



Practice Tip (10.30.19)

Invalid Service of Eviction Action Complaint

Summary

When advising a tenant in an eviction action, a thorough review of the affidavits of service and discussion with the client regarding how they received the Summons and Complaint is essential. The existence of a service defense may improve a client's bargaining position in settlement negotiations with the landlord and may provide a basis for a motion to dismiss.

Analysis

Strict Compliance Required

Because the consequences of losing an eviction action, *i.e.*, forcible eviction by the County Sheriff, are so dire for the tenant-defendant, the courts require strict compliance with the eviction statute service requirements. *E.g.*, *Koski v. Johnson*, 837 N.W.2d 739 (Minn. App. 2013). Substantial compliance is not enough, and actual notice is irrelevant. Thus, a close reading of the statute and careful attention to detail is required when reviewing the service of the Summons and Complaint.

Statutory Service Requirements

Minnesota Statute § 504B.331 sets forth the service requirements in an eviction action. It requires that landlords serve the Summons and Complaint at least seven days before the date of the initial appearance stated in the Summons, and that proof of service is filed at least three days before the initial appearance.¹ In addition, the statute requires that the Summons must be served "in the manner provided for service of a summons in a civil action in district court . . . [and] may be served by any person not named a party to the action." § 504B.331(a).²

Section 504B.331 authorizes three types of service: (1) personal service, (2) substituted service, and (3) service by mailing and posting.

(1) Personal Service

Personal service occurs when a non-party personally hands the tenant-defendant a copy of the Summons and Complaint. Personal service requires only one affidavit filed with the court stating the date when the Summons and Complaint was delivered to the defendant.

¹ Computation of the seven-day period is governed by the provisions of Rule 601 of the Minnesota Rules of Civil Procedure. The filing of the affidavits of service at least three business days before the initial appearance is required by Rule 605 of the General Rules of Practice for the District Courts.

² If the person serving the Summons is closely associated with the plaintiff, reference should be made to cases interpreting Rule 4.02 of the Minnesota Rules of Civil Procedure to ascertain whether the person can serve process on behalf of the plaintiff.

PRACTICE TIP INVALID SERVICE IN EVICTION ACTIONS



(2) Substituted Service

If the defendant cannot be personally served, substituted service will be effective to confer personal jurisdiction. Substituted service can only be accomplished by leaving a copy of the Summons and Complaint at the defendant's last usual place of abode, *i.e.*, the rental unit, with a person of suitable age and discretion who resides in the unit. For cases interpreting the term, “suitable age and discretion,” consult the annotations to Rule 4.03(a) of the Minnesota Rules of Civil Procedure. Also, the person receiving the Summons and Complaint must actually reside in the rental unit. The person cannot be a relative, friend, babysitter, etc., who is just visiting the unit. An affidavit of substituted service must be filed.

(3) Mail and Post Service

When neither personal nor substituted service are possible, service may be accomplished alternatively, through mail and posting. § 504B.331(d). Again, strict compliance with the statutory prerequisites is mandated. There are four prerequisites for alternative service:

- The defendant cannot be found in the county. § 504B.331(d).
- If the property is residential, the landlord must make two attempts to personally serve the defendant on two different days, with one of the attempts between the hours of 6:00 p.m. and 10:00 p.m. § 504B.331(d)(1)(ii).
- A copy of the Summons and Complaint must be mailed to the defendant at the defendant’s last known address. § 504B.331(d)(2)(ii).
- The plaintiff or the plaintiff’s attorney has signed and filed with the court an affidavit stating that “the defendant cannot be found, or that the plaintiff or the plaintiff’s attorney believes that the defendant is not in the state,” and stating that a copy of the Summons has been mailed to the defendant at the defendant’s last known address. § 504B.331(d)(2)(i), (ii).

Proper alternative service results in four affidavits:

- (1) Affidavit of Plaintiff: an affidavit of the plaintiff or the plaintiff’s attorney stating that “the defendant cannot be found, or that the plaintiff or the plaintiff’s attorney believes that the defendant is not in the state”;
- (2) Affidavit of Not Found: an affidavit showing two attempts on different days to personally serve the defendant with the dates, times, and locations of the attempted service;
- (3) Affidavit of Mailing: an affidavit stating that a copy of the Summons has been mailed to the defendant at the defendant’s last known address; and
- (4) Affidavit of Posting: an affidavit stating the date and time when the Summons was posted and the location of the posting.³

With alternate service, the date of the execution of the affidavits and the time of day of the filing of the affidavits is important. A close reading of the statute suggests that service by posting

³ Rule 606 of the General Rules of Practice.

PRACTICE TIP
INVALID SERVICE IN EVICTION ACTIONS



cannot occur until after personal service has been attempted on two different days, a copy of the Summons has been mailed to the defendant, and the affidavit by plaintiff or the plaintiff's attorney has been signed and filed.⁴ In some jurisdictions, particularly in Hennepin county, the failure to file all these documents in the proper order has been and can be dispositive.⁵

Presenting the Invalid Service Defense

If there is a service defense, the defense should be presented at the time of the initial appearance as a threshold oral motion to dismiss the eviction action for lack of personal jurisdiction and to expunge the record. A personal jurisdiction defense can be waived and proceeding with an initial appearance without making the motion would likely be considered a waiver of the defense.

⁴ Rule 606 of the General Rules of Practice.

⁵ When e-filed, the date and time of the e-filing is noted in the upper right-hand corner of the document. Documents filed at the counter may or may not contain a time stamp.