No. 15-CV-1142

DISTRICT OF COLUMBIA COURT OF APPEALS

SOUTHERN HILLS LIMITED PARTNERSHIP,

Appellant,

v.

CHARLES ANDERSON,

Appellee.

On Appeal from the Superior Court
of the District of Columbia, Civil Division,
Landlord & Tenant Branch

BRIEF OF THE LEGAL AID SOCIETY OF THE DISTRICT OF COLUMBIA AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE AND URGING AFFIRMANCE

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INTERESTS OF AMICUS CURIAE[1]

The Legal Aid Society of the District of Columbia was formed in 1932 to provide legal aid and counsel to indigent persons in civil law matters and to encourage measures by which the law may better protect and serve their needs. Legal Aid is the oldest general civil legal services program in the District of Columbia. Since its inception, Legal Aid has represented numerous tenants living in poverty in the District and participated as *amicus curiae* in many appeals involving landlord-tenant matters. Legal Aid has an interest in the correct interpretation and effective enforcement of eviction protections for tenants in the District.

[1] Both the Appellant, Southern Hills Limited Partnership, and the Appellee, Charles Anderson, have consented to the Legal Aid Society of the District of Columbia's filing this brief as *amicus curiae*. *See* D.C. App. R. 29(a).

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INTRODUCTION

This case raises significant constitutional and statutory interpretation questions regarding what a landlord must do to comply with the requirement of diligent and conscientious efforts to serve a defendant personally in an action for possession before resorting to service by posting and mail. Although District law permits a landlord to serve an eviction complaint by posting and mailing under limited circumstances, "posting is the least favored form of service and used only

where attempts at personal or substituted service have failed." *Parker v. Frank Emmet Real Estate*, 451 A.2d 62, 64 (D.C. 1982); *see also Frank Emmet Real Estate v. Monroe*, 562 A.2d 134, 136 (D.C. 1989) ("service by posting in eviction actions is a bottom choice") (internal citations omitted); *Bell v. Tsintolas Realty Co.*, 430 F.2d 474, 477 (D.C. 1970) (service by posting is "a last resort"). The specific question before this Court is whether a landlord attempting to serve a tenant-defendant and "aware of the possibility of Defendant's incarceration" due to the existence of a specific criminal prosecution should look at a publicly-available docket in that case to determine whether the tenant-defendant is, in fact, incarcerated. *See* Appellant's Appendix (Aplt. App.) at 148-50.

The Legal Aid Society of the District of Columbia urges this Court, in deciding this appeal, to reaffirm its precedents requiring diligent and conscientious efforts in the particular circumstances of each case to provide personal service prior to posting and to clarify that such diligence necessarily entails good-faith efforts to personally serve the defendant based on information reasonably available to the landlord. This Court should reiterate that the landlord is required to make use of available information to attempt personal service even when the landlord's actual knowledge does not yet include the tenant's precise location. Requiring the landlord to take such steps based on the knowledge that it has is consistent with this Court's

case law and with the constitutional requirement for notice reasonably calculated to apprise the tenant of the action.

ARGUMENT

I. AN ENTITY RESPONSIBLE FOR SERVICE MUST ACT DILIGENTLY AND CONSCIENTIOUSLY BASED ON ALL RELEVANT FACTS THAT IT KNOWS OR SHOULD KNOW.

A. Service must be Reasonably Calculated to Provide Notice under all the Circumstances of a Particular Case.

Service by posting and mail is a last resort, available to the landlord only after diligent and conscientious efforts at personal service have failed, in part because of the important "constitutional overtones" related to the defendant's notice of proceedings and opportunity to be heard. *See Frank Emmet Real Estate v. Monroe*, 562 A.2d 134, 137 (D.C. 1989). The Supreme Court has addressed the constitutional issues at stake when considering the adequacy of service upon a tenant by posting, holding that "'[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is *notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action* and afford them an opportunity to present their objections.'" *Greene v. Lindsey*, 456 U.S. 444, 449-50 (1982) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). This is the standard because "the right to be heard has little reality or worth unless one is informed that the matter is pending and can choose

for himself whether to appear, default, acquiesce or contest." *Id.* at 449 (internal quotation marks and citations omitted).

Whether service is "reasonably calculated" to give parties notice of the action and meets the basic requirements of due process is a case-specific and fact-specific inquiry. Answering this question accurately requires an understanding of the facts known to the person or entity with the obligation to serve the defendant with process. *See Jones v. Flowers*, 547 U.S. 220, 230 (2006) ("[W]e have required the government to consider unique information about an intended recipient regardless of whether a statutory scheme is reasonably calculated to provide notice in the ordinary case."). A case-by-case approach is consistent with the Supreme Court's mandate that service, to comply with the requirements of due process, must be "*reasonably calculated, under all the circumstances*" to give the tenant actual notice. *Greene*, 456 U.S. at 449-50. In *Greene*, the Supreme Court observed that service by posting might be adequate in many eviction cases but that in the particular factual circumstances of that case, where posted notices were known to be torn down regularly, service by posting alone failed to provide due process. *Id.* at 453-54.

Notice and the opportunity to be heard are especially critical in the context of an eviction action: the case determines a tenant's "right of continued residence in [his] home." *Id.* at 451. The stakes are especially high in cases, like this one, involving subsidized housing, *see* Aplt. App. at 141, in which the tenant almost

always stands to lose not just a particular home but the very subsidy making any home affordable; loss of the subsidy often means homelessness for the tenant. In the context of such dire risks of deprivation, it is particularly important that the notice be reasonably calculated to apprise the tenant of the eviction action and allow the tenant to contest that action. *See Greene*, 456 U.S. at 449-450.

B. The Landlord Must Act Diligently and Conscientiously Based on Individual Circumstances and Unique Facts in a Given Case.

The tenant's notice of an eviction action in the District is governed by Super Ct. L&T R. 4, which requires service in compliance with D.C. Code § 16-1502. The Code, in turn, requires the following:

> If the defendant has left the District of Columbia, or cannot be found, the summons may be served by delivering a copy thereof to the tenant, or by leaving a copy with some person above the age of sixteen years residing on or in possession of the premises sought to be recovered, and if no one is in actual possession of the premises, or residing thereon, by posting a copy of the summons on the premises where it may be conveniently read. If the summons is posted on the premises, a copy of the summons shall be mailed first class U.S. mail, postage prepaid, to the premises sought to be recovered, in the name of the person known to be in possession of the premises, or if unknown, in the name of the person occupying the premises, within 3 calendar days of the date of posting.

D.C. Code § 16-1502.

Under this statute and rule, personal service upon the tenant or an adult residing with the defendant is the default, preferred method of service, *see* Super Ct.

R. 4(e)(2), while "posting is the least favored form of service and used only where attempts at personal or substituted service have failed," *Parker v. Frank Emmet Real Estate*, 451 A.2d 62, 64 (D.C. 1982). Accordingly, "it is a prerequisite to posting that a diligent and conscientious effort be made by the process server to either find the defendant to effect personal service or to leave a copy of the summons with a person residing on or in possession of the premises." *Frank Emmet Real Estate v. Monroe*, 562 A.2d 134, 136 (D.C. 1989) (internal quotation marks and citations omitted). Thus, the exceptions to personal service are to be narrowly construed and apply only where diligent and conscientious efforts at personal service have failed. *See id.*; *Parker*, 451 A.2d at 64.

"[T]he judicially construed requirement of diligence was designed to prevent the commencement of actions for possession where . . . further efforts on the part of the process server could have avoided utilization of the least preferred method of effecting service of process." *Parker*, 451 A.2d at 65 (internal quotation marks and citations omitted). Whether a landlord exercised diligence and conscientiousness before resorting to service by posting is thus a case-specific, factual inquiry requiring reasonableness in the circumstances. *Id.* ("Thus, *under the circumstances of this case*, we cannot conclude that, as a matter of law, the efforts of the process server were diligent and conscientious.") (emphasis added); *see also* 62B Am. Jur. 2d Process § 137 (2015) (the general standard for diligence in service of process is

"whether the complainant reasonably employed knowledge at his command, made diligent inquiry, and exerted an honest and conscientious effort appropriate to the circumstances, to acquire the information necessary to enable him to effect personal service on the defendant.").

Southern Hills Limited Partnership's argument, should it prevail, would amount to an absolute rule establishing that two efforts at personal service at the unit *per se* constitute diligent and conscientious efforts at personal service unless the landlord has precise knowledge of the tenant's exact whereabouts away from the unit. *See* Appellant's Opening Brief at 8. Such an absolute rule would fly in the face of the Supreme Court's pronouncement that it is "impossible to draw a standard set of specifications as to what is constitutionally adequate notice, to be mechanically applied in every situation." *Schroeder v. City of New York*, 371 U.S. 208, 212 (1962).

Two attempts at personal service at the unit have been held to constitute due diligence in some circumstances, namely when the landlord has no notice that service is unlikely to be effective at the unit. *See Carrasco v. Thomas D. Walsh, Inc.*, 988 A.2d 471, 474 (D.C. 2010). However, determining what constitutes diligent and conscientious efforts at personal service in any given case requires an individualized analysis of the specific facts of that case, not the rote application of a rule. *See Parker*, 451 A.2d at 64-65 (reviewing cases in which attempts at personal

service were found adequate and inadequate based upon their specific facts); *see also Dewey v. Clark*, 86 U.S. App. D.C. 137, 180 F.2d 766, 768-69 (1950) (three attempts at personal service, absent information about the tenant's whereabouts, were adequate).

Even in the "ordinary" eviction case, *see Jones*, 547 U.S. at 230, due diligence requires multiple efforts at personal service at substantially different times of the day or week, in recognition of the wide variety of work schedules that tenants may have. *See Capitol City Properties v. Watts*, 132 W.L.R. 2417 (Super. Ct. 2004) (Kravitz, J.). Underlying this requirement is the assumption that the landlord is aware of the possibility that the tenant may be working during business hours and that therefore attempting personal service during typical working hours alone does not constitute conscientious efforts. *Id.* This is just one example of the requirement that the landlord make reasonable assumptions based on available information. If the landlord has specific information about the tenant's work hours, the landlord must attempt service at times when the tenant is likely to be at home based on those specific work hours. Otherwise, the landlord must make reasonable attempts at personal service by attempting service at different times of day.

C. Diligence and Conscientiousness Require the Landlord to Take Reasonable Steps Based Not Only on Facts Actually Known but also on Facts that the Landlord Should Have Known.

This Court has long required landlords to use the information in their possession – even if that information does not include knowledge of the tenant's exact whereabouts – in order to engage in diligent efforts prior to resorting to service by posting. For example, in *Edelhoff v. Shakespeare Theater at the Folger Library*, 884 A.2d 643, 644-45 (D.C. 2005), the landlord knew that a tenant had gone overseas and left only a contact telephone number, with no forwarding address, and this Court held that posting and mailing to the unit after two failed attempts at personal service at the unit was inadequate. The basis for this holding was the landlord's failure to use the information it did have (the tenant's overseas telephone number) to attempt to effectuate personal service. *Id.* In so holding, this Court remarked that the lack of a precise address was inconsequential because the landlord could have contacted (or could have tried to contact) the tenant at the telephone number she had provided before resorting to service by posting and mailing to the unoccupied unit. *Id.* at 646.

In *Frank Emmet Real Estate v. Monroe*, 562 A.2d 134, 136-37 (D.C. 1989), this Court held posting after two attempts at personal service at the unit was inadequate due to a lack of diligence when a tenant had temporarily relocated to Colorado and provided the landlord with a contact telephone number and address there. Again, the basis for this holding was the landlord's failure to use the

information available to it. *Id.* This Court held that the landlord should have availed itself of the long-arm statute, permitting service by mail with return signature, prior to resorting to service by posting and mail to the then-unoccupied unit. *Id.* at 137.

In this case, Southern Hills asks this Court to hold that only precise knowledge of the tenant's location requires any action by the landlord to use knowledge in its possession to personally serve the tenant. *See* Appellant's Opening Brief at 8. However, each case requires the landlord to make use of the specific information reasonably available under the circumstances prior to resorting to service by disfavored means such as posting or publication. *See Robinson v. Hanrahan*, 409 U.S. 38, 40 (1972) ("*Mullane* held that notice by publication is not sufficient with respect to an individual whose name and address are known *or easily ascertainable*.") (emphasis added); *accord Schroeder v. City of New York*, 371 U.S. 208, 212-13 (1962) ("The general rule that emerges from the *Mullane* case is that notice by publication is not enough with respect to a person whose name and address are known *or very easily ascertainable* . . . .") (emphasis added); *Edelhoff*, 884 A.2d at 644-45; *Monroe*, 562 A.2d at 136-37.

In the context of civil forfeiture cases, many courts have similarly found notice through other than in-person service to be constitutionally defective where the government knew or had reason to believe the defendant was incarcerated. *See Sarit v. DEA*, 987 F.2d 10, 15 (1st Cir. 1993) (noting that most cases holding notice

inadequate despite technical compliance with a statutory requirement include an element that the government "knew at the time the notice was sent that the notice *was likely to be* ineffective") (emphasis added); *Dosunmu v. United States*, 361 F.Supp 2d 93, 98 (E.D.N.Y. 2005) (service inadequate where "Customs *should have known* that [the individual facing seizure] would end up in a federal detention facility once he was handed over to the INS. At a minimum, Customs should have inquired into [his] whereabouts rather than merely send the Notices of Seizure to the address [on file] . . . especially after those letters were returned undeliverable") (emphasis added); *Calabro v. United States*, 830 F. Supp. 175, 179 (E.D.N.Y. 1993) (notice in civil forfeiture case was "constitutionally defective since [the plaintiff] knew *or reasonably should have known* that mailing a notice to [defendant]'s residence was not reasonably calculated to give actual notice [because defendant was incarcerated awaiting trial]") (emphasis added).

Requiring that a plaintiff-landlord apply the information it does have to attempt personal service, even when the landlord does not initially have the tenant's precise location, is also consistent with the requirements in tax lien and other property cases in the District, which allow service by publication (another disfavored means) only after "reasonable efforts to provide actual notice." *See Malone v. Robinson*, 614 A.2d 33, 38 (D.C. 1992). Even this arguably lesser standard of reasonableness (as compared to diligent and conscientious efforts required in

eviction actions) requires that "where the plaintiff has *unique information about the recipient* of the notice that results in the statutorily-provided manner of providing notice not being reasonably calculated to provide actual notice" then the party responsible for service of process "must take additional reasonable steps" to effectuate service beyond merely resorting to otherwise permissible, but disfavored, service by publication. *See Rimelon DC, LLC v. Estate of Robinson*, 2010 D.C. Super. LEXIS 4 (D.C. Super. Ct. 2010) (Duncan-Peters, J.).[2]

Reaffirming that landlords must take reasonable steps based on what they do know would also be consistent with approaches adopted by other jurisdictions in evaluating whether due diligence has been exercised before a plaintiff in a civil action resorts to service by posting or publication. *See, e.g.*, *Murphy v. Murphy*, 514 P.2d 865, 867 (Haw. 1973) (inquiring as to "whether the complainant reasonably employed knowledge at his command, made diligent inquiry, and exerted an honest and conscientious effort appropriate to the circumstances, to acquire the information necessary to enable him to effect personal service on the defendant"); *In re*

[2] Similarly, in Juvenile and Domestic Relations Branch matters, service by publication is a disfavored form of service that is permitted only after a plaintiff has engaged in "diligent but unavailing efforts to locate the defendant[]." *Bearstop v. Bearstop*, 377 A.2d 405, 408 (D.C. 1977). In such cases, this Court has required plaintiffs to utilize the "many feasible methods of tracking down a missing spouse" in order to reasonably attempt personal service. *Id.* A landlord should similarly be required to use the methods available to it to locate an incarcerated tenant before resorting to service by posting.

Foreclosures of Liens for Delinquent Land Taxes by Action v. Bhatti, 334 S.W.3d 444, 450 (Mo. 2011) (key question is "whether the sheriff knew or had reason to know that the notice he sent to Owner was ineffective, and if so, whether the sheriff took reasonable, additional steps to notify Owner of the potential taking of the property"); *Jones v. Wallis*, 712 S.E.2d 180, 183 (N.C. Ct. App. 2011) ("due diligence dictates that plaintiff use all resources reasonably available to her in attempting to locate defendants") (internal quotation marks and citation omitted). Plaintiff does not cite, and we are not aware of, any state that has adopted Southern Hills's proposed "actual knowledge" standard.

II. SOUTHERN HILLS DID NOT ACT DILIGENTLY OR CONSCIENTIOUSLY BECAUSE IT WAS AWARE OF THE POSSIBILITY OF MR. ANDERSON'S INCARCERATION BUT FAILED TO TAKE REASONABLE STEPS BASED ON THAT AWARENESS.

In the decision on appeal, the trial court properly applied *Monroe* and *Edelhoff*, in which this Court held that a landlord is required to make reasonable use of its knowledge about a tenant's likely whereabouts, to find in favor of Mr. Anderson. *See* Aplt. App. at 148-49. The trial court's decision acknowledges Southern Hills's argument that it lacked "actual knowledge" that the tenant was incarcerated but concludes, in a finding that is reviewable only for clear error, that "Southern Hills was aware of the possibility of Defendant's incarceration" at the time of service. *Id.* at 148-50. This finding is not clearly erroneous; the very basis

of Southern Hills's action for possession against Mr. Anderson was his arrest for serious crimes. *Id.*

Where, as here, the landlord has specific knowledge related to the tenant's possible incarceration, it is reasonable to require that, before resorting to service by posting, the landlord inquire as to whether the tenant-defendant is, in fact, incarcerated. The record clearly demonstrates that Southern Hills did not do so. Had Southern Hills conducted this most basic inquiry (based on its knowledge of the criminal activity and possible resulting incarceration) prior to posting, Southern Hills would have discovered that Mr. Anderson was incarcerated in the D.C. jail on December 15, 2011, at the time Southern Hills purportedly attempted personal service for the second time. *See* Aplt. App. at 36. This basic fact as to Mr. Anderson's location was an easily discoverable matter of public record in the very criminal case serving as the basis for this action for possession. *See id*.[3]

Requiring the landlord to take the reasonable step of checking the online court docket in a criminal case closely intertwined with the eviction action prior to resorting to service by posting recognizes "the practical problems faced by landlords

[3] In addition to checking on a defendant's incarceration or release status through the public case docket, included in the Appellant's Appendix at 36 and available through the District of Columbia Courts' Website (https://www.dccourts.gov/cco/maincase.jsf), landlords can also obtain information about an inmate's location through the Department of Corrections. *See* http://doc.dc.gov/page/locate-inmate.

in dealing with eviction situations and the need for their expeditious resolution." *Frank Emmet Real Estate v. Monroe*, 562 A.2d 134, 137 (D.C. 1989). A simple check of public records for the underlying criminal case does not unreasonably delay the summary process in the Landlord and Tenant Branch nor does it impose unreasonable costs upon the landlord.

Most importantly, service by posting and mailing without checking those records, when the landlord has specific information regarding the possibility that the tenant is incarcerated, is not reasonably calculated to give the tenant notice of the eviction action. This is precisely a situation in which "further [reasonable] efforts on the part of the process server [checking public incarceration information] could have avoided utilization of the least preferred method of effecting service of process" without any undue burden on the landlord. *See Parker v. Frank Emmet Real Estate*, 451 A.2d 62, 65 (D.C. 1982) (internal quotation marks and citations omitted).

Southern Hills contends that the trial court's conclusion in this case implies that landlords must call all tenants' employers or call all city hospitals to inquire about the location of elderly tenants. Appellant's Opening Brief at 9. This dramatically overstates the requirement: the landlord is only required to take reasonable steps based on the knowledge that it has. So, for example, a landlord need not call hospitals and nursing homes in an effort to inquire about an elderly

tenant absent some more specific information that would assist the landlord in locating the tenant. However, if a tenant who previously delivered his rent in person has had a family member delivering that rent for months prior to the case, the landlord should be expected to inquire with the family member as to the tenant's location. Similarly, while a landlord should not be required to call every tenant's employer in an attempt to locate the tenant, if a tenant has informed the landlord that she will be out of town on employment detail and provided her employer's information, the landlord should, before resorting to service by posting, inquire with the employer about the tenant's location. By the same token, a landlord who is aware that a tenant works the graveyard shift cannot establish due diligence by merely attempting personal service during the early morning hours. Instead, the landlord would be required to attempt personal service either at the tenant's workplace during shift hours or at the unit when it was reasonable to believe the tenant would be home given the unique information the landlord had regarding the tenant's schedule.

Unduly burdensome steps are not required. If, for example, the landlord's knowledge was limited to awareness of a tenant's health condition, the landlord would not be required to call every hospital and nursing home in the city to inquire about the tenant if personal service at the unit failed. Only when a landlord has information giving rise to reasonable inferences regarding a tenant's alternative location must the landlord take additional reasonable steps to effectuate personal

service beyond multiple attempts at personal service at the unit before resorting to posting and mailing. *See Parker*, 451 A.2d at 65. Reasonableness is the ultimate touchstone here. Southern Hills did not take reasonable steps based on the information it possessed – therefore, it did not act diligently and conscientiously.

CONCLUSION

This Court should reaffirm its longstanding commitment to the case-specific, fact-specific analysis of whether a landlord has engaged in diligent and conscientious efforts at personal service. Commitment to those principles is necessary in light of the constitutional implications of inadequate notice of an eviction action provided to a tenant, especially one in subsidized housing. Requiring the landlord to take reasonable steps to effectuate personal service, such as checking public records based on the knowledge it already has, is not too much to ask, especially when, as here, a tenant's ability to put a roof over his head is at stake.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Amicus Curiae Brief to be delivered by first class mail postage prepaid this 4th day of April 2016 to each of the following:

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