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DO YOUR DUE DILIGENCE

Most attorneys during their career have the opportunity or obligation to effectuate service of process of a legal document pursuant to a rule or statute. It can be in any area of the law. My practice area of creditors' rights litigation requires me to serve process of a lawsuit under a statute that, at first glance, is complex, but over time has become engrained in my mind.

For a Wisconsin court to have jurisdiction over an individual defendant in a civil action, a summons must be served personally upon the defendant or, if with reasonable diligence the defendant cannot be served personally, by leaving a summons with a competent family member at the defendant's home. If with reasonable diligence the defendant cannot be served by the above methods, then service may be made by publication and mailing.

I recently represented a client who, two years earlier, had obtained a large money judgment against a defendant/guarantor. Prior to obtaining a judgment in the case, the process server attempted to personally serve the guarantor 4 times – once at his parents' house and, upon learning that the guarantor no longer resided there, 3 more times at his place of business. While attempting to serve at the guarantor's place of business, the process server left his business card asking that he be contacted. The server testified to the court that the guarantor eventually called him, told the server that he would not make himself available for service, and instructed the server to publish. Based on the guarantor's statements, service by publication was initiated. A default judgment was eventually entered against the guarantor after he failed to timely respond to the publication summons. Thereafter, the client initiated and continued to attempt to enforce and collect upon the judgment using supplementary collection procedures.

Twenty months after the judgment was entered, the guarantor filed a motion to reopen the case, asking the court to void its own judgment on the basis that the court lacked personal jurisdiction over him. The guarantor claimed that the creditor did not exercise due diligence in trying to find and serve him personally, thus rendering service by publication ineffective to establish jurisdiction.

Under Wisconsin law, there is no time limitation in bringing such a motion since ineffective service of process renders a court without jurisdiction over a defendant. It matters not whether the judgment is aged nor whether a client has spent thousands of dollars trying to enforce and collect upon the judgment. To make matters more difficult, a defendant's actual

knowledge of a lawsuit is not a factor in a court's determination of whether a plaintiff has undertaken due diligence in attempting to serve a defendant.

Needless to say, my client was alarmed when it received the guarantor's motion. So what does a plaintiff like mine need to do to avoid such a situation? How may a plaintiff find comfort that it exercised due diligence in attempting to personally serve a defendant prior to publishing a summons as a means of service of the lawsuit? Does a plaintiff need to hire an expensive investigator to perform a search of the individual? Should a costly asset/information database search be ordered?

Due diligence is not defined by statute, but Wisconsin is not without judicial authority. A Wisconsin court of appeals has described reasonable diligence as the diligence to be pursued that is reasonable under the circumstances, but not all diligence which may be conceived. Nor is it that diligence which stops just short of the place where, if it were continued, might reasonably be expected to uncover an address of the person on whom service is being attempted. See *Loppnow v. Bielik*, 2010 WI App 66, ¶ 10, 324 Wis.2d 803.

While this judicial statement is somewhat amorphous, in my practice, I have gleaned that judges generally seem to require at least 3 attempts at personal service before service may be made by publication. Such attempts at service, however, may be viewed as futile if a server stops short in making a proper inquiry into the defendant's whereabouts before attempting service. See *Heaston v. Austin*, 47 Wis. 2d 67 (1970); *West v. West*, 82 Wis. 2d 158 (1972) (Due diligence was not established when a husband could have ascertained his wife's address by contacting any one of several relatives or in-laws). Courts may also take into consideration a defendant's statements as to his whereabouts or evasive actions on the part of a defendant in determining whether the due diligence standard was met. See *Welty v. Heggy*, 124 Wis. 2d 318 (Ct. App. 1985); *Emery v. Emery*, 124 Wis. 2d 613 (1985).

In my case, the court's determination ultimately boiled down to the existence of evasive actions on the part of the guarantor. An evidentiary hearing was held and, although the guarantor denied ever speaking to the process server, the court found the process server more credible than the guarantor in regard to the guarantor's evasive maneuvers and statements to the process server. Vital to the court's ruling was the existence of the process server's notes on the face of his affidavit stating that the defendant indicated he would not make himself available and advised the process server to publish.

From this experience, it is clear that meticulous notes, records and other documentary evidence must be kept in regard to a process server's communication with a defendant along with the server's attempts to serve a defendant if publication is the method in which a plaintiff chooses to rely upon to effectuate service of process. Moreover, before choosing a process server it is a good idea to check the server's licensure history, including any reprimands or suspensions that may have been handed down by governing regulatory

bodies. This will ensure no negative history exists that could render due diligence testimony from the server incredible.

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