2014 IL App (2d) 130954-U
No. 2-13-0954
Order filed August 12, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

JULIE GRANDGEORGE, Plaintiff-Appellant, v. CATHERINE DUDLEY, DREYER MEDICAL CLINIC, DREYER CLINIC, INC., DREYER MEDICAL GROUP, LTD., and DREYER MEDICAL CLINIC, S.C., Defendants-Appellees.	)	Appeal from the Circuit Court of Du Page County. No. 12-L-1413 Honorable John T. Elsner, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Schostok and 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 defendants: the relevant 8½-month delay was sufficient for defendants' prima facie case, and plaintiff had no reasonable excuse for failing to serve them.

¶ 2 Plaintiff, Julie Grandgeorge, appeals the trial court's order dismissing with prejudice her complaint against defendants, Catherine Dudley, Dreyer Medical Clinic, Dryer Clinic, Inc., Dreyer Medical Group, Ltd., and Dreyer Medical Clinic, S.C., under Illinois Supreme Court Rule

103(b) (eff. July 1, 2007) for failure to exercise reasonable diligence in serving defendants. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On October 24, 2008, plaintiff received medical treatment from defendant Dudley. Plaintiff was allergic to latex, and Dudley allegedly wore latex gloves during the treatment, causing injuries to plaintiff. On October 22, 2010, two days before the limitations period would run (735 ILCS 5/13-212(a) (West 2008)), plaintiff filed a complaint in Cook County against defendants, alleging medical malpractice. She did not attach a reviewing physician's report as required by section 2-622(a)(1) of the Code of Civil Procedure (Code) (735 ILCS 5/2-622(a)(1) (West 2008)). Instead, plaintiff's counsel filed an affidavit under section 2-622(a)(2) of the Code (735 ILCS 5/2-622(a)(2) (West 2008)), stating that he was still looking for a reviewing physician. Plaintiff obtained a 90-day extension to file a report and, two days before the expiration of that period, she moved for an additional 30 days and to voluntarily dismiss the complaint. On February 10, 2011, the complaint was dismissed with leave to refile within one year. While the action was pending, plaintiff did not have a summons issued and did not serve defendants.

¶ 5 On February 10, 2012, plaintiff refiled her complaint and did not attach a reviewing physician's report. Over four months later, on June 26, 2012, she filed a report. On July 3, 2012, she had a summons issued and, on July 19, 2012, defendants were served at the same address where Dudley treated plaintiff.

¶ 6 On August 27, 2012, defendants appeared and moved to transfer the matter to Du Page County. Plaintiff did not contest the transfer. On December 4, 2012, the motion was granted and, on February 20, 2013, the trial court set an initial status conference for March 18, 2013.

Defendants filed a motion to dismiss under Rule 103(b), to be presented at the scheduled conference.

¶ 7 Defendants argued that a total of 8½ months passed during which plaintiff did nothing to serve them. They provided an affidavit from Dudley, who averred that she had lived at the same residence since November 1998, had been an employee of Dreyer Medical Group since November 1997, and had worked at the Dreyer Medical Clinic, where plaintiff was treated, since November 1997. Plaintiff argued that defendants were aware of the cause of action because Dudley knew of the events giving rise to the lawsuit. She also argued that, in determining whether she exercised reasonable diligence in serving defendants, the trial court should consider only the four-month period after the lawsuit was refiled. Plaintiff's counsel provided an unnotarized affidavit, stating that, while the case was pending, his associate searched for a local doctor to provide a reviewing physician's report and for the correct address at which to serve defendants.

¶ 8 The trial court found that plaintiff did not exercise due diligence in serving defendants and dismissed the complaint with prejudice. Plaintiff appeals.

¶ 9 II. ANALYSIS

¶ 10 Plaintiff argues that the trial court erred when it dismissed her complaint with prejudice. Rule 103(b) provides that an action may be dismissed with prejudice if the plaintiff fails to exercise reasonable diligence in obtaining service on the defendant after the expiration of the applicable statute of limitations. Ill. S. Ct. R. 103(b) (eff. July 1, 2007).

¶ 11 "In moving for dismissal under Rule 103(b), the defendant must initially make a *prima facie* showing that the plaintiff failed to exercise reasonable diligence in effectuating service after filing the complaint." *Emrikson v. Morfin*, 2012 IL App (1st) 111687, ¶ 17. Once the

defendant has established that the time between the filing of the complaint and the date of service suggests a lack of diligence, the burden shifts to the plaintiff to provide a satisfactory explanation for the delay in service. *Id.* The standard used in resolving a Rule 103(b) motion is not a subjective test of the plaintiff's intent. Instead, it is an objective test of reasonable diligence in effecting service. *Lewis v. Dillon*, 352 Ill. App. 3d 512, 518 (2004). In the absence of a satisfactory explanation, the trial court is justified in granting a dismissal pursuant to Rule 103(b). *Id.*

¶ 12 A consideration of a party's diligence, or lack thereof, under Rule 103(b) is a fact-intensive analysis. *McRoberts v. Bridgestone Americas Holding, Inc.*, 365 Ill. App. 3d 1039, 1042 (2006). The factors to be considered in allowing or denying a Rule 103(b) motion include (1) the length of time used to obtain service of process; (2) the activities of the plaintiff; (3) the plaintiff's knowledge of the defendant's location; (4) the ease with which the defendant's whereabouts could have been ascertained; (5) actual knowledge by the defendant of the pendency of the action as a result of ineffective service; (6) special circumstances that would affect the plaintiff's efforts; and (7) actual service on the defendant. *Case v. Galesburg Cottage Hospital*, 227 Ill. 2d 207, 212-13 (2007).

¶ 13 Plaintiff initially suggests that we review the matter *de novo*. However, it is well settled that a trial court's ruling on a motion to dismiss pursuant to Rule 103(b) will not be disturbed absent an abuse of discretion. See *Emrikson*, 2012 IL App (1st) 111687, ¶¶ 13-14. 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.' " *Id.* ¶ 14 (quoting *Evitts v. DaimlerChrysler Motors Corp.*, 359 Ill. App. 3d 504, 513 (2005)).

¶ 14 Without citing to any authority, plaintiff argues that defendants forfeited the issue because they appeared in court and moved to transfer the matter to Du Page County without first objecting to the lack of service. But a defendant does not forfeit a Rule 103(b) objection as long as the objection is raised during the initial stages of the litigation and the defendant does not otherwise actively participate in defending the action on the merits. See *Muskat v. Stenberg*, 211 Ill. App. 3d 1052, 1057 (1991). It is only where it is obvious that the defendant's use of pretrial procedures is in anticipation of a defense on the merits that forfeiture may apply. See *Daily v. Hartley*, 77 Ill. App. 3d 697, 704 (1979). Here, defendants took no action on the merits of the case. Instead they appeared in lieu of filing an answer and moved to transfer the matter to Du Page County. Once it was transferred, they promptly asserted their Rule 103(b) objection. They did not engage in any discovery or otherwise act in anticipation of providing a defense on the merits. Accordingly, their objection was not forfeited.

¶ 15 As to whether plaintiff acted with due diligence in serving defendants, we first consider the length of time used to obtain service of process. Plaintiff contends that the only time that should be considered is the time after the action was refiled. It is true that, where an action is not pending, there is no reason to serve a defendant with process and nothing to delay or be diligent about. *Case*, 227 Ill. 2d at 217. Thus, the period while the action was voluntarily dismissed is not considered. However, courts consider "the periods before a dismissal and after a refiling as separate entities that are to be added together in determining diligence." *Id*. at 219. Accordingly, the relevant periods are the 3½ months from when the complaint was first filed on October 22, 2010, until it was voluntarily dismissed on February 10, 2011, and the approximately 5 months from when it was refiled on February 10, 2012, until July 3, 2012, when summons was issued, which was served on July 19, 2012. Thus, the delay was approximately

8½ months. This delay was sufficient for the trial court to find that defendants made a *prima facie* showing of a lack of diligence. See, *e.g.*, *Tischer v. Jordan*, 269 Ill. App. 3d 301, 308 (1995) (4½-month delay sufficient to show a *prima facie* case).

¶ 16 As to the finding that plaintiff failed to exercise reasonable diligence, the trial court did not abuse its discretion in dismissing the action. Plaintiff did nothing to seek to serve defendants while the complaint was first pending. Then, after it was refiled, she still did nothing for almost five months. Plaintiff had actual knowledge of defendants' location at the time of the injury and could have easily confirmed whether that remained the same. Meanwhile, nothing in the record suggests that plaintiff had any actual difficulty in serving defendants when she finally did so. Plaintiff states that she was having difficulty obtaining a reviewing physician's report, but difficulty in finding a reviewing physician does not excuse a plaintiff from serving the defendants. *Lewis*, 352 Ill. App. 3d at 519); *Muskat*, 211 Ill. App. 3d at 1060.

¶ 17 Plaintiff also argues that defendants had actual knowledge of the events giving rise to the lawsuit. But knowledge of the background facts is not a determining factor. Instead, it is actual knowledge of the pendency of the suit that is relevant. See *Segal v. Sacco*, 136 1ll. 2d 282, 287 (1990); *Faust v. Michael Resse Hospital & Medical Center*, 61 Ill. App. 3d 233, 238 (1978). Finally, plaintiff notes that defendants were actually served. But that factor is minimal in light of the overall lack of diligence in eventually obtaining that service. Accordingly, the trial court did not abuse its discretion when it granted defendants' motion to dismiss.

¶ 18 III. CONCLUSION

¶ 19 The trial court did not abuse its discretion when it dismissed the complaint under Rule 103(b). Accordingly, the judgment of the circuit court of Du Page County is affirmed.

¶ 20 Affirmed.