

SERVICE OF TENANT REMEDIES ACTION – A WEIRD STATUTE

A number of years ago I represented a residential tenant in a Tenant Remedies Action (“TRA”), an action seeking repairs to her unit, under what is now Minn. Stat. § 504B.395-.471. After filing the complaint and being issued a summons by the court administrator, my next task was to serve the summons and complaint on the landlord. I soon came to learn the oddities of serving a TRA summons and complaint.

Once the TRA summons is issued, the case is set for hearing 7-14 days later, usually and in this case also closer to 14 days. Minn. Stat. § 504B.401. Service must be achieved at least seven days before the hearing, *id.*, meaning at most I had seven days to served the summons. I engaged the sheriff to attempt service on the landlord. As the last day to serve approached, the sheriff had been unable to serve the landlord.

So, I read the statute to see what sort of alternative service was possible. Here is what I read:

The summons and complaint must be served upon the landlord or the landlord's agent not less than seven nor more than 14 days before the hearing. Service shall be by personal service upon the defendant pursuant to the Minnesota Rules of Civil Procedure. If personal service cannot be made with due diligence, service may be made by affixing a copy of the summons and complaint prominently to the residential building involved, and mailing at the same time a copy of the summons and complaint by certified mail to the last known address of the landlord.

Minn. Stat.. § 504B.401, subd. 2 (emphasis added).

Since the sheriff had apparently tried pretty hard to serve the landlord, I decided this was “due diligence”. Given the time frame, I had little choice in the matter. So, following the statute, I drove out to my client’s home. She rented one of a very few properties owned by the landlord, a small single-family structure located a few miles from the landlord’s home. Following the dictates of the statute, I posted the summons and complaint on her front door (and since she was home, explained why). Then I went to the local post office and mailed the landlord a copy of the summons and complaint by Certified Mail.

The process seemed bizarre. What good did posting the summons and complaint on a building miles from the landlord’s home do in alerting the landlord to the case? Eventually the landlord would go to the trouble of picking up his certified mail. It just seemed weird and unfair. It also happened that we wanted to settle the dispute rather than winning a default judgment, so actual notice was good for us. Therefore, I drove to the landlord’s home and when he did not answer the door, I posted another summons and complaint on his door. When he appeared in court, he said that was the summons and complaint he actually got and read. We did settle the dispute in the judge’s chambers.

Minn. Stat. § 504B.401 was enacted in 1973 as 1973 Minn. Laws ch. 611, s. 16 and has not changed since except as to the time frame (originally it was 7-10 days rather than 7-14 days, even

less time to serve). Given the need for speed – the TRA is/was designed to help tenants get rapid court action to deal with unmet repairs – it’s clear why section 401 allowed/s alternative service if the landlord cannot be served personally. Why it was written as it is, however, is a bit of a mystery.

Indeed, the statute either violates the U.S. Constitution or comes close. Under Mullane v. Central Hanover Trust Company, 339 U.S. 306,314 (1950), “notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their” case is required.

Clearly posting the summons on the tenant’s door, miles from the landlord’s home, did not achieve this. *See* Greene v. Lindsey, 456 U.S. 444, 102 S.Ct. 1874, 72 L.Ed.2d 249 (1982) (even posting a summons on the door of the tenant's apartment without also mailing a copy to the tenant was inadequate notice of an eviction action).

What is left is the certified mail. Given that certified mail typically takes two or three days to reach the recipient and if he is not home to sign for it at least another day to get it and perhaps more depending on conditions, the certified mail seems at best to barely meet the standard of Mullane.

Putting aside Mullane and the landlord’s concern, the statute also poses a dilemma for the tenant’s attorney. What is “due diligence”? Most, if not all, cases about due diligence required before resorting to alternative service (such as by publication) involve ordinary lawsuits where the plaintiff has a lot of time to try direct personal service. Here the plaintiff has at most seven days. I don’t believe I was the first nor will I be the last attorney who wonders if he did enough due diligence under section 504B.401.

What is a good solution? I suggest looking to the statute governing service of an eviction action complaint, Minn. Stat. § 504B.331. Like a TRA, this is a hurry-up, landlord-tenant case, set for hearing 7-14 days after filing and with service required seven days before the hearing. At least with residential evictions, “due diligence” is not part of the equation. If the tenant cannot be found in the county – and courts generally interpret this to mean service failed despite trying to serve the tenant at home so long as he is not known to be away from home like in jail – then “nail and mail” service is allowed if two attempts of personal service are made, on different days, and at least once from 6-10 pm, but fail. Then, using “nail and mail”, the landlord can serve by posting one summons on the tenant's door and mailing one to the tenant by First Class Mail¹ if both are done at least seven days before the hearing.

Section 504B.331 service would be a good model for TRA service. Probably if the landlord has a business address for service, the two attempts should be required to be made during business hours, but otherwise section 504B.331 could be nearly photocopied, with service by posting on the landlord’s door and mailing by First Class Mail (or even both First Class Mail and Certified Mail as in Minn. Stat. § 504B.271, subd. 1(d).

Notes

1. The statute has detailed requirements of the exact order things must be done, when affidavits must be filed, and who may take each step. However, these details are straightforward. They don't make the process problematic as with section 504B.401.