



Dove v. Wil-O-Wisp Apartments

594 S.E.2d 258 (2004) | Cited 0 times | Court of Appeals of North Carolina | April 6, 2004

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

Plaintiff commenced this action against defendants on 29 January 2002 by filing a complaint in superior court alleging ten claims for relief, including "unauthorized entry," "invasion of privacy," and "abuse of authority." A civil summons was issued that same day. Plaintiff inquired about the status of his case in March of 2002 and the Clerk of Superior Court for Lenoir County informed plaintiff, by letter dated 19 March 2002, that "the summons have not been returned showing the defendants have been served[.]" Plaintiff subsequently attempted to serve the Wil-O-Wisp Apartment defendants by certified mail. The "Domestic Return Receipt," addressed to "Wil-O-Wisp Appartments,(sic)" was signed by Marnie Geurin showing receipt on 5 April 2002.

On 12 June 2002, plaintiff filed a Motion for Default Judgment against defendants with the exception of defendant Luby Edward Outlaw. To support his motion for default, petitioner attached a copy of the "Domestic Return Receipt" signed by Marnie Geurin. Plaintiff also attached a "Domestic Return Receipt" addressed to "Wil-O-Wisp Apartments" and signed by Anita Farrow on 19 January 2002, which was ten days before the complaint was filed and summons was issued.

On 13 January 2003, defendants moved to dismiss the action, in part, for insufficient process and insufficient service of process under Rules 12(b)(4) and (5) of the North Carolina Rules of Civil Procedure. All of the motions came for hearing before the trial court, which found that plaintiff did not obtain service over any of the designated defendants within thirty days from the issuance of the summons and that plaintiff did not secure an endorsement of the original complaint or sue out an alias or pluries summons. The trial court concluded that any receipt of a copy of the summons and complaint on 4 April 2002 did not confer jurisdiction over the defendants, and dismissed plaintiff's complaint pursuant to N.C.R. Civ. P. 12(b)(4) and (5) and denied plaintiff's motion for default judgment. Plaintiff appeals.

The dispositive issue on appeal is whether the trial court erred in granting defendants' motion to dismiss for insufficiency of service of process. The trial court dismissed plaintiff's action primarily based on its finding that no service of summons was obtained on the defendants "within thirty days after the issuance of the summons as required under Rule 4(c)." Subsection (c) of Rule 4, however, was amended in July of 2001 so that a summons must be served within sixty days. N.C. Gen. Stat. § 1A-1, Rule 4(c) (2003). Because plaintiff filed his action in 2002, the sixty day period applies to this case.



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Nevertheless, we conclude the trial court properly dismissed the lawsuit under Rule 12(b)(4) and (5) and denied plaintiff's motion for default judgment.

Service of a summons must be made "within 60 days after the date of the issuance of the summons." N.C.R. Civ. P. 4(c)(2003). The validity of the summons for service of process may be extended by either securing an endorsement of the original summons or issuing an alias or pluries summons within ninety days. N.C.R. Civ. P. 4(d)(2003). If the summons is not served within sixty days nor revived within ninety days, the action is discontinued as to any defendant who was not served within the time allowed. N.C.R. Civ. P. 4(e)(2003).

In the present case, the summons was issued on 29 January 2002. The record shows plaintiff attempted service by certified mail on 5 April 2002, which is not within sixty days of 29 January 2002. Furthermore, plaintiff did not seek an endorsement nor an alias or pluries summons within ninety days. Therefore, none of the defendants were served in this case. Accordingly, the trial court properly allowed defendants' motion to dismiss and denied plaintiff's motion for default judgment.

Affirmed.

Judges McGEE and BRYANT concur.

Report per Rule 30(e).

