Warning Orders: Importance of Recent Arkansas Precedent

Arkansas Courts have recently reviewed cases regarding the sufficiency of constructive service by warning order. Service by warning order is governed by Arkansas Rule of Civil Procedure 4(f), which states:

> "If it appears by the affidavit of a party seeking judgment..., after diligent inquiry, the identity or whereabouts of a defendant remains unknown..., service shall be by warning order issued by the clerk."

The issue examined in Arkansas' recent cases is what constitutes "diligent inquiry," and to what extent these "diligent efforts" must be described within the affidavit submitted to the Court. The Supreme Court of Arkansas held, "A mere recitation in an affidavit that a diligent inquiry was made is not sufficient." *Smith v. Edwards*, 279 Ark, 79, 648 S.W.2d 482 (1983). The Rule requires the party seeking constructive service by warning order to show that he or she did, indeed, attempt to locate the defendant. Ark. Rule Civ. Pro. 4(f). So, what is sufficient description of "diligent inquiry" to withstand a challenge to validity of service? An analysis of recent Arkansas precedent provides some insight.

Billings v. U.S. Bank National Association is an Arkansas case where the court held the Plaintiff did not properly serve the Defendant by warning order because the "diligent inquiry" requirement was not satisfied. *Billings v. U.S. Bank National Association,* 2016 Ark. App. 134, 484 S.W.3d 715 (2016). The Plaintiff, U.S. Bank, filed an affidavit for warning order a few weeks after filing its complaint in 2012. *Id.* at 716. The affidavit stated counsel "made diligent inquiry" into the whereabouts of the Unknown Heir(s) of the borrower, but the "Defendant(s)' present address(es) are unknown." *Id.* The Plaintiff, through counsel, received a fax regarding the borrower's son's petition to be appointed the personal representative of the borrower's estate. *Id.* The petition included the son's address as the subject property address. *Id.* The Plaintiff then published the warning order for the Unknown Heir(s), but subsequently amended its complaint to include the borrower's son and two sisters as Defendants. *Id.* The Plaintiff then filed an affidavit for warning order against the borrower's son/personal representative, Montrevel Billings, claiming that pursuant to diligent inquiry, they discovered the property address was no longer his address, and his current address was unknown. *Id.* at 716-717. The Court then granted a default judgment against the Defendant, Mr. Billings. *Id.* at 717.

Prior to the sale, the Defendant filed a motion to vacate the foreclosure decree, and the Court suspended the sale of the home until the matter was resolved. *Id.* A hearing was held in 2015, where the Court found service was proper and denied the Defendant's motion to vacate. *Id.* The Defendant then filed a motion for reconsideration, which was denied, and then he appealed. *Id.*

The Court in *Billings* stated the Plaintiff, "presented no facts in either… affidavit to support its statement that it made a diligent inquiry." *Id*. at 718. Though the Plaintiff later tried to

prove the attempts of service made prior to the warning order, the Court held that these attempts were irrelevant because they were not initially described in the affidavits for warning order. *Id.* The Plaintiff, "was required to show what efforts it made, if any, to locate Montrevel *before* it sought constructive service by a warning order. U.S. Bank did not include any facts in its affidavits for a warning order to show any efforts it may have taken to diligently inquire into Montrevel's location; therefore, service by warning order was not properly executed." *Id.*

Conversely, in *Morgan v. Big Creek Farms of Hickory Flat, Inc.,* the Court held that Plaintiff, Big Creek Farms, properly utilized a warning order to complete service upon the Defendants. *Morgan v. Big Creek Farms of Hickory Flat, Inc.,* 2016 Ark. App 121, 488 S.W.3d 535 (2016). The Plaintiff and the Defendants entered into a construction contract in 2008. *Id.* at 537. Construction was completed in 2009, and the Plaintiff attempted multiple times to collect payment pursuant to the contract. *Id.* In late 2011, the Plaintiff filed suit to recover the amount owed. *Id.* On four occasions the Plaintiff attempted personal service by sheriff at the Defendants' address without success. *Id.* at 539. During these attempts the sheriff's department identified another address where the Defendants' utility bills were being mailed. *Id.* The Plaintiff hired a private investigator who confirmed this new address as a possible address. *Id.* Personal service was again attempted on the Defendants at the newfound address three times; all attempts were unsuccessful. *Id.*

After two unsuccessful service attempts by certified and first-class mail at the first address, the Plaintiff filed and was granted an extension of time. *Id.* Subsequently, the Plaintiff filed an affidavit for warning order, detailing these attempts. *Id.* Service by warning order was conducted, and the Plaintiff eventually granted a default judgment against the Defendants in 2012. *Id.* at 537-539. In 2014, the Defendants filed a motion to set aside the judgment. *Id.* at 537. Said motion was denied and the Defendants then appealed the decision, which the Court of Appeals of Arkansas then denied, as well. *Id.* at 539. The Court's reasoning was that the affidavit for warning order clearly demonstrated "diligent inquiry," through the inclusion of process server and private investigator affidavits and an explanation of those efforts. *Id.* at 539.

These two cases provide some guidelines for what Arkansas courts consider valid constructive service. A blanket statement that diligent inquiry was made, but was unsuccessful, as in the *Billings* decision, is not sufficient. Additionally, attempting to prove diligent inquiry after the fact is not sufficient. It is common practice that warning orders are utilized as a last resort for service upon defendants, and the language of the Rule dictates this. Only after diligent inquiry has been conducted may a warning order be issued.

What if, instead, affidavits and receipts of attempted service are attached as exhibits to the warning order affidavit, but not described within the body of the affidavit? In theory, incorporating exhibits makes whatever is contained in the exhibits a part of the pleadings. To some, this seems to be sufficient for it to "appear" that diligent inquiry was conducted by the

party seeking the warning order. However, the Court has not yet ruled on this, and we are left with speculation.

The Rule is not clear in describing the extent to which a party must prove its diligent inquiry. The most instruction provided by the Rule indicates it must "appear by the affidavit" that diligent inquiries were made. The Court held in two starkly different cases what it will and will not consider diligent inquiry for purposes of a warning order. The policy at issue in these cases is clear: one should not be able to constructively notify a defendant of a pending lawsuit without first deliberately attempting to give the defendant actual notice. Any other policy would cause an increase in unnecessary default judgments - those where a defendant may have been able to and desired to defend his or her interest. The challenge now will be to determine and predict how Arkansas courts will handle constructive service with facts that fall in between.