

2012 IL App (1st) 111550-U

FIFTH DIVISION
March 23, 2012

No. 1-11-1550

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

ROBERT SUGGS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	No. 10 L 3082
)	
ARCADIS U.S., INC., GE AVIATION SYSTEMS, LLC,)	
GE AVIATION SYSTEMS NORTH AMERICA,)	
EUROTHERM, USA, and SMITHS AEROSPACE, INC.,)	Honorable
)	Kathy M. Flanagan,
Defendants-Appellees.)	Judge Presiding.

JUSTICE McBride delivered the judgment of the court.
Justices J. Gordon and Howse concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err in dismissing defendant with prejudice for lack of diligence in serving process. Corporate service upon defendant through the Secretary of State was improper where plaintiff used an erroneous address to mail process to defendant and reasonable diligence would have prevented or discovered that error. Dismissal with prejudice was proper where nearly a year passed between the improper service and plaintiff's motion for default, including six months where defendant was the only defendant, and where the complaint was filed just before expiration of the limitations period so that the lack of diligence followed the end of the limitations period.

¶ 2 This case arises from plaintiff Robert Suggs's premises liability action against defendant Eurotherm Inc. and codefendants Arcadis U.S. Inc., GE Aviation Systems LLC ("GE-LLC"), GE Aviation Systems North America Inc. ("GE-NA"), and Smiths Aerospace Inc. Plaintiff appeals from an order of the circuit court dismissing defendant with prejudice for lack of diligence in serving defendant with process. He contends that the court abused its discretion in dismissing defendant with prejudice for a mere scrivener's error by plaintiff's counsel.

¶ 3 Plaintiff filed his complaint on March 10, 2010, alleging that he suffered personal injury in an incident on March 10, 2008, on premises owned and operated by defendant and codefendants.

¶ 4 On March 12, summonses were issued to the sheriff of Cook County for codefendants Arcadis and GE- LLC. The attached list of all defendants stated a Virginia address for defendant and a Michigan address for GE-NA. The sheriff served Arcadis and GE-LLC on March 18, and the latter filed an appearance, answer, and affirmative defenses in April 2010 while the former appeared in May 2010. The case proceeded with discovery.

¶ 5 In June 2010, plaintiff filed proof of service upon defendant and the remaining codefendants. Codefendant Smiths had been served on March 19 by the sheriff of Winnebago County. Service against defendant and codefendant GE-NA was made upon the Secretary of State pursuant to section 5.25 of the Business Corporation Act (the Act). 805 ILCS 5/5.25 (West 2010). Plaintiff filed affidavits with the Secretary indicating that his counsel sent copies of the summons and complaint to defendant and codefendant GE-NA by certified mail. However, the same Michigan address previously listed for GE-NA was used on the affidavits for defendant and GE-NA. Plaintiff's counsel signed and notarized the affidavits on March 18 and the Secretary stamped the affidavits as filed on March 26 for defendant and March 29 for GE-NA.

¶ 6 Between June and August 2010, plaintiff voluntarily dismissed all codefendants.

¶ 7 In February 2011, plaintiff filed a motion for default against defendant, alleging that it had been served through the Secretary on March 26, 2010, but had not appeared in the case. The attachments to the motion included a copy of the March 2010 summons and party list with a Virginia address for defendant and a copy of the affidavit to the Secretary with GE-NA's Michigan address for defendant. The motion hearing was scheduled for March 4.

¶ 8 On March 2, defendant filed a motion to quash service and for dismissal with prejudice. Defendant noted that the complaint and summons that were supposed to be sent to it by certified mail were actually mailed to one of the GE codefendants, with which defendant averred it "has no affiliation." Defendant stated that it had no notice of the instant action until it received plaintiff's default motion. Defendant argued that it had not been at the Virginia address in the party list since April 2010 and that its present postal address could have been easily found with an internet search, so that plaintiff "failed to exercise even the most basic diligence." Defendant argued that it should be dismissed with prejudice because the complaint was filed on the last day of the two-year limitations period. *See* Ill. S. Ct. R. 103(b)(eff. July 1, 2007).

¶ 9 Plaintiff responded to defendant's motion to quash and dismiss, arguing that service upon the Secretary pursuant to the Act was proper despite the clerical error of listing an incorrect address for defendant on the affidavit to the Secretary. Plaintiff conceded that its clerical error "led to the certified mail copy of suit and Summons to Defendant simply being misdirected." Plaintiff asserted that defendant had notice of the underlying March 2008 incident. Plaintiff argued that it would be unfair to "deny Plaintiff his day in Court where the history of this case shows his diligence as to all other Defendants." Attached to the response was a copy of an April 2008 letter from codefendant Arcadis describing the incident and subsequent investigation.

¶ 10 Defendant replied in support of its motion to quash and dismiss, arguing that inadvertence or mistake can be the basis of a dismissal for lack of diligence in service of process and noting

that any evidence that defendant was aware of the 2008 incident is irrelevant to whether it had notice of the instant civil action.

¶ 11 On May 20, 2011, the court granted defendant's motion and dismissed the case with prejudice, expressly finding that defendant "has never been properly served." The court noted that inadvertence is not a bar to a finding of lack of diligence and that plaintiff has not explained why he did not make another attempt at serving defendant once he or his counsel discovered the scrivener's error. This appeal timely followed.

¶ 12 On appeal, plaintiff contends that the court abused its discretion in dismissing defendant with prejudice for a mere scrivener's error by plaintiff's counsel.

¶ 13 Supreme Court Rule 103(b) (eff. July 1, 2007) provides for the dismissal of a defendant in a civil case where "the plaintiff fails to exercise reasonable diligence to obtain service" upon that defendant. The dismissal is without prejudice if the failure preceded expiration of the limitations period but "shall be with prejudice" if the failure "occurs after the expiration of the applicable statute of limitations." The limitations period for a personal injury action is two years. 735 ILCS 5/13-202 (West 2010). Dismissal may be sought by any party or may be considered *sua sponte* by the court, and "the court shall review the totality of the circumstances," including any lack of reasonable diligence in prior cases voluntarily dismissed, dismissed for want of prosecution, or refiled. Ill. S. Ct. R. 103(b).

¶ 14 Rule 103 "was adopted to effectuate the historical and constitutional mandate that justice be fairly and promptly rendered" and is intended to protect defendants from "unnecessary delay in the service of process and to prevent the plaintiff from circumventing the applicable statute of limitations by filing suit before the expiration of the limitations period but taking no action to have defendants served until the plaintiff is ready to proceed with the litigation." *Christian v. Lincoln Automotive Co.*, 403 Ill. App. 3d 1038, 1042 (2010). While dismissal with prejudice

under Rule 103(b) is a "harsh penalty," it provides "courts wide latitude to dismiss when service is not effected with reasonable diligence." *Id.*

¶ 15 After a defendant has made a *prima facie* showing that the plaintiff failed to exercise reasonable diligence in effectuating service, the burden shifts to the plaintiff to offer an adequate explanation. *Id.* Rule 103(b) is based upon the objective test of reasonable diligence rather than the subjective test of the plaintiff's intent, and the relevant factors include "the length of time used to obtain service of process; the activities of plaintiff; plaintiff's knowledge of defendant's location; the ease with which defendant's whereabouts could have been ascertained; actual knowledge on the part of the defendant of pendency of the action as a result of ineffective service; special circumstances that would affect plaintiff's efforts; and actual service on defendant." *Id.* at 1042-43. We review a trial court's ruling on a Rule 103(b) motion to dismiss for an abuse of discretion, reversing only where that decision is so arbitrary or fanciful that no reasonable person would take the view adopted by the trial court. *Id.* at 1044.

¶ 16 Section 5.30 of the Act provides that a "foreign corporation [that] transacts business in this State without having obtained authority to transact business *** has designated and appointed the Secretary of State as an agent for process upon whom any notice, process or demand may be served" and that such service shall be made as provided in section 5.25(c). 805 ILCS 5/5.30 (West 2010). Section 5.25(c) of the Act provides that a plaintiff serves process by sending the summons and complaint by registered or certified mail to either "the last registered office of the corporation as shown by the records on file in the office of the Secretary of State" or "such address the use of which the [plaintiff] knows or, on the basis of reasonable inquiry, has reason to believe, is most likely to result in actual notice" and by serving the Secretary or one of his clerks with the summons and complaint along with a fee and an affidavit of compliance with the provisions of the Act. 805 ILCS 5/5.25(c) (West 2010).

¶ 17 Here, the key facts are undisputed. For an incident on March 10, 2008, plaintiff filed his complaint on March 10, 2010. Plaintiff had a correct mailing address for defendant in March 2010 when he attempted service. (While defendant moved to another Virginia address, it did so in April 2010). Plaintiff filed an affidavit with, and paid the requisite fee to, the Secretary to serve defendant pursuant to the Act. However, plaintiff provided on that affidavit a clearly erroneous address for defendant: specifically, the Michigan address of an unrelated codefendant. Lastly, plaintiff does not argue or claim that he (or his counsel) mailed the complaint and summons to the correct address while merely stating the wrong address on the affidavit, but indeed has admitted that the summons and complaint were inadvertently misdirected.

¶ 18 Upon these facts, it was reasonable for the court to conclude that plaintiff had failed to exercise reasonable diligence in serving defendant. While there was essentially no delay in attempting to serve defendant, that attempt was fundamentally flawed. It is reasonable to conclude that plaintiff did not send the summons and complaint to an "address the use of which the [plaintiff] knows or, on the basis of reasonable inquiry, has reason to believe, is most likely to result in actual notice" and thus did not fully comply with section 5.25 of the Act. It is also eminently reasonable to conclude that defendant did not have actual notice of this action until nearly a year after its commencement when plaintiff sought default: defendant's averment to that effect is corroborated by its virtually-immediate response to the default motion. Stated another way, plaintiff did not act diligently when he (or more precisely his attorney) used so clearly erroneous an address – he not only could readily determine defendant's address but actually had the correct address at hand – in a stage so basic and vital to civil litigation as the service of process. Thus, though there is no indication that plaintiff's errors were anything but inadvertent, that does not avail him where the result or effect of those errors was so fundamental.

¶ 19 Moreover, that impact was compounded by the passage of nearly a year from the abortive service attempt of March 2010 to the default motion of February 2011. Plaintiff mailed the complaint and summons to defendant – or so he believed – by certified mail, and thus should have had some indication or warning that the address was improper. If plaintiff had received a certified-mail return that allayed such concerns, there is no indication on this record or in plaintiff's briefs that he has so asserted. Plaintiff demonstrated a particular lack of diligence when defendant was the only party left after plaintiff voluntarily dismissed the last codefendant in mid-August 2010 yet he did not seek to default defendant for six months. While plaintiff correctly notes that no subsequent court date was set after the last voluntary dismissal, that does not relieve him of the obligation to keep track of the progress of his case – or in this case the lack of progress.

¶ 20 Lastly, we note plaintiff's argument that the inadvertence of counsel's scrivener's error constitutes a "special circumstance" outweighing the other Rule 103(b) factors and rendering the dismissal an abuse of discretion. For the aforementioned reasons, and because plaintiff has not cited any case law that would support such a sweeping and peculiar proposition, we disagree.

¶ 21 Accordingly, the judgment of the circuit court is affirmed.

¶ 22 Affirmed.