

No. 1-11-2951

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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BARBARA MEBANE,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 L 7922
	)	
JOHN GRAY and ENITH GUTIEREZ,	)	Honorable
	)	Jeffrey Lawrence,
Defendants-Appellants.	)	Judge Presiding.

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PRESIDING JUSTICE LAVIN delivered the judgment of the court.  
Justices Fitzgerald Smith and Pucinski concurred in the judgment.

**ORDER**

¶ 1 *Held:* Where plaintiff's second attorney successfully effected service of complaint on defendants, trial court did not abuse discretion in dismissing complaint with prejudice pursuant to Rule 103(b) based on initial counsel's failure to exercise reasonable diligence in obtaining service; the judgment of the trial court was affirmed.

¶ 2 Plaintiff Barbara Mebane appeals the trial court's dismissal of her personal injury action with prejudice pursuant to Illinois Supreme Court Rule 103(b) (eff. July 1, 2007) based on the court's finding that she failed to exercise reasonable diligence in obtaining service on defendants John Gray and Enith Gutierrez. On appeal, plaintiff contends the court's ruling constituted an

abuse of discretion because her attorney made repeated attempts to serve defendants with notice of the original complaint. We affirm.

¶ 3 The record on appeal establishes that on March 18, 2008, a complaint was filed asserting that on March 22, 2006, plaintiff was injured in a building owned by defendants at 1101 Rice Avenue in Bellwood when a staircase railing detached from the wall, causing plaintiff to fall. The 2008 complaint was filed by attorney Robert Shulman. After unsuccessful attempts to serve notice of the complaint upon defendants, the trial court dismissed the complaint for want of prosecution on October 21, 2009.

¶ 4 On June 24, 2010, plaintiff discharged Shulman as her attorney. On July 9, 2010, plaintiff's complaint was re-filed by different counsel, who represents her in this appeal. On that date, service was attempted on Gray at 14522 South State in Riverdale and on Gutierrez at 1224 South Albany in Chicago. On November 1, 2010, substitute service was achieved on Gray at the Riverdale address. On November 9, 2010, substitute service was achieved on Gutierrez at the address on Albany in Chicago.

¶ 5 In March 2011, defendants moved to dismiss the complaint, asserting plaintiff failed to act with reasonable diligence in serving them with notice of the 2008 complaint. Defendants argued that two attempts were made to serve Gray, and no attempts were made to serve Gutierrez, before the case was dismissed in October 2009 for want of prosecution, and service was only achieved after the case was refiled in 2010, more than two years after the expiration of the statute of limitations in March 2008.

¶ 6 The motion further asserted that plaintiff's counsel attempted to serve Gray at an address on Kostner Avenue in Chicago in 2008 even after the initial unsuccessful attempt to that location. Defendants further argued that plaintiff retained attorney Kenneth Roseman in May 2006, shortly

after her injury, and that Roseman had directed correspondence in 2006 to Gray and Gutierrez at 1224 South Albany in Chicago (though Roseman did not file a complaint or issue any summons).

¶ 7 On June 6, 2011, plaintiff filed a response to defendants' motion, to which an affidavit of attorney Shulman was attached. Shulman attested to the activities that followed the filing of the 2008 complaint. A summons for Gray was issued on March 18, 2008, the day the complaint was filed, at the Kostner Avenue address; however, that summons was returned without service. As to Gutierrez, no summons was issued because no address could be located. In July 2008, an alias summons for Gary was issued listing the Kostner Avenue address.

¶ 8 Shulman further attested that LaSalle Process Services (LaSalle) was retained and appointed as a special process server. LaSalle again attempted service on Gray at the Kostner Avenue address. In August 2008, Shulman asked LaSalle to perform a skip trace, which is an Internet-based search tool, to obtain information on defendants. LaSalle learned of an address for Gutierrez that had been valid in 2006 but was not a current address. Shulman located a foreclosure action listing Gray and Gutierrez as defendants and an assignment of mortgage that listed an address for both defendants; however, Shulman was not able to obtain accurate contact information. In January 2009, another alias summons was issued for Gray with no address listed because Shulman lacked a "new confirmed address for Gray at which to attempt service." Shulman investigated two additional addresses for Gray that did not result in service. Plaintiff retained new counsel in June 2010.

¶ 9 Following a hearing on September 12, 2011, the trial court granted defendants' motion and dismissed plaintiff's complaint with prejudice as to both defendants based on "plaintiff's lack of diligence prior to June 24, 2010." The record contains the written order of that ruling but does not include a transcript of the hearing.

¶ 10 On appeal, plaintiff contends the trial court abused its discretion in granting defendants' motion to dismiss the 2010 action based on the lack of diligence in obtaining service. Plaintiff argues that Shulman took reasonable steps to effectuate service as set out in his affidavit and she asserts the unsuccessful nature of her counsel's actions do not negate his efforts.

¶ 11 Illinois Supreme Court Rule 103(b) provides that an action may be dismissed with prejudice if a plaintiff fails to exercise reasonable diligence in obtaining service on a defendant after the expiration of the applicable statute of limitations. The rule further states that in considering that standard, the court "shall review the totality of the circumstances." Supreme Court Rule 103(b) (eff. July 1, 2007). The rule is designed to prevent the intentional delay of service of summons upon a defendant for an indefinite amount of time to circumvent the limitations period.

*Emrikson v. Morfin*, 2012 IL App (1st) 111687, ¶ 16.

¶ 12 A trial court's ruling on a motion to dismiss pursuant to Rule 103(b) will not be disturbed absent an abuse of discretion. *Id.* A trial court abuses its discretion when its decision is arbitrary, fanciful or unreasonable or where no reasonable person would adopt the court's view.

*Emrikson*, 2012 IL App (1st) 111687, ¶ 14.

¶ 13 In moving for dismissal under Rule 103(b), the defendant must initially make a *prima facie* showing that the plaintiff failed to exercise reasonable diligence in effectuating service after filing the complaint. *Emrikson*, 2012 IL App (1st) 111687, ¶ 17. Once the defendant has established that the time between filing of the complaint and the date of service suggests a lack of diligence, the burden shifts to the plaintiff to provide a satisfactory explanation for the delay in service. *Id.* In the absence of a satisfactory explanation, the trial court is justified in granting a dismissal pursuant to Rule 103(b). *Id.*

¶ 14 A consideration of a party's diligence, or lack thereof, under Rule 103(b) is a fact-intensive analysis. *McRoberts v. Bridgestone Americas Holding, Inc.*, 365 Ill. App. 3d 1039,

1042 (2006). The factors to be considered in allowing or denying a Rule 103(b) motion include (1) the length of time used to obtain service of process; (2) the activities of the plaintiff; (3) the plaintiff's knowledge of the defendant's location; (4) the ease with which the defendant's or defendants' whereabouts could have been ascertained; (5) actual knowledge of the defendant of the pendency of the action as a result of ineffective service; (6) special circumstances that would affect the plaintiff's efforts; and (7) actual service on the defendants. *Case v. Galesburg Cottage Hospital*, 227 Ill. 2d 207, 212 (2007).

¶ 15 We first consider the length of time used to obtain the service of process. Plaintiff's initial complaint was filed on March 18, 2008, four days before the end of the limitations period. See 735 ILCS 5/12-202 (West 2008) (providing a two-year statute of limitations for personal injury actions). Defendants were not served between March 2008 and October 2009, when the complaint was dismissed. Both defendants were successfully served in November 2010.

¶ 16 The trial court's order in this case expressly stated that its dismissal of the complaint was based on "plaintiff's lack of diligence prior to June 24, 2010." However, the periods before a dismissal and after a re-filing are "separate entities that are to be added together in determining diligence," without including any interim period. *Case*, 227 Ill. 2d at 219; see also *Catlett v. Novak*, 116 Ill. 2d 63, 71 (1987) (ruling on a Rule 103(b) dismissal requires an examination of the plaintiff's diligence in the original action as well as in the re-filed action).

¶ 17 Those rules would exclude consideration of the interim period between the dismissal of the 2008 complaint on October 21, 2009, and the filing of the second complaint on July 9, 2010. Therefore, the applicable time period for consideration as to plaintiff's diligence is March 18, 2008 to October 21, 2009, which is a span of about 19 months, and the four-month period from July 9, 2010, to November 2010, when service was made.

¶ 18 Even under that analysis, however, the 23-month period that it took to serve the defendants with notice of the complaint supports an inference of a lack of reasonable diligence. See *Emrikson*, 2012 IL App (1st) 11168, ¶ 19 (a time period of as little as five months between the filing of a complaint and subsequent service is sufficient to establish a *prima facie* showing of failure to diligently affect service); see also *Case*, 227 Ill. 2d at 213 (court must consider the "passage of time in relation to all the other facts and circumstances of each case individually").

¶ 19 As to plaintiff's activities and the additional applicable factors, the record reflects that Shulman attempted service on the Kostner Avenue address and hired LaSalle as a special process server; however, service was again attempted at the same address as the prior unsuccessful try. Skip trace searches and the issuance of alias summonses have been deemed indicative of reasonable diligence. *Emrikson*, 2012 IL App (1st) 111687, ¶ 25. Plaintiff is correct that no extended period of inactivity occurred in this case. However, the record reflects that defendants' whereabouts could have been, and indeed swiftly were, ascertained by counsel who replaced Shulman in June 2010. The attorney who succeeded Shulman immediately attempted service on defendants in July 2010 at the addresses that had been known to Roseman in 2006 and successfully achieved substitute service in November 2010.

¶ 20 Although the common law record submitted to this court presents the facts as fully set out above, this court has not been provided with a transcript of the hearing on the Rule 103(b) motion, which is the burden of plaintiff as the appellant. See *Dolan v. O'Callaghan*, 2012 IL App (1st) 111505, ¶ 49. Therefore, it is unknown to this court how the trial court weighed the above-listed factors. Any doubts arising from the incompleteness of the record are resolved against the appellant. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984).

¶ 21 This court lacks any basis to conclude that the trial court abused its discretion in dismissing plaintiff's complaint pursuant to Rule 103(b). Based on our review of the record and

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the factors pertinent to Rule 103(b), we cannot conclude that any reasonable person would not have adopted the trial court's view that plaintiff's complaint should be dismissed based on a failure to exercise reasonable diligence in service.

¶ 22 Accordingly, the judgment of the trial court is affirmed.

¶ 23 Affirmed.