

Is Service by Posting Available in Non-Residential Leases?

North Carolina small claims magistrates across the state report that most summary ejectment actions are served by posting, and that's not surprising. [GS 42-29](#), the statute establishing the procedure for service of process in such cases, establishes a very narrow window within which the officer must operate: the officer must visit the defendant's place of abode to attempt personal service within five days of the summons being issued, but at least two days prior to the court date. For the most part this brief span of time does not permit an officer to make a second effort at personal service. Consequently, in those instances in which no one opens the door to accept service, the officer is instructed by the statute to post the complaint and summons to a conspicuous place on the rental premises. This method of service -- variously referred to as *service by posting* or *nail and mail* -- has long been a legally permissible alternative means of service in certain circumstances. In this blog post, I'm going to explore whether and how this works in a situation in which the rental agreement involves something other than a residential setting.

[As I've written previously](#), the familiar Rules of Civil Procedure set out in GS 1A-1 apply to small claims court "except when a differing procedure is prescribed by statute." GS 1A-1, [Rule 1](#). A number of "differing procedures" applicable to small claims court are set out in [GS Ch 7A, Art. 19](#), including GS [7A-217](#), which provides:

- **7A-217. Methods of subjecting person of defendant to jurisdiction.**

When by order or rule a small claim action is assigned to a magistrate, the court may obtain jurisdiction over the person of the defendant by the following methods:

(1) *By delivering a copy of the summons and of the complaint to the defendant 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. When the defendant is under any legal disability, the defendant may be subjected to personal jurisdiction only by personal service of process in the manner provided by G.S. 1A-1, Rule 4(j)(2).*

(2) *When the defendant is not under any legal disability, the defendant may be served by registered or certified mail, signature confirmation, or designated delivery service as provided in G.S. 1A-1, Rule 4(j). Proof of service is as provided in G.S. 1A-1, Rule 4(j)(2).*

(3) *When the defendant is under no legal disability, the defendant may be subjected to the jurisdiction of the court over the person of the defendant by written acceptance of service or by voluntary appearance.*

(4) *In summary ejectment cases only, service as provided in G.S. 42-29 is also authorized.*

Notice that the first three sections of this statute clearly address service of process on a defendant

who is a natural person, whether or not under a legal disability. The provisions of [GS 1A-1, Rule 4\(j\)\(1\) & \(2\)](#)—which governs service under these circumstances in civil actions generally—have clearly been replaced in small claims cases by this statute. What about different circumstances, though? What if the defendant is a corporation or partnership, for example? Because there is no statute setting forth a “differing procedure” for small claims, the procedure in Rule 4(j)(6)&(7) applies. See Brannon, [NC Small Claims Law](#) p. 16, fn. 39.

You’ve probably spotted the lingering question by now: how are we to understand part (4) of the small claims statute, the part that allows “service as provided in GS 42-29” in summary ejectment actions? GS 42-29 is the statute we began with, requiring the officer to “make at least one visit” to the defendant’s “place of abode.” If unable to serve the defendant personally at that point, the statute directs the officer to leave copies at “the defendant’s dwelling house or usual place of abode with some person of suitable age and discretion then residing therein.” This language obviously tracks the language used in the statute set out above referring to service of process on natural persons. It contemplates service on a tenant who is not a business entity. Consider in this light the final sentence of GS 42-29: “If such service cannot be made the officer shall affix copies to some conspicuous part of the premises claimed.” (emphasis added).

No North Carolina case has addressed the meaning and application of these statutes in a non-residential context. It seems to me that small claims magistrates might reasonably interpret them in two different ways. First, one might argue that service by posting in a non-residential summary ejectment action is simply not authorized by law. In support of this argument, note that the statutes authorizing service by posting, GS 7A-217 and 42-29, both use language clearly contemplating service on a natural person pursuant to a visit to that person’s home. Nothing in these statutes directly authorizes service by posting process on a business establishment, and there is reason to question whether such service would meet minimal due process standards. See [Greene v. Lindsey, 456 U.S. 444 \(1982\)](#), in which the US Supreme Court noted the significance of a residential setting in determining whether service by posting can be safely assumed to provide an interested defendant with actual notice of a pending eviction action.

The second, more conservative argument one might make stops short of declaring that service by posting is authorized only in residential evictions, but instead permits such service in all actions for summary ejectment provided that the statutory requirements set out in GS 42-29 are satisfied. One of the challenges to this interpretation concerns the application of the statutory language referring to the defendant’s place of abode, but there is a more significant limitation: the statute requires that the process must be posted on “the premises claimed,” i.e., the rental premises. When the rental premises are something other than residential property, the statute requires the officer, after first attempting personal service on the defendant, to travel to the rental premises to post the summons and complaint. There are a number of practical concerns about whether this requirement is actually satisfied in common practice.

The requirement that process be posted on the rental premises, if posted at all, is an extremely

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important one. In all other small claims cases, such service is considered insufficient notice to a defendant, and even in summary ejectment actions service by posting is insufficient to support entry of a money judgment against the defendant. The rationale for an award of possession of rental property based on posted service is dependent upon the fact that notice was posted on the property at issue. Posting notice somewhere other than the rental premises, even at the defendant's home, is simply insufficient.