

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-62

Filed: 3 September 2019

Guilford County, No. 18 CVS 2665

DAVID PATTON, Plaintiff,

v.

BOEBORA ANNE VOGEL, PATSY JONES PATTON, Defendants.

Appeal by plaintiff from order entered 11 October 2018 by Judge Anderson Cromer in Guilford County Superior Court. Heard in the Court of Appeals 8 August 2019.

*Schwaba Law Firm, PLLC, by Andrew J. Schwaba and Zachary D. Walton, for plaintiff-appellant.*

*Hoffman Koenig Hering PLLC, by G. Clark Hering, IV and Daniel W. Koenig, for defendant-appellee Vogel.*

TYSON, Judge.

David Patton (“Plaintiff”) appeals from an order granting Boebora (Barbara) Anne Vogel’s (“Defendant”) motion to dismiss. We affirm the trial court’s order.

I. Background

This action arose from a motor vehicle accident, which occurred on 10 May 2015 in Greensboro, North Carolina. Plaintiff was a passenger inside of a vehicle being driven by his wife. Plaintiff’s wife stopped when the vehicle in front made a

right turn. Plaintiff and his wife's vehicle was struck from behind by Defendant's vehicle.

Plaintiff filed his complaint on 19 January 2018 and amended the complaint on 5 February 2018. Plaintiff deposited a file-stamped copy of the amended complaint and summons with FedEx Corporation ("FedEx") and signed a request for a return receipt on 15 February 2018. Plaintiff addressed the complaint to 3531 Cherry Lane in Greensboro, North Carolina, the address Defendant had listed on the accident report. The package was returned to Plaintiff by FedEx, which indicated 3531 Cherry Lane was vacant.

Plaintiff retained a private investigator to determine Defendant's current address. The private investigator responded that Defendant resided at 3896 North Elm Street in Greensboro, North Carolina. Plaintiff deposited a file-stamped copy of the complaint and summons with FedEx with a request for a return receipt on 13 March 2018. Plaintiff received a signed receipt of delivery on 15 March 2018, signed by "R. Price."

Plaintiff filed an affidavit of service, alleging to have served Defendant on 14 March 2018 at 3896 North Elm Street in Greensboro, North Carolina. Plaintiff obtained an alias and pluries summons on 26 March 2018.

Defendant preserved her challenges and answered Plaintiff's complaint on 17 May 2018. She alleged Plaintiff lacked jurisdiction to bring the claim due to

insufficient process and service of process. Defendant requested the complaint be “dismissed pursuant to Rule 12(b)(2)(4)(5).” Defendant filed a separate motion to dismiss on 28 August 2018, based upon the grounds contained in her answer.

Defendant included an affidavit with her motion to dismiss. She averred she lived at 3531 Cherry Lane in Greensboro, North Carolina on and after the date of the accident, had neither lived nor worked at 3896 North Elm Street in Greensboro, North Carolina, had not authorized “R. Price” or anyone else to accept legal papers for her, and had never been served with a copy of the summons, complaint, or amended complaint.

Plaintiff filed a brief in response to Defendant’s motion to dismiss and requested the trial court to deny Defendant’s motion. In the alternative, Plaintiff requested the court to continue the hearing on Defendant’s motion for Plaintiff to be allowed additional time for discovery. Following a hearing on Defendant’s motion to dismiss, the trial court denied Plaintiff’s request for a continuance and entered an order granting Defendant’s motion to dismiss on 10 October 2018. Plaintiff timely appealed.

## II. Jurisdiction

An appeal of right lies with this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2017).

## III. Issues

Plaintiff argues the trial court: (1) erred by granting Defendant's motion to dismiss for lack of jurisdiction; and, (2) abused its discretion by denying Plaintiff's motion to continue for additional time for discovery.

#### IV. Standards of Review

This Court reviews "questions of law implicated by . . . a motion to dismiss for insufficiency of service of process" *de novo*. *New Hanover Cty. Child Support Enf't ex rel Beatty v. Greenfield*, 219 N.C. App. 531, 533, 723 S.E.2d 790, 792 (2012). "The standard of review for denial of a motion to continue is generally whether the trial court abused its discretion." *Morin v. Sharp*, 144 N.C. App. 369, 373, 549 S.E.2d 871, 873 (2001). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason." *Edmundson v. Lawrence*, 187 N.C. App. 799, 801, 653 S.E.2d 922, 924 (2007) (citation and internal quotation marks omitted).

#### V. Analysis

##### A. Motion to Dismiss

##### *1. Personal Jurisdiction*

Plaintiff asserts the trial court erred by granting Defendant's motion to dismiss for lack of personal jurisdiction. This Court has previously held "[w]here there is no valid service of process, the court lacks jurisdiction over a defendant, and a motion to dismiss pursuant to Rule 12(b) should be granted." *Davis v. Urquiza*, 233 N.C. App.

462, 463-64, 757 S.E.2d 327, 329 (2014) (citation omitted). “On a motion to dismiss for insufficiency of process where the trial court enters an order without making findings of fact, our review is limited to determining whether, as a matter of law, the manner of service of process was correct.” *Thomas & Howard Co. v. Trimark Catastrophe Servs.*, 151 N.C. App. 88, 90, 564 S.E.2d 569, 571 (2002) (alteration and citations omitted).

For the court to acquire personal jurisdiction over a party, the manner of service must accord with our statutes and Rules of Civil Procedure. N.C. Gen. Stat. § 1A-1, Rule 4 (2017). One method to achieve proper service of process is “[b]y depositing with a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) a copy of the summons and complaint, addressed to the party to be served, delivering to the addressee, and obtaining a delivery receipt.” N.C. Gen. Stat. § 1A-1, Rule 4(j)(1)(d).

Proper service may also be achieved “[b]y delivering a copy of the summons and of the complaint to the natural person 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.” N.C. Gen. Stat. § 1A-1, Rule 4(j)(1)(a).

Plaintiff asserts the documents were properly delivered to the North Elm Street address after he was unable to serve Defendant at her provided address: 3531 Cherry Lane, Greensboro, North Carolina. Plaintiff’s only information connecting

Defendant to the North Elm Street address came from his own private investigator, who did not attend the hearing or file an affidavit.

Aside from the information provided by the private investigator on the North Elm Street address, every other source of information, including the accident report, stated Defendant's address was 3531 Cherry Lane, Greensboro, North Carolina. Defendant's affidavit asserts her only residence was located at 3531 Cherry Lane, she had no connection to the North Elm Street address, had no knowledge of "R. Price," and had not authorized "R. Price" to sign for her or to act as her agent.

The relevant North Carolina Rules of Civil Procedure require that the summons and complaint be served at Defendant's "dwelling house or usual place of abode." *See* N.C. Gen. Stat. § 1A-1, Rule 4(j)(1)(a). No evidence presented to the trial court tends to show 3896 North Elm Street was ever Defendant's "dwelling house or usual place of abode." *Id.* The purported service at the North Elm Street address was not in compliance with the statutes. *Id.* The court never acquired jurisdiction over this claim. Plaintiff's argument on this ground is overruled.

## *2. Presumption of Effective Service of Process*

Plaintiff asserts Defendant failed to meet her burden to overcome the presumption of effective service of process. We disagree.

Plaintiff argues Defendant's single affidavit averring she did not reside at the North Elm Street address does not overcome the presumption that the North Elm

Street address was Defendant's dwelling. A party may assert the presumption of effective service. "A showing on the face of the record of compliance with the statute providing for service of process raises a rebuttable presumption of valid service." *Granville Med. Ctr. v. Tipton*, 160 N.C. App. 484, 491, 586 S.E.2d 791, 796 (2003) (citations omitted).

The trial court must consider the evidence and conclude whether or not the service was valid. See *J&M Aircraft Mobile T-Hangar, Inc. v. Johnston Cty. Airport Auth.*, 166 N.C. App. 534, 546, 603 S.E.2d 348, 355 (2004). Plaintiff produced no evidence other than the "R. Price" receipt from FedEx to support the presumption of effective service. Plaintiff's argument on this issue is overruled.

### *3. Additional Time to Complete Service*

The alias and pluries summons obtained by Plaintiff on 26 March 2018 expired after 90 days without Plaintiff obtaining a further endorsement. N.C. Gen. Stat. § 1A-1, Rule 4(d)(2). Plaintiff asserts it was not necessary to renew the summons. Rule 4(j)(2) provides that if a party's attempted service is deemed invalid, the serving party must be given an additional sixty days to complete service before a claim may be dismissed as a result of the invalid service. N.C. Gen. Stat. § 1A-1 Rule 4(j)(2).

Rule 4(j)(2) does not apply to the facts in this case. "Rule 4(j)(2) . . . is only applicable in default judgments." *Hamilton v. Johnson*, 228 N.C. App. 372, 378, 747 S.E.2d 158, 163 (2013). This case does not involve a default judgment. Instead, it

comes before us upon dismissal, after Defendant had challenged the service of the summons. *See* N.C. Gen. Stat. § 1-75.10(a) (2017).

Also, Rule 4(j2)(2) only applies to situations where a person who was unauthorized to sign the delivery receipt signed while present “*in the addressee’s dwelling house or usual place of abode.*” N.C. Gen. Stat. 1A-1, Rule 4(j2)(2) (emphasis supplied). Defendant avers by affidavit she never resided at the North Elm Street address, did not know “R. Price,” or authorize him or her to act as an agent or to receive and sign for the document in question for her.

Plaintiff failed to meet the conditions set out in Rule 4(j2)(2). *See id.* This rule is not pertinent to the facts and does not apply to this order. Plaintiff is not entitled to another sixty days to properly serve Defendant. Plaintiff’s argument is dismissed.

#### B. Motion for Additional Time to Conduct Discovery

Plaintiff asserts the trial court abused its discretion by refusing to grant Plaintiff’s motion for continuance to allow additional time to conduct discovery. “Motions to continue pursuant to Rules 56(f) and 40(b) of our Rules of Civil Procedure are granted in the trial court’s discretion.” *Caswell Realty Assoc. v. Andrews Co.*, 128 N.C. App. 716, 721, 496 S.E.2d 607, 612 (1998) (citations omitted).

Over thirty-five years ago, this Court held ordinarily, “[t]he granting of a motion for a continuance is within the trial court’s discretion and its exercise will not be reviewed absent a manifest abuse of discretion.” *Gillis v. Whitley’s Disc. Auto*



*Sales, Inc.*, 70 N.C. App. 270, 273, 319 S.E.2d 661, 664 (1984) (citation omitted). As noted earlier, “[a] trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason.” *Edmundson*, 187 N.C. App. at 801, 653 S.E.2d at 924.

Plaintiff argues the trial court abused its discretion by refusing to grant Plaintiff’s motion for additional time to conduct discovery and the court ignored facts set forth in Kayla Carmenia’s affidavit. Ms. Carmenia is employed as a paralegal in Plaintiff’s attorney’s office. Her affidavit avers she attempted to serve the summons and complaint upon Defendant at 3531 Cherry Lane, Greensboro, North Carolina twice, and FedEx returned the process and informed her both times that address was vacant. Ms. Carmenia further avers, per the recommendation of a private investigator hired by Plaintiff, she sent the summons and complaint to a senior living facility located at the North Elm Street address where the documents were delivered and signed for by “R. Price.”

The trial court heard and rejected Plaintiff’s arguments. During the hearing, the trial court noted that Defendant’s affidavit averred “she’s never lived anywhere but [3531 Cherry Lane]. It’s on the accident report. Everything is consistent except for your investigator, who is not here.”

Plaintiff was on notice of the lack of service issue since 14 May 2018, when Defendant first presented a motion to dismiss, asserting the court lacked jurisdiction

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*Opinion of the Court*

under Rules 12(b)(2), (4) and (5). *See* N.C. Gen. § 1A-1, Rule 12(b) (2017). Plaintiff had time to address the matter prior to the expiration of the alias and pluries summons and before the hearing on 19 September 2018. Plaintiff has failed to show trial court's discretionary ruling was "manifestly unsupported by reason." *Edmundson*, 187 N.C. App. at 801, 653 S.E.2d at 924. Plaintiff's argument is overruled.

VI. Conclusion

The trial court correctly granted Defendant's motion to dismiss. Defendant has failed to show the trial court abused its discretion to deny Plaintiff's motion to continue. We affirm the trial court's order. *It is so ordered.*

AFFIRMED.

Judges INMAN and HAMPSON concur.