

No. 1-16-1143

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ALLISAH M. LOVE,)	
)	
Plaintiff-Appellant,)	Appeal from the
)	Circuit Court of
v.)	Cook County.
)	
MUHAMMAD UNIVERSITY OF ISLAM,)	No. 10 M1 017702
)	
Defendant-Appellee)	Honorable
)	Daniel P. Duffy,
(Dr. Larry Muhammad,)	Judge Presiding.
Defendant).)	

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Hoffman and Justice Delort concurred in the judgment.

ORDER

¶ 1 *Held:* Plaintiff's complaint was properly dismissed pursuant to Illinois Supreme Court Rule 103(b) (eff. July 1, 2007) for failure to exercise diligence in effecting service where plaintiff made no attempt to serve defendant for more than 4 ½ years after first unsuccessful attempt and defendant was ultimately served by certified mail after expiration of statute of limitations.

¶ 2 Plaintiff-appellant Allisah M. Love appeals from the dismissal of her complaint against defendant-appellee Muhammad University of Islam (defendant) and Dr. Larry Muhammad, who was named in the complaint as a defendant but who is not a party to this appeal. The

trial court determined that plaintiff failed to exercise diligence in effecting service on defendant and, because the statute of limitations on plaintiff's claims had expired, dismissed her complaint with prejudice. We affirm.

¶ 3 Plaintiff filed her verified small claims complaint on September 17, 2010. She alleged that on November 4, 2009, she had been terminated by Dr. Larry Muhammad from her position as a part-time language arts instructor for defendant. Plaintiff claimed her termination was "a breach of contract, retaliatory discharge with intentional infliction of emotional distress, defamation of character, and based on fraudulent business practices and claims." No written contract was attached to the complaint. Plaintiff sought damages of \$9,500.

¶ 4 A summons was issued on September 17, 2010. In the return, the sheriff indicated that service was attempted on October 8, 2010, at 7351 S. Stony Island Avenue in Chicago, the defendant's business address. The return read: "Employee of mosque (parking lot) says he is unauthorized to accept."

¶ 5 The record reflects no further activity in the case until April 22, 2015, when the matter was continued to July 8, 2015, and the court directed issuance of an alias summons. Plaintiff waited until July 8, 2015, to obtain issuance of the summons and directed that defendant be served at 123 W. Madison Street, 19th Floor in Chicago (the Madison Street address). This latter address was listed in the Secretary of State's records as corresponding to defendant's registered agent, Power & Dixon, a law firm. There is no explanation in the record as to why plaintiff did not attempt service on defendant's registered agent sooner. The Secretary of State's records also reflected that defendant had been involuntarily dissolved on October 8, 2010. When the sheriff attempted service at the Madison Street address in July 2015, the return reflected that the business at that address had no knowledge of the defendant.

¶ 6 Defendant was ultimately served on September 24, 2015, by certified mail directed to the Stony Island Avenue address. Defendant filed an appearance on November 25, 2015, and on December 24, 2015, moved to dismiss plaintiff's complaint for failure to exercise due diligence in effecting service in violation of Illinois Supreme Court Rule 103(b) (eff. July 1, 2007). No written response from plaintiff appears in the record, although plaintiff has included in an appendix to her brief a "motion to quash" the motion to dismiss, which is file-stamped January 13, 2016.¹ On March 21, 2016, the circuit court granted defendant's motion to dismiss with prejudice, finding that plaintiff had failed to exercise due diligence and that the statute of limitations applicable to plaintiff's claims—five years—had expired.² Plaintiff timely appealed.

¶ 7 Illinois Supreme Court Rule 103(b) provides:

"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

¹ Generally, a litigant may not include in an appendix materials that are not included in the record on appeal. If materials are missing from the record, the proper procedure is to seek leave to supplement the record with the omitted items. *Pikovsky v. 8440-8460 North Skokie Boulevard Condominium Ass'n, Inc.* 2011 IL App (1st) 103742, ¶ 16 ("a reviewing court will not supplement the record on appeal with the documents attached to the appellant's brief on appeal as an appendix, where there is no stipulation between the parties to supplement the record and there was no motion in the reviewing court to supplement the record with the material").

² Although plaintiff's complaint referred to a breach of contract, no written contract was attached to the complaint. Thus, all of plaintiff's claims fall under the catch-all five-year limitations period of section 13-205 of the Illinois Code of Civil Procedure. 735 ILCS 5/13-205 (West 2008).

expiration of the applicable statute of limitations, the dismissal shall be with prejudice ***." Ill. S. Ct. R. 103(b) (eff. July 1, 2007).

¶ 8 The purpose of Rule 103(b)'s requirement that a plaintiff exercise reasonable diligence in obtaining service on a defendant is

"to protect a defendant from unnecessary delay in the service of process and to prevent the plaintiff from circumventing the applicable statute of limitations, which are designed to afford the defendant a fair opportunity of investigation, by filing suit before the expiration of the limitations period but taking no action to have the defendant[] served until the plaintiff is ready to proceed with the litigation." *Kole v. Brubaker*, 325 Ill. App. 3d 944, 949 (2001).

The rule does not dictate a specific time within which a defendant must be served, and trial courts are vested with broad discretion in determining whether a plaintiff has exercised reasonable diligence. *Segal v. Sacco*, 136 Ill. 2d 282, 285-86 (1990). Given the substantial discretion vested in the trial court under Rule 103(b), we review the dismissal of a complaint with prejudice for failure to exercise reasonable diligence in obtaining service to determine whether that discretion was abused. *Mular v. Ingram*, 2015 IL App (1st) 142439, ¶ 20; *Kole*, 325 Ill. App. 3d at 949.

¶ 9 Once the defendant has made a *prima facie* showing of a lack of reasonable diligence, the burden shifts to the plaintiff to demonstrate, by way of affidavit or other competent evidentiary materials, that reasonable diligence was exercised and that any delays in effecting service were justified. *Mular*, 2015 IL App (1st) 142439, ¶ 21; *Kole*, 325 Ill. App. 3d at 949-50. The standard under the rule is objective and the fact that the delay in effecting service

may not have been intentional is not determinative. *Kreykes Electric, Inc. v. Malk & Harris*, 297 Ill. App. 3d 936, 940 (1998) ("Rule 103(b) is not rooted in a subjective test of the plaintiff's intent but, rather, upon an objective evaluation of reasonable diligence in obtaining service of process."); *Penrod v. Sears, Roebuck & Co.*, 150 Ill. App. 3d 125, 129 (1986). Further, defendant need not demonstrate prejudice resulting from the delay in service in order to obtain dismissal under the rule; rather, the existence of prejudice is an "appropriate consideration," but the lack of prejudice will not defeat dismissal where reasonable diligence has not been shown. *Mular*, 2015 IL App (1st) 142439, ¶ 21; *Kole*, 325 Ill. App. 3d at 952.

¶ 10 Here, the analysis is straightforward. Plaintiff filed her complaint on September 17, 2010. She made one attempt to serve defendant and the summons was returned unserved on October 15, 2010. Thereafter, plaintiff did nothing for over four and one-half years. There is no indication in the record that the location of the defendant changed and, in fact, defendant was ultimately served at the Stony Island Avenue address via certified mail in September 2015. Further, as plaintiff alleged she was terminated on November 2, 2009, the five-year statute of limitations applicable to her claims expired on November 1, 2014, nearly a year before plaintiff served defendant on September 24, 2015. Therefore, her complaint was properly dismissed with prejudice.

¶ 11 The fact that the defendant, according to the Secretary of State's website, had been involuntarily dissolved in October 2010 does not help plaintiff. As plaintiff points out, the Business Corporation Act of 1983 provides that in the event of a corporate dissolution, the corporation's registered agent shall remain an agent for service of process for five years post-dissolution. 805 ILCS 5/5.05(d) (West 2008). But plaintiff made no effort at all to serve the defendant through its registered agent, Power & Dixon, until July 2015, more than four years after the first unsuccessful attempt at service in October 2010. By that time, Power & Dixon

had apparently moved its offices, as the July 2015 occupant of the Madison Street address had no knowledge of or relationship to the defendant.³ Even then, plaintiff still waited another two months to serve defendant by certified mail at defendant's original address. The ease with which plaintiff was ultimately able to serve defendant belies her claims that equitable considerations should excuse the delay. *Mular*, 2015 IL App (1st) 142439, ¶ 25. The circumstances of this case prevent us from excusing plaintiff's lack of diligence in effecting service.

¶ 12 Because the circuit court did not abuse its discretion in dismissing plaintiff's complaint with prejudice, the judgment of the circuit court of Cook County is affirmed.

¶ 13 Affirmed.

³ Power & Dixon, the firm that was the defendant's registered agent, currently has its offices at 1525 E. 53rd Street, Suite 447, Chicago. See www.poweranddixon.com (last visited on May 2, 2017).