

91-LW-0675 (5th)

ROBERT C. DUCKWORTH and JOY DUCKWORTH, Plaintiffs-Appellants
v.
JOHN W. DECKER, Defendant-Appellee

Case No. 47-CA-90
5th District Court of Appeals of Ohio, Fairfield County.
Decided on August 26, 1991.

Civil Appeal from Common Pleas Court, Case No. 89 CV-JU-0240

DANIEL G. WILES, WILES, DOUCHER, VAN BUREN, & BOYLE CO., 115 West Main Street, Columbus, OH 43215 For Plaintiffs-Appellants.

ROBERT E. FROST, FROST & BROSCIAK, 400 South Fifth St., Columbus, OH 43215 For Defendant-Appellee.

DANIEL R. FREYTAG, 10 West Locust St., P.O. Box 486, Newark, OH 43055 For Defendant-Appellee.

OPINION

Before Hon. Norman J. Putman, P.J., Hon. Irene B. Smart, J., Hon. William B. Hoffman, J.

Grey, J.

This is an appeal from the judgment of the Court of Common Pleas of Fairfield County, Ohio, dismissing the complaint of plaintiff-appellants, Robert and Joy Duckworth (appellants) against defendant-appellee, John W. Decker (appellee).

Appellants raise the following assignments of error:

ASSIGNMENT OF ERROR NO. I

WHERE A DEFENDANT HAS ATTEMPTED TO CONCEAL HIMSELF AND THE PLAINTIFFS HAVE CAUSED NOTICE OF A SUIT TO BE PUBLISHED IN AN APPROPRIATE PUBLICATION OF GENERAL CIRCULATION AND THE PUBLISHER AND THE PLAINTIFFS HAVE FILED AFFIDAVITS WITH THE COURT TO THAT EFFECT IT IS ERROR FOR THE TRIAL COURT TO DISMISS THE CASE.

ASSIGNMENT OF ERROR NO. II

WHERE DEFENDANT'S COUNSEL WAITED UNTIL THE LAST MOMENT TO FILE A MOTION TO DISMISS ON THE BASIS THAT PLAINTIFFS DID NOT FILE AN AFFIDAVIT PRIOR TO PUBLICATION OF NOTICE HE IS ESTOPPED FROM OBJECTING TO JURISDICTION OR SUFFICIENCY OF SERVICE OR (SIC) PROCESS ON THAT BASIS.

For the reasons stated below, appellants' assignments of error are overruled.

On June 28, 1989, appellants filed their complaint seeking damages arising out of an automobile accident that occurred on September 1, 1987. The trial court docket shows that on June 30, 1989, a "Notice of Failure of Service" was filed, indicating the failure of certified mail service upon appellee with the return receipt endorsed "Moved Left No Address."

On November 9, 1989, appellee filed his answer setting forth the defenses of lack of jurisdiction over the person; insufficiency of process and insufficiency of service of process.

The trial court's docket indicates that on December 13, 1989, a "Publisher's Affidavit" was filed by the Lancaster Eagle Gazette. Attached to the affidavit is a copy of the public notice, apparently published in the newspaper as an attempt to perfect service upon the appellee by publication in accordance with Civ. R. 4.4.

On October 16, 1990, appellee moved to dismiss the appellants' complaint against him, arguing that appellants' attempt to serve him by publication was defective under the Civil Rules. The trial court sustained appellee's motion concluding that the requirements of Civ. R. 4.4 had not been satisfied.

Civ. R. 4.4(A) sets forth the procedural requirements for obtaining service by publication:

(A) Residence unknown. When the residence of a defendant is unknown, service shall be made by publication in actions where such service is authorized by law. Before service by publication can be made, an affidavit of a party or his counsel must be filed with the court. The affidavit shall aver that service of summons cannot be made because the residence of the defendant is unknown to the affiant and cannot with reasonable diligence be ascertained. Upon the filing of the affidavit the clerk shall cause service of notice to be made by publication in a newspaper of general circulation in the county in which the complaint is filed. If no newspaper is published in that county, then publication shall be in a newspaper published in an adjoining county. The publication shall contain the name and address of the court, the case number, the name of the first party on each side, and the name and last known address, if any, of the person or persons whose residence is unknown. The publication shall also contain a summary statement of the object of the complaint and demand for relief, and shall notify the person to be served that he is required to answer within twenty-eight days after the last publication. The publication shall be published at least once a week for six successive weeks unless publication for a lesser number of weeks is specifically provided by law. Service shall be complete at the date of the last publication.

After the last publication, the publisher or his agent shall file with the court an affidavit showing the fact of publication together with a copy of the notice of publication. The affidavit and copy of the notice shall constitute proof of service. (Emphasis added).

Neither appellants nor their counsel filed an affidavit averring that service of summons could not be made because appellee's residence was unknown to them and could not with reasonable diligence be ascertained. This is a prerequisite to the publication of any kind of notice in a newspaper of general circulation. The rule states that such an affidavit "must be filed with the court." Thus, the language of this rule is mandatory, not discretionary. Accordingly, appellants' first assignment of error is overruled.

II

Appellants argue that appellee has waived his right to object to the sufficiency of service because appellee "waited until the last moment to file a motion to dismiss." We find this argument to be without merit. Appellee "properly raised the issue of sufficiency of service as an affirmative defense in his first responsive pleading." First Bank of Marietta v. Cline (1984), 12 Ohio St. 3d 317, 318, decision PER CURIAM.

Accordingly, appellants' second assignment of error is overruled.

For the foregoing reasons, the judgment of the Court of Common Pleas of Fairfield County, Ohio, is affirmed.

Smart, J. and Hoffman, J. concur.

JUDGMENT ENTRY

For the reasons stated in the Memorandum-Opinion on file, the judgment of the Court of Common Pleas of Fairfield County, Ohio, is affirmed.