Court File No. CV-10-8647-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE RECEIVERSHIP OF SKYSERVICE AIRLINES INC.

B E T W E E N:

THOMAS COOK CANADA INC.

Applicant

- and –

SKYSERVICE AIRLINES INC.

Respondent

BRIEF OF AUTHORITIES
(motion for substituted service of a summons to witness on Rob Giguere, returnable March 27, 2012)

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INDEX

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TAB 1

Laframboise v. Woodward
[Indexed as: Laframboise v. Woodward]

59 O.R. (3d) 338

[2002] O.J. No. 1590

Court File No. 43,570/01

Ontario Superior Court of Justice

J.W. Quinn J.

April 24, 2002

Civil procedure -- Commencement of proceedings -- Service -- Substituted service -- "Impractical" in rule 16.04(1) means "unable to be carried out or done" -- On motion for order for substituted service, plaintiff must demonstrate inability to carry out prompt personal service and not mere difficulty in serving defendant personally -- Substituted service must have reasonable possibility of bringing action to attention of defendant -- Substituted service not available if whereabouts of defendant unknown -- Counsel must give undertaking that plaintiff will not move to strike out defendant if insurer is unable to produce defendant for discovery before order for substituted service on defendant's insurer will be granted -- Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 16.04(1).

The plaintiff moved for an order permitting substituted service of a statement of claim upon the defendant's automobile insurer.

Held, the motion should be granted.

Rule 16.04(1) of the Rules of Civil Procedure permits the court to make an order for substituted service where it appears to the court that it is "impractical for any reason to effect prompt service of an originating process". "Impractical" means "unable to be carried out or done". Thus, in a motion under rule 16.04(1), there is an obligation upon counsel to show that he or she is unable to carry out prompt personal service. Mere difficulty in serving a defendant personally is not enough. In this case, it appeared that the defendant was successfully keeping one step ahead of the process server. All reasonable steps had been taken to effect prompt personal service.

While rule 16.04(1) does not say that substituted service must bring home to a defendant knowledge of the action, substituted service cannot be intended merely as an artificial alternative to personal service. The form of substituted service must have a reasonable possibility of bringing the action to

the attention of the defendant. If the defendant will not learn of the action through substituted service, then it is more appropriate to ask for an order dispensing with service altogether. Substituted service is not available if the whereabouts of the defendant are unknown.

An undertaking by counsel for the plaintiff not to move to strike out the defence if the insurer is unable to produce the defendant for discovery is a requirement before an order for substituted service on the defendant's insurer will be granted. Such an undertaking is not sufficiently given in a letter; it must be contained in the supporting affidavit.

Babineau v. Babineau (1983), 32 C.P.C. 229 (Ont. S.C.); Meius v. Pippy, [1980] O.J. No. 221, 20 C.P.C. 215 (H.C.J.), apld

Other cases referred to

Box v. Ergen (1978), 20 O.R. (2d) 635, 88 D.L.R. (3d) 408 (C.A.), revg (1978), 20 O.R. (2d) 635, 88 D.L.R. (3d) 408 (H.C.J.), revg (1976), 15 O.R. (2d) 735, 76 D.L.R. (3d) 626 (Co. Ct.); Brisette v. City-Wide Taxi Ltd., [1952] O.W.N. 501 (Master); Crédit Foncier Franco-Canadien v. McGuire (1979), 14 B.C.L.R. 281, 12 C.P.C. 103 (S.C.); McDonald and McDonald v. McEwan and Hannah (1983), 25 Sask. R. 68 (Q.B.); Paupst v. Henry (1983), 43 O.R. (2d) 748, 2 D.L.R. (4th) 682, [1984] I.L.R. 1-1718, 38 C.P.C. 5 (H.C.J.); Saraceni v. Rechenberg, [1971] 2 O.R. 735, [1971] I.L.R. 1-431 (Co. Ct.), affd [1971] 2 O.R. 738n, [1971] I.L.R. 1-432 (H.C.J.); Vaters v. Calgary Cab Co. (2001), 92 Alta. L.R. (3d) 224, [2001] A.J. No. 81 (C.A.); West v. Pope, [1998] O.J. No. 1978 (Gen. Div.)

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 16.04(1)

MOTION for an order permitting substituted service of statement of a claim on a defendant's insurer.

Roseanne Trivieri, for plaintiff/moving party.

J.W. QUINN J.: --

Introduction

[1] The plaintiff moved without notice for an order permitting substituted service of a statement of claim upon the automobile insurer of the defendant. After some shortcomings in the supporting material were cured by means of additional affidavits, I granted the order. Later, I had second thoughts about one aspect of the matter and so I decided to issue these Reasons, which address the requirements for substituted service upon an insurer pursuant to rule 16.04(1) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194.

[2] The action arises out of a motor vehicle accident that occurred July 28, 2000. The statement of claim was issued September 20, 2001.

Best Evidence Required

[3] The first affidavit filed in support of the motion contained these passages:

> 3. On October 9, 2001 . . . Ontario Process Serving was requested to serve the defendant at the address set out in the statement of claim.[1] at end of document] I have been advised and verily believe that Ontario Process Serving attempted to serve the defendants (sic) at this address but the premises were vacant and no forwarding address had been left.
> 4. On January 4, 2001,[2] at end of document] we made inquiries to the defendant's insurer, Certas Insurance Company, and requested that they provide to us the defendant's current address. Certas Insurance Company provided us with the same address as the one we had attempted service on October 9, 2001.
>
> . . . . .
>
> 8. The defendant was notified in writing on November 24, 2000 of the plaintiffs' intention to bring this action . . .[3] at end of document]

[4] I returned the motion materials to counsel with a note saying that I required the following documents to be made exhibits to the first affidavit: an affidavit of attempted service from the process server; copies of the correspondence to and from the insurer; and a copy of the letter of November 24, 2000. Counsel's second-hand summaries of these matters were not sufficient. A court is always entitled to the best evidence, particularly on a motion made ex parte.

Full and Fair Disclosure of All Relevant Facts

[5] The first affidavit also included the following:

> 5. . . . I requested a statement of driving record from the Ministry of Transportation but have been unsuccessful in obtaining an alternate address.

The affidavit did not indicate when the request was made of the Ministry. Furthermore, it was unclear why the deponent had been "unsuccessful". Was it because a reply had not yet been received from the Ministry? Or had there been a reply, but it contained an old address? Full and fair disclosure of these relevant facts was requested of counsel and supplied by way of an additional affidavit.[4] at end of document]

Unable to Effect Prompt Personal Service

[6] Rule 16.04(1) of the Rules of Civil Procedure provides for substituted service. It reads, in part:

> 16.04(1) Where it appears to the court that it is impractical for any reason to effect prompt service of an originating process. . . the court may make an order for substituted service . . .

[Emphasis added]

The three most important words in rule 16.04(1) are "impractical", "prompt" and "may".

[7] It sometimes seems to me that counsel seeking substituted service treat "impractical" as the equivalent of "inconvenient". In The New Shorter Oxford English Dictionary, 1993 ed., "impractical" is defined thusly: "not practicable; unable to be carried out or done". "Practicable", in turn, means: "able to be effected, accomplished, or done".

[8] In Crédit Foncier Franco-Canadian v. McGuire (1979), 12 C.P.C. 103, 14 B.C.L.R. 281 (S.C.), van der Hoop L.J.S.C. had occasion to consider the meaning of "impractical" in the context of a rule of civil procedure that included these words: "Where for any reason it is impractical to serve a document as set out in Rule 11, the Court may order substituted service . . .". At p. 105 C.P.C., after a scholarly search for the definition of "impractical", van der Hoop L.J.S.C. concluded that: ". . . what is impractical . . . is not capable of being done usefully or is capable of being done at too great a cost". With great respect, I prefer the Shorter Oxford definition to which I have referred: "unable to be carried out or done". Of course, "unable" must be read in conjunction with "prompt". Where time is not of the essence, prompt service as contemplated by rule 16.04(1) may take on a different meaning than when compared to a case where there is some urgency.

[9] Accordingly, in a motion of this nature, there is an obligation upon counsel to show that he or she is unable to carry out prompt personal service. Substituted service is not intended to spare a plaintiff the inconvenience or expense of personal service, if the latter can be effected. Mere difficulty in serving a defendant personally is not enough. Rule 16.04(1) does not provide an automatic right to an order for substituted service whenever there is some delay, expense, inconvenience or difficulty locating a party.

All Reasonable Steps Taken to Serve Personally

[10] The inability to serve a party personally is proved by showing that all reasonable steps have been taken to locate the party and to personally serve him or her. What is reasonable will depend on the nature of the case, the relief claimed, the amount involved and all of the surrounding circumstances.

[11] At bar, counsel for the plaintiff tracked the defendant to three different municipalities in the past two years, but without being successful in finding her. In regard to the last municipality, a supporting affidavit stated, "all of our searches to date have been unable to locate" the defendant. I returned the affidavit to counsel, indicating that a conclusory statement of this kind was insufficient. I asked for particulars so that I might satisfy myself whether, in fact, all searches had been carried out. The court must be told what steps have been taken and inquiries made to locate the defendant and whether, for example, there are relatives of the defendant who might be located and served. It is also helpful if counsel advise what steps or inquiries were not taken or made and the reasons therefor.

[12] Having received the requested particulars, I found that the defendant was successfully keeping one step ahead of the process server. Perhaps this was mere coincidence or perhaps it was because of the letter of November 24, 2000 which was forwarded to the defendant at her first address of record and spoke of legal action being brought against her. In the result, I was satisfied that all reasonable steps had been taken to effect prompt personal service (although, in a proper case, I would not rule out requiring a plaintiff to hire a private investigator to make an attempt to find a defendant).[5] at end of document]

What is the Most Appropriate Form of Substituted Service?

[13] The next consideration is whether the type of substituted service sought is appropriate. Under rule 16.04(1), the court is given a wide discretion as to the manner of service. Typically, substituted service may include: service on any person with whom the court is satisfied the defendant is in communication; mailing to an address (the last known or otherwise) at which the defendant has resided; leaving copies of the documents in question at an address (the last known or otherwise) at which the defendant has resided; or advertising in a local newspaper having circulation in the area where the defendant is thought to reside.

[14] I realize that rule 16.04(1) does not say that substituted service must bring home to a defendant knowledge of the action. Yet, I do not think that substituted service is intended merely as an artificial alternative to personal service. Surely substituted service must have some likelihood of informing a defendant of the proceeding; otherwise, the exercise of obtaining an order for substituted service is a charade. In this regard, I accept the test in Babineau v. Babineau (1983), 32 C.P.C. 229 (Ont. S.C.), where Master Donkin held that the form of substituted service sought must have a reasonable possibility of bringing the action to the attention of the defendant.[6] at end of document] If the defendant will not learn of the action through substituted service then it strikes me as more appropriate to ask for an order dispensing with service altogether. In my view, substituted service is not available if the whereabouts of the defendant are unknown.

[15] One must select the mode of substituted service that is most likely to bring the document in question to the attention of the defendant. Here, I contemplated requiring service by publication, but I concluded that, because the defendant's suspected current location was in an obscure part of the Province, publication would not be possible. I am at a loss to explain why I jumped to that conclusion. It was wrong of me to do so. Had I the presence of mind to request counsel to look into the matter she would have learned that the bucolic municipality in which the defendant might now reside actually is serviced by a fine weekly newspaper. I should have ordered service on the defendant by publication in two consecutive editions of that newspaper along with service on the insurer by mail. This is what was done by Master Peterson in West v. Pope, [1998] O.J. No. 1978 (Gen. Div.).

Substituted Service on the Insurer of a Defendant

[16] Substituted service on the insurer of a defendant is an anomaly. I say that because it is premised on no one knowing where the defendant can be found. Still, such service is commonplace.

[17] An early decision in which service on the automobile insurer of a defendant was allowed is Saraceni v. Rechenberg, [1971] 2 O.R. 735, [1971] I.L.R. 1-431 (Co. Ct.). There, Henry Co. Ct. J. heard an application to rescind an ex parte order permitting substituted service on the insurer of the defendant and held that the insurer was an agent of the defendant. Using agency principles to conclude that service upon the insurer is service upon the defendant, Henry Co. Ct. J. stated, at p. 737 O.R.:

> I also find that to all intents and purposes the insurance company is in effect the real defendant in this action. They are obliged by the policy and the Insurance Act to defend and satisfy any claim brought against their own insured [up to the policy limits].

The application in Saraceni was dismissed, as was a subsequent appeal to the High Court of Justice, heard by Stark J. (conveniently found at p. 739 O.R. of the same report).

[18] Saraceni v. Rechenberg was applied in McDonald and McDonald v. McEwan and Hannah (1983), 25 Sask. R. 68 at pp. 70-72 (Q.B.). However, Saraceni v. Rechenberg was not followed in

Box v. Ergen (1978), 20 O.R. (2d) 635, 88 D.L.R. (3d) 408 (H.C.J.), where Garrett J. set aside substituted service of a writ of summons on an insurance company, and, at p. 641 O.R., wrote:

> . . . as far as I am concerned there is nothing in the Insurance Act, R.S.O. 1970, c. 224 . . . which constitutes the insurance company the agent for service of a defendant. True, when the defendant is served he must bring the writ in. It must defend the case. It must pay the judgment. I have never heard it said that the insurance company act [sic] as agent for service. If that were the case in any matter of service which involved the slightest difficulty the plaintiff would simply serve the insurance company . . . I am not saying that in appropriate cases where orders for substitutional service are made directing service by publication, service on the insurance agent or service on the insurance company, that there is anything particularly wrong with it. I think just service on the insurance company itself is totally insufficient.

[19] The decision of Garrett J. was followed in Paupst v. Henry (1983), 43 O.R. (2d) 748 at p. 752, 2 D.L.R. (4th) 682 (H.C.J.), in which Henry J. held that an insurer is not the agent of a defendant for service.

[20] In Vaters v. Calgary Cab Co., [2001] A.J. No. 810 at para. 4, 92 Alta. L.R. (3d) 224, the Alberta Court of Appeal ruled that "notwithstanding . . . the authority of an insurer to represent a defendant insured's interests generally, a plaintiff must still comply with the Rules of Court and personally serve a defendant with its statement of claim".

[21] Substituted service on the insurer of a defendant has been allowed in numerous Ontario cases without, from what I have been able to determine, an explanation being offered as to the underlying reason (apart from the agency argument in Saraceni v. Rechenberg). Left to my own devices, I would not permit substituted service on an insurance company. It places the onus of finding the insured on the insurer. If a defendant cannot be found and there is no way to bring home to him or her knowledge of the proceedings, service should be dispensed with and a copy of the statement of claim simply forwarded to the insurance company (who, of course, should be at liberty to deliver a statement of defence and put the plaintiff to the proof of the claim). Nevertheless, a special practice obviously has grown up in this area of the law from which I feel that I should not depart.

The Undertaking

[22] Then there is the matter of an oft-forgotten undertaking. In Meius v. Pippy, [1980] O.J. No. 221, 20 C.P.C. 215 (H.C.J.), a case involving substituted service upon the insurer of a defendant, Cory J., at para. 5, expressed concern "with the problems that would arise and beset the insurer in attempting to produce the missing [defendant] for discovery". His Lordship went on to say:

> . . . that problem has been resolved by the undertaking of counsel which is confirmed by this order that the plaintiff will not move to strike out the defence of the defendant . . . if the insurer is unable to produce [her] for discovery.

[23] In a letter from counsel at bar, which accompanied one of the supplementary affidavits, she wrote, in part: "While not a requirement . . . we are prepared to give [the] undertaking . . . should the insurer request same." I advised counsel, based upon Meius v. Pippy, that I thought the undertaking was a requirement and, further, that the undertaking was not sufficiently given in a letter. It must be contained in the supporting affidavit. And, it should be part of the order. Otherwise, how

would the insurer ever come to know about the undertaking? A further affidavit was requested from counsel and received.

Discretion

[24] Motions of this nature are not to be treated casually by counsel or the court. In the end, after considering all of the circumstances, there must be a sufficient basis for the exercise of the court's jurisdiction under [rule] 16.04(1).

Disposition

[25] Ultimately, having been satisfied regarding all of the above matters (apart from the second-guessing reflected in para. [15]), I gave the order requested.

Motion granted.

Notes

Note 1: The address in the statement of claim was the same as that contained in the motor vehicle accident report.

Note 2: This date is incorrect, as revealed in a subsequent affidavit, and should be 2002 rather than 2001.

Note 3: A letter was forwarded to the defendant at the address set out in the motor vehicle accident report. This was four months after the accident and ten months before the statement of claim was served.

Note 4: Counsel submitted several affidavits after filing the initial motion record. If they are to be used on a motion, affidavits must be filed as part of a motion record. The first motion record of a plaintiff who is the moving party is entitled "Motion Record of the Plaintiff/Moving Party". If the plaintiff intends to rely upon a subsequent affidavit, it should be made part of a motion record and entitled "Supplementary Motion Record of the Plaintiff/Moving Party". If yet another affidavit is to be used, it is included in a motion record called "Second Supplementary Motion Record of the Plaintiff/Moving Party", and so on. Sometimes it is helpful to provide the court with a cumulative motion record.

Note 5: Plaintiffs sue for large sums of money and frequently expend many thousands of dollars obtaining medical and other reports. The requirement that they hire a private investigator to locate a defendant will not always be out of line.

Note 6: Master Donkin, essentially, was following the decision of Senior Master Marriott in Brisette v. City-Wide Taxi Ltd., [1952] O.W.N. 501 at p. 502.

TAB 2

Indexed as:
Babineau v. Babineau

Between
Babineau, petitioner/applicant, and
Babineau, respondent/respondent

[1983] O.J. No. 2187

32 C.P.C. 229

18 A.C.W.S. (2d) 53

No. FL 9341

Ontario Supreme Court - High Court of Justice

Master Donkin

January 18, 1983.

Counsel:

M. Pilon, for the applicant.
No other counsel mentioned.

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1 **MASTER DONKIN**:-- This is an ex parte application for substitutional service of a notice of motion and affidavits. The motion is for a declaration that the applicant is the beneficial owner of certain property and subsequent relief, or certain alternative relief.

2 The affidavit in support of the present application sets out that the parties were married in 1951; bought the property as joint tenants in 1953; last saw each other in 1956: and were divorced on the present applicant's petition in 1977. Service of the petition was by publication. The applicant does not have any knowledge of the present whereabouts of the respondent nor of any person in contact with her. Prior to the divorce he retained a private investigator who was unable to find the respondent. The affidavit then states that if a notice is published in newspapers in Toronto and Montreal "it is reasonably possible that the respondent will read the same or her attention will be drawn thereto".

(The italics are mine.) It should be noted that the deponent does not say that it is probable that she will actually learn of the motion.

3 In Brisette v. City-Wide Taxi Limited, [1952] O.W.N. 501 at 502, Senior Master Marriott states as follows:

> "In The Annual Practice, 1951, at page 88, the principles usually followed as to substituted service are stated to be as follows: 'If the writ is not likely to reach the defendant nor to come to his knowledge if service is substituted, than as a general rule substituted service should not be ordered'.
>
> Where by the refusal of an order for substituted service the plaintiff would be deprived of the right to relief that he could not obtain except by action, the Court may relax this rule to some extent, and where the material indicates that there is a possibility of the substituted service reaching the defendant it may make an order therefor. This may be done, for example, in actions for the recovery of land: see The Annual Practice, loc. cit. Ordinarily, however, the material should indicate that if service is made in the manner suggested therein there is a reasonable likelihood of its coming to the attention or knowledge of the defendant."

4 The statement which he quotes appears in the 1979 edition of The Supreme Court Practice at page 1101, paragraph 65/4/6.

5 I have not found or been referred to cases in which this principle has actually been followed, but since it has been reprinted for many years and adopted by Senior Master Mariott, I will follow it and order that service may be made by publication once in the Toronto Globe & Mail and once in a newspaper in Montreal.

MASTER DONKIN

qp/s/adm/mes

IN THE MATTER OF THE RECEIVERSHIP OF SKYSERVICE AIRLINES INC.

B E T W E E N :

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ONTARIO

COMMERCIAL LIST

Proceeding Commenced at Toronto

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(Motion for Substituted Service, returnable March 27, 2012)

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