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2012 IL App (3d) 110440-U

Order filed May 7, 2012

IN THE
APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

KATIE COSKUN,)	Appeal from the Circuit Court
)	of the 10th Judicial Circuit,
Plaintiff-Appellant,)	Peoria County, Illinois
)	
v.)	Appeal No. 3-11-0440
)	Circuit No. 10-L-116
AMY ADAMS,)	
)	Honorable Michael Brandt,
)	Honorable David J. Dubicki,
Defendant-Appellee.)	Judges, Presiding.

PRESIDING JUSTICE SCHMIDT delivered the judgment of the court.
Justices Holdridge and Wright concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not abuse its discretion when dismissing plaintiff's complaint pursuant to Illinois Supreme Court Rule 103(b).

¶ 2 Plaintiff, Katie Coskun, filed this personal injury action against defendant, Amy Adams in the circuit court of Peoria County. The trial court dismissed the matter pursuant to Illinois

Supreme Court Rule 103(b). Ill. S. Ct. R. 103(b) (eff. July 1, 2007). Plaintiff appeals, claiming the trial court erred when finding she failed to act with due diligence when attempting service on defendant. We affirm.

¶ 3

BACKGROUND

¶ 4 Plaintiff filed this lawsuit on Monday, April 12, 2010. Her complaint alleges that she suffered injuries as a result of an automobile accident which occurred on April 11, 2008. The record on appeal reveals that while the plaintiff filed the complaint on April 12, 2010, she did not have a summons issued on that day. The record is devoid of any evidence demonstrating an attempt by the plaintiff to serve defendant in the nine months that followed the filing of the complaint.

¶ 5 On January 20, 2011, plaintiff filed a "motion for special order for service on Illinois Secretary of State" pursuant to section 2-203.1 of the Illinois Code of Civil Procedure. 735 ILCS 5/2-203.1 (West 2010). The motion alleges that plaintiff attempted service on defendant but could not locate defendant's current address. It continues that defendant's "place of residence upon diligent inquiry cannot be ascertained and there is no last known place of residence." As such, plaintiff requested an order "for service in any manner consistent with due process, namely pursuant to 625 ILCS 5/10-301, which allows for service on the Illinois Secretary of State ***."

¶ 6 On the same day, January 20, 2011, the trial court denied plaintiff's motion, finding "there has been no showing of compliance with 2-203.1. *** There is no showing that service under 625 ILCS 5/10-301 would be appropriate as said section applies to non-resident defendants."

¶ 7 The next document in the record is titled "Investigative Report" and purports to be a two-paragraph report from investigator David Barbknecht. The report is dated March 29, 2011, and states that attorney Fadi Rustom asked the investigator to locate a person named Amy Adams living in the Peoria area. Barbknecht located an Amy Suzanne Adams living in the Peoria area. The report lists her date of birth and address on University Street, Peoria, Illinois.

¶ 8 On March 30, 2011, defendant filed a special and limited appearance for the purpose of dismissing plaintiff's claim. The pleading indicates that while the accident occurred on April 11, 2008, no summons had ever been issued in this matter and plaintiff still had not properly served defendant. It continued, claiming that dismissal was proper as plaintiff failed to demonstrate she exercised reasonable diligence to obtain service on defendant after the expiration of the applicable statute of limitations.

¶ 9 Finally, on April 18, 2011, plaintiff obtained personal service on defendant at the University Street address listed in Barbknecht's investigative report. Ten days later, plaintiff filed a response to defendant's special and limited appearance. In her response, plaintiff alleges her counsel continued to attempt to settle this matter after the filing of the complaint and did not attempt to serve defendant until "settlement negotiations failed ***." Plaintiff further acknowledged in her response that her first attempt at service was through the Illinois Secretary of State's office. Plaintiff claimed difficulty in locating defendant's address as there was no crash report "available to assist in the identification of the defendant and her address."

¶ 10 Following arguments, on June 3, 2011, the trial court granted defendant's motion to

dismiss with prejudice pursuant to Illinois Supreme Court Rule 103(b). Ill. S. Ct. R. 103(b) (eff. July 1, 2007). This timely appeal followed.

¶ 11

ANALYSIS

¶ 12 The issue before us is whether the circuit court erred when it granted defendant's motion to dismiss plaintiff's complaint based on violation of Supreme Court Rule 103(b). The rule provides:

“(b) Dismissal for Lack of Diligence. If the plaintiff fails to exercise reasonable diligence to obtain service on a defendant prior to the expiration of the applicable statute of limitations, the action as to that defendant may be dismissed without prejudice. If the failure to exercise reasonable diligence to obtain service on a defendant occurs after the expiration of the applicable statute of limitations, the dismissal shall be with prejudice as to that defendant only and shall not bar any claim against any other party based on vicarious liability for that dismissed defendant's conduct. The dismissal may be made on the application of any party or on the court's own motion. In considering the exercise of reasonable diligence, the court shall review the totality of the circumstances, including both lack of reasonable diligence in any previous case voluntarily dismissed or dismissed for want of prosecution, and the exercise of reasonable diligence in obtaining service in any case refiled under section 13–217 of the

Code of Civil Procedure.” Ill. S. Ct. R. 103(b) (eff. July 1, 2007).

¶ 13 We find the trial court did not abuse its discretion when dismissing plaintiff's complaint pursuant to Rule 103(b). In making its ruling, the trial court noted:

"[T]he facts of the case are set forth in the common law record, and what occurred in the case is that on April 12th, a complaint was filed. No summons was issued at all, and there's no indication here, as counsel correctly points out, that no summons was issued by some type of expressed or implied agreement between the defendant and the plaintiff. What is suggested here is that no summons was issued because of no known location where the defendant could be served. Thus, the plaintiff should have been put on notice at that particular time that some action ought to have taken place to locate the defendant since there is no showing here that the defendant by its actions waived the requirements of due diligence under 103.

The record reflects actually, unfortunately, that once there was diligence, that the person was adequately found in a short period of time. That ought to have taken place back in April of 2010. And that's what the record reflects here and really nothing else.

And once the defendant raises the *prima facie* suggestion of lack of due diligence under the rule, then the burden turns upon plaintiff,

and the court is to consider the totality of the circumstances. And essentially that's the totality of the circumstances. The plaintiff didn't know the location of the defendant, but failed to take any steps to attempt to locate the defendant until months and months later. Even arguably if I assume that January 20th was that step, and really it wasn't, what ought to have taken place is what ultimately did take place; contacting the person. They were notified, and they were served here in Peoria."

¶ 14 The trial court's recitation of the record is accurate. On the last day possible given the statute of limitations (735 ILCS 5/13-202 (West 2010)), two years and a day after this accident occurred, the plaintiff filed her complaint. (The statute actually ran on Sunday.) No summons issued with the complaint and plaintiff made no attempt to serve the defendant that day, or for the next nine months.

¶ 15 More than nine months after the statute of limitations expired, plaintiff filed a motion, claiming "no current address can be located for this defendant." The motion acknowledged that plaintiff was unaware of whether defendant resided in or out of the State of Illinois.

Nevertheless, plaintiff sought "a court order *** pursuant to 625 ILCS 5/10-301, which allows for service on the Illinois Secretary of State on behalf of any driver on the roadways of the State of Illinois who cause a motor vehicle accident." The trial court denied plaintiff's motion after correctly informing plaintiff that section 10-301 of the Illinois Vehicle Code (625 ILCS 5/10-301

(West 2010)) only applies to nonresidents and no allegation existed that defendant was not a resident of the State of Illinois.

¶ 16 After the trial court denied plaintiff's motion on January 20, 2011, plaintiff took no additional action to attempt service for another three months. While the record does not indicate what day plaintiff hired the investigator, an investigative report dated March 29, 2011, evinces the first substantial step taken by the plaintiff to serve defendant. That report was written approximately 50 weeks after the filing of the complaint and expiration of the statute of limitations. On that day, an investigator informed plaintiff's counsel of defendant's address, which he acquired after a "computer check for Amy Adams using the Peoria, Illinois area as a parameter."

¶ 17 The tenets of law applicable when analyzing dismissal pursuant to Rule 103(b) are familiar and well settled. A court may consider many factors when determining whether to allow or deny a Rule 103(b) motion, including, but not limited to : (1) the length of time used to obtain service of process; (2) the activities of plaintiff; (3) plaintiff's knowledge of defendant's location; (4) the ease with which defendant's whereabouts could have been ascertained; (5) actual knowledge on the part of the defendant of pendency of the action as a result of ineffective service; (6) special circumstances that would affect plaintiff's efforts; and (7) actual service on defendant. *Case v. Galesburg Cottage Hospital*, 227 Ill. 2d 207, 212-13 (2007). There is no specific time limitation provided by Rule 103(b). *Id.* A court must consider the passage of time in relation to all the other factors and circumstances of each case individually. *Id.* A ruling on a

motion to dismiss pursuant to Rule 103(b) will not be disturbed absent an abuse of discretion.

Id.

¶ 18 After acknowledging these principles, plaintiff provides four reasons why the trial court erred when determining she failed to use due diligence in serving defendant. First, plaintiff notes she and "her counsel were in constant settlement negotiation with [defendant's] insurance adjuster" both before and after the filing of the lawsuit. Second, she notes she filed a formal request for the accident report but since the police were "not contacted at the scene of the accident, no accident report was created." Third, she notes her efforts to serve "the Illinois Secretary of State pursuant to 625 ILCS 5/10-301" were thwarted by the trial court. Finally, she notes that when she was "left with no other option ***, counsel for appellant hired an investigator to track down appellee. [The] investigator[] successfully located appellee and on April 17, 2011, appellee was personally served with summons and the complaint by private process server." These four factors, plaintiff argues, indicate that she "diligently pursued the whereabouts of appellee and actively sought the service of process for appellee." We disagree.

¶ 19 Reviewing the applicable factors listed by our supreme court in *Case*, as stated above, we find few if any weigh in plaintiff's favor. The length of time used to obtain service of process was more than a year from both the filing of the complaint and the expiration of the statute of limitations. The actions of the plaintiff were almost nonexistent. It is undisputed that plaintiff took no action to serve defendant for at least nine months. When she finally acted, she filed a motion seeking an order allowing service on the Illinois Secretary of State under a totally

inapplicable statute. Filing that motion does not weigh in plaintiff's favor.

¶ 20 We accept that plaintiff is sincere in her claims that she did not know "defendant's location." However, the fourth factor weighs heavily against plaintiff: the ease with which defendant's whereabouts could have been ascertained. The investigative report supplied by the plaintiff indicates that the only action taken by the "investigators" she hired was a computer search. The trial court was correct in noting that "once there was diligence, that the person was adequately found in a short period of time."

¶ 21 Given the lack of action taken by the plaintiff and the relative ease with which defendant was actually located, we find no abuse of discretion in dismissing this action pursuant to Rule 103(b). Ill. S. Ct. R. 103(b) (eff. July 1, 2007).

¶ 22 **CONCLUSION**

¶ 23 For the foregoing reasons, the order of the circuit court of Peoria County is affirmed.

¶ 24 Affirmed.