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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

May 3, 1995

The Honorable Carolyn R. Hills
Horry County Magistrate
1106 Glens Bay Road
Surfside Beach, South Carolina 29575

Re: Informal Opinion

Dear Judge Hills:

You have asked for guidance as to the general law regarding service of process in an ejectment action.

S.C. Code Ann. Section 27-37-30 provides the procedure for service upon a tenant for ejectment as follows:

> The copy of such rule [to show cause] may be served as is provided by law for the service of the summons in actions pending in the court of common pleas of this State or, when no person can be found in possession of the premises and the premises shall have remained unoccupied for a space of fifteen days or more immediately prior to the date of such service, the copy of such rule may be served by leaving it affixed to the most conspicuous part of the premises.

Section 27-37-40 is part of the statutory remedy for ejectment of a tenant by a landlord. Section 27-37-10 provides that a tenant may be ejected from possession of the premises when (a) such tenant fails or refuses to pay the rent when due or demanded; (b) the term of tenancy or occupancy has ended or (c) the terms or conditions of the lease have been violated. South Carolina's ejectment procedure has been determined to meet the requirements of due process. Johnson v. Tamberg, 430 F.2d 1125 (4th Cir. 1970).

A method of substituted service of process is provided by Section 27-37-40 where personal service cannot be had. By the terms of the statute, "when no person can be found in possession of the premises and the premises shall have remained unoccupied for a space of fifteen days or more immediately prior to the date of such service", then, the statute permits the rule to show cause to be served by leaving it affixed to the most conspicuous part of the premises." (emphasis added). Applying the clearly conjunctive ("and") language of the statute, substituted service is proper when no person can be found (1) in possession of the premises and (2) the premises have remained "unoccupied" for 15 days or more immediately prior to "the date of such service." Of course, "possession" can either be actual or constructive. See, State v. Halyard, 274 S.C 397, 264 S.E.2d 841 (1980). Premises are "unoccupied" when "no longer used for the accustomed and ordinary purposes of a dwelling or place of abode ...." Black's Law Dictionary, (5th ed), p. 1379.

The purpose of any service of process, including substituted service, is to obtain jurisdiction of the person. Petroleum Transp. Inc. v. Public Service Commission, 255 S.C. 419, 179 S.E.2d 326 (1971). No court has jurisdiction to render judgment against a defendant who has not been properly served with process. Klatte v. McEand, 95 S.C. 219, 78 S.E. 712 (1913). Accordingly, substituted service must conform to the statute which authorizes it, Seubert v. Buchanan, 250 S.C. 140, 156 S.E.2d 632 (1967) and must comport with due process. Of course, jurisdiction of the person, unlike jurisdiction of the subject matter, may be waived, if not properly preserved. Eaddy v. Eaddy, 283 S.C. 582, 324 S.E.2d 70 (1984); Myrtle Beach Lumber Co. v. Globe Intern. Corp., 281 S.C. 290, 315 S.E.2d 142 (1984); Muldrow v. Jeffords, 144 S.C. 509, 142 S.E. 602 (1928). See also, Osburn v. Pace, 55 Or. App. 492, 636 P.2d 497 (1982) [error for trial court to raise the question of personal jurisdiction on its own motion]. However a judgment by default granted without proper service of process upon the defendant is void where the defendant does not otherwise waive service. Yarbrough v. Collins, 290 S.C. 76, 348 S.E.2d 194 (Ct. App. 1986), reversed on other grounds, 293 S.C. 290, 360 S.E.2d 300 (1987). Before a default judgment may be entered for the plaintiff, the plaintiff must prove and the court must find that jurisdiction of the defaulting party was acquired by lawful service of process. State ex rel. Medlock v. Love Shop Ltd., 286 S.C. 486, 334 S.E.2d 528 (Ct. App. 1985).

Whether service of process has been properly effectuated pursuant to statute is largely a matter for the trial court to determine. Generally speaking, the appellate court will consider itself bound by the trial court's conclusion as to whether service of process is proper unless the trial court's ruling is either without evidentiary support or is controlled by an error of law. Hammond v. Cammons Engine Co., Inc., 287 S.C. 200, 336 S.E.2d 867 (1985), citing CB Askins v. Firedoor Corp. of Fla., 281 S.C. 611, 316 S.E.2d 713

(1984); Engineering Products v. Cleveland Crane and Engineering, 262 S.C. 1, 201 S.E.2d 921 (1974).

Moreover, concerning substituted service, it has been stated:

> [s]ervice is complete when all the required acts are done. So, if all that the statute requires is done, it is immaterial that the defendant in fact receives no actual notice thereof; and the fact that he does not thereafter personally receive the papers which were so served, or that he receives them at a late date ordinarily does not affect the validity of the service. Conversely, if the statute is not complied with it is of no avail that defendant does in fact receive actual notice of the action.

72 C.J.S., Process, § 50.

Our Supreme Court has stated that the proof or affidavit of service must be sufficient to show that the requirements of the specific statute regarding service have been met. In Matheson v. McCormac, 186 S.C. 93, 109, 195 S.E. 122 (1938), for example, the Court stated:

> [t]he proof of service must show affirmatively that the service of process was correctly made. This is imperatively necessary to give the Court jurisdiction of the person thus sought to be brought into Court.

186 S.C. at 109. And in Cannon v. Haverty Furniture Co., 179 S.C. 1, 183 S.E. 469, 473 (1935), the Court opined:

> It is not sufficient that the purported proof of service does not show on its face that the service was in an improper way, but the proof of service should show affirmatively that the requirements of the law in making the service were complied with. [Emphasis in original].

In both Matheson and Cannon, the Court concluded that, because the affidavit of service was inadequate, jurisdiction was not obtained over the defendant by the purported substituted service.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

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