Rule 4(j1), service by publication, and the "due diligence" requirement: What's email got to do with service of process?

Appropriate service of process is one of the necessary elements for personal jurisdiction—meaning the documents used to initiate a civil lawsuit, a summons and complaint, must be served on the defendant in a manner that allows the court to exercise authority over her. Any judgment entered without service of process is void unless a defendant makes a general appearance in a case or otherwise waives objection to the lack of appropriate service. For that reason, issues with service of process can result in a judgment being set aside.

When most people think about service of process, they probably think about being directly handed papers: "You've been served!" (In North Carolina, this type of service is made by the sheriff.) Other, less dramatic, methods of personal service on an individual, such as service by certified or registered mail, are also allowed. NC Rule of Civil Procedure 4(j)(1). There are special rules for obtaining service of process on entities such as a corporation or the State. *See* Rule 4(j). Although NC Rule of Civil Procedure 5 was recently amended to allow the use of email to serve documents *after* the initiation of a lawsuit, such as orders and subsequent pleadings, Rule 4 does not allow service of process of a summons and complaint by email. However, if a plaintiff has in her possession defendant's email address, she may need to use it in order to achieve valid Rule 4 service of process.

How can that be? To answer that question, we need to delve momentarily into the topic of service by publication.

Service by Publication & the Due Diligence Requirement

Service by publication[1] —which typically permits service to be achieved by publishing a notice of the lawsuit where the defendant is believed to be located—is only allowed when someone "cannot otherwise be served." Rule 4(j1). It's a method of last resort. Because service by publication is less likely to provide actual notice to a defendant than personal service, issues regarding service by publication frequently arise in the context of a motion to set aside a default judgment.

Service by publication "is in derogation of the common law," so statutes authorizing it are "strictly construed." *Sink v. Easter*, 284 N.C. 555, 560 (1974) (citations and internal quotation marks omitted). Rule 4(j1)'s many requirements are considered in this context, and if any requirements are not met, service by publication is defective. Because service of process is jurisdictional, this means any resulting orders or judgments are void and can be set aside. *See Fountain v. Patrick*, 44 N.C. App. 584, 586 (1980).

Some of Rule 4(j1)'s requirements are relatively straightforward. The question of when a party "cannot otherwise be served," however, is a quite complicated one. Service by publication is

allowed *only* if the party to be served "cannot with due diligence be served by personal delivery, registered or certified mail, or by a designated delivery service." Rule 4(j1). Whether this requirement has been met is assessed on a case-by-case basis.

The North Carolina Court of Appeals has made clear "that there is no 'restrictive mandatory checklist for what constitutes due diligence' for purposes of service of process by publication," instead requiring "a case by case analysis." *Jones v. Wallis*, 211 N.C. App. 353, 358 (2011) (citation and internal quotation marks omitted). This case-by-case analysis can yield different results in the context of a particular case. *See, e.g.*, *Henry v. Morgan*, 264 N.C. App. 363, 366 (2019) ("For example, this Court has in the past emphasized the importance of examining public records [to find information about a defendant's location to facilitate service by Sheriff or certified mail] . . . but has in another decision held that the due diligence requirement was satisfied even though a plaintiff failed to consult DMV records.") (citations and internal quotation marks omitted). This can present a tricky situation for litigants, who may have trouble predicting whether their efforts at due diligence will suffice.

One Must for Due Diligence: Contact Information in the Plaintiff's Possession

The individualized analysis used to determine due diligence can make it difficult for a plaintiff to predict if her efforts will meet the standard. There is, however, at least one box that *must* be checked in order to comply—a party is required to use "contact information which he [has] *in his possession*" to obtain information about a defendant's location or to otherwise facilitate service by means other than publication. *Chen v. Zou*, 244 N.C. App. 14, 19 (2015). Failure to do so will render service by publication defective. *Id.*

For an easy example, consider the following scenario. A summons is issued for mailing to Address #1 and is unable to be served. Later, the defendant's attorney provides plaintiffs with an updated mailing address, Address #2. A summons is issued for mailing to Address #2, but plaintiffs never attempt to serve it, instead moving directly to service by publication. Here, because plaintiffs never attempted to serve defendant at the updated address they were provided, they did not "exercise[] the due diligence required before resorting to service by publication," and the judgment obtained is void. *See Dowd v. Johnson*, 235 N.C. App. 6, 11 (2014).

We know then that an updated mailing address is contact information a plaintiff should use to directly attempt service of process on a defendant. What other types of contact information may a plaintiff need to consider using, before moving to service by publication? This is where email can come into the picture. The plaintiff has an obligation to use contact information in her possession to try to facilitate appropriate service of process, even where the method of communication is not one that can be used for service of process under Rule 4. The NC Court of Appeals has stated this requirement as absolute: "Plaintiff failed to use Defendant's contact information which he had *in his possession*. … Accordingly, service of process by publication was improper." *Chen v. Zou*, 244 N.C. App. 14, 18-19 (2015) (setting aside divorce judgment where plaintiff did not reach out to

request defendant's address for service of process despite otherwise having contact with defendant through phone calls and texts).

The North Carolina Court of Appeals recently reiterated the rule that plaintiffs must attempt to use contact information they possess for defendants to obtain information that will facilitate personal service, even where the method of communication is not one that can be used for service of process under Rule 4. In *County of Mecklenburg v. Ryan*, Mecklenburg County brought a civil action to foreclose on Ms. Ryan's home for past-due property taxes and obtained a default judgment against her. Ryan uses a wheelchair; is legally blind; told the county she had difficulty receiving mail; and requested they use email to contact her because her disability made it difficult for her to receive mail. After filing their complaint, Mecklenburg County unsuccessfully attempted to serve Ms. Ryan both by personal delivery and by mail; the county had previously been unsuccessful in its attempts to contact her by telephone. Mecklenburg County never attempted, however, to contact Ms. Ryan by email before resorting to service by publication. As in prior cases addressing the same question, the plaintiff's failure to attempt to ascertain by email how it might otherwise "accomplish service of process" was fatal to the validity of the service by publication. *Cty. of Mecklenburg v. Ryan*, 2022-NCCOA-90, ¶ 20. The Court of Appeals held: "[A]lthough it had Ryan's email address, Mecklenburg County did not attempt to contact Ryan via email. Accordingly, we hold that Mecklenburg County's service under Rule 4 was insufficient." *Cty. of Mecklenburg v. Ryan*, 2022-NCCOA-90, ¶ 21-22 (relying on *In Re Foreclosure of Ackah*, 255 N.C. App. 284 (2017), *aff'd per curiam*, 370 N.C. 594 (2018)).

Conclusion

What are the main takeaways here? First, although the due diligence inquiry is an individualized one, plaintiffs should always use contact information in their possession to attempt to facilitate service of process before attempting service by publication. Second, the requirement that plaintiffs use contact information they possess for the defendant includes using phone and email information. Even though phone and email cannot be used to achieve service of process pursuant to Rule 4, failure to use this contact information may invalidate an attempt at service by publication. Finally, while the case law on this issue has considered phone and email information, the reasoning in these cases is not tied to any specific method of communication. With the increasing usage of other social media platforms for primary communication, such as WhatsApp, Instagram, and Facebook Messenger, we may well see cases testing the limits of what methods must be tried before a plaintiff can resort to service by publication.

[1] You can read about service by publication on defendants outside of the U.S. in this blog post by my colleague Cheryl Howell.