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A L E R T

NEW JERSEY APPELLATE DIVISION RULES SPECIFIC SEARCHES NOT REQUIRED BEFORE RESORTING TO SERVICE BY MAIL

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In New Jersey, there are three different means by which service can be effected by mail when the primary method, personal service, is unsuccessful. Each method is unique to the specific situation that gives rise to the resort to service by mail, and is ruled by its own set of conditions. The New Jersey Appellate Division recently rejected an attempt to blur the lines between the rules, and provided clarity as to what constitutes “diligent effort and inquiry,” a requirement found in each rule.

In *U.S. Bank Nat’l Ass’n v. Curcio*, No. A-2649-13T4, 2016 N.J. Super. LEXIS 22 (App. Div. Feb. 1, 2016), the defendant defaulted on a promissory note, which had been assigned to the plaintiff, U.S. Bank National Association. After exchanging some correspondence with the defendant (which was addressed to the defendant’s encumbered residence in New Jersey), the bank initiated a foreclosure action on the mortgaged property. Three attempts at personal service at the encumbered property ensued—and failed. A New Jersey rule, Rule 4:4-3(a), permits service by mail if a party is unable to personally serve process after diligent effort and inquiry. The bank engaged in what it considered to be a “diligent effort” to locate the defendant: (1) employment of a private investigator to conduct records searches; (2)

inquiry with the U.S. Postal Service regarding change of address submissions; (3) skiptracing; (4) inquiry with the Department of Motor Vehicles; (5) inquiry with the Tax Assessor’s office; and last but not least: (6) talking with neighbors. Every inquiry indicated that the defendant still resided at the encumbered property.

The bank then mailed the summons and complaint by regular and certified mail to the encumbered property. The certified mail was returned marked “unclaimed.” The regular mail was not returned. The bank filed a certification with the court, stating the specific efforts it took to locate the defendant, and entered default when no answer was filed. Eventually, the bank obtained a default judgment and the court ordered a sheriff’s sale of the property.

The defendant moved to vacate the entry of default judgment, but the trial court found that the bank’s three unsuccessful attempts to serve the defendant personally allowed the bank to serve the defendant by mail. An appeal to the Appellate Division followed. The defendant argued that the bank should have performed title searches through surrogate courts, examined vital statistics, and searched the records of the New Jersey Department of Banking and Insurance, among other entities. The court rejected this argument,

noting “our Court Rules do not require specific searches ... before resorting to service by mail.”¹ “As set forth above,” the court continued, “[the bank] performed a diligent inquiry.”² The court noted that the “defendant does not argue that such [proposed] searches would have led to [the bank] discovering a different address for defendant. ... Instead, defendant’s certification admits that she has resided at the encumbered property for thirty-five years.”³ The court would not say what specific attempts would constitute “diligent effort and inquiry.” Instead, it implied that a review of all efforts would be made on a case-by-case basis to determine if, under the circumstances of that case, the inquiry made was “diligent.” Here, the court found the bank’s efforts were diligent, justifying service by mail pursuant to Rule 4:4-3(a).

Defendant then argued that the bank should have made service by mail pursuant to Rule 4:4-4(b) (1). Rule 4:4-4(b)(1) provides for service by mail but requires that specific information be sought personally or by mail of anyone who may have information as to the defendant’s location, something that the bank did not do. However, Rule 4:4-4(b) (1) is New Jersey’s long-arm provision prescribing how service may be made on a person *not present in the state*. The bank had no reason to believe that the defendant was residing out of state and all of its inquiries indicated that she was indeed still residing at the mortgaged residence in New Jersey. The court found that Rule 4:4-4(b)(1) did not apply.

The court also discussed Rule 4:4-5(a) because the trial court had referred to it when deciding that service by mail was proper. Rule 4:4-5(a) permits service by mail in actions affecting property, which certainly was the case here, but also requires diligent inquiry before mail service will be permitted. However, like Rule 4:4-4(b)(1), it

applies only when the party *cannot*, after diligent inquiry, *be served within the state*. The court found that service under this rule was not necessary because the defendant could be, and was, served within the state by mail under Rule 4:4-3(a).

In light of *Curcio*, practitioners now know that there are no specific steps that are required in order to meet the “diligent inquiry” requirement. To be sure, not every case will require a private investigator and skiptracing. But these tools, employed as part of a belt-and-suspenders approach to a diligent inquiry, cannot hurt. Practitioners should also be sure to document their efforts to effect personal service. Ultimately, there are any number of ways to conduct an inquiry into the location of a defendant, and as long as the sum total of those inquiries demonstrates to the court that the effort was diligent, service by mail should be proper. ♦

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¹ Curcio, 2016 N.J. Super. LEXIS 22, at *11-12 (citing R. 4:4-7).

² Id. at *12.

³ Id. (citations omitted).