2018 IL App (1st) 162568-U

No. 1-16-2568

Order filed May 31, 2018

Fourth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

PETER A. CANTWELL,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 12 M1 138924
	)	
GARY J. HERSTEIN,	)	Honorable
	)	Daniel P. Duffy,
Defendant-Appellee.	)	Judge presiding.

PRESIDING JUSTICE BURKE delivered the judgment of the court.
Justices McBride and Ellis concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the circuit court's dismissal of plaintiff's complaint with prejudice for failing to exercise reasonable diligence to obtain service on defendant where the record on appeal is insufficient to support plaintiff's claims of error.

¶ 2 In 2012, plaintiff, Peter A. Cantwell, sued defendant, Gary J. Herstein, on claims of breach of contract, *quantum meruit* and account stated based on defendant's alleged failure to pay for legal services rendered in 2004 and 2005. Following the filing of the complaint, plaintiff could not effectuate service of process on defendant until 2016. Based on this delay, defendant

moved to dismiss plaintiff's complaint based on a failure to exercise reasonable diligence to obtain service on him under Illinois Supreme Court Rule 103(b) (eff. July 1, 2007). The circuit court granted the motion with prejudice in a written order, which referred to remarks it made in open court.

¶ 3 Plaintiff now appeals the circuit court's dismissal, principally arguing that it abused its discretion in finding he failed to exercise reasonable diligence to obtain service on defendant. However, despite the court referencing remarks it made in open court, plaintiff has not provided us with a transcript of the hearing on the motion or a bystander's report of the proceeding (see Ill. S. Ct. R. 323(c) (eff. July 1, 2017)). Because of this failure, we must affirm the court's dismissal with prejudice.

¶ 4 I. BACKGROUND

¶ 5 On June 26, 2012, plaintiff filed a verified complaint against defendant, alleging that, on September 10, 2004, defendant employed his law firm, Cantwell & Cantwell, in connection with litigation pending in the circuit court of Cook County. According to the complaint, on September 17, 2004, plaintiff, on behalf of his law firm, sent defendant "a written retainer agreement" to represent him in connection with the litigation. Plaintiff attached the agreement to the complaint.

¶ 6 The agreement took the form of a letter addressed to defendant at an apartment located on the 100 block of West Oak Street in Chicago. The agreement stated that, based on telephone conversations and a preliminary interview, plaintiff's law firm required "an initial retainer" from defendant of $2,000. The agreement provided the various rates for the law firm's attorneys, including plaintiff, and informed defendant that he would be billed periodically for the services rendered. The agreement also stipulated that the law firm's representation of defendant would "not commence until [it] received a signed copy of this Agreement from [him] and the payment

of [his] initial retainer." On the fourth, and final, page of the document, there was a heading titled "ACCEPTANCE" and provided a location for defendant to sign and date his acceptance of the terms contained in the agreement. However, the agreement did not include defendant's signature.

¶ 7 According to the complaint, on September 20, 2004, Cantwell & Cantwell received the $2,000 retainer payment from defendant in the form of a check, which plaintiff attached to the complaint. The complaint further alleged that, from September 2004 until August 2005, plaintiff and his associates rendered in excess of 38 hours of legal work for defendant in connection with his litigation in addition to various other legal expenses, which totaled $9,868.27. Plaintiff attached billing invoices containing descriptions of these legal services to the complaint. According to the invoices, the first date of services was September 10, 2004, and the last date of services was August 18, 2005. But the complaint alleged that, as of September 30, 2005, defendant had only paid the law firm $2,200. The complaint claimed that plaintiff made numerous demands of defendant for payment of the amount owed "through both correspondence demanding payment and telephone inquiries," but defendant "refuse[d] to respond" and pay the amount owed. Based on defendant's alleged failure to pay for the services rendered, the complaint asserted claims of breach of contract, *quantum meruit* and account stated.

¶ 8 Following the filing of his complaint, plaintiff attempted to serve defendant at the apartment located on the 100 block of West Oak Street in Chicago, but the sheriff's office of Cook County could not serve defendant because his name was "not in directory." On August 1, 2012, plaintiff issued an alias summons for defendant at an apartment located on the 3500 block of Sangamon Street in Chicago, but service was unsuccessful. In February 2013, plaintiff moved the circuit court to appoint a special process server to serve defendant. The circuit court granted

the appointment, but after months of effort, the special process server was unsuccessful. On July 3, 2013, plaintiff issued another alias summons for defendant at a residence located on the 1600 block of North Sheffield Avenue in Chicago, but service was again unsuccessful. In March 2014 and on April 15, 2016, plaintiff issued additional alias summonses for defendant at an apartment located on the 2000 block of North Lincoln Avenue in Chicago, but apparently service was again unsuccessful.[1] On April 19, 2016, plaintiff attempted to serve defendant by certified mail at the apartment located on the 2000 block of North Lincoln Avenue. According to the delivery receipt, the mail was received by "4 Park" the following day, who signed for the mail as an agent. At some point during the next three weeks, defendant received the mail, and on May 18, 2016, an attorney representing him filed an appearance in this case.

¶ 9 Thereafter, defendant filed a motion to dismiss pursuant to section 2-619(a)(5) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(5) (West 2012)) asserting that plaintiff's action was not commenced within the time period prescribed by law. Defendant noted that the statute of limitations for breach of a written contract was 10 years, and the statutes of limitations for breach of an oral contract, *quantum meruit* and account stated were 5 years. He argued that, while plaintiff attached a copy of a retainer agreement to the complaint, the agreement had not been signed by defendant and thus the relevant statutes of limitations were 5 years. Defendant posited that all of plaintiff's causes of action were based on alleged attorney-client services which ended in September 2005, yet the complaint was not filed until 2012, after the statutes of limitations had elapsed. Defendant further highlighted that plaintiff did not obtain service on him until nearly 11 years after the alleged incidents occurred.

[1] Although the record on appeal contains documents supporting plaintiff's service attempts on all of the dates set forth in this order, the record does not contain any documentation regarding his March 2014 service attempt. This service attempt, however, was attested to in an affidavit of plaintiff's filed in conjunction with his briefing on defendant's motion to dismiss.

¶ 10 Plaintiff responded, arguing that his complaint sufficiently pled the existence of a written contract governing the parties' relationship and that he had attached this contract and the check from defendant to the complaint. Plaintiff posited that, because the statute of limitations on a written contract was 10 years and he filed his complaint within that time period, his complaint was timely. Moreover, plaintiff argued that, even if the parties' relationship was not governed by a written contract, the parties had an executory contract and there were critical issues of fact that precluded dismissing his complaint, namely when defendant's silence in response to plaintiff's demand for payment "morphed into an unequivocal manifestation that [defendant] had no intent to pay his legal bills." According to plaintiff, only at this point, could defendant have actually breached the contract to commence the statute of limitations, and because the resolution of this issue was a factual one, the court could not decide it as a matter of law.

¶ 11 Defendant subsequently filed an affidavit and a reply. In the affidavit, he provided more background on the parties' relationship. In 2004, defendant had been sued personally by the Illinois Attorney General in connection with his employment as a salesman at Career Management, Inc., (*People of the State of Illinois v. DRB, Ltd., et al.*, Case No. 03 CH 16663) along with other salespeople at the company. Career Management, Inc., informed defendant that it had hired the law firm of Jones Day to represent all of the salespeople named in the lawsuit and he did not need to hire an attorney himself. Defendant was "nervous that Jones Day would put the company's interest over [his] own," so he hired plaintiff "to watch, but not participate in the case." According to defendant, plaintiff agreed to do so for a flat-fee of $2,000, and the parties never executed any documents memorializing the agreement. At some point during 2005, Jones Day "removed" defendant from the case. Several months later, plaintiff contacted him and demanded payment for outstanding legal bills. In response, defendant insisted that he had only

retained plaintiff on a flat-fee basis. Defendant stated that he and plaintiff "exchanged emails arguing" but plaintiff eventually stopped contacting him in 2005. Defendant did not hear from plaintiff again until early 2016 when he received the summons for this case in the mail. Defendant averred that he had never seen the retainer agreement attached to the complaint and never executed any retainer agreement with plaintiff.

¶ 12 In the reply, defendant maintained the applicable statutes of limitations for all of the claims were 5 years, and because plaintiff filed the complaint more than 7 years after the alleged incidents giving rise to the litigation and service was not obtained until nearly 11 years after those incidents, dismissal was proper.

¶ 13 The circuit court subsequently ordered the parties to file supplemental briefs addressing whether plaintiff exercised reasonable diligence to obtain service on defendant and continued defendant's motion to dismiss for a hearing on August 10, 2016.

¶ 14 Thereafter, plaintiff filed an affidavit and supplemental brief. In the affidavit, he described the various methods he took to eventually obtain service on defendant. According to the affidavit, plaintiff contacted the Postmaster of the United States Postal Service in Chicago multiple times to confirm various addresses of defendant, and each time plaintiff received confirmation of the addresses. Plaintiff also used Westlaw PeopleMap multiple times to obtain addresses associated with defendant. Despite these two methods of locating addresses connected to defendant, service to those addresses were unsuccessful. Plaintiff further detailed his use of a special process server who also could not locate defendant. Plaintiff averred that, during his research to locate defendant, he learned that defendant "was using the alias 'Gary Gepner,' which was the last name of his ex-wife." Plaintiff's research also revealed that defendant had been born in Minnesota, had an address in Minneapolis as recently as 2001 and previously

owned a condominium in Scottsdale, Arizona. Lastly, plaintiff highlighted that, in various other pending cases in Cook County, other plaintiffs had difficulty obtaining service on defendant. According to plaintiff, after receiving a notification from the clerk of the circuit court of Cook County on January 4, 2016, that his case against defendant might be dismissed for a "lack of activity," his law firm "immediately" used Westlaw PeopleMap once again and found an apartment connected to defendant on the 2000 block of North Lincoln Avenue in Chicago. Based on this search, plaintiff eventually served defendant in April 2016 using certified mail.

¶ 15 In plaintiff's supplemental brief, he argued that he exercised reasonable diligence to serve defendant, as detailed in his affidavit. Plaintiff posited that, despite his efforts, he was "continuously frustrated by [defendant's] evasiveness [*sic*] conduct." Based on defendant being connected to addresses in Minnesota and Arizona as well as his use of an alias, plaintiff "reasonably believed" that defendant "had fled the State of Illinois under an assumed identity in order to avoid service of process." Despite the difficulties in serving defendant, plaintiff insisted that he never ceased his efforts to locate and serve defendant, and concluded that he demonstrated reasonable diligence to obtain service on defendant.

¶ 16 Defendant also filed an affidavit and supplemental brief. In the affidavit, he averred that, at the time the complaint was filed, he was living on the 1600 block of North Sheffield Avenue in Chicago. In May 2013, he moved to the 2000 block of North Lincoln Avenue in Chicago and had lived there ever since. Defendant asserted that he did not learn of the lawsuit until he received the complaint via certified mail in early 2016, after which he immediately contacted an attorney. Defendant averred that he never attempted to evade service and while he had been married to a woman with the last name of "Gepner," he never assumed her last name.

¶ 17 In defendant's supplemental brief, he noted that, based on plaintiff's affidavit, his two most recent addresses had been located by plaintiff and his most recent address on the 2000 block of North Lincoln Avenue had been confirmed by the Postmaster of the United States Postal Service in Chicago in November 2013. Defendant posited that, despite this confirmation, plaintiff waited until March 2014 to attempt service on him at that address. Defendant highlighted that plaintiff merely stated that he was unsuccessful in this service attempt without providing any actual details of the attempt. Defendant argued that, despite having a confirmed address for him, plaintiff took no further action in the case until two years later when he sent the certified mail. Defendant also noted that plaintiff never obtained personal service on him, and concluded that plaintiff failed to exercise reasonable diligence in obtaining service on him.

¶ 18 On August 10, 2016, the circuit court entered a written order, granting defendant's motion to dismiss with prejudice "due to a lack of due diligence in obtaining service as stated in open court." The order did not provide the reasons for the court's finding. Plaintiff timely appealed the court's dismissal order.

¶ 19 II. ANALYSIS

¶ 20 Before addressing the merits of plaintiff's appeal, we note that defendant has failed to file a brief as the appellee. However, where the record is simple and the claimed errors are such that we can resolve them without the need of an appellee's brief, we should decide the merits of an appeal despite the lack of an opposing brief. See *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976). We find that to be the case here and therefore address the merits of plaintiff's appeal.

¶ 21 A. Dismissal Based on a Lack of Reasonable Diligence

¶ 22 Plaintiff first contends that the circuit court erred when it dismissed his complaint based on his failure to exercise reasonable diligence in serving defendant because the court did not give proper consideration to his repeated and reasonably diligent efforts to effectuate service of process on defendant.

¶ 23 Illinois Supreme Court Rule 103(b) (eff. July 1, 2007) provides that:

> "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."

A Rule 103(b) dismissal is intended "to protect defendants from unnecessary delay in the service of process on them and to prevent the circumvention of the statute of limitations" (*Segal v. Sacco*, 136 Ill. 2d 282, 286 (1990)) and should not be used as a mechanism to clear a crowded docket. *Silverberg v. Haji*, 2015 IL App (1st) 141321, ¶ 30. In order to promote the expeditious management of litigation, the circuit court has "wide latitude to dismiss when service is not effected with reasonable diligence." *Christian v. Lincoln Automotive Co.*, 403 Ill. App. 3d 1038, 1042 (2010). However, because "controversies should ordinarily be resolved on their merits after both sides have had their day in court," dismissing a lawsuit with prejudice based on a lack of reasonable diligence in service is "a harsh penalty." *Id.*

¶ 24 On a Rule 103(b) motion, the defendant has the burden to establish a *prima facie* showing of a lack of reasonable diligence on the part of the plaintiff. *Mular v. Ingram*, 2015 IL App (1st)

142439, ¶ 21. We have previously found delays in service from the time a complaint was filed of one year and five months sufficient for the defendant to make its *prima facie* showing. See *id.* ¶ 22 (one-year delay between filing complaint and service sufficient to shift burden); *Emrikson v. Morfin*, 2012 IL App (1st) 111687, ¶ 19 (five-month delay between filing complaint and service sufficient to shift burden).

¶ 25 If the defendant makes a *prima facie* showing, the plaintiff must then demonstrate "that reasonable diligence was exercised and that any delays in effecting service were justified." *Mular*, 2015 IL App (1st) 142439, ¶ 21. There are several factors the circuit court may consider in determining whether the plaintiff has exercised reasonable diligence, 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 which would affect plaintiff's efforts; and (7) actual service on defendant." *Segal*, 136 Ill. 2d at 287.

¶ 26 Although defendant initially raised his Rule 103(b) argument in a motion to dismiss filed pursuant to section 2-619(a)(5) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(5) (West 2012)), which we generally review *de novo* (*Lutkauskas v. Ricker*, 2015 IL 117090, ¶ 29), a dismissal under Rule 103(b) will not be disturbed unless the circuit court has abused its discretion. *Case v. Galesburg Cottage Hospital*, 227 Ill. 2d 207, 213 (2007). The court abuses its discretion only when its decision is arbitrary, unreasonable or no reasonable person would adopt the same view. *In re Marriage of Heroy*, 2017 IL 120205, ¶ 24.

¶ 27 In this case, the circuit court's written order stated that it had granted defendant's motion to dismiss with prejudice "due to a lack of due diligence in obtaining service as stated in open

court." Despite the court referencing remarks it made in open court, there is no transcript of the hearing on the motion or a bystander's report of the proceeding (see Ill. S. Ct. R. 323(c) (eff. July 1, 2017)) included in the record on appeal. The burden to provide a sufficient record on appeal is on the appellant (*Webster v. Hartman*, 195 Ill. 2d 426, 432 (2001)), here plaintiff. In the absence of that record, we must presume that the court's order conformed to the law and had a sufficient factual basis. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). Moreover, any doubts that arise from an insufficient record will be resolved against the appellant. *Corral v. Mervis Industries, Inc.*, 217 Ill. 2d 144, 157 (2005).

¶ 28 Given that we have no record of the circuit court's reasons for finding that plaintiff failed to exercise reasonable diligence in serving defendant and the abuse of discretion standard is "highly deferential to the circuit court" (*Taylor v. County of Cook*, 2011 IL App (1st) 093085, ¶ 23), we have no basis to find the court's ruling arbitrary or unreasonable. In order to determine if the court's reasoning was arbitrary or unreasonable, necessarily we must know its reasoning. See *Corral*, 217 Ill. 2d at 156 ("An issue relating to a circuit court's factual findings and basis for its legal conclusions obviously cannot be reviewed absent a report or record of the proceeding."); *Illinois Founders Insurance Co. v. Williams*, 2015 IL App (1st) 122481, ¶ 56 (finding that, absent a report of proceeding or bystander's report of a hearing, the appellate court could not "divine the trial court's reasoning" in denying a motion and thus could not determine whether the court abused its discretion). It is not enough that plaintiff asserts in his brief that the court failed to consider several of the factors enunciated in *Segal*, as we are limited to the evidence contained in the record on appeal and cannot simply rely on the assertions in plaintiff's brief. See *Thomas v. Powell*, 289 Ill. App. 3d 143, 147 (1997). Consequently, in light of this record, or the lack thereof, we cannot say the circuit court abused its discretion in dismissing plaintiff's complaint.

See *Foutch*, 99 Ill. 2d at 392 (concluding that, absent the transcript of the hearing on a motion to vacate, the court had "no basis for holding that the trial court abused discretion in denying the motion").

¶ 29 B. Factual Questions Precluding Dismissal

¶ 30 Plaintiff next contends that the circuit court's dismissal under Rule 103(b) with prejudice was improper because a question of fact existed about the application of the statute of limitations for his breach of written contract claim. According to plaintiff, the court had to determine when the actual breach occurred and only then could it know on what date the statute of limitations began to run and thus whether the statute of limitations had expired. Plaintiff asserts that the fundamental and predicate factual issue of when the breach occurred had to be decided before the court could dismiss his complaint with prejudice and that decision could not be made without an evidentiary hearing.

¶ 31 As previously discussed, Illinois Supreme Court Rule 103(b) (eff. July 1, 2007) provides that:

> "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."

¶ 32 The Committee Comments to Rule 103 states that "a dismissal with prejudice shall be entered only when the failure to exercise due diligence to obtain service occurred *after* the

expiration of the applicable statute of limitations." (Emphasis added.) Ill. S. Ct. R. 103, Committee Comments (rev. May 1997). This is so because "[p]rior to the expiration of the statute, a delay in service does not prejudice a defendant." *Id.* Thus, depending on when the plaintiff's failure to exercise reasonable diligence to obtain service occurs will determine whether the dismissal will be made with prejudice or without prejudice.

¶ 33 Here again, we must note that the circuit court's written order stated that it had granted defendant's motion to dismiss with prejudice "due to a lack of due diligence in obtaining service as stated in open court." Because plaintiff has not provided this court with a transcript of the hearing or a bystander's report of the proceeding (see Ill. S. Ct. R. 323(c) (eff. July 1, 2017)), we have no conclusive way of knowing what the court stated in open court and what preceded its ruling that plaintiff failed to exercise reasonable diligence in serving defendant. Although plaintiff asserts the court failed to make certain predicate findings, we again reiterate that we are bound by the evidence in the record on appeal and "cannot rely upon mere assertions by a party." *Thomas*, 289 Ill. App. 3d at 147. In the absence of the record of what transpired in open court during the hearing on defendant's motion to dismiss, any doubts we have about the proceeding based on the insufficient record must be resolved against plaintiff as the appellant. See *Corral*, 217 Ill. 2d at 157. Consequently, we must presume that the court's order conformed to the law and had a sufficient factual basis *(Foutch*, 99 Ill. 2d at 391-92), and therefore, we must affirm its dismissal with prejudice.

¶ 34 III. CONCLUSION

¶ 35 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 36 Affirmed.