaintiff filed a summons and complaint in this case on 26 October 2000 against multiple defendants, including Donna M. Mast (defendant) asserting claims for breach of contract, indemnity, specific performance, injunctive relief and attachment. Defendant moved from her residence at 2505 Dalrymple Street, Sanford, North Carolina to 125 Challenge Road, Raleigh, North Carolina at some

time prior to the filing of the complaint but subsequent to the execution of the contract at issue.

Plaintiff attempted service of the summons and complaint on defendant by mailing a copy to the Dalrymple Street address in Sanford by certified mail. The summons and complaint were returned to plaintiff undelivered, indicating that the defendant had moved to the Challenge Road address in Raleigh. Plaintiff caused an alias and pluries summons to be issued and attempted service through the Sheriff of Wake County at defendant's new address. The Wake County Sheriff's Department unsuccessfully attempted to deliver the summons and complaint to the Raleigh address on five separate occasions, all during normal business hours. On at least three of these occasions, the deputy left notes on defendant's door indicating that service of legal process had been attempted at the residence and that defendant could pick up the summons and complaint at the sheriff's department. Defendant saw the notes, but made no attempt to pick up the summons and complaint, as she believed her husband would take care of the matter. The Wake County Sheriff's Department returned the summons and complaint unserved, noting that it was "unable to locate [defendant] prior to expiration."

Plaintiff then attempted service by publication pursuant to Rule 4(j1). Plaintiff filed an affidavit of service by publication on 3 April 2001. No answer was filed by defendant, and plaintiff moved for entry of default on 30 April 2001. Default was entered by the Cumberland County Clerk of Court on that same date.

Defendant filed a motion to set aside entry of default on 9 July 2001, which was granted by Judge Robert F. Floyd, Jr. by order entered 24 September 2001. Defendant then filed a motion to dismiss the action pursuant to North Carolina Rules of Civil Procedure Rules 12(b)(4), 12(b)(5) and 12(b)(6). Judge Floyd concluded that plaintiff's attempted service by publication was improper, and granted defendant's motion to dismiss by order entered 28 November 2001. Plaintiff appeals these two orders.

In plaintiff's first assignment of error it argues that the trial court abused its discretion in granting defendant's motion to set aside entry of default because the evidence failed to establish that defendant had good cause in failing to answer plaintiff's complaint. We disagree.

Rule 55(d) of the North Carolina Rules of Civil Procedure governs the setting aside of an entry of default, or an entry of judgment of default. The standard for setting aside an entry of default under Rule 55(d) is "good cause." A trial court's ruling to set aside an entry of default will not be overturned on appeal absent an abuse of discretion. *Brown v. Lifford*, 136 N.C. App. 379, 382, 524 S.E.2d 587, 589 (2000). When reviewing the trial court's ruling setting aside an entry of default, this court should consider whether defendant was diligent in addressing the matter, whether plaintiff suffered harm as a result of the delay, and whether defendant would suffer a "grave injustice" if the entry of default was allowed to stand. *Id.* (citation omitted).

After carefully reviewing the materials presented to the trial court upon defendant's motion to set aside the entry of default, we discern no abuse of discretion, and hold that this assignment of error is without merit.

In plaintiff's second assignment of error it argues that the trial court erred in granting defendant's motion to dismiss for insufficiency of service because plaintiff used due diligence in its attempts to serve defendant and she was properly served by publication. We disagree.

The service of process in civil actions is governed by Rule 4 of the North Carolina Rules of Civil Procedure. Rule 4(j) governs service of process, and states in relevant part:

*Process -- Manner of service to exercise personal jurisdiction. -- In any action commenced in a court of this State having jurisdiction of the subject matter and grounds for personal jurisdiction as provided in G.S. 1-75.4, the manner of service of process within or without the State shall be as follows:*

(1) Natural Person. - Except as provided in subsection (2) below, upon a natural person by one of the following:

a. By delivering a copy of the summons and of the complaint to him or by leaving copies thereof at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein.

. . . . .

c. By mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the party to be served, and delivering to the addressee.

Rule 4(j1) states in part:

*Service by publication on party that cannot otherwise be served. -- A party that cannot with due diligence be served by personal delivery, registered or certified mail, or by a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) may be served by publication.*

"A defect in service of process by publication is jurisdictional, rendering any judgment or order obtained thereby void. . . . Therefore, statutes authorizing service of process by publication are strictly construed, both as grants of authority and in determining whether service has been made in conformity with the statute." *Fountain v. Patrick*, 44 N.C. App. 584, 586, 261 S.E.2d 514, 516 (1980). "Due diligence dictates that plaintiff use all resources reasonably available to her in attempting to locate defendants. Where the information required for proper service of process is within plaintiff's knowledge or, with due diligence, can be ascertained, service of process by publication is not proper." *Id.* at 587, 261 S.E.2d at 516.

Respondent has not assigned as error the trial court's findings of fact, thus they are binding on appeal. *In re Wilkerson*, 57 N.C. App. 63, 65, 291 S.E.2d 182, 183 (1982). The trial court's conclusions of law arising from these facts are reviewable *de novo*, and it is this Court's duty to determine if the trial court's findings of fact support its conclusions of law. *In re Clark*, 76 N.C. App. 83, 86, 332 S.E.2d 196, 199 (1985); *Alpar v. Weyerhaeuser Co.*, 20 N.C. App. 340, 345, 201 S.E.2d 503, 507 (1974).

In the instant case the trial court made the following relevant findings of fact: Prior to the filing of the summons and complaint, defendant moved from the Dalrymple Street address in Sanford to the Challenge Road address in Raleigh, and left a forwarding address with the postmaster in Sanford. Plaintiff attempted service on defendant by certified mail at the Dalrymple Street address; the certified mail envelope was returned to plaintiff indicating that defendant had moved to the Challenge Road address. Plaintiff understood that defendant had moved, and that Challenge Road was her new address. Plaintiff attempted to serve defendant personally at the Challenge Road address through the Wake County Sheriff's Department. A Wake County Sheriff's Deputy made five unsuccessful attempts to serve defendant at the Challenge Road address, all five during business hours. During each of these attempts, the yard of the Challenge Road house was well kept, Christmas decorations were set out, and a cursory inspection would have indicated that the house was furnished and occupied. Plaintiff made no attempt to serve defendant by certified mail at the Challenge Road address. Defendant had received correspondence from the court at the Challenge Road address. And, finally, "Plaintiff knew, or through the exercise of reasonable diligence should have known, that the Defendant was residing at ... Challenge Road . . . ."

Based on these findings, the trial court concluded that plaintiff had not exercised reasonable diligence in its attempts to serve defendant prior to resorting to service by publication, and

therefor service by publication was improper, and the purported service was void. The trial court then granted defendant's motion to dismiss based on insufficient service of process.

The trial court's unchallenged findings of fact show that plaintiff knew, or should have known, that defendant resided at the Challenge Road address when service of process was attempted, and that plaintiff did not attempt service by certified or registered mail at that address. Rule 4(j1) states that service of process by publication is only appropriate when the party "cannot with due diligence be served by personal delivery, registered or certified mail . . . ." The trial court's unchallenged facts support its conclusion that plaintiff failed to exercise due diligence in its attempts to serve defendant prior to resorting to service of process by publication. The findings of fact and conclusions of law support the trial court's dismissal of plaintiff's action based on insufficiency of service of process. This assignment of error is without merit.

AFFIRMED.

Judges GEER and LEVINSON concur.

Report per Rule 30(e).