Arkansas Association of Defense Counsel

February 6, 2017

Considerations for Defending Service

Amy Tracy,
Munson, Rowlett, Moore & Boone, P.A.

Strategically, there are many aspects to service which can be considered in forming a defense, including assessment of the applicable statute of limitations; form and substance of the summons; how the service was made; what was actually served and to whom; and whether it was timely served. Arkansas Rule of Civil Procedure 4(i) provides the summons and a copy of the complaint must be made upon a defendant within 120 days after the filing of the complaint, or within the time period established by an extension. Notably, effective December 1, 2016, Federal Rule of Civil Procedure 4(m) was amended to provide for the completion of service within 90 days after the filing of the Complaint.

It is not uncommon for a plaintiff to request an extension of time for service where there is difficulty in locating or serving the proper defendant. To be effective in state court, an order granting an extension must be entered within 30 days after the motion to extend is filed, by the end of the 120-day period, or by the end of the period established by the previous extension, whichever date is later. Ark. R. Civ. P. 4(i)(2). If there is difficulty in serving a party, service by warning order may be attempted, pursuant to Ark. R. Civ. P. 4(f). Specifically, the Rule provides:

> If it appears by the affidavit of a party seeking judgment or his or her attorney that, after diligent inquiry, the identity or whereabouts of a defendant remains unknown, or if a party seeks a judgment that affects or may affect the rights of persons who are not and who need not be subject personally to the jurisdiction of the court, service shall be by warning order issued by the clerk. This subdivision shall not apply to actions against unknown tortfeasors.

A possible strategic defense to service by warning order may include an analysis of what constitutes diligent inquiry, and whether it can be disputed. In discussing notice by publication, Comment 12 to Rule 4 of the reporter's notes states:

> The burden is on the party attempting service by publication to attempt to locate the missing or unknown defendant. Such party or his attorney is required to demonstrate to the court, by affidavit or otherwise, that after diligent inquiry, the defendant's identity or whereabouts remain unknown.

In *Smith v. Edwards*, 279 Ark. 79, 648 S.W.2d 482 (1983), the Court advised Rule 4(f) permits constructive service by warning order only if the whereabouts of the defendant is unknown "after diligent inquiry." The affidavit in *Smith* requesting a warning order and signed by counsel "recites the standard phrase that the location of appellant was unknown 'after a diligent and reasonable inquiry.' A mere recitation, however, is not enough." *Id*.

Because Arkansas Courts have held merely reciting diligent inquiry has been made, as is often seen in affidavits of warning order, is insufficient for proper service, it can be reasonably argued that a proper affidavit to support the issuance of a warning order must include a detailed account of specific attempts made at service. In *Jackson v. Jackson*, 81 Ark. App. 249, 253-54, 100 S.W.3d 92, 94-95 (2003), the Court held the diligent inquiry must be detailed in the affidavit for a warning order prior to obtaining constructive service. The Court recognized compliance is an essential prerequisite to

the publication of warning orders. Absent such compliance, no jurisdiction can be acquired over a defendant and all proceedings as to him are void. *Id*. (citing *Beidler v. Beidler*, 71 Ark. 318, 74 S.W. 13 (1903)).

Similarly, the burden is on the moving party to demonstrate to the court that he actually attempted to locate the defendant. *Scott v. Wolfe*, 2011 Ark. App. 438, 7, 384 S.W.3d 609, 613 (2011). In *Scott*, an affidavit for warning order which merely stated "Richard Colley was unable to locate and serve the Defendant, Karen Scott" and further stated a file-marked copy of the summons and complaint were mailed to Scott at her last known address via certified mail, return receipt requested, was insufficient to obtain service by warning order. *See id.* The Court held the affidavit must describe unsuccessful attempts at personal service; hypothetical failures at personal service will not suffice. The Court determined where Scott's whereabouts could be determined, Scott was entitled to actual notice rather than constructive notice. *See also Nava v. Ark. Dep't of Human Servs*., 2006 Ark. App. LEXIS 194 (2006)(where the appellee was able to demonstrate it asked appellant's acquaintance where appellant was located, attempted to call her multiple times, and even contacted the American and Mexican consulates to determine her whereabouts.) and *Bloodman v. Bank of Am., N.A.*, 2016 Ark. App. 67 (2016) (where the bank made five unsuccessful attempts at personal service at Ms. Bloodman's last known address and additionally attempted certified mail to a post office box identified on Ms. Bloodman's court pleadings.)

Inquiry is not diligent where a warning order has been issued without Plaintiff first unsuccessfully attempting personal service. *See, e.g., Jackson v. Jackson*, 81 Ark. App. 249, 100 S.W.3d 92 (2003). Where no diligent inquiry is made under Rule 4(f), the case should be dismissed for improper service of process. *See Gilbreath v. Union Bank*, 309 Ark. 360, 830 S.W.2d 854 (1992).

It also seems reasonable in this day and age that "diligent inquiry" includes an internet search for the named defendant. It has been suggested by courts in several jurisdictions that attorneys have a "duty to Google" as part of their due diligence, and that "nothing is as convenient or cheap as the internet to search for people via publicly available information." CAROLE LEVITT AND MARK E. ROSCH, FIND INFO LIKE A PRO: MINING THE INTERNET'S PUBLICLY AVAILABLE RESOURCES FOR INVESTIGATIVE RESEARCH, ABA LAW PRACTICE MANAGEMENT SECTION (American Bar Association, 2010).

In *Munster v. Groce*, 829 N.E.2d 52 (Ind. App. 2005)(holding insufficient service of process), the Court, in footnote 3, commented that there was no evidence the party, in trying to obtain service, did a public records or Internet search to find the missing party. Upon Googling "Joe Groce Indiana," the judge discovered an address for the party that differed from any attempted for service, as well as an obituary for the party's mother, where service had been previously attempted.

In *Dubois v. Butler*, 901 So.2d 1029 (Fla. App. 2005), the Court held Plaintiffs must exercise "an honest and conscientious effort" to serve a Defendant and that the Plaintiff must follow "obvious leads," including checking telephone directories, attempt multiple mailing addresses, and contact telephone companies and utility companies and other public agencies. (citations omitted). The Court noted "...advances in modern technology and the widespread use of the Internet have sent the investigative technique of a call to directory assistance the way of the horse and buggy and the eight track stereo." *Id*.

Likewise, in *Weatherly v. Optimum Asset Management*, 928 So.2d 118 (La. App. 2005), the trial court nullified a tax sale after the judge conducted an Internet search and determined the tax delinquent owner was "reasonably identifiable." The appellate court did not take issue with the trial court's conducting an internet search and affirmed the lower court's holding.

If a Plaintiff cannot specifically demonstrate the exercise of diligent inquiry in attempting to determine the whereabouts of a defendant before seeking service by Warning Order, it may be argued any attempted service by Warning Order could be declared invalid.

The AADC thanks Amy Tracy of Munson, Rowlett, Moore & Boone, PA for writing this article.

We welcome your articles and thoughts for future editions.

We Are Better Together: Support the AADC.