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Greene v. Lindsey: THE USE OF POSTING TO SERVE PROCESS IN SUMMARY EJECTMENT CASES

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The United States Supreme Court in the recent decision of Greene v. Lindsey, 50 U.S.L.W. 4483 (May, 1982) limited the use of posting as a method of service of process in summary ejectment cases. The decision was narrow and did not rule that service of process by posting was unconstitutional in every case.

Greene involved a Kentucky statute, much like North Carolina's, that allowed the officer to serve a summary ejectment summons and complaint by posting it in a conspicuous place on the premises if the officer could not find at the premises the defendant or any member of the defendant's family who was over sixteen.[1] Two tenants in a Louisville housing project were served by posting. The landlord was seeking repossession of their apartments. The tenants claimed never to have seen the summonses and that the first they learned of their eviction was when they were served with writs of possession after judgment had been entered against them and their appeal time had run. They argued that the

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[1]North Carolina's statute requires more effort to locate defendant before allowing service by posting. G.S. 42-29 provides that the sheriff must serve the defendant personally (anywhere in the county that he can find him) or leave copies at the defendant's dwelling with a person of suitable age and discretion also residing in the dwelling. If such service cannot be made, and if the defendant cannot be found in the county after a due and diligent search, the sheriff shall post copies to a conspicious part of the premises.

posting procedure did not satisfy the minimum standards of constitutionally adequate notice set out in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), and therefore denied them the due process of law required by the Fourteenth Amendment to the United States Constitution.

To be constitutional the notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane, 339 U.S. at 314. The Court then looked at the notice given in Kentucky to determine whether it met the standard of Mullane. The Court pointed out that it is reasonable to assume that a property owner will watch over his property--particularly his residence. As a general matter "posting notice on the door of a person's home would, in many or perhaps most instances, constitute not only a constitutionally acceptable means of service, but indeed a singularly appropriate and effective way of ensuring that a person who cannot conveniently be served personally is actually apprised of the proceedings against him." Greene, 50 U.S.L.W. at 4485. However in this particular case, the lower courts had found as a fact that in the housing projects where these tenants lived, "notices posted on apartment doors ...were 'not infrequently' removed by children or other tenants before they could have their intended effect" (Greene, 50 U.S.L.W. at 4485) and the officers who served process were aware of the problem. Because of the facts in Greene, the Court held that under those conditions notice by posting on the apartment door was not reasonably calculated to give notice and was therefore unconstitutional.

In my opinion, this case should be read narrowly. The Court pointed out that in most instances when a landlord is suing to remove a tenant from premises service by posting is adequate. If a sheriff is aware of any apartment complex in his county where the summonses and complaints are being torn down by children or other persons before the tenant has an opportunity to see them, he should not serve process by posting in that complex. If after a due and diligent search the sheriff is unable to locate the defendant or find a person of suitable age and discretion at the dwelling to serve, the sheriff in those instances should return to summons "unable to locate defendant and did not serve by posting because I have knowledge that notices are torn down before tenant has an opportunity to see them."

However, when the tenant lives in a house or in an apartment complex where the sheriff does not believe that notices are being torn down, the sheriff can continue to serve summonses in summary ejectment cases by posting after he has made a due and diligent search for the tenant.

In those cases in which the sheriff is unable to serve the summons by posting because he knows the paper is likely to be removed before the tenant has seen it, the question becomes how must the tenant be served. The Court rather cavalierly said that service by first class mail should be used since it was an "efficient and inexpensive means of communication" and would provide constitutionally adequate notice. The only problem with that suggestion is that North Carolina[2] statutory law does not provide for service by first class mail. G.S. 7A-217 provides for service of summonses in small claims cases by (1) personal service, (2) certified mail, return receipt requested, (3) voluntary appearance and (4) in summary ejectment cases as provided in G.S. 42-29. Thus, if a particular case the sheriff is unable to post the notice after being unable to serve the defendant personally, the plaintiff will have to serve the defendant by certified mail. G.S. 7A-217 requires that at the request of the plaintiff, the clerk of superior court must mail the summons by certified mail, return receipt requested to the defendant. Service is complete upon return to the clerk of receipt signed by the defendant. Service by mail is proved prima facie by the signature of the defendant on the receipt card. The plaintiff must pay the cost of service by certified mail.

To reiterate the findings in Greene, a sheriff should not serve a summary ejectment summons by posting if he has knowledge that the summons is likely to be removed before the tenant sees it. In all other summary ejectment cases, a sheriff may continue ot serve by posting when he is unable to find the tenant after a due and diligent search.

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[2]Neither does Kentucky law provide for service by first class mail.