

No. 1-10-0826

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).

SECOND DIVISION
June 14, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JOHN YAKSTAS, LINDA YAKSTAS,)	Appeal from the
INDIVIDUALLY AND AS PARENT AND)	Circuit Court of
GUARDIAN OF ERIK YAKSTAS, A MINOR)	Cook County.
)	
Plaintiffs-Appellants,)	
)	No. 09 L 5307
v.)	
)	
LAURA GOODMAN,)	Honorable
)	Diane J. Larsen,
Defendant-Appellee.)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Cunningham and Justice Karnezis concurred
in the judgment.

O R D E R

HELD: The circuit court did not abuse its discretion in granting defendant's motion to dismiss plaintiff's refiled complaint seeking damages resulting from an automobile collision where the evidence showed a lack of reasonable diligence in obtaining service on defendant; affirmed.

Plaintiffs John Yakstas and Linda Yakstas, individually and as parental guardian of minor Erik Yakstas, appeal from an order of the circuit court of Cook County granting defendant Laura Goodman's motion to dismiss plaintiffs' refiled complaint seeking damages for injuries sustained in an automobile collision based on plaintiffs' failure to effectuate prompt service under Illinois Supreme Court Rule 103(b) (eff. July 1, 2007). On appeal, plaintiffs contend that the circuit court abused its discretion in granting the motion because they exercised reasonable diligence in serving defendant.

The automobile accident giving rise to this action occurred on June 24, 2005. On June 22, 2007, plaintiffs filed their original complaint seeking damages related to that incident and, on that same day, attempted to serve defendant with summons at an address on Delaware Place in Chicago. This was the address for defendant reflected on the accident report. About one month later, the summons was returned unserved because defendant was "not listed" at that address.

In August 2007, plaintiffs' counsel sent an e-mail to a private investigator requesting a skip trace. On September 20, 2007, plaintiffs attempted to serve a first alias summons on defendant at an address on Grand Avenue in Chicago. This was returned unserved one month later, with indications that two

1-10-0826

attempts had been made to serve defendant, but that there had been "no contact."

The record further shows that on May 6, 2008, plaintiffs voluntarily dismissed the complaint with leave to reinstate within one year. Plaintiffs refiled the complaint on May 5, 2009, asserting the same claim, and that in March and April 2009, plaintiff John Yakstas, a licensed private investigator, conducted research on Internet databases to locate defendant. On the date of the refiling, and on June 29, 2009, plaintiffs attempted to serve defendant at an address on State Street in Chicago. Both summonses were returned unserved, with markings that defendant was "unknown" and had moved. On September 20, 2009, plaintiffs finally served defendant at an address on Damen Avenue in Chicago.

Defendant filed a motion to dismiss the complaint with prejudice based on plaintiffs' failure to effectuate prompt service as required by Rule 103(b). Defendant specifically asserted that plaintiff attempted to serve defendant only twice in the 11-month period between the time of the original filing and the voluntary dismissal, both of which occurred after the statute of limitations had expired. Defendant appended to the motion an affidavit averring that she had lived at the address on Grand Avenue in Chicago from the time of the accident until June 2009, that she worked from that address during the day, that she

had not avoided service, and that the Grand Avenue address was listed in the telephone directory and on Internet databases.

Plaintiffs responded that they had exercised due diligence in attempting to serve defendant, as evidenced by the five summonses issued to defendant at four different addresses, the three requested skip traces, and one appointed process server. They also attached affidavits from their trial counsel and plaintiff John Yakstas, outlining the efforts they had individually undergone to effectuate service.

Following a hearing, the circuit court dismissed the complaint with prejudice. In announcing its decision, the court noted that "[i]t's a very difficult motion," but that it could not find "due diligence" in light of the seven months of inactivity prior to the voluntary dismissal in May 2008, particularly in a time when the statute of limitations had already run. Plaintiffs now appeal, contending that the circuit court abused its discretion in granting defendant's motion to dismiss where they met the elements of "due diligence" in attempting service upon defendant.

Rule 103(b) provides for dismissal of a complaint with prejudice where plaintiffs fail to exercise reasonable diligence in serving a defendant after the expiration of the statute of limitations. Ill. Sup. Ct. R. 103(b) (eff. July 1, 2007). The rule was adopted to aid the trial court in the expeditious

handling of suits, to protect defendant from unnecessary delay in service of process, and prevent the circumvention of the statute of limitations. *Kole v. Brubaker*, 325 Ill. App. 3d 944, 949 (2001). Trial courts are permitted broad discretion to dismiss a case when service is not effected in a diligent manner (*Kole*, 325 Ill. App. 3d at 949), and a ruling on a motion to dismiss will not be disturbed absent an abuse of discretion (*Womick v. Jackson County Nursing Home*, 137 Ill. 2d 371, 376 (1990)).

In moving for dismissal under Rule 103(b), defendant is initially required to make a *prima facie* showing that plaintiff failed to exercise reasonable diligence in effectuating service after filing suit. *Kole*, 325 Ill. App. 3d at 949. Because of the nature of the issue, the determination of whether defendant has established a *prima facie* case of lack of diligence must be made on a case-by-case basis. *Kole*, 325 Ill. App. 3d at 949.

Here, the record shows that plaintiffs served defendant 27 months after the expiration of the statute of limitations. However, the time that elapsed between the voluntary dismissal and the refiling of the complaint, a period of 12 months, is not considered in the "overall lapse of time" that the action was pending; however, the periods before the voluntary dismissal and after the refiling, here an aggregate 15 months, are to be added together for that purpose. *Case v. Galesburg Cottage Hospital*, 227 Ill. 2d 207, 219 (2007).

We observe that the original complaint and summons were filed two days prior to the expiration of the statute of limitations, and that the first summons was filed before the expiration of the statute. An alias summons issued three months after the attempt to serve the original summons listed defendant's then-current address on Grand Avenue. This summons was returned undelivered after two unsuccessful attempts where "no contact" was indicated.

After these two unsuccessful attempts at service, a period of seven months elapsed without any activity. Plaintiffs then voluntarily dismissed the cause, and after refiling, attempted service two more times, once unsuccessfully at an incorrect address, and finally at defendant's proper address. In deciding the motion, the circuit court noted that the seven-month period of inactivity was "just too long." Because the record does not indicate any unusual circumstances that would have prevented or otherwise hindered plaintiffs' ability to serve defendant, we find the elapsed seven-month time period raises an inference that plaintiffs failed to act diligently under Rule 103(b). *Kole*, 325 Ill. App. 3d at 949.

Once defendant has established that the time between the filing of the suit and the date of actual service is indicative of a lack of diligence in the absence of any patently unusual circumstances, the burden shifts to plaintiffs to demonstrate,

with specificity and in conformity with the rules of evidence, that reasonable diligence was exercised and to offer an explanation to satisfactorily justify any delay in service. *Kole*, 325 Ill. App. 3d at 949-50. The standard used is an objective one of reasonable diligence in effectuating service and not the subjective intent of the plaintiff. *Kole*, 325 Ill. App. 3d at 950.

When resolving a Rule 103(b) motion, the circuit court may consider many factors including, but is 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*, 227 Ill. 2d at 212-13. There is no specific time limitation provided by Rule 103(b); rather, the circuit court must consider the passage of time in relation to all the other facts and circumstances of each case individually. *Case*, 227 Ill. 2d at 213.

Although plaintiffs' ultimate service of defendant evinces diligence, plaintiffs have not satisfactorily explained why seven months elapsed after the expiration of the statute of limitations and the return of the initial alias summons, where no efforts

were made to serve defendant. *Kole*, 325 Ill. App. 3d at 950. The prior invalid service did not relieve plaintiffs of their obligation to obtain valid service within the diligence requirements of the rule; and in the absence of any credible explanation regarding their activities during this period, the lack of service can only be attributed to their lack of diligence. *Kole*, 325 Ill. App. 3d at 950-51.

As to their activities and knowledge of defendant's location, plaintiffs assert that they were diligent because they attempted service on defendant on multiple occasions at different addresses, requested skip traces, and engaged the services of a private investigator. We note, however, that this activity took place over a 15-month period, and that the asserted activities during March and April 2009, where plaintiffs allegedly consulted various databases searching for defendant's address may not be considered because there was no case pending before the circuit court at that time.

In addition, plaintiffs acknowledge that one of their searches uncovered a judgment against defendant in connection with the same underlying automobile accident, and the public record of this judgment lists defendant's address on Grand Avenue. Although plaintiffs twice attempted service at this address, "no contact" was made. The record, therefore, demonstrates that defendant had knowledge of defendant's then-

current address for about 10 months, 9 prior to the voluntary dismissal and 1 during a period between refiling and defendant moving to another address. On these facts, we find no basis to conclude that plaintiffs' activities show reasonable diligence in serving defendant. *Kole*, 325 Ill. App. 3d at 951.

Although defendant was ultimately served in this matter, this factor does not overcome the lack of diligence exhibited by plaintiffs where other relevant factors show that defendant was available and amenable to service. *Kole*, 325 Ill. App. 3d at 951. The record indicates that plaintiffs had a copy of the public record of the judgment entered against defendant in a case arising out of the same automobile accident, and had also served defendant in another lawsuit. Similarly, defendant's whereabouts were easily ascertainable. The record contains several printouts from publicly accessible Internet databases indicating defendant's address on Grand Avenue, and defendant asserts that it took her only a matter of minutes to locate her current address in both the telephone directory and Internet databases.

The record also fails to demonstrate that defendant was aware that this lawsuit was pending. At the time of service, defendant had been involved in other lawsuits arising out of the same accident and, when ultimately served in this matter, initially thought the summons was related to one of the previously filed lawsuits. Finally, the record does not indicate

1-10-0826

any special circumstances which would have impeded plaintiffs' efforts to serve defendant, as evidenced by the facts showing that defendant's home address was easily ascertainable and that she was available for service at an earlier date had plaintiffs acted in a timely manner. *Kole*, 325 Ill. App. 3d at 951.

For the reasons stated, we find no abuse of discretion by the circuit court of Cook County in granting defendant's motion to dismiss under Rule 103(b), and we affirm the order of the circuit court of Cook County to that effect.

Affirmed.