2019 IL App (2d) 180485-U
No. 2-18-0485
Order filed February 13, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

DAVID CALLAHAN and HEINE HEININGER,	)	Appeal from the Circuit Court of Du Page County
Plaintiffs-Appellants,	)	
v.	)	No. 17-L-1011
CHERYL YORK and THE COUNTY OF DU PAGE,	)	
Defendants-Appellees.	)	Honorable Kenneth L. Popejoy, Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court
Presiding Justice Birkett and Justice Hudson concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not abuse its discretion in dismissing plaintiff's complaint under Rule 103(b) for failing to exercise reasonable diligence in serving defendant: plaintiffs were on notice that their attempted service on defendant was improper, and yet they did nothing to effect proper service in the several months thereafter.

¶ 2 Plaintiffs, David Callahan and Heine Heininger, filed a complaint against defendants, Cheryl York and the County of Du Page (County), seeking to pursue a class action (see 735 ILCS 5/2-801 *et seq.* (West 2016)) on behalf of numerous patients of Robert Moylan, a

psychotherapist. Plaintiffs alleged that York, an investigator for the Du Page County State's Attorney's office, had illegally seized confidential records from Moylan's office. The County moved to dismiss the count against it for failing to state a claim based on *respondeat superior*. York moved under Illinois Supreme Court Rule 103(b) (eff. July 1, 2007) to dismiss the two counts against her, based on plaintiffs' failure to use reasonable diligence to serve her with process in the manner required by section 2-203(a) of the Code of Civil Procedure (735 ILCS 5/2-203(a) (West 2016)). The trial court granted the County's motion and later granted York's motion. Plaintiffs appeal the dismissal of the counts against York. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On September 13, 2017, plaintiffs filed their three-count complaint, alleging the following facts. Moylan's duties included providing court-ordered counseling for people who had been found guilty of alcohol-related driving offenses. During 2015-16, plaintiffs and the other class members were his patients. On or about September 14, 2016, York applied for a warrant to search his records. She knowingly used false allegations in order to obtain the warrant. When she executed the warrant, she seized not only Moylan's business records but also confidential therapy notes and patient files.

¶ 5 Count I of the complaint alleged that York's acts violated the Mental Health and Developmental Disabilities Confidentiality Act (740 ILCS 110/1 *et seq.* (West 2016)) and caused plaintiffs emotional distress. Count II alleged that, shortly before Callahan appeared in court in his case, York intentionally caused him emotional distress by harassing him about what she believed from the notes was his failure to attend therapy with Moylan. Count III alleged that the County was liable for York's acts under *respondeat superior*.

¶ 6 On September 13, 2017, summonses were issued listing York, the County, and Robert Berlin as the Du Page County State's Attorney, as the defendants in the case. One was addressed to York "in C/O DuPage State's Attorney's Office, 503 N. County Farm Rd., Wheaton, IL 60187." The others were addressed to the County and Berlin at the same address.

¶ 7 Crucial here is the sheriff's return of service on York. The affidavit stated that a sheriff's deputy served the papers on October 10, 2017. The deputy did not give a copy of the summons and complaint to York personally but served a "business" by leaving the papers with "the registered agent, authorized person, or partner of the defendant." Specifically, the papers had been served on "Cici (Reception)."

¶ 8 On November 8, 2017, Assistant State's Attorney Gregory Vaci entered an appearance on behalf of York and the County. That day, the County moved to be dismissed (see 735 ILCS 5/2-615 (West 2016)), contending that it could not be liable for York's actions, as the State's Attorney was an employee of the State of Illinois, not the County.

¶ 9 On January 3, 2018, York moved under section 2-301 of the Code (735 ILCS 5/2-301 (West 2016)) to be dismissed as a defendant. She cited section 2-203(a) of the Code, which states in pertinent part, "Except as otherwise expressly provided, service of summons upon an individual defendant shall be made (1) by leaving a copy of the summons with the defendant personally, (2) by leaving a copy at the defendant's usual place of abode." 735 ILCS 5/2-203(a) (West 2016). York also cited Rule 103(b), which states in pertinent part:

> "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 [(735 ILCS 5/13-217 (West 2016))]." Ill. S. Ct. R. 103(b) (eff. July 1, 2007).

¶ 10 York's motion argued that plaintiffs had failed to exercise reasonable diligence. Section 2-203(a) of the Code required them to serve her as an individual, but they had yet to do so. Further, there was no indication that, in the four months since they filed the complaint, plaintiffs had ever tried to serve her in accordance with section 2-203(a).

¶ 11 On January 10, 2018, the court dismissed the County from the action.

¶ 12 On March 9, 2018, plaintiffs responded to York's motion. They alleged as follows. Immediately after filing the complaint, they issued summonses and sent them to the Du Page County sheriff's office. When plaintiffs checked service, they were informed that service had been obtained. During November and December 2017, the County filed a motion to dismiss and the State's Attorney filed an appearance for both York and the County. In that period, York filed nothing. In conversations with defense counsel in this case, the matter of service on York had never come up.

¶ 13 Plaintiffs argued that York had not met her burden to make a *prima facie* case that they had not exercised reasonable diligence. According to plaintiffs, the case law supported dismissal

only when the delay far exceeded four months and the plaintiff had made no attempt to serve the defendant. Plaintiffs maintained that the factors listed in Rule 103(b) militated against dismissal. Plaintiffs had issued the summons immediately. They did not seek to serve York at her residence, as law-enforcement agencies do not customarily disclose employees' home addresses. Also, the State's Attorney's office, which accepts process every week, had done so here.

¶ 14 Plaintiffs' response attached an affidavit from their attorney, Gregory E. Kulis, stating as follows. After the summons issued, "[he was] informed that there was service on both Defendants." Based on his experience, law-enforcement agencies do not disclose agents' home addresses, and they accept service for their agents to avoid having to do so. The filing of the action had been publicized "all over Channel 7 news." Kulis had been "led to believe" that York had been served.

¶ 15 On March 21, 2018, the trial court heard argument on York's motion. The court noted that a check on a computer showed that, on March 9, 2018, plaintiffs finally issued a summons "specifically, against [York]"; the receptionist had accepted it "but it still [wasn't] service on [York]." Kulis noted that law-enforcement agencies do not like to give out home addresses, but he admitted that they are not obligated to do so. He noted that the State's Attorney's office had accepted the summons, but he conceded that that was not personal service and that he had no case law holding that it was. He had not performed any investigation into York's home address; he had "relied on what [he] believed to be service at the time."

¶ 16 Kulis contended that under the case law dismissal with prejudice (which would necessarily be the result given that the statute of limitations would have run) is appropriate only "when somebody does absolutely nothing," not even issuing a summons, "for six or seven months." The court noted that York had filed her motion to dismiss on January 3, 2018, and that

Kulis had neither filed a response nor attempted to reissue a summons until March 9, 2018. Kulis argued that someone in his office had told him that York had been served. He also noted that he had been active in the case, filing pleadings and motions. The court asked whether he had done anything since September 2017 in regard to attempting service on York. Kulis responded, "I went to my office and they said no, no, she's been served." The court asked him whether he had looked at "the evidence of service." Kulis responded that he did not personally look at "every piece of paper that [came] into [his] office."

¶ 17 The court noted that the complaint had been filed "right at the last minute" before the expiration of the statutory limitations period. Seven months had elapsed with only one attempt to obtain service, and that had been made in September. "Any number of things could have been done" to locate York. She had known that an action was pending against her. Vaci argued that plaintiffs had not exercised reasonable diligence, as personal service had clearly been required and plaintiffs had merely left the papers at her workplace. Kulis argued that the failure to serve York had been "inadvertent error" but that he had at least attempted to serve her. He should have issued another summons at some point, but he had believed that York had been served. Kulis admitted, however, that York's attorney had never told him that she had been served.

¶ 18 The court again noted that, since the return of the original summons, nothing more had been done to obtain service on York. The court also noted that, although Kulis claimed that he had believed that York had been served, her motion of January 3, 2018, told him otherwise, and he had done nothing since to attempt to serve her. It had not been reasonable to assume that she had been served. The court observed that the first page of the summons did not even show York's name, so it was "questionable" whether any summons had been issued against her. In any event, however, "the point" was that "when one was issued and nothing happened and then

you're, basically, told you have a problem with it and nothing happens with it from January, February into March, that's not reasonable diligence."

¶ 19 The court granted York's motion. Plaintiffs moved to reconsider. They argued that the dismissal had been based on two facts: that plaintiffs had not served York as of March 18, 2018, and that York's name had not been on the cover sheet of the summons. Plaintiffs contended that under the case law the first fact was insufficient to support dismissal; they had made one attempt to serve York, had been active in the case otherwise, and could not have obtained York's home address. Also, York had known of the action, and plaintiffs had honestly believed that she had been served. Plaintiffs contended that the court had been incorrect on the second matter; there was no cover sheet on the summons, and York's name was on the summons sheet itself. Further, York had signed a waiver of service in a parallel federal case, and the present action had been well publicized in the media.

¶ 20 In response, York argued that plaintiffs had not made even one attempt to do what the law plainly required: serve her personally or at her abode. She maintained that she had made a *prima facie* case that plaintiffs had failed to exercise reasonable diligence, even though inaction over less than eight months was involved.

¶ 21 On June 12, 2018, plaintiffs' motion to reconsider went to a hearing. In ruling, the court observed that Rule 103(b) set "no specific time limitation," but "five to seven months between filing and service of process seems to be the minimum date that [is] generally needed to make a prima facie showing of failure to exercise reasonable diligence." York had filed her motion 3½ months after plaintiffs had filed their complaint; at that time, she had not been served. As of March 21, 2018, when York's motion was heard, plaintiffs had taken no further steps to effect service. The delay of approximately six months weighed in favor of dismissal.

¶ 22 The court noted that plaintiffs had issued the summons on September 13, 2017, but, on October 10, 2017, they received notice that the summons had been left with a receptionist, allegedly an agent of the State's Attorney. However, because York had been named as an individual defendant, "this service was clearly improper." Even after receiving the notice of the improper attempt at service, plaintiffs did nothing. This consideration supported dismissal.

¶ 23 Next, the court turned to the ease with which plaintiffs could have discovered York's whereabouts. The court noted that, even assuming that the law prohibited them from learning York's personal address, they had never tried to locate that address and had never attempted to serve her personally at her workplace. This factor also weighed in favor of dismissal. York's actual knowledge of the suit weighed against dismissal, but that was insufficient as balanced against the obvious lack of diligence. Next, special circumstances did not weigh against dismissal: the County's motion to dismiss the count against it did not detain plaintiffs much, and even after it was decided, they did not properly serve York. This factor weighed in favor of dismissal. Finally, York still had not been served when the dismissal motion was heard, and this supported dismissal.

¶ 24 The court concluded that, although the dismissal would necessarily be with prejudice, as the statute of limitations had run, the harsh result was proper. Kulis's subjective belief that York had been served was unreasonable in light of the clear statutory requirements. Thus, York had made a *prima facie* case of unreasonable diligence, and plaintiffs had not rebutted it.

¶ 25 The court dismissed the counts against York with prejudice. Plaintiffs timely appealed.

¶ 26 BACKGROUND

¶ 27 We may disturb a Rule 103(b) dismissal only if the trial court abused its discretion. *Case v. Galesburg College Hospital*, 227 Ill. 2d 207, 213 (2007). "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." (Internal quotation marks omitted.) *Emrikson v. Morfin*, 2012 IL App (1st) 111687, ¶ 14 (trial court acted within its discretion in dismissing action for lack of diligence in obtaining service).

¶ 28 "The purpose of Rule 103(b) is 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). The factors a trial court may consider include, but are not limited to, (1) the length of time used to obtain service of process; (2) the plaintiff's activities in attempting to effectuate service; (3) the plaintiff's knowledge of the defendant's location; (4) the ease with which the defendant's whereabouts could have been ascertained; (5) whether the defendant actually knew that the action was pending; (6) special circumstances that would affect the plaintiff's efforts; and (7) whether the defendant was actually served. *Case*, 227 Ill. 2d at 212-13; *Womick v. Jackson County Nursing Home*, 137 Ill. 2d 371, 377 (1990); *Jones v. Shallow*, 201 Ill. App. 3d 594, 596-97 (1990). Once the defendant has made a *prima facie* showing of a lack of reasonable diligence in serving process, the burden shifts to the plaintiff to show reasonable diligence. *Segal*, 136 Ill. 2d at 286; *Emrikson v. Morfin*, 2012 IL App (1st) 111687, ¶ 17.

¶ 29 Plaintiffs rely on four arguments: (1) the court erred in concluding that sufficient time had elapsed between the filing of the complaint and the litigation of the motion to dismiss (first factor); (2) the court erred in concluding that plaintiffs' activities militated in favor of dismissal (second factor); (3) the court erred in concluding that plaintiffs' knowledge of York's whereabouts and the ease with which she could be located favored dismissal (third and fourth factors); and (4) the court erred in concluding that special circumstances did not militate in favor

of dismissal (sixth factor). We find plaintiffs' arguments on these factors unpersuasive. More important, we cannot say that, considering the totality of the circumstances, the trial court abused its discretion in concluding that plaintiffs had failed to exercise reasonable diligence.

¶ 30 We consider plaintiffs' arguments in turn. On the first factor, plaintiffs assert that the trial court erred in "creating a *per se* amount of time, five to seven months, that establishes a presumption of lack of diligence." Plaintiffs argue that the inquiry into diligence is fact-specific and that the court's creation of a *per se* rule is unsupported by the case law. They contend further that, if anything, the case law militates in favor of holding that a delay of five to seven months is insufficient to support dismissal based on the first factor.

¶ 31 Plaintiffs' contention is unsound for several reasons. First, it mischaracterizes what the court said. The court stated that "five to seven months between filing and service of process seems to be the *minimum* date [*sic*] that [is] generally needed to make a prima facie showing of failure to exercise reasonable diligence." (Emphasis added.) Thus, the court did not use a *per se* rule that a delay of five to seven months is unreasonable; if anything, it suggested that the case law set a *per se* rule that any delay *less* than this amount is reasonable. Further, plaintiffs are equally wrong in asserting that the statement was unsupported by the case law: it was essentially a verbatim quotation from *Verploegh v. Gagliano*, 396 Ill. App. 3d 1041, 1045 (2009).[1]

¶ 32 Second, the statement on which plaintiffs mistakenly rely was made in the context of a longer discussion that clearly showed that the court was aware that the inquiry under the first factor was necessarily *ad hoc* and fact-specific. Thus, the court knew and applied the law.

[1]The only difference is that the trial court used the word "date" instead of "delay," plainly an inadvertent slip. The court was not only following case authority but quoting it.

¶ 33 Given the foregoing, we cannot say that the court was unreasonable to find that the first factor weighed in favor of dismissal, although it was not necessarily sufficient by itself to support dismissal. The delay between the filing of the complaint and the hearing on York's motion to dismiss was slightly more than six months. The delay between the filing of the complaint and the hearing on plaintiffs' motion to reconsider was nine months. Even as of the latter date, York had still not been served. We note that the court commented that the complaint was filed "right at the last minute" before the statute of limitations would have barred it. Thus, the court properly considered Rule 103(b)'s recognized purposes of preventing the circumvention of the statute of limitations and promoting the expeditious filing of lawsuits. See *Segal*, 136 Ill. 2d at 286; *Dupon v. Kaplan*, 163 Ill. App. 3d 451, 454 (1987).

¶ 34 We turn to plaintiffs' argument on the second factor. They contend that the court incorrectly interpreted the phrase "the activities of the plaintiff" (*Womick*, 137 Ill. 2d at 377; *Verploegh*, 396 Ill. App. 3d at 1045) to refer solely to the plaintiff's activities in attempting to effectuate service on the defendant instead of what the plaintiff did "in furtherance of the case generally." Plaintiffs contend that, had the court applied this factor correctly (as they see it), it would have given it some weight in plaintiffs' favor instead of against them, because the record shows that, after filing their complaint, plaintiffs actively pursued the case by accruing a large class membership, responding to the County's motion to dismiss, and discussing the case in the news media, as well as making a prompt if unsuccessful attempt to serve York.

¶ 35 Plaintiffs' argument rests on an erroneous premise. The trial court did not misconstrue the case law on the second factor; plaintiffs do. At least two opinions state explicitly that the second factor requires the consideration of the plaintiff's "activities *in attempting to effectuate service*." (Emphasis added.) *Jones*, 201 Ill. App. 3d at 596; *Semersky v. West*, 166 Ill. App. 3d

637, 642 (1988). Although the specific phraseology has been shortened in some later opinions, these opinions are still good law. Moreover, the restriction of the plaintiff's activities to those that were related to the effectuation of service is simply a commonsense implication from Rule 103(b)'s language and purposes. The sole issue in a Rule 103(b) motion hearing is whether the plaintiff "fail[ed] to exercise reasonable diligence *to obtain service on a defendant* prior to the expiration of the applicable statute of limitations." (Emphasis added.) Ill. S. Ct. R. 103(b) (eff. July 1, 2007). The plaintiff's activities in attempting to effectuate service are obviously relevant to whether he was diligent in this respect; his activities in matters that had nothing to do with effectuating service have little if any bearing on this limited issue.

¶ 36 Considering the second factor in light of case law and common sense—and thus rejecting plaintiffs' construction of it entirely—we cannot say that the trial court erred in weighing this factor against them. Indeed, it is difficult to see how it could have done otherwise. Plaintiffs' activities in attempting to effectuate service on York were slight. It is true that, in September 2017, they promptly issued a summons and attempted to serve it on her—once. But as of October 10, 2017, plaintiffs were on notice that York had not been served as section 2-203(a) of the Code plainly required. The sheriff's affidavit told them so by omitting a check mark on the line that stated that York had been served personally and including a check mark on the line that stated that the papers had been served on a "business," followed by the notation that the papers had been left with the receptionist at York's workplace. No reasonable person would construe this as showing that York had been served in accordance with section 2-203(a). Yet after October 10, 2017, plaintiffs did not make any further attempt to serve her personally, even after she moved to dismiss in January 2018. Plaintiffs obviously knew where York worked and could

have sent a sheriff's deputy back there to serve her personally. They did not do so, and they did little if anything else.

¶ 37 We thus reject plaintiffs' contention that the second factor favored them. The trial court applied the correct law and was well within its discretion to hold that the second factor strongly favored dismissal.

¶ 38 We turn to plaintiffs' next contention: that the trial court misapplied the third and fourth factors, the plaintiffs' knowledge of the defendant's location and the ease with which the defendant's whereabouts could have been ascertained. Plaintiffs rely on the court's comment that they did nothing to ascertain York's home address, and they reiterate their assertion that, because she was a law-enforcement agent, her residence would have been difficult to ascertain. But plaintiffs' argument ignores the obvious: even granting that York's home address was difficult to discover (an assumption that is dubious because plaintiffs never tried to do so), there was no question that her workplace was not only knowable but known from the start of the action. Thus, as the court recognized, the third and fourth factors did not help plaintiffs, because they never explained why it would have been difficult to effect personal service, or at least attempt to do so, at the State's Attorney's office in Wheaton. There is no evidence that York had changed her workplace, repeatedly absented herself from the office, or tried to avoid service (see, *e.g.*, *Dupon*, 163 Ill. App. 3d at 455-56; *Licka*, 70 Ill. App. 3d at 937-38). Plaintiffs' contention that the court erred in its weighing of the third and fourth factors is wholly unpersuasive.

¶ 39 Finally, plaintiffs contend that the court erred in its application of the sixth factor, any special circumstances that bore on plaintiffs' efforts. Plaintiffs argue that the court slighted two such special circumstances that bore on the issue of their diligence: (1) their reliance on the

sheriff's affidavit assuring them that service had been effected and (2) the fact that service was effected on somebody who was held out as an agent of the person served. Neither such "special circumstance" is anything of the kind, at least insofar as it would aid plaintiffs. Moreover, the court rightly concluded that there were no special circumstances that would cast the issue of plaintiffs' diligence in a more favorable light.

¶ 40 On the first alleged special circumstance, plaintiffs rely on *Clemons v. Atlas,* 185 Ill. App. 3d 894 (1989). There, the court reversed a Rule 103(b) dismissal, explaining that much of the delay in serving the defendant was occasioned by errors that could not be attributed to the plaintiff. Specifically, in the month after the complaint was filed, the sheriff's deputy attempted several times to serve the defendant or a family member at the defendant's abode. The deputy reported that neither the defendant nor any family member of sufficient age was present, but this turned out to be wrong; the defendant and at least one family member had been present. Thus, whatever the cause the original failure to serve the defendant, the plaintiff was not to blame. *Id.* at 896. The plaintiff tried again with an alias summons, but the sheriff lost or misplaced the papers. This was also not the plaintiff's fault. *Id.* at 897. The plaintiff then rectified the errors of others and effected service. *Id.* The appellate court held that the total delay, 14 months, did not show a lack of diligence. *Id.*

¶ 41 The situation here is altogether different. The sheriff did nothing wrong, and any deficiency in the service was soon made apparent to plaintiffs. The sheriff's affidavit did not reasonably lull plaintiffs into believing that York had been served as the statute required: it clearly put them on notice otherwise. As of the receipt of the sheriff's affidavit, plaintiffs knew, or surely should have known, that proper service had not been effected.

¶ 42 Plaintiff's reliance on the agency doctrine is equally spurious. York was named as an individual defendant who was liable personally for her torts. The receptionist who accepted the papers might conceivably have been an agent of the State's Attorney or reasonably mistaken for one. But it was not reasonable to assume that she was an agent for York as an individual, even were this sufficient to constitute *personal* service.

¶ 43 Aside from the spurious special circumstances, no genuine ones militated strongly in favor of plaintiffs. See *Cannon v. Dini*, 226 Ill. App. 3d 82, 87 (1992) (taking into account that, for most of period between issuance of initial summons and further efforts seven months later, plaintiff had needed to address two separate motions to dismiss complaint). Between the filing of the complaint and York's filing of the motion to dismiss, plaintiffs were not distracted by many matters extraneous to service on York. York was the primary defendant in the case and the other defendant, the County, was dismissed well before she filed her motion. Thus, the court did not misapply the sixth factor and plaintiffs' reliance on it is unavailing.

¶ 44 The remaining considerations do not militate against the trial court's decision. Although York was aware of the suit against her at some point, this consideration by itself did not need to outweigh the others, particularly in view of Rule 103(b)'s concern with promoting expeditious litigation, especially when the statute of limitations is involved. See *Womick*, 137 Ill. 2d at 377; *Sinn v. Elmhurst Medical Building, Ltd.*, 243 Ill. App. 3d 787, 792 (1993). Moreover, the seventh factor favored dismissal: as of the date of the hearing on her motion to dismiss, York still had not been served properly.

¶ 45 Moving from the individual factors to the larger picture, we cannot say that the trial court abused its discretion in holding that plaintiffs had not exercised reasonable diligence in serving York. Even after learning that the initial attempt at service had been insufficient, their counsel

acted under the inexcusable if not inexplicable assumption that York had been properly served. The record shows more than sufficient ground for the trial court's conclusion that plaintiffs had not exercised reasonable diligence.

¶ 46 CONCLUSION

¶ 47 For the foregoing reasons, the judgment of the circuit court of Du Page County is affirmed.

¶ 48 Affirmed.