

20090133

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

FILED
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CLERK OF SUPREME COURT

APR - 5 2009

Kathy Nelson,

STATE OF NORTH DAKOTA

Plaintiff-Appellee,

Supreme Court No. 20090133

vs.

District Court No. 09-09-C-00814

Carol Johnson,

Defendant-Appellant.

BRIEF OF APPELLEE

APPEAL FROM A JUDGMENT OF EVICTION IN A FORCIBLE DETAINER
ACTION

CASS COUNTY DISTRICT COURT, EAST-CENTRAL JUDICIAL DISTRICT
HONORABLE STEVEN E. McCULLOUGH

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ISSUES ON APPEAL

Appellant Carol Johnson [“Johnson”] sets forth four (4) appellate issues arising out of the Judgment of March 3, 2009, obtained against her in an eviction action. The first two (2) issues raised by Johnson involve the service of the statutory notice, required under N.D.C.C. § 33-06-02 as a condition prerequisite to maintain an eviction action. Appellee Kathy Nelson [“Nelson”] submits the first two (2) issues of Johnson asserted in the alternative, should be combined and phrased as follows:

1. Can the three day notice to quit, required under N.D.C.C. § 33-06-02, be served upon a tenant by posting?

Nelson submits Johnson’s third and fourth issues are moot;¹ Johnson has vacated Nelson’s premises. However if such issues were determined by this Court not to be moot, the issues should be framed as follows:

2. Do the district court’s findings of fact, conclusions of law, and oral pronouncements at hearing adequately explain why the district court rejected Johnson’s defenses of retaliatory eviction, waiver or equitable estoppel?
3. Was the district court clearly erroneous when it rejected Johnson’s alleged defenses to the eviction action?

STATEMENT OF THE CASE

This appeal stems from an eviction action initiated by Nelson against her tenant

¹ In the near future, Nelson expects to file a motion to dismiss the appeal based on mootness issues.

Johnson for the non-payment of February 2009 rent. The form of action initiated against Johnson is sometimes referred to as a forcible detainer action. At the time Nelson's eviction action was brought and later determined, the form of action was governed by Chapter 33-06 of the North Dakota Century Code. In 2009, the Legislative Assembly of North Dakota adopted code Chapter 47-32, entitled "Eviction", and repealed code Chapter 33-06 as surplusage. Other than renumbering the chapter of the code, it appears that Chapter 47-32 of North Dakota Century Code (2009) is a *verbatim* version of repealed code Chapter 33-06. To avoid confusion, and because this action was commenced, and decided, in February, 2009, all statutory citations in this brief will refer to statutes within Chapter 33-06 of the North Dakota Century Code [2007 version], and not to the 2009 code.

To maintain an eviction action for non-payment of rent, a landlord must provide his tenant at least three days' written notice of the landlord's intention to evict. This required "notice may be served and returned as a summons is served and returned or, if the party cannot be found, then by the sheriff of the county or process server posting the notice conspicuously upon the premises." N.D.C.C. § 33-06-02 (2007).

On February 5, 2009, Nelson, as Landlord, caused service by posting [taping] the three day notice on the door of her tenant Johnson. Appellant's Appendix, page A-16; Plaintiff's Exhibit 5; and Transcript of Proceeding of February 25, 2009, page 41.

On February 13, 2009, Nelson issued a Summons and Complaint setting forth a cause of action for the eviction of Johnson for non-payment of rent. Appellant's Appendix, pages A-2 to A-6. On February 25, 2009, Johnson answered Nelson's Complaint without

contesting the manner of how service of process had been accomplished by Nelson. In this appeal, Johnson does not present any issue to this Court concerning the service of process of the Summons and Complaint. On page 16 of her Appellant's Brief, Johnson [Appellant/Defendant] writes:

Pursuant to N.D.R.Civ.P. 4(i)(5), Defendant's written admission of receipt of the summons and complaint is sufficient proof of service of these items. Id. Defendant's affidavit, however, evidenced her receipt of only the summons and complaint. AFDVT ¶ 12. Thus, service requirements of N.D.C.C. § 33-06-02 and Rule 4 are not at issue for the summons and complaint, but are at issue with respect to the statutory notice.

The District Court determined that Johnson was served the Summons and Complaint on February 13, 2009. Appellant's Appendix, page A-16. Due to her voluntary admissions, and/or her voluntary, general appearance through her Answer, Johnson does not take issue with this factual finding of the district court.

Johnson does take issue with the service of the requisite three day's notice of intention to evict. On February 25, 2009, Johnson filed Defendant's Notice of Motion to Dismiss Summons and Complaint [dated February 23, 2009]. District Court Docket Entry #6. On February 25, 2009, Johnson also filed Defendant's Motion to Dismiss Summons and Complaint in Forcible Detainer [dated February 24, 2009]. District Court Docket Entry # 7. On February 25, 2009, Johnson filed Defendant's Affidavit in Support of her Motion to Dismiss Summons and Complaint in Forcible Detainer [dated February 25, 2009]. Appellant's Appendix, pages A-10 to A-14.

In her February 24, 2009, motion to dismiss, Johnson sought the following relief:

1. To dismiss the action because the complaint fails to

state a claim against the Defendant upon which relief may be granted.

2. To dismiss the action on the ground the Defendant was not served with a 3-day Notice to Quit prior to the commencement of the action, as set forth in Defendant's Affidavit annexed hereto as Exhibit 1, and by this reference incorporated as though fully set forth herein.
3. To award Defendant costs, and such other and additional relief as the Court may deem to be advisable.

District Court Docket Entry # 7.

In her Answer, Johnson set forth a "First Defense" which admitted to a written six month lease [Docket Entry # 10; Plaintiff's Exhibit 1] effective September 15, 2008, of property located at 1231 21st Street South, Fargo, North Dakota, for the monthly rental of \$495.00. In her Answer's First Defense, Johnson generally denied allegations of the amount of rent after Nelson had added the contractual late fees due Nelson, denied her refusal or nonpayment of rent, and denied the service of the Notice to Quit [under N.D.C.C. § 33-06-02]. Appellant's Appendix, page A-7. Johnson asserted three other defenses in her Answer which she labeled, (1) "Second Defense (Retaliatory Eviction)," (2) "First Affirmative Defense - Waiver," and (3) "Second Affirmative Defense - Equitable Estoppel - (N.D.C.C. § 31-11-06)." Appellant's Appendix, pages A7-A8.

Trial of the eviction action, and the hearing of Johnson's motion occurred on February 25, 2009, with the Honorable Steven E. McCullough, Judge of the District Court, presiding. On the record, Judge McCullough made his findings or conclusions as to why he

rejected each alleged defense that Johnson raised, either in her Answer, her motion, or during the trial of the action. Transcript of Proceeding of February 25, 2009, pages 68-70.

On March 3, 2009, Judge McCullough made his written Findings of Fact, Conclusions of Law, and Order for Judgment. Appellant's Appendix, page A-15 to A-17. A Judgment awarding Nelson restoration of the property, \$520.00 in rental and late fees, \$400.00 attorney fees, and \$130.00 in costs was entered on March 3, 2009.

On April 27, 2009, Johnson timely appealed from the March 3, 2009, Judgment.

STATEMENT OF FACTS

1. Three days' written notice of Nelson's intent to evict was served upon Johnson on February 5, 2009. The requisite notice was served by Chris Nelson who testified, by affidavit, that he was over the age of eighteen (18) years, not a party to the action, and had no interest therein. Plaintiff's Exhibit 5; District Court Docket # 14. See also Finding of Fact 5 found on page A-18 of Appellant's Appendix. Chris Nelson testified as to this process, and was subjected to cross-examination by Johnson. Transcript of Proceeding of February 25, 2009, pages 38-47.

2. Pursuant to the terms of the written lease between Nelson and Johnson, rent for February, 2009, was due on the first day of said month in the amount of \$495.00. Plaintiff's Exhibit 1; Docket Entry #10. Under the terms of the written lease, there is a late fee of \$25.00 if the rent is not paid on the first day of the month, and an additional \$5.00 late fee for each day that rent is late after the fifth day of the month. *Id.* On February 24, 2009 [one day prior to the eviction trial; 23 days late], Johnson tendered a check for the payment

of rent and late fees to Nelson [through her attorney]. Defendant's Exhibit 6, District Court Docket Entry # 15; Transcript of Proceeding of February 25, 2009, page 59.

3. The District Judge orally determined that Johnson's retaliatory eviction defense was premised on whether the three day's notice of intent to evict had been served on Johnson. Transcript of Proceeding of February 25, 2009, page 68. It was determined that the notice had been served on February 5, 2009. Appellant's Appendix, page A-16. Johnson's defense of retaliatory eviction was based upon her letter of February 9, 2009, and received by Nelson on February 11, 2009. Transcript of Proceeding of February 25, 2009, pages 26 and 29. Johnson's 30-day notice [Defendant's Exhibit 3, District Court Docket Entry # 3] trails Nelson's service of the requisite three day's notice of intent to evict.

4. Johnson's defenses of waiver and estoppel involved Johnson's position that Nelson had agreed to an extension of the payment of rent to February 20, 2009. Transcript of Proceeding of February 25, 2009, page 69. Appellant's Appendix, page A-12. Johnson did not tender a check for February rental and late fees until February 24, 2009 – four (4) days following the alleged date set for payment [based upon an agreement that Nelson had **no recollection** of entering into; Transcript of Proceeding of February 25, 2009, pages 32-33]. Defendant's Exhibit 6; District Court Docket Entry # 15; Transcript of Proceeding of February 25, 2009, page 59.

LAW AND ARGUMENT

Standard of Review

Nelson respectfully submits the District Court's finding that Johnson had been served

the three day's notice of intention to evict involves a question of fact, and is subject to the clearly erroneous standard of N.D.R.Civ.P. 52(a).

The clearly erroneous rule is defined in Fladeland v. Gudbrandson, 2004 ND 118, ¶ 7, 681 N.W.2d 431: "A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if there is no evidence to support it, or if, after reviewing all the evidence, we are left with a definite and firm conviction a mistake has been made."

Similarly, Nelson respectfully submits that the District Court's dismissal of Johnson's defenses of retaliatory eviction, waiver, and estoppel involve questions of fact, and are governed by the clearly erroneous standard.

POINT 1. Nelson's son was qualified to be the process server and had properly served the requisite three day notice of intention to evict on Johnson.

Proper service of the three day's notice of a landlord's intention to evict is a jurisdictional prerequisite to an eviction action in North Dakota. N.D.C.C. § 33-06-02 (2007). Proper service of this necessary notice is governed by statute, and not by N.D.R.Civ.P. 4. Service of this notice, "... may be served and returned as a summons is served and returned or, if the party cannot be found, then by the sheriff of the county or a process server posting the notice conspicuous upon the premises." N.D.C.C. § 33-06-02 (2007). Most of Johnson's argument concerning the claimed lack of service of the three day notice centers around her mistaken belief that the notice must be served under the provisions of N.D.R.Civ.P. 4. Johnson is mistaken in that said statute authorizes a method of service not contemplated by the rules of civil procedure.

Chris Nelson testified at the hearing, and also submitted an affidavit of service of the requisite notice by taping to Johnson's door. Transcript of Proceeding of February 25, 2009, page 41. In his affidavit of service, Chris Nelson testified that he was "over the age of eighteen (18) years and not a party to the foregoing action or interested therein.." District Court Docket # 4. Chris Nelson testified that he had served Three Day Notices in the past. Transcript of Proceeding of February 25, 2009, pages 39-40. Johnson submitted no evidence that Chris Nelson was not over the age of eighteen (18) years on the date of service. As to the age of Chris Nelson and as to the taping of the requisite notice on the door, the District Court is not clearly erroneous in determining that Johnson had been served. Chris Nelson's testimony and affidavit are competent testimony to prove service, and sustains the District Court's findings.

Johnson also brings into question whether Chris Nelson is an "interested" party because he is the son of Kathy Nelson. Johnson asks this Court to adopt the definition of a person "interested in an action" set forth in Laclede Gas Company v. Abrahamson, 296 S.W.2d 100 (Mo. 1956), which Missouri case addresses a person's right to *intervene* in an action. If the legal test of the right of person to intervene is the same for service of process, then the North Dakota test found in Fisher v. Fisher, 546 N.W.2d 354 (N.D. 1996) should prevail, and would not prevent Chris Nelson from being a process server for the requisite notice. It cannot be said that Chris Nelson has a "direct interest" in the eviction action, or even a "legally protectable interest" in the eviction action. The evidence at trial showed he was not an owner of the real property. There is no evidence in the record that would suggest

that Chris Nelson had a right to either rents, or possession, of the real property.

Based upon the evidence present to the District Court, through affidavit or live testimony subjected to cross-examination by Johnson, it cannot be said that the District Judge was clearly erroneous when he determined that Johnson had been served the three day notice, and thus, the District Court had jurisdiction of the eviction action.

POINT 2. The dismissal of all Johnson's defenses was not clearly erroneous.

Johnson's defense of retaliatory eviction was rejected by the District Court because Johnson's 30 day notice trailed the service of three day notice. Transcript of Proceeding of February 25, 2009, page 68. There is sufficient evidence in the record that supports the District's Court's finding, including the testimony of Chris Nelson, and the undisputed fact that Johnson's 30 day notice was mailed to Nelson on February 9, 2009. A District Judge is not clearly erroneous when he concludes that the purposes of an eviction action is not retaliation, when *the eviction action precedes the claimed triggering event for retaliation*.

Nor is the District Court clearly erroneous in rejecting Johnson's claimed defenses of waiver or estoppel. Nelson testified she did not recall the conversations concerning the late payment of February rent. Transcript of Proceeding of February 25, 2009, pages 32-33. While Johnson attempts to prove waiver or estoppel until February 20, 2009, Johnson acknowledges that she did not tender a check for February rent until February 24, 2009 – four days too late. The District Judge cannot be said to be clearly erroneous when he holds, "And therefore, even if there was some sort of an accord or an agreement for delayed rent payment, that hasn't been complied with and, therefore, can't prevent the eviction action from

proceeding in this case.” Transcript of Proceeding of February 25, 2009, page 69.

Nor was it error for the District Judge to state his essential findings of Johnson’s defenses on the record and not in written findings. As stated in Healy v. Healy, 397 N.W.2d 71, 75-76 (N.D. 1986):

The purpose of findings required by Rule 52(a), N.D.R.Civ.P., is to enable the appellate court to obtain a correct understanding of the factual issues determined by the trial court as a basis for its conclusions of law and judgment. *Koller v. Koller*, 377 N.W.2d 130, 131 (N.D.1985). Findings that enable this court to understand the reasoning behind the court’s decision are all that is necessary. *Koller, supra*. An oral recitation by the court from the bench complies with Rule 52(a) and is entitled to consideration on appeal. *Quirk v. Swanson*, 368 N.W.2d 557, 561 (N.D.1985).

The District Court adequately explained his reasoning for ruling in favor of Nelson in the eviction action brought against Johnson.

Johnson presents no issue to this Court as to the amount of rent or late fees determined to be due. Johnson presents no issue concerning the award of attorney fees or costs to Nelson. Johnson’s appellate issues merely relate to her defenses that she plead in her Answer which are governed by the clearly erroneous standard. There is ample evidence in the record below to sustain the District Court’s determination that Johnson did not comply with either the lease agreement, or even her alleged agreement for the delay of February rental to February 20, 2009 – it was not paid then either.

CONCLUSION

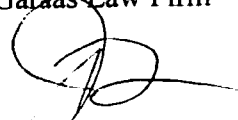
The District Court had jurisdiction of Nelson’s eviction action because the requisite three day notice had been served by posting upon Johnson’s door. The District Court was not clearly erroneous in rendering judgment in favor of Nelson for the eviction of Johnson,

nor in dismissing Johnson's defenses.

Wherefore, Appellee prays that Johnson's appeal be dismissed and that Nelson be awarded her costs, and legal fees, if proper for her defense of this appeal.

Respectfully submitted this 5th day of August, 2009.

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IN THE DISTRICT COURT FOR CASS COUNTY, NORTH DAKOTA

Kathy Nelson,

Appellee,

Civil No. 09-09-C-814

Sup. Ct. 20090133

vs.

AFFIDAVIT OF SERVICE

Carol Johnson,

Appellant.

State of North Dakota
County of Cass

Jonathan T. Garaas, being first duly sworn on oath, deposes and says: Affiant is a resident of the City of Fargo, North Dakota, and over the age of eighteen years, and not a party to the above entitled matter.

On the 5th day of August, 2009, Affiant deposited in the United States Post Office at Fargo, North Dakota, a true and correct copy of the following documents in the above entitled action:

APPELLEE'S BRIEF

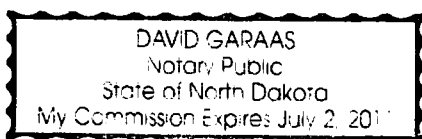
The copies of the foregoing were securely enclosed in an envelope with postage duly prepaid and addressed as follows:

Carol Johnson
P O Box 342
Fargo, ND 58107-0342

To the best of Affiant's knowledge, the address above given was the actual post office address of the party intended to be so served. The above documents were duly mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure.


Jonathan T. Garaas

Subscribed and sworn to before me this 5th day of August, 2009.




Notary Public